No. B295666

**IN THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 4**

JASON BRILEY,

Plaintiff and Respondent,

v.

CITY OF WEST COVINA,

Defendant and Appellant.

APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
THE HONORABLE TERRY GREEN, PRESIDING
LOWER COURT CASE NO.: BC630552

AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF APPELLANT CITY OF WEST COVINA

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I. INTRODUCTION

California law has consistently applied an exhaustion of administrative remedies requirement for claims that disciplinary action violated Labor Code section 1102.5 and for other types of claims by public employees. (*Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 317; *Terris v. County of Santa Barbara* (2018) 20 Cal.App.5th 551, 553.) In the instant case, the Trial Court interpreted the "futility" exception to the exhaustion requirement (*Bollengier v. Doctors Med. Ctr.* (1990) 222 Cal.App.3d 1115, 1126) in a way that is so broad it undermines the purposes of the doctrine and disserves public employers and employees alike. This Court can take this case as an opportunity to clarify the futility exception to the requirement of exhaustion of administrative remedies. It can set forth an exception that is appropriately narrow in light of the strong public policy concerns supporting the exhaustion requirement, by requiring specific and concrete showings to justify the exception.

Here, the Trial Court determined that bias rendered exhaustion of administrative remedies futile, yet as Plaintiff and Respondent Jason Briley ("Briley") cannot deny, the supposed evidence supporting bias is practically non-existent, and rested on nothing more than speculation about how officials of Defendant and Appellant City of West Covina (the "City") would react to Briley's claim. Fire Chief Whithorn, who recommended

Briley's dismissal, and had been the subject of some of Briley's complaints that were determined unfounded, would be a part of the final decision making process, but subject to City Manager Freeland's approval of the final decision after the Human Resources Commission hearing; the City Manager's final decision would merely be in consultation with the original decision maker Chief Whithorn. Plaintiff pointed out that Freeland, in a prior human resources position, had been involved in processing Briley's whistleblowing allegations in the past (the City points out, in its Reply Brief at page 20, that Freeland merely summarized and transmitted the investigation findings). But Briley's arguments about how these facts render these two officials so biased that participation in the administrative process is "futile" rest only on pure speculation at best. They do not meet the applicable standard for futility. (*See*, *Collins v. Woods* (1984) 158 Cal.App.3d 439, 442 ["A party need not pursue administrative remedies when the agency's decision is *certain* to be adverse." Emphasis added].)

Moreover, Briley's arguments concerning supposed bias in this case fail to satisfy the correctly interpreted rule concerning the futility exception to the exhaustion of administrative remedies doctrine, and undermine the underlying purposes of the exhaustion requirement. The exhaustion of administrative remedies doctrine, among other things, allows cities, special

districts, and other local agencies to review and evaluate an employee's evidence and arguments regarding or relating to discipline before making a final decision. This allows the agency an opportunity to reverse its decision, if that is the right thing to do, and thereby avoid further harm and expense to all concerned. Exhaustion allows both sides to learn each other's positions and the evidence supporting those positions, before having to resort to expensive judicial proceedings, and before having to draw on judicial resources. Even if the parties ultimately resort to the courts, the exhaustion requirement results in a fully developed evidentiary record, streamlining the subsequent judicial proceeding by allowing the court to focus on any errors committed during the administrative action.

The policies behind the exhaustion requirement apply even if decision makers are, to some extent, involved with the employee's work experience and the employee's allegations. California law presumes that public employees will faithfully execute their duties. (Evid. Code, § 664 [presumption that public officials regularly perform their duties]; *Cutting v. Vaughn* (1920) 182 Cal. 151, 156 ["[I]t is, of course, presumed that all public officers perform their duties in a lawful and proper manner."].)

Also, even the presence of some genuinely biased/involved decision makers (assuming arguendo that their bias/involvement would lead them to ignore their obligations as public officers),

would not actually render a process futile, because the presence of administrators who lack bias/involvement would operate as a corrective against improper decisions. This is particularly true where there are multiple levels of administrative review, which is commonplace.

Here, the Trial Court's discussion of the application of the futility exception rested primarily on the fact that there were many of the same actors at the City in various roles at the executive level. Indeed, the Trial Court judge's personal experience working at West Covina many years ago, which he described on the record, gave him a sense that the City was a "small town" or management was a close-knit group, in which bias/participation could infect the process if one or more of the decision makers had been involved in the allegations of the employee in some way. (Reporter's Transcript ("RT") 619.) The Trial Court judge's logic, and discussion at the hearing on bias, however, ignores the requirement and expectation that public officers in California will do their job duties in accordance with the law, unless this presumption is rebutted in some sufficient way, in this case by Briley.

Moreover, as a practical matter, the Trial Court's articulation of the futility standard here would make it the rule rather than the exception for California agencies. Although the Trial Court analogized the City's government to a "small town,"

likely to generate conditions to which the futility exception would apply, West Covina is in fact among California's largest cities, the sixty-sixth (66th) largest out of four hundred eighty two (482). This means there are hundreds of small cities for which the Trial Court's logic would potentially preclude applying the exhaustion requirement. In addition, there is no reason the Trial Court's logic would not apply the futility exception to even larger cities. The logic thus basically eviscerates the exhaustion requirement in California.

Indeed, many local agencies utilize procedures to which the Trial Court's logic applying the futility exception could apply, as easily as it applied in this case. The League of California Cities sent out a survey of its member cities, and twenty-two (22) of seventy (70) (i.e., about 31%) responding members reported that, to review public employee discipline, the City used a system by which there is a hearing before a Human Resources or Personnel Commission made up of residents, followed by review and final approval by the City Manager.

For these reasons, those described below, and those articulated in the City's Opening and Reply briefs, this Court should find that the Trial Court erred in declining to sustain the City's exhaustion of administrative remedies defense. This Court should publish a decision setting forth a concrete, well-defined, and appropriately narrow definition of the futility exception to

the exhaustion requirement.

II. LEGAL ARGUMENT

A. THE EXHAUSTION OF INTERNAL ADMINISTRATIVE REMEDIES DOCTRINE APPLIES TO CLAIMS THAT DISCIPLINARY ACTION VIOLATED LABOR CODE SECTION 1102.5

1. Public Policy Behind the Exhaustion Requirement

"[T]he rule of exhaustion of administrative remedies is well established in California jurisprudence…." (*Campbell v. Regents of Univ. of California* (2005) 35 Cal.4th 311, 321.) "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Ibid.* [quoting *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292].) Exhaustion of administrative remedies is a "jurisdictional prerequisite" to filing a lawsuit. (*Westlake Cmty. Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 474-77; *Palmer v. Regents of Univ. of Cal.* (2003) 107 Cal.App.4th 899, 903-05.)

As the California Supreme Court described, "[t]he rule has important benefits: (1) it serves the salutary function of mitigating damages; (2) it recognizes the quasi-judicial tribunal's expertise; and (3) it promotes judicial economy by unearthing the relevant evidence and by providing a record should there be a review of the case." (*Campbell, supra,* 35 Cal.4th at 322.) A

federal district court has expanded on this description of the exhaustion doctrine's purposes as follows: "This requirement serves a three-fold purpose: first, it allows an organization to minimize or eliminate damages by giving it an opportunity to quickly determine if it has committed an error and remedy the problems; second, courts accord recognition to the 'expertise' of the organization's quasi-judicial tribunal, and third, even if resort to the courts is ultimately necessary, the internal procedures 'promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court may review.'" (*Morgado v. Regents of Univ. of California*, 2013 WL 2252115, *11 (N.D. Cal. May 22, 2013) [quoting *Westlake Cmty. Hosp v. Superior Court* (1976) 17 Cal.3d 465, 476].)

First, an excessively broad futility exception decisively undercuts the "salutary function of mitigating damages" i.e., allowing an agency an opportunity "to minimize or eliminate damages by giving it an opportunity to quickly determine if it has committed an error and remedy the problems." (*Campbell, supra,* 35 Cal.4th at 321; *Morgado, supra,* 2013 WL 2252115, *11). Even if Personnel or Human Resources Commission members or other decision makers in the administrative process have some involvement in the underlying matters, this does not change the fact that going through the administrative process itself can lead the agency to find it has committed error and reverse the

decision. Involved decision makers, faced with evidence, including witness testimony, could come to understand that the original decision could lead to liability or that it is unjust, and could change the initial decision. Decision makers who are not involved could act as correcting influences and head off a decision that is in error. Unless clear evidence shows the decision makers have prejudged the matter (as opposed to simply having knowledge of the subject matter/facts, supposed bias, or personal involvement/embroilment), the first public interest purpose of potentially "mitigating damages" will always be served in going forward with the administrative process. (See, *Campbell, supra,* 35 Cal.4th at 321.)

Second, a broad futility exception would also undercut the public policy function of the exhaustion requirement's recognition of "the quasi-judicial tribunal's expertise." (*Campbell, supra,* 35 Cal.4th at 321.) The expertise of the agency would still apply to making the decision on discipline even if some decision makers were involved in the underlying matters. This second public policy function does not consider whether the subjective aspects of decision making are completely unaffected, but whether the decision maker's objective expertise and knowledge of the agency business remains intact; generally such knowledge and expertise remain intact even under circumstances involving allegations of knowledge about or involvement in underlying facts or supposed

bias.

Third, a broad futility exception decisively undermines the exhaustion requirement's purpose of promoting judicial economy by "unearthing the relevant evidence and by providing a record should there be a review of the case" when "resort to the courts is ultimately necessary." (*Campbell, supra,* 35 Cal.4th at 322; *Morgado, supra,* 2013 WL 2252115, *11). Even if some decision makers have knowledge about or involvement in the underlying matter, indeed even if they are supposedly biased,[1] proceeding with the administrative process still conserves judicial resources and helps focus further judicial inquiry by promptly creating a robust record on which future court proceedings can rely. Indeed, substantial costs to the litigants can be saved through this process, particularly for the employee who is able to rely on the local agency's resources to a great extent rather than having to incur the expenses associated with civil discovery in order to

[1] Plaintiff argued in the Trial Court that bias of decision makers led to a due process violation and not just application of the futility exception to exhaustion. This Brief does not address that contention, which is discussed by the City's briefing. Instead, this Brief focuses on the futility exception, which is the doctrine the Trial Court actually applied to set aside the exhaustion requirement.

develop the record for further review.[2]

2. The Exhaustion Requirement Applies to Claims that Discipline Was Retaliatory in Violation of Labor Code Section 1102.5 Even Where Disciplinary Appeal Procedures Do Not Expressly Refer to Consideration of Retaliation or Other Affirmative Defenses

The exhaustion of administrative remedies requirement is specifically applicable to Labor Code section 1102.5 claims. (*Campbell, supra*, 35 Cal.4th at 329-31.) In *Campbell*, the Supreme Court held that the employee had to exhaust her internal administrative remedies before she could file a claim that she suffered an alleged retaliatory termination in violation

[2] A broad futility exception would in fact allow an employee to abuse the process by turning this purpose of the exhaustion requirement against the employer. The employee could, as in this case, start the administrative process, and could even go further and obtain information and evidence from the employer including witness and exhibit lists or other information, and then declare the process futile and proceed directly to Court. A concretely defined and appropriately tailored futility exception would prevent this.

of Labor Code section 1102.5.[3] (*Id.*) In responding to the employee's claim that exhaustion was not required because the administrative proceeding provided an inadequate remedy (because it did not provide for monetary damages), the Supreme Court held that the determining issue was whether the agency lacked the authority to hear the complaint. Moreover, the Court noted that the purported "inadequacy" of the remedy did not override the policy considerations behind the exhaustion requirement:

> In addition, even though Campbell's complaint seeks money damages in addition to reinstatement, our cases hold that the "policy considerations which support the imposition of a general exhaustion requirement remain compelling...." (*Westlake, supra,* 17 Cal.3d at p. 476, 131 Cal.Rptr. 90, 551 P.2d 410.) The logic holds even when no internal damage remedy is available, or a plaintiff seeks only money damages, so that resort to the courts is inevitable. As [*Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515] explains, ***courts have found the rule inapplicable only when the agency lacks***

[3] Amici Curiae are aware of *Satyadi v. West Contra Costa Healthcare District* (2014) 232 Cal.App.4th 1022, which established that an employee is not required to exhaust the administrative remedy provided under Labor Code section 98.7 by filing a complaint with the Labor Commissioner prior to filing a lawsuit alleging retaliation in violation of Labor Code section 1102.5. However, *Satyadi* is not controlling here because, unlike *Campbell*, it did not address exhaustion of available *internal* administrative remedies.

> ***authority to hear the complaint***, not when the administrative procedures arguably limit the remedy the agency may award. (*Edgren, supra*, 158 Cal.App.3d at p. 521, 205 Cal.Rptr. 6; see also *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 342–343, 124 Cal.Rptr. 513, 540 P.2d 609 [exhaustion rule does not apply when resolution of controversy falls outside scope of grievance procedures].) ***We believe that the "administrative proceeding will still promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court may review."*** (*Westlake, supra*, 17 Cal.3d at p. 476, 131 Cal.Rptr. 90, 551 P.2d 410.)

(*Id.* at 323. Emphasis added.)

Here, there is nothing under the City's rules governing disciplinary appeals that demonstrates the Commission lacked the authority to hear Briley's allegations of retaliation in order to determine whether Briley's termination violated Labor Code section 1102.5 and should be reversed. (Appellant's Opening Brief, pp. 23-25.) Accordingly, Briley was required to exhaust administrative remedies as to his whistleblower retaliation claim by participating in the disciplinary appeal process and asserting all defenses, including that his termination was retaliatory.

Briley cites to this Court's decision in *Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, in an effort to demonstrate the City's administrative remedies were inadequate

"because there were no clearly defined procedures specifically for challenging whistleblower retaliation." (Respondent's Brief, p. 28.) However, in *Lloyd*, the county's exhaustion defense failed based upon the Court's finding that the plaintiff's whistleblower retaliation claim was not covered by the administrative remedy the county specifically provided for claims of discrimination based on "non-merit factors." (*Lloyd, supra,* 172 Cal.App.4th at 328.) *Lloyd* did *not* address whether the exhaustion requirement would have applied in the context of a disciplinary appeal hearing. In fact, as the *Lloyd* plaintiff was a temporary employee who had been laid off (*id*. at 323-324), he likely did not even have the right to a disciplinary appeal hearing under the county's civil service rules. This is in direct contrast to Briley, who was a full-time employee entitled to all civil service hearing rights as to disciplinary action against him, including a full hearing on all claims relating to such action.

Briley also contends the Commission itself ruled it did not have jurisdiction over whistleblower complaints. (Respondent's Brief, p. 28.) In doing so, Briley conflates the City's narrower grievance procedures with the broader disciplinary appeal procedures. Even if the Commission purportedly determined it lacked the authority under the City's grievance rules to hear a standalone whistleblower retaliation complaint that is very different from the Commission lacking authority in a disciplinary

appeal proceeding to hear any and all affirmative defenses an employee raises which go straight to the propriety of the discipline being challenged. By refusing to participate in the disciplinary appeal process, Briley avoided his responsibility to at least have the City's administrative process determine the underlying validity of the grounds for termination. Given that he did not merely claim that the complaints against him were exaggerated or post hoc, but that they were in fact false, the underlying termination claims absolutely could have been part of the administrative proceedings even without the retaliation claims, and even if all of that would have to be considered together, on the issue of retaliation.

Briley admits that the City's rules provided him with the right to a hearing to contest his dismissal, but he then contends, without any evidence whatsoever, that he would not have had the right to introduce facts or witnesses to support his defense that his termination was the result of his whistleblower activities. This assertion flies in the face of the City's rules, which provide employees the right to introduce relevant evidence and witnesses, and Briley cannot seriously argue that retaliation would not be "relevant" to the decision to terminate him. Moreover, any claim he would have been prevented from introducing evidence of retaliation is pure speculation on his part and cannot be a proper basis for his refusal to exhaust administrative remedies.

Nevertheless, by refusing to proceed with the disciplinary appeal process, he both deprived the City of the opportunity to consider the issue and possibly mitigate the potential for damages by reversing the termination (to the extent the Commission agreed it was improper or retaliatory or even that the bases supporting the termination were false, as Briley asserted at trial), and deprived the Trial Court and parties of the benefits of a streamlined review of an established evidentiary record. Had Briley proceeded with his disciplinary appeal, and even if the Commission had erroneously ruled that it would not consider evidence pertaining to his whistleblower retaliation claim, in a properly filed writ action, the Trial Court could have directed the City to hear and consider any improperly excluded defenses and evidence. Alternatively, if the Trial Court could have proceeded on the retaliation claims with the benefit of the underlying termination having already been explored, this would also have been beneficial.

B. THE FUTILITY EXCEPTION ONLY APPLIES UNDER VERY NARROW AND SPECIFIC CIRCUMSTANCES AND SHOULD BE VIEWED AS DISFAVORED

1. The Trial Court Misapplied the Futility Exception Here

The Trial Court here relied on one of the exceptions to the doctrine of exhaustion of administrative remedies, the exception

for "futility." But futility is a "very narrow" exception to the exhaustion requirement. (*Econ. Empower. Found. v. Quakenbush* (1997) 57 Cal.App.4th 677, 690; *Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 683; *see also*, *Bollengier v. Doctors Med. Ctr.* (1990) 222 Cal.App.3d 1115, 1126 [same].) To fall within the exception, "Plaintiffs must be able to 'positively state what the administrative agency's decision in [their] particular case would be.'" (*Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834.) The Court in *Coachella Valley Mosquito & Vector Control Dist. v. California Pub. Emp't Relations Bd.* (2005) 35 Cal.4th 1072, 1080, explained that for the exception to apply, a party must show that the "agency has declared what its ruling will be on a particular case." In *Bollengier*, the Court described the limits of the exception -- "'exhaustion would be a dead doctrine'" if a plaintiff's "'own speculative, subjective feelings about the matter . . . allow[ed] him to unilaterally ignore avenues of review.'" (*Bollengier, supra*, 222 Cal.App.3d at 1130.)

Here, the Trial Court's ruling applying the futility exception referenced none of these requirements -- that Plaintiff had any ability "positively" to state what the administrative decision would be or that either the Human Resources Commission or the City itself had "declared" what its ruling would be. Rather, the Trial Court focused on the projected participation of Fire Chief Whithorn and City Manager Freeland

in the administrative process (Whithorn would be reviewing the decision of the Human Resources Commission whose decision would be subject to final approval or modification by Freeland (RT 615:11-19 [counsel summarizing evidence]), and what the Trial Court perceived as alleged "hard feelings" based on Fire Chief Whithorn's deposition testimony that Briley had been "undermining" this "authority" with "unfounded" charges in such a way as to make Chief Whithorn's "relationship with him strained." (RT 604:1-605:13.) The Trial Court indicated that this is not what one wants to hear from a judge who will pass on a civil case or a juror in voir dire. (RT 605:14-20.) But that is not the standard articulated for futility in cases like *Bollengier* and *Doyle*, nor is the Trial Court's perception that the matter should have been reviewed by decision makers with "fresh eyes." (RT 606:1-5.) The Trial Court opined at one point that the matter was "prejudged" (RT 607:13-19) but this statement constituted a conclusion that did not have the support of any of the Trial Court's observations or evidence before it. Indeed, the Trial Court stated that its conclusion rests on the "appearance of unfairness" only, and did not reference the standards of *Bollengier* and *Doyle*. (RT 616:3-9.) As to City Manager Freeland, who would participate in the final decision after the Human Resources Commission rendered its determination, the Trial Court at one point in announcing its decision assumes

Freeland in fact would not have pre-judged it: "He may be pure as the driven snow or pure as mother's milk. He may be absolutely an eagle scout. I have no opinion on the matter. The appearance though is that he's embroiled in this and it would be inappropriate for a person who [is] wearing multiple hats to also wear a hat in judgment." (RT 616:4-9.)

Instead, the Trial Court's ruling relied on precisely the type of evidence this Court has determined inadequate to support futility – "speculative, subjective feelings" of what the decision will be. (*Bollengier, supra*, 222 Cal.App.3d at 1130.) Indeed, the Trial Court's reasoning at the hearing candidly acknowledged that the Court's conclusions rested basically on speculation. The Court described: "Too many of the same names kept popping up in different roles wearing different hats and sitting at different levels, sometimes repeated levels of passing judgment here." (RT 618:13-16.) The Trial Court judge goes on to describe that he had actually worked at the City of West Covina early in his career and describes it as a "small place" and a "small town" at which "you don't have the luxury of having different people reviewing at different stages." (RT 618:17-619:6.)

The Trial Court judge focused not on the standards applicable to municipal officers serving on a Personnel or Human Resources Commissions but on his own personal standards as a judge adjudicating civil and criminal matters. The Court

described: "I do know what it means to be a Judge and I cannot be embroiled in a controversy and be the Judge in that controversy." (RT 603:21-23.) The Trial Court references the bias standard applicable to judges at the end of the discussion also: "And personal embroilment is something that we were taught as Judges that we could never have, but personal embroilment is what I saw repeatedly here." (RT 619:24-26.)

As described by the City's counsel in their Opening and Reply briefs, the Trial Court's discussion of "futility," and Plaintiffs' arguments, rest on a determination that they *might* not be fair, not that they *actually* would not be fair or that the decision makers had in fact pre-judged the matter. (See, e.g., City's Reply Brief filed at pp. 7, 18-19.) Accordingly, the case record and applicable law confirm that the Trial Court misapplied the futility exception.

These considerations described above confirm why the Trial Court erred in this particular case. The considerations also illustrate how easily the futility exception can be misapplied, and why this Court should use this case as an opportunity to provide an appropriately concrete and narrow interpretation of the futility doctrine. In addition, in light of the important public policies furthered by the exhaustion of administrative remedies requirement, this Court should reiterate that the futility exception is disfavored.

2. The Trial Court's Interpretation of the Exhaustion Requirements Would Undermine the Purpose of the Requirements to the Detriment of California's Cities, Special Districts, and Other Local Agencies

Affirming the Trial Court's decision on futility would approve an interpretation of the doctrine that has far-reaching effects, and could effectively prevent many local agencies from using and benefitting from the important policies underlying the exhaustion requirement, and their mandatory administrative procedures. First, many cities in California use an administrative process similar to that used by the City of West Covina. The League of California Cities sent out a survey of its members, and twenty-two (22) of seventy (70) (i.e., about 31%) reported that, to review public employee discipline, the City used a system by which there is a hearing before a Human Resources or Personnel Commission made up of residents, followed by review and final decision by the City Manager.

Second, the Trial Court in applying the futility exception relied in part on its observation that West Covina is a "small place" and "small town." (RT 618:19, 619:3.) But as League records acknowledge, West Covina ranks sixty-sixth (66) in size among four hundred eighty two (482) California cities. If West Covina has trouble simply because of its size in applying the exhaustion requirement, then most cities will, as well. In

addition, the Trial Court's logic could apply even to cities larger than West Covina.

Finally, this case presents this Court with the opportunity to pass on how, procedurally, an employee can raise an exception to the doctrine of exhaustion of administrative remedies, like the futility exception. As the law exists now, the employee takes a significant risk in declaring the process futile and proceeding to court with a civil lawsuit – the employee faces severe consequences in having a Court disagree that the process is futile. Adverse consequences of the employee's wrong choice are foisted on the employer as well, since the employer must bear the cost of defending a civil action until the Court decides the exhaustion issue. A solution could be a judicially formulated requirement that an employee formally present the futility issue to the public employer so that at a minimum a record develops by which a Court can later review the issue. This could be part and parcel of the administrative process. The parties' addressing this threshold issue of futility in this way could actually lead them to resolve the issue between themselves, without any Court intervention and without the employee having the ability to undercut the process, even if the employee ultimately loses the issue in Court. Stepping back, the best solution to the risk and uncertainty that the availability of the futility exception presents is for this Court to formulate a concrete and predictable rule for

when the exception applies, and this case presents an excellent opportunity for this Court to do so.

III. CONCLUSION

For all of the foregoing reasons, *Amici Curiae* the League of California Cities and the California Special Districts Association request that this Court reverse Trial Court judgment in this matter and publish an opinion that provides much-needed clarification of the law on exceptions to the doctrine of exhaustion of administrative remedies.

Dated: March 5, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204, subd. (c)(1))

I, Alex Y. Wong, of Liebert Cassidy Whitmore, attorneys for Amici Curiae League of California Cities and California Special Districts Association, do hereby certify in accordance with California Rules of Court, rule 8.204, subdivision (c)(1), that the foregoing brief, according to the Microsoft Word computer program used to prepare the brief, consists of 4701 words, including footnotes.

Dated: March 5, 2021 LIEBERT CASSIDY WHITMORE

By: */s/Alex Y. Wong*
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On **March 5, 2021**, I served the foregoing document(s) described as **AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF APPELLANT CITY OF WEST COVINA** in the manner checked below on all interested parties in this action addressed as follows:

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/s/ Beverly T. Prater
Beverly T. Prater