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Supreme Court of California
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No. S273630

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KRISTINA RAINES ET AL.,
Plaintiffs & Petitioners,

v.

U.S. HEALTHWORKS MEDICAL GROUP ET AL.,
Defendants & Respondents.

Upon Certification Pursuant to California Rules of Court, Rule 8.548, to Decide a Question of Law Presented in a Matter Pending in the United States Court of Appeals for the Ninth Circuit – Case No. 21-55229

PETITIONERS' OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Pursuant to California Rules of Court, rule 8.548, this Court granted the United States Court of Appeals for the Ninth Circuit's request to answer the following question:

> Does California's Fair Employment and Housing Act, which defines "employer" to include "any person acting as an agent of an employer," Cal. Gov't Code § 12926(d), permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination?

INTRODUCTION

The Fair Employment and Housing Act ("FEHA"), Government Code section 12926, subdivision (d), defines "employer" to include "any person acting as an agent of an employer, directly or indirectly." (Gov. Code, § 12926, subd. (d).) In *Reno v. Baird* (1998) 18 Cal.4th 640, this Court created a narrow exception to this definition for individual supervisory employees acting as agents of their employer in discrimination cases.

The Court recognized this exception to avoid the absurd consequences of finding an individual supervisor liable but not a business with less than five employees. (*Reno*, *supra,* 18 Cal.4th at p. 650-51 & n. 3; *see also Jones v. Torrey Pines* (2008) 42 Cal.4th 1158 [extending *Reno* to retaliation claims].) As to other contexts, the Court "specifically express[ed] no opinion on whether the 'agent' language merely incorporates respondeat superior principles or has some other meaning." (*Reno*, 18 Cal.4th

at p. 658.) That reserved question is now squarely before the Court.

This Court should answer "yes" to that question. Under the plain language of Government Code section 12926, subdivision (d), a business entity acting as an agent of an employer is an "employer" under FEHA. It should therefore be liable if it violates FEHA's prohibitions.

This conclusion is both compelled by the statutory language and consistent with the public policies underlying FEHA, including the Legislature's express command that FEHA "be construed liberally" in furtherance of its remedial purposes. (Gov. Code, § 12993, subd. (a).) It is consistent with analogous (and less protective) federal law. It creates none of the illogical or absurd results that concerned this Court in *Reno*. It also furthers the general public policy undergirding the common law of holding wrongdoers liable for their own malfeasance, even when acting as agents for others.

The facts here demonstrate particularly clearly why it is important to hold corporate agents liable under FEHA. Defendants perform blatantly unlawful and invasive pre-employment medical examinations for thousands of employers across the State. Correction of that misconduct at the point at which it occurs is manifestly a more effective way to enforce FEHA than requiring that each of Defendants' thousands of customers be sued for Defendants' actions.

The Court should apply FEHA's plain language and answer the certified question in the affirmative.

STATEMENT OF THE CASE

I. FEHA PROTECTS JOB APPLICANTS FROM IRRELEVANT MEDICAL EXAMINATIONS

Under FEHA, any pre-employment medical examination must be "job-related and consistent with business necessity." (Gov. Code, § 12940, subd. (e). All future statutory references are to the Government Code unless otherwise indicated.) This limiting provision ensures "that no Californians are denied the opportunity to prove themselves at jobs they are capable of doing just because of assumptions made on the basis of their medical history;" to protect the "dignity and self-reliance" of people with disabilities; and to build on "this state's long history of strong protections for the privacy rights of Californians." (*Sen. Com. On Judiciary,* Analysis of Assem. Bill No. 2222 (1999-2000 Reg. Sess.) as amended July 6, 2000, pp. 6-7 [hereafter "*Senate Analysis*"]; *see also Assem. Com. On Lab. And Emp.,* Analysis of Assem. Bill No. 2222 (1999-2000 Reg. Sess.) as amended April 5, 2000, p. 4 [hereafter "*Assembly Analysis*"].)

The purpose of these examinations is to assess whether the applicant is presently able to do the specific job in question and to facilitate the required good faith, interactive process between applicant and employer to determine whether a reasonable accommodation is necessary. (*See Assembly Analysis* at pp. 1, 4.) An inquiry is job-related if it is "tailored to assess the employee's ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability." (*Kao v. Univ. of S.F.* (2014) 229

Cal.App.4th 437, 451 [quoting Cal. Code Regs., tit. 2, § 11065(k)].) An inquiry is consistent with business necessity if "the need for the disability inquiry or medical examination is vital to the business." (*Id.* at p. 452 [quoting Cal. Code Regs., tit. 2, § 11065(b)].)

Untailored inquiries and examinations violate section 12940, subdivision (e), and constitute discrimination under section 12940, subdivision (d). (*See*, *e.g.*, *Rodriguez v. Walt Disney* (C.D. Cal. June 14, 2018) No. 8:17-CV-01314-JLS, 2018 WL 3201853, at *3; *Senate Analysis* at pp. 6-7.)

II. DEFENDANTS' BUSINESS IS DESIGNED TO VIOLATE FEHA'S LIMIT ON MEDICAL INQUIRIES

Historically, employers conducted applicant fitness-for-work screenings themselves through an in-house "company doctor." (ER-69.) Over the years, however, employers began outsourcing these screenings to third parties—so-called "occupational healthcare providers" such as Defendant U.S. Healthworks Medical Group. (ER-69.)

Between its founding and its acquisition and re-branding by the Concentra defendants named in the operative pleading, U.S. Healthworks became the nation's second largest provider of occupational health services and the largest in California, owning

and operating seventy-eight medical centers in the State.[1] (ER-68–69.)

During the relevant four-year period, thousands of employers required more than half a million job applicants to undergo and pass screenings at Defendants' California facilities as a condition of employment. (ER-11, 70–71.) These screenings were mandatory and applicants had no say in the administrator of the screening. (ER-71.) Defendants conducted over 200,000 of these screenings annually in California. (ER-69–70.)

While employers could choose to provide certain screening protocols to Defendants (*e.g.*, by specifying "lifting restrictions"), Defendants required every applicant, at the outset of the screening and regardless of job position, to complete in full an omnibus Health History Questionnaire (the "Questionnaire") of Defendants' own design and creation. (ER-35–36, 71, 75.)

The Questionnaire asked numerous discriminatory, invasive, and non-job-related questions. (ER-57, 74.) These included, for example, whether the applicant has or has *ever* had:

---

[1] The Concentra defendants were at all relevant times the nation's largest provider of occupational and urgent care centers, with over 1,200 medical centers nationally, and together are the successor in interest to U.S. Healthworks. (ER-69.) Each such defendant is alleged to have engaged in the same conduct, and together with U.S. Healthworks, are collectively referred to as "Defendants." The parent entity of the Concentra defendants, Select Medical Holdings, is publicly traded and has a market cap of over $3.1 billion. (*See* Bloomberg US, *Stock Quote: SEM* (May 25, 2022) <https://www.bloomberg.com/quote/ SEM:US> [as of May 25, 2022].)

(1) venereal disease; (2) painful or irregular vaginal discharge or pain; (3) problems with menstrual periods; (4) irregular menstrual period; (5); penile discharge, prostate problems, genital pain or masses; (6) cancer; (7) mental illness; (8) HIV; (9) permanent disabilities; (10) painful/frequent urination; (11) hair loss; (12) hemorrhoids; (13) diarrhea; (14) black stool; (15) constipation; (16) tumors; (17) organ transplant; (18) stroke; or (19) a history of tobacco or alcohol use. (ER-57, 74, 85-86.) The Questionnaire also asked about (20) pregnancy, (21) the date of a woman's last menstrual period (22) all over-the-counter and prescribed medication, and (23) prior on-the-job injuries or illnesses. (ER-57, 74.) In effect, the Questionnaire was so broad that it required applicants to disclose their entire personal medical and disability history from birth to present. (ER-57, 75.)

In violation of FEHA, many of these questions were unrelated to any potential employee's ability to perform any job and inconsistent with business necessity for any business. (ER-75.) In further violation of the statute, when an applicant provided a positive response to any written question on the Questionnaire, Defendants' policy and practice was to verbally probe the applicant to explain their response. (ER-74.) Defendants treated no medical topic as out-of-bounds. (ER-37–38, 75.)

Referring employers did not develop the Questionnaire and did not require that applicants complete it. To the contrary, Defendants were solely responsible for (1) creating the Questionnaire; (2) implementing the Questionnaire; (3) the policy

requiring all applicants to answer every question it posed; and (4) all verbal follow-up questions. (ER-71–72, 73–75.)

If an applicant failed or refused to fully answer every question—no matter why—Defendants would not "pass" the applicant, resulting in denial of employment. (ER-70–71, 75, 86.) In this, referring employers effectively delegated to Defendants the decision either to permit or deny employment. (ER-70.)

Defendants also required all applicants to sign an unlawful form titled "Authorization to Disclose Protected Health Information to Employer" (the "Authorization") purporting to authorize Defendants to disclose applicants' protected health information to their prospective employers and to unspecified others. (ER-71, 74.) This Authorization was coerced, threatening applicants that "refusal to sign" "may violate a condition of [] employment" and that "revocation of this authorization may carry consequences related to [their] employment." (ER-71, 74–75.)

III. DEFENDANTS SUBJECTED PLAINTIFFS TO EXAMINATIONS THAT VIOLATED FEHA

Plaintiff Kristina Raines applied for a job as a food service aide at a California retirement community managed by Front Porch Communities. (ER-76.) Her job duties were to consist of delivering food trays to residents; cleaning, disposing of waste, and washing dishes; re-stocking food supplies; and the like. (*Ibid*.) Front Porch offered her the job conditioned on passing Defendants' pre-employment medical screening at their Carlsbad, California facility. (*Ibid*.)

During the required screening, Defendants' staff directed Raines to fill out the Questionnaire and to sign the Authorization. (ER-76.) She signed the Authorization and answered all of the questions on the Questionnaire and all subsequent verbal questions—save for any questions about the date of her last menstrual period. (ER-77.) She objected on the grounds that the date of her last menstrual period had nothing to do with the job Front Porch offered her and that the question sought particularly private information. (ER-77.)

Defendants' staff threatened Raines by stating that she would not "pass" the screening or be permitted to start work unless she answered all of their questions. (ER-77.) When she again declined, consistent with their policy, Defendants terminated and refused to administer the remainder of the screening and forced her to leave. (*Ibid.*) Shortly thereafter, Front Porch revoked the job offer because Defendants' staff informed it that Raines did not complete the screening. (*Ibid.*)

Plaintiff Darrick Figg applied for a job as a member of the San Ramon Valley Fire Protection District's Volunteer Communication Reserve. (ER-77.) The Fire Protection District offered Figg the job but conditioned his employment on passing a pre-employment medical screening at one of Defendants' California facilities. (*Ibid.*) Like Raines, Figg was required to complete the entire Questionnaire and to sign the Authorization. (ER-77–78.) He complied, despite most of the questions having no bearing on his ability to do the job in question. (ER-78.) As a result, Defendants deemed him "medically acceptable for the

position offered" and, because he "passed" the screening, Figg was allowed to begin work. (*Ibid.*)

PROCEDURAL HISTORY

Raines filed an individual action against Front Porch and U.S. Healthworks in the San Diego Superior Court. (ER-68.) She later substituted Concentra defendants for Doe defendants. (*Ibid.*)

Following discovery revealing that Defendants asked the questions on its Questionnaire to all referred California jobseekers, Raines amended her complaint to assert class claims for impermissible medical inquiries under FEHA; discrimination under the Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq.*; intrusion upon seclusion; and violations of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*. ("UCL"). (ER-68.)

Defendants then removed the action to the United States District Court for the Southern District of California under the Class Action Fairness Act, 28 U.S.C. § 1332(d). (ER-113.) Raines filed a Second Amended Complaint ("SAC") adding Figg as a plaintiff, dismissing Front Porch as a defendant pursuant to a settlement, and adding additional Concentra defendants. (ER-108.)

The district court granted Defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss the SAC with leave to amend. (ER-98, 107.) Plaintiffs filed the operative Third Amended Complaint

("TAC"), asserting the same causes of action with additional facts. (ER-69–94.)

On Defendants' motion to dismiss the TAC, the district court dismissed all claims without leave to amend except the UCL claim for which leave to amend was allowed. (ER-21.) While the district court accepted Plaintiffs' agency allegations as well-pled, it concluded as a matter of law that because individual supervisory employees are not personally liable under FEHA for discrimination and retaliation, citing *Reno* and *Jones*, all agents are immune. (ER-7–12.)

Plaintiffs then filed an *ex parte* application to dismiss the UCL claim with prejudice pursuant to *WMX Techs. v. Miller* (9th Cir. 1997) 104 F.3d 1133, 1136-37, and appealed the district court's order dismissing the TAC's three remaining causes of action. (ER-22–23, 24–25, 99–100.) Following briefing and argument, the Ninth Circuit requested certification of the question of law set forth above. (*Raines v. U.S. Healthworks* (9th Cir. 2022) 28 F.4th 968.)

In its request, the Ninth Circuit noted that "millions of employees [] could be impacted by a decision defining the scope of liability for business entities acting as agents of their employers." (*Raines*, *supra*, 28 F.4th at p. 971.) While acknowledging that (1) FEHA's text "appears to encompass direct liability for any individual or business entity acting as an agent of an employer" and (2) the Legislature "instructs courts to construe its provisions 'liberally' in accordance with its broad remedial purposes," the Ninth Circuit felt it "unclear whether the Legislature intended

FEHA's definition of 'employer' to create direct liability" in these circumstances. (*Ibid.*)

For the reasons that follow, the answer to the Ninth Circuit's question is unequivocally "yes." A business entity is directly liable under FEHA when it acts as an agent of an employer and engages in conduct prohibited by FEHA. The reasoning this Court adopted in *Reno* and *Jones*—creating an exception to that liability for individual supervisory employees—poses no barrier to that logical and reasonable interpretation of the statute.

ARGUMENT

I. FEHA HOLDS AGENTS LIABLE FOR THEIR DISCRIMINATORY ACTIONS ON BEHALF OF EMPLOYERS

A. FEHA Unambiguously Treats an Employer's Agents as Employers and Thus Makes Them Liable

FEHA prohibits an employer from conducting any pre-employment medical examinations or inquiries unless they are "job-related and consistent with business necessity." (§ 12940, subd. (e).)

FEHA defines "employer" as "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly." (§ 12926, subd. (d).) It excludes "a religious association or corporation not organized for private profit." (*Ibid.*)

Thus, the plain text of FEHA treats the direct and indirect agents of an employer as themselves employers. FEHA's implementing regulations further emphasize this point. (*See* Cal. Code Regs., tit. 2, § 11008(d)(3) ["Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer."].) As such, the plain language of the statute makes corporate agents like Defendants liable for their own violations of FEHA.

Where statutory language is unambiguous, there is no need for additional judicial construction. (*Los Angeles MTA v. Alameda Produce* (2011) 52 Cal.4th 1100, 1107.) While the judicial role in all cases is to give effect to the Legislature's intent, whenever reasonably possible courts must avoid reading statutes in a way that renders meaningless language the Legislature has chosen to enact. (*People v. Fontenot* (2019) 8 Cal.5th 57, 73.)

Particularly in cases like this—involving clear but broad remedial legislation and an express legislative command to construe it liberally—the statute must be read to heed that command. "Wherever the meaning is doubtful, it must be so construed as to extend the remedy." (*Wittenburg v. Beachwalk HOA* (2013) 217 Cal.App.4th 654, 666 [citing *People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269].)

Unlike for individual supervisors, there is no "incongruity" (*Reno*, *supra,* 18 Cal.4th at pp. 650-51) embedded in the pertinent statutory language shielding corporate agents from liability. This Court should adopt the plain language meaning as it pertains to

corporate agents and hold them directly liable for employment discrimination.

B. No Extrinsic Factor Supports Disregarding the Plain Meaning of FEHA or Ignoring the Legislative Command to Interpret It Broadly

This Court need not look beyond the plain language of FEHA. Courts may only disregard plain language when it is repugnant to the general purview of the statute, it would lead to absurd consequences, or there is some other compelling reason to do so. (*See People v. Leal* (2004) 33 Cal.4th 999, 1008; *People v. Hernandez* (2021) 60 Cal.App.5th 94, 106; *see also Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1698, *reh'g denied and opinion modified* (June 26, 1992) [abandoning plain meaning to avoid absurd consequences should be done "most sparingly [] and only in extreme cases else we violate the separation of powers principle of government"]; Cal. Const., art. III, § 3.)

The Attorney General, entrusted with constitutional authority to enforce FEHA, agrees: "FEHA's statutory language defining 'employer' is clear, and its plain meaning therefore controls." (*See* Amicus Brief of the Attorney General in *Raines*, *supra*, 2021 WL 2604301 (C.A.9), at *2, 7; Cal. Const., art. V, § 13.) "While the judiciary is the final authority, considerable weight is accorded to an executive department's construction of a statutory scheme it is entrusted to administer." (*In re Israel O.* (2015) 233 Cal.App.4th 279, 289 [cleaned up].)

The Court should only consider veering from the plain meaning of the statute where there is ambiguity by virtue of some "extrinsic factor." (*See State Farm v. Lara* (2021) 71 Cal.App.5th 197, 218-19.) These "extrinsic factors" include "the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Hoechst Celanese v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519.)

For all the reasons discussed below, these factors fully support Plaintiffs' reading of the pertinent statutory provisions and the Legislature's clear intent on the subject.

1. Public Policy Supports Corporate Agent Liability

If the Court were to look beyond the plain language of section 12926, subdivision (d), it should conclude that FEHA's public policy supports the plain language meaning. Holding corporate agents responsible for their own unlawful practices furthers the animating purpose of FEHA "to provide effective remedies that will eliminate [] discriminatory practices." (§ 12920.)

Corporate agents like Defendants often ply their services to numerous (here thousands) of employers impacting thousands (here hundreds of thousands) of applicants and employees. The purpose of FEHA is served by holding these actors liable and undermined by immunizing them. Insulating them spreads risk

in a way that makes it harder to eliminate discriminatory practices in California.

While the reasons for holding corporate agents liable for FEHA violations may vary by context, the specific context here illustrates starkly why those agents should be liable for their actions:

First, corporate agents are commonly experts in their respective field. As such, they should shoulder the burden of liability if they break the law performing their expertise. Here, one of Defendants' core businesses is performing pre-employment medical inquiries and profiting "from the fruits of [that] enterprise." (*Janken v. GM Hughes Elec.* (1996) 46 Cal.App.4th 55, 78-79; *see also* ER-89.) Defendants, and not the employers, are experienced with and qualified to perform such exams. They should be held accountable for their actions in performing them.

Second, corporate agents are often the ones who set the policies and procedures they follow in performing their specialized task. That was the case here. Defendants created and imposed the offending Questionnaire and they required all questions be answered before deeming an applicant to have "completed" and "passed" the screening. (ER-71–72, 73–75.) Defendants are also directly committing the conduct prohibited by FEHA. (ER-75, 83.) And Defendants knew at the time of the screening whether their medical inquiries were tailored. That is, the policies and practices challenged here on their face violate section 12940, subdivision (e). If the goal is to eliminate discriminatory practices, holding accountable those who set the

facially illegal practices, including corporate agents, supports that goal.

Third, corporate agents may be in the best position to change discriminatory practices statewide across industries. Corporate agents, like Defendants here, may be responsible for a significant amount of offending conduct across diverse employers and industries. That complying with the law might require Defendants to spend time and resources developing practices they can lawfully profit from in this State is exactly the point of the statute. And, as will be seen below, that result furthers the risk-allocation purposes at the heart of agency law.

Fourth, corporate agents may often be the chief financial beneficiary of their unlawful conduct. Here, for example, Defendants benefit from propounding and requiring answers to a cost-saving, all-encompassing "one and done" questionnaire instead of spending the time and resources to tailor inquiries to the job in question as California law requires. (ER-37, 75.)

2. Interpreting FEHA to Only Incorporate Respondeat Superior Liability Is Inconsistent with Public Policy and Common Law Principles

In *Reno*, this Court "specifically express[ed] no opinion on whether the 'agent' language merely incorporates respondeat superior principles or has some other meaning." (*Reno*, *supra*, 18 Cal.4th at p. 658.) If the former, as Defendants urged below, the "agent" language in the statute would be totally superfluous because the doctrine of respondeat superior would apply to hold principals liable for their agents' conduct whether "agent" was

explicitly included in the definition of "employer" under FEHA or not. (*See Presbyterian Camp v. Superior Court* (2021) 12 Cal.5th 493, 502 ["For nearly 150 years, the long-standing history of respondeat superior—a form of vicarious liability—has been reflected in both California statutory and common law, pursuant to which, *by default*, 'an employer may be held vicariously liable for torts committed by an employee with the scope of employment.'"] [emphasis added]; *see also Reno,* 18 Cal.4th at p. 658 ["courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage."].)

Further, to limit FEHA agent liability to an expression of respondeat superior only (*i.e.*, without holding the agent liable as well) would be inconsistent with common law agency principles. As that law teaches, agents have long been liable for their own wrongful conduct, even when that conduct is carried out under a delegation of authority by the principal and regardless of whether the principal may be vicariously liable. (*See* 3 Witkin, Summary 11th Agency § 210 (2021); *Perkins v. Blauth* (1912) 163 Cal. 782, 787; Cal. Civ. Code, § 2343 ["one who assumes to act as an agent is responsible to third parties as a principal for his or her acts in the course of the agency" where, as here, "his or her acts are wrongful in their nature"].)

Reading FEHA to incorporate "merely" respondeat superior liability, as Defendants urge, requires the Court to abandon its obligation to read FEHA broadly in light of its remedial purpose. "Because the FEHA is remedial legislation, which declares the

opportunity to seek, obtain and hold employment without discrimination to be a civil right and expresses a legislative policy that it is necessary to protect and safeguard that right the court must construe the FEHA broadly, not restrictively." (*Fitzsimons v. Cal. Emergency Physicians* (2012) 205 Cal.App.4th 1423, 1429 [cleaned up].)

Plaintiffs' theory—that employers' corporate agents should bear liability for their wrongful conduct, regardless of whether the employer must share in that liability—is entirely consistent with the common law of agency, the remedial purposes of FEHA, and the doctrine of respondeat superior. (*See Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208; *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959; 3 Witkin, Summary 11th Agency § 176 (2021) [discussing this Court's "modern theory" of the doctrine].) In contrast, applying a limited respondeat superior doctrine to absolve the agent altogether in the context of corporate agency liability under FEHA would undermine the statute's purposes and eviscerate broader principles of agency. (*See* Section B.4, below.)

3. Analogous Federal Law Supports FEHA Liability

By design, FEHA is far more protective than federal law. (*See* § 12926.1, subd. (a).) Even so, California courts often look to federal courts' interpretations of Title VII and the ADA for assistance interpreting FEHA. (*See Reno*, *supra*, 18 Cal.4th at p. 647.) Those federal courts have held that a corporate agent or administrator can be liable for discrimination as an "employer."

Williams v. City of Montgomery (11th Cir. 1984) 742 F.2d 586, 588-589 held that a third-party agent was liable under Title VII where the employer delegated control of its traditional rights to the third-party agent. Similarly, where, as here, the agent "significantly affects access of any individual to employment opportunities," federal courts have recognized that the agent can be independently liable. (*Spirt v. Teachers Ins.* (2d Cir. 1982) 691 F.2d 1054, 1063, *vacated and remanded on other grounds*, 463 U.S. 1223 (1983), *reinstated and modified on other grounds*, 735 F.2d 23 (2d Cir. 1984), *cert. denied*, 469 U.S. 881 (1984) [interpreting Title VII]; *see also Vernon v. State* (2004) 116 Cal.App.4th 114, 128-131 [discussing *Sibley Memorial Hosp. v. Wilson* (D.C. Cir. 1973) 488 F.2d 1338 and *Assoc. of Mexican–American Educators v. State of California* (9th Cir. 2000) 231 F.3d 572].)

In addition, agents of employers can also be liable where, as here, the agents "exercise control over an important aspect of [Plaintiffs'] employment." (*Carparts Distrib. V. Auto. Wholesaler's* (1st Cir. 1994) 37 F.3d 12, 17 [interpreting the ADA]; *see also Bloom v. Bexar County, Tex.* (5th Cir. 1997) 130 F.3d 722, 725 & n.2 [noting *Carparts* and *Sibley Memorial* "do not rule out the possibility that a plaintiff may maintain an action against a defendant who is not, technically, the plaintiff's direct employer" where the agent has control over things such as "job application procedures, the hiring, advancement, or discharge of employees, [or] other terms, conditions, and privileges of employment."].)

Just as the California Supreme Court did in interpreting FEHA in *Reno*, federal courts have also noted that the rule prohibiting the imposition of ADA or Title VII liability upon *individual* agents reflects the desire of Congress to strike a balance between the goal of stamping out all discrimination and the goal of protecting *individuals* from the hardship of litigating discrimination claims. (*See E.E.O.C. v. AIC Security* (7th Cir. 1995) 55 F.3d 1276, 1281.)

Crucially, "those objectives are not in conflict when the 'agent' engaging in discriminatory conduct falls within the applicable statutory definition [of 'employer']." (*E.E.O.C. v. Grane Healthcare* (W.D. Pa. 2014) 2 F.Supp.3d 667, 684 [quoting *EEOC v. AIC Security*, *supra*, at p. 1281].) That is, an agent that "has the requisite number of employees and is engaged in an industry affecting commerce" can be liable for discriminatory conduct perpetrated against a plaintiff employed directly by another. (*DeVito v. Chicago Park Dist.* (7th Cir. 1996) 83 F.3d 878, 882 [remanding to determine if agent of employer met employer numerosity requirement]; *see also E.E.O.C. v. AIC, supra,* 55 F.3d at p. 1282 ["We hold that individuals who do not otherwise meet the statutory definition of 'employer' cannot be liable under the ADA."].)

4. Holding Corporate Agents Liable for their Wrongdoing is Consistent with *Reno v. Baird*

The public policy bases this Court relied upon in *Reno* and *Jones* to create an exception for individual supervisor liability for

discrimination and retaliation under the statute dictate an opposite result here.

First, *Reno* and *Jones* articulated an exception, not a rule.

Courts must assume the Legislature knew how to create an exception if it wished to. (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992.) The Legislature did that. (*See* § 12926, subd. (d) [excluding small employers and nonprofit religious associations].) Thus, except as necessary to avoid absurd results, the Court should not construe FEHA to create exceptions not specifically made by the Legislature. (*Stockton Theatres v. Palermo* (1956) 47 Cal.2d 469, 476.)

In *Reno*, this Court did not construe the agent language to mean "merely" that the Legislature intended respondeat superior liability to lie, thus absolving any agent for discriminating under FEHA. (18 Cal.4th at p. 658.) Rather, it created an exception to personal liability for individual supervisors based on public policy factors. (*See id.* at pp. 650-54.) Expanding that exception without the existence of any of the animating policy considerations supporting it would violate the Court's rules of statutory construction, not to mention the spirit and letter of FEHA.

When this Court does construe a statute, its construction "becomes as much a part of the statute as if it had been written into it originally." (*People v. Hallner* (1954) 43 Cal.2d 715, 720.) So, as with any exception to a general rule of an enactment—whether "written into" the statute by the Legislature or by the courts—that exception must be strictly construed. (*See Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th

1351, 1358.) Other exceptions—like the ones Defendants urge here—are necessarily excluded. (*See In re James H.* (2007) 154 Cal.App.4th 1078, 1084.)

Second, there is no reason to interpret the Court's construction of "person" in *Reno* in connection with supervisors to mean that all agents are immune. *Reno* drew precisely the distinction between individual supervisors and other agents Defendants call untenable: "Yet it is manifest that if every *personnel manager* risked losing his or her home, retirement savings, hope of children's college education, etc., whenever he or she made a personnel management decision," the Court wrote, "management of industrial enterprises and other economic organizations would be seriously affected." (*Reno*, 18 Cal.4th at pp. 652–53 [cleaned up and emphasis added].)

Nor was the presence or absence of the word "person" in the provisions of FEHA at issue in those cases outcome determinative. In *Reno*, there was no "person" language, and the supervisor was immune. In *Jones*, there was "person" language, and the supervisor was still immune. What *was* outcome determinative and shared in those cases was the *kind of agent* (*i.e.,* supervisory employees) at issue and the public policy implications arising from liability on *that kind of agent*.

If Defendants were right that no distinction obtains, this Court could and presumably would have adopted Defendants' maximalist position in 1998 or 2008—or any time after 1959. (*See* Fair Employment Practices Act, Stat. 1959, c. 121, p. 2000, § 1 [current version of Gov. Code § 12926, subd. (d)].) If *Reno* were

decided on purely textual grounds, the Court need not have considered absurd consequences at all—let alone those unique to a specific kind of agent undertaking specific kinds of acts. (*Cf.* *Reno*, 18 Cal.4th at p. 651, n. 3.) Yet the analysis in *Reno* (and *Jones*) is exhaustive on that subject. (*See*, *e.g.*, *Jones*, *supra*, 42 Cal.4th at p. 1163.)

Third, Defendants do not face potentially ruinous "burdens of litigating such [FEHA discrimination] claims." (*Janken*, *supra*, 46 Cal.App.4th at pp. 71-72.) *Reno* reasoned that, because the "legislature clearly intended to protect employers of less than five from the burdens of litigating discrimination claims[,] it is 'inconceivable' that the legislature simultaneously intended to subject individual non-employers to the burdens of litigating such claims." (*Reno*, *supra*, 18 Cal.4th at pp. 650-51.) By contrast, during the relevant period Defendants here were California's largest occupational healthcare providers. (ER-65.)

Fourth, for the same reason, there is no "*in terrorem*" effect attached to Defendants' liability as there might be for individual supervisors. (*See Janken*, *supra*, 46 Cal.App.4th at p. 75; *Reno*, *supra*, 18 Cal.4th at p. 653.) Requiring that corporate agents comply with FEHA does not raise, as it might for individual supervisors, "the spectre of financial ruin for themselves and their families." (*Janken*, 46 Cal.App.4th at p. 75.) Corporations do not have families—at least not ones they come home to after a shift.

Fifth, holding Defendants liable for violating FEHA does not create any inherent conflict of interest among co-workers and

management. (*See Reno, supra*, 18 Cal.4th at pp. 651-54; *Jones*, *supra*, 42 Cal.4th at p. 1166.) Both agents and employers should follow FEHA's mandates and avoid discrimination. Neither the employer nor the agent should benefit from violating the law and neither an employer nor its agent has a legally protected interest in violating FEHA.

Sixth, there is no exceptional "chilling effect" like this Court identified in *Reno* and *Jones*. Defendants' argument that if they are required to comply with FEHA they cannot serve their principal is misguided. (*See* Answering Brief of Defendants-Appellees in *Raines*, *supra,* 2021 WL 3869745 (C.A.9), at *21 [hereafter "Defendants' Br."].) Agents must follow laws too. There is no conflict when they are required to do so even when it might be easier and more profitable to them or their principal not to.

Indeed, at oral argument[2] before the Ninth Circuit, Judge Watford failed to see how Defendants' duties to their principals and to the law conflict:

> Let's say an employer comes to your clients and says, "hey I know I'm not allowed to ask these questions, because they have nothing to do with whether the person is qualified for the job, but here's the set of questions we want you to put to them, please do it." You as the defendant, you have the ability to say "well,

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[2] No transcript is currently available. For the Ninth Circuit's publicly available video of the argument, *see* Oral Argument in Ninth Circuit Case No. 21-55229 (Jan. 12, 2022) <https://www.ca9.uscourts.gov/media/video/?20220112/21-55229/> (as of May 26, 2022) ("Oral Arg.").

> [] this is illegal, so we're not going to do it." Where's the conflict from your clients' standpoint?

(Oral Arg. at 26:45-27:10.)

Counsel's response was telling: If Defendants are liable, they will "tailor" their "decision on what's job related and not job related." (Oral Arg. at 27:40-48.) But that is exactly what the law requires.[3] (*See* § 12940, subd. (e)(3); Cal. Code Regs., tit. 2, § 11065(k) [inquiries must be "tailored to assess the employee's ability to carry out the essential functions of the job"]; *see also Disney*, *supra,* 2018 WL 3201853, at *4 ["medical inquiries must be narrowly tailored and job-related"].)

Seventh, unlike individual supervisory employees who might make a "personnel decision which could later be considered discriminatory" (*see Janken*, *supra*, 46 Cal.App.4th at p. 66), corporate agents, like Defendants, know or should know at the time they provide the services whether their policies and procedures violate FEHA.

Eighth, any purported legislative inaction following this Court's opinions in *Reno* and *Jones* does not show acquiescence to

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[3] Notably, section 12940, subdivision (e)(3) does not *only* require tailoring; it requires that "all entering employees in the same job classification are subject to the same examination or inquiry." While burdens of complying with the law are no defense, Defendants need to only tailor their questions to each type of job, not each individual. The tailoring provision and the "same examination" provision thus set workable boundaries within which Defendants can engage in lawful conduct.

a rule prohibiting agent liability of any kind and under any circumstances.

Before the Ninth Circuit, Defendants insisted that if the Legislature wanted to ensure liability for any other kind of agent, it would have amended FEHA's definition of "person" following *Reno*. (*See* Defendants' Br., 2021 WL 3869745 at *19, 24-25.) Here as in many cases, "legislative inaction is a slim reed upon which to lean." (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117.) While legislative inaction can sometimes indicate acquiescence to a judicial construction (*see People v. Whitmer* (2014) 59 Cal.4th 733, 741), it does not indicate acquiescence to something the Court *explicitly* declined to hold. In essence, Defendants assume the Legislature misread *Reno* and that, relying on that misreading, decided not to act. (*See* Defendants' Br., 2021 WL 3869745 at *24-25.)

In light of *Reno*'s express language, the narrow exception created by *Reno* for individual supervisors, the absence of any published judicial opinion extending the exception in *Reno* and *Jones* to all other agents and conduct, and the continuing vitality of the Legislature's command to construe FEHA broadly, there is no support for the proposition that the Legislature made an affirmative decision not to act to support an interpretation of FEHA that no court has ever articulated.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court answer the Ninth Circuit's question in the affirmative.

Respectfully submitted,

Dated: May 27, 2022 Phillips, Erlewine, Given & Carlin LLP

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Dated: May 27, 2022 Phillips, Erlewine, Given & Carlin LLP

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