No. S273630

In the Supreme Court of the State of California

Kristina Raines; Darrick Figg, individually and on behalf of all others similarly situated,
Plaintiffs, Appellants and Petitioners,

vs.

U.S. HEALTHWORKS MEDICAL GROUP, a corporation; SELECT MEDICAL HOLDINGS CORPORATION, a corporation; CONCENTRA GROUP HOLDINGS LLC, a corporation; US HEALTHWORKS, INC., a corporation; SELECT MEDICAL CORPORATION, a corporation; CONCENTRA INC., a corporation; CONCENTRA PRIMARY CARE OF CALIFORNIA, a medical corporation; OCCUPATIONAL HEALTH CENTERS OF CALIFORNIA, a medical corporation; DOES 4 & 8-10, inclusive,
Defendants, Appellees and Respondents.

ANSWERING BRIEF ON THE MERITS

Upon Certification, California Rules of Court, Rule 8.648 to Decide Question of Law in Matter Pending in U.S. Court of Appeals for the Ninth Circuit, No. 21-55229

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Certificate of Interested Entities or Persons

The following entities or persons have (1) an ownership interest of 10 percent or more directly or indirectly in the party or parties filing this certificate or (2) a financial or other interest in the outcome of this case that the justices should consider in determining whether to disqualify themselves.

Interested entity or person	Nature of interest
T.Rowe Price; Blackrock, Inc.	Several of the defendants are subsidiaries of Select Medical Holdings Corporation (NYSE: SEM), a publically traded company. Select Medical Holdings Corporation has no parent. T. Rowe Price (NASDAQ: TROW) owns more than 10% of Select Medical Holdings Corporation's stock. Blackrock, Inc. (NYSE: BLK) also owns more than 10% of Select Medical Holdings Corporation's stock.

DATED: July 26, 2022

Respectfully submitted,

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I. CERTIFIED QUESTION

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?

II. SHORT ANSWER

The FEHA holds an employer liable for its agents' conduct, but does not permit an agent who did not employ plaintiff to be held directly liable for employment discrimination, regardless of whether the agent is a business entity or an individual.

III. SUMMARY OF ARGUMENT

The Legislature designed the FEHA to impose duties and liabilities on employers, as distinct from those who work for or provide services to employers. The FEHA language that defines a "person" includes individuals as well as business entities, without distinguishing among the individuals or entities that fall under the definition of "person." Accordingly, the FEHA language that defines an "employer" to include "any person

acting as an agent of an employer" codifies the doctrine of *respondeat superior* and thereby assures that an employer is liable for its agent's conduct. The Legislature did not intend that language to impose employment discrimination liability not only on the employer, who indisputably is liable for its agent's conduct, but also on an agent that never employed the plaintiff.

To hold otherwise would invert the principle of vicarious liability in a way that confounds settled law. The feature that defines an agency relationship is the principal's control over the agent. From that feature, our law has developed settled rules that recognize that an agent's duty is to its principal, not a third party, and that an employer's duties are non-delegable. Thus, a court may hold an employer liable for actions of the employer's entity-agents because the employer can control those actions and prevent their occurrence or direct that they occur in a lawful manner. By contrast, an agent cannot control the principal's actions. There is no indication the Legislature intended to upend settled agency law to hold directly liable for *employment* discrimination agents who do not control *employment* decisions.

In addition to the medical services at issue here, employers retain entities as agents for countless activities, including

businesses that provide transportation, food, hospitality, legal, accounting, courier and other services. Yet, in the decades since this Court held in *Reno v. Baird* (1998) 18 Cal.4th 640 (*Reno*) that the identical FEHA language did not permit direct employment discrimination liability against agents who are individuals, the Legislature has not amended the FEHA to differentiate entity agents from individual agents. Thus, a ruling imposing entity-agent direct liability would be a dramatic expansion of the law, one that could affect "millions." (*Raines v. U.S. Healthworks* (9th Cir. 2022) 28 F.4th 968, 971.)

There are sound reasons to leave any such expansion to the Legislature. On one hand, the FEHA already makes an employer liable for an entity-agent's conduct, so there is no need for a redundant cause of action against agents. On the other hand, the implications of exposing agents to direct employment liability are troubling—given that an agent, by definition, acts under the employer's control, but does not control the employer's decisions. Given the lack of any clear indication that the Legislature intended to upend settled California law, the better approach to the certified question would heed the Hippocratic Oath: "first, do no harm." This Court should hold that the FEHA does not permit

such liability for any "person"—individual or business entity agent—unless the Legislature clarifies the statute to make any such intention explicit.

IV. STATEMENT OF THE CASE

A. Relevant FEHA Provisions

Government Code section 12940 states:

> [A]n *employer or employment agency* may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

(Gov. Code, § 12940, subd. (e)(2), emphasis added.)

The statute further provides:

> [A]n *employer or employment agency* may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(Gov. Code, § 12940, subd. (e)(3), emphasis added.)

FEHA states an "employer" is "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly." (Gov. Code, § 12926, subd. (d).) FEHA defines a "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Gov't Code, § 12925, subd. (d).)

Thus, the FEHA defines "any person acting as an agent of an employer" to include individuals, businesses and similar agents, without drawing any distinction between individuals, businesses or any other type of agent.

B. Plaintiffs' Allegations Regarding the Pre-Employment, Post-Job-Offer ("PEPO") Exams that Employers Retained USHW to Perform

U.S. HealthWorks Medical Group ("USHW") operated urgent care centers in California.[1] (ER-68, ¶ 22.) It also worked with other businesses to provide occupational health care,

[1] Although defendants dispute plaintiffs' allegations, because this proceeding arises from a dismissal on the pleadings, defendants recite the facts as plaintiffs have alleged them consistent with the applicable standard of review and without waiver or acceptance of those facts for purposes other than pleadings-based challenges.

including pre-employment, post-job-offer medical exams ("PEPO Exams"). (ER-69-70, ¶¶ 26, 28.) Businesses and governmental entities required individuals who received offers of employment from those entities to obtain PEPO Exams that USHW administered. (ER-69, ¶ 27.) Many individuals—like Plaintiff Raines—are required by law to undergo medical examinations that include a medical history inquiry. (See Cal. Code Regs., tit. 22, § 72535 [Employees' Health Examination and Health Record – "All employees working in the facility, including the licensee, shall have a health examination within 90 days prior to employment or within seven days after employment and at least annually thereafter by a person lawfully authorized to perform such a procedure. Each such examination shall include a medical history and physical evaluation."].)

The employers paid for the exam and advised USHW that the purpose for the exam was to determine whether the applicant could perform the job. (ER-70-71, ¶ 31 a-c.) "The referring employers also had the right to control USHW in how it conducted the pre-placement medical exams." (ER-71, ¶ 32.)

By sending their putative employees to an outside provider of medical services, the employers assured that the examination

would occur in a confidential and private setting medical setting, rather than in the workplace.

In connection with the PEPO Exams, USHW asked patients to complete a standardized form titled "Health History Questionnaire" ("Questionnaire"). (ER-73-74, ¶¶ 36-37.) It also asked patients to sign a form titled "Authorization to Disclose Protected Health Information to Employer" ("Authorization") so it could report results of the PEPO Exams. (ER-74-75, ¶ 41.)

"After completing each exam, USHW filled out and sent to the employer a 'medical examiner recommendation form' stating either that the applicant is 1) 'medically acceptable for the position offered,' 2) 'medically acceptable for the position offered, except that a condition exists which limits work [and specifies],' 3) 'Placed on medical hold pending [further investigation]' or 4) 'Other' [and specifies]." (ER-70, ¶ 31a.) Beyond these job-related and business necessity statements, there are no allegations that USHW reported to employers any information that USHW's patients furnished to USHW on the Questionnaire.

USHW operates as "a third-party vendor providing services" and it led patients to believe it acted as their "own physician." (ER-84, ¶ 85.) If a patient "provided a positive

response to any of the inquiries contained in the [Questionnaire]," USHW would have a "medical examiner verbally ask the [patient] to explain the basis for the positive responses." (ER-74, ¶ 40.) "In conducting the pre-placement exams, USHW considered whether the applicant's future health may be at risk in taking the job. USHW clinicians would attempt to dissuade applicants from taking the job where the clinician thought the job could be potentially hazardous to the applicant's future health even though it would not impact his or her ability to currently perform the essential job functions (such as where the applicant [smoked] and would be working with asbestos creating a heightened chance of developing lung cancer or where a pregnant woman would be working with silica which could increase her exposure to cancer but did not impact her current ability to do the job)." (ER-73, ¶ 34(d).)

In other words, USHW not only evaluated whether the patient could carry out the job's essential function or whether the patient poses a danger to others due to disability, but also acted in the best interests of its patient by screening for and assessing future health risks. Simply put, USHW acted as a medical professional, not an employer.

C. Plaintiffs' Allegations Regarding their PEPO Exams

Plaintiffs received employment offers from two different companies: Front Porch Communities and Services ("Front Porch") and San Ramon Valley Fire Protection District ("San Ramon"). (ER-76, ¶¶ 48-49; ER-77, ¶ 57.) Those employers, and laws governing the employers, required Plaintiffs to receive PEPO Exams from USHW as a condition of employment. (*Id.*; see also Cal. Code Regs., tit. 22, § 72535 [mandating health examination for those in skilled nursing facilities like Front Porch].) Plaintiffs do not allege USHW required them to undergo the PEPO Exams. (ER-77-78, ¶¶ 52, 58.)

As part of the PEPO Exams, Plaintiffs completed the Questionnaire and the Authorization. (ER-76, ¶ 50; ER-77-78, ¶ 58.) USHW asked verbal follow-up questions related to the Questionnaire. (ER-77, ¶ 52; ER-78, ¶ 60.)

The Questionnaire includes questions about (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; and (19) history of tobacco or alcohol use. (ER-74, ¶ 37.) Plaintiffs assert USHW provided the Questionnaire to every PEPO Examinee. (ER-85, ¶ 89.)

Plaintiff Raines refused to answer one of the questions on the Questionnaire. (ER-77, ¶¶ 52-53.) Front Porch then told her it was revoking her employment offer because Raines had refused to answer that question. (ER-77, ¶54.) Front Porch's Human Resources manager advised Raines that all Front Porch job applicants, including the manager herself, had to answer the same questions that USHW had asked of Raines. (ER-77, ¶ 55.)

Plaintiff Figg completed the PEPO Exam, and commenced employment with San Ramon. (ER-78, ¶ 62.)

D. Procedural History

In October 2018, Plaintiff Raines filed a lawsuit in the Superior Court, County of San Diego, against Front Porch, USHW, and other Defendants alleging violations of FEHA, the Unruh Act, the Confidentiality of Medical Information Act, and intrusion into private affairs. (ER-64, 68, 113.) Subsequently, she dismissed the FEHA claims against USHW and other non-employing Defendants. However, in May 2019, she reasserted the

claims against USHW and the other non-employing Defendants in a First Amended Complaint and added class claims. Defendants then removed the action to the United States District Court for the Southern District of California, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). (ER-113.)

Raines settled her claims against Front Porch, and in January 2020, dismissed Front Porch. (ER-109.) The following month, she filed a Second Amended Complaint ("SAC"), in which Plaintiff Figg joined. (ER-108.) The SAC named additional non-employing Defendants but Figg did not name his employer, San Ramon. (ER-5, 108.) The SAC asserted claims for violations of FEHA, the Unruh Act and the Unfair Competition Law ("UCL"), and a claim for intrusion upon seclusion. (*Ibid.*)

The district court dismissed the SAC for failure to state a claim, but granted Plaintiffs leave to amend. (ER-5, 95-98.)

In August 2020, Plaintiffs filed the operative Third Amended Complaint ("TAC"), alleging the same claims. (ER-64-94.) The district court dismissed all claims in the TAC except the UCL claim, without leave to amend. (ER-3-21.) With regard to the FEHA claim, the district court explained that the "purpose of FEHA's 'agent' language, Cal. Gov't Code § 12926(d), is to hold

employers—the entities which actually employ individuals—liable for discriminatory actions of their agents." (ER-10.) Under the reasoning from *Reno* and *Jones*, "FEHA liability would not extend to USHW as an agent, regardless of whether it is a large business or an individual supervisor." (ER-10.) The "fact that 'the employer is liable via the respondeat superior effect of the "agent" language provides protection to employees even if [the agents] are not personally liable.'" (ER-11-12.) "USHW may not be held liable as an agent of Plaintiffs' employers as a matter of law under FEHA." (ER-12.)

Plaintiffs dismissed the UCL claim and appealed to the Ninth Circuit. (ER-22-25, 99-100.) The Ninth Circuit certified the FEHA question that this Court has accepted for review.[2]

V. ARGUMENT

A. Agents of an Employer who did not Employ the Plaintiffs are not Directly Liable Under the FEHA

FEHA's language defining an "employer" to include "any person acting as an agent of an employer" does not distinguish between a "person" that is a business entity and a "person" that

[2] Because this Court has accepted review of only the FEHA claim, we do not discuss plaintiffs' other causes of action further.

is an individual. Rather, as noted, the FEHA defines a "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Gov. Code, § 12925, subd. (d).) This text does not permit different treatment for individuals or entities.

Thus, there is no textual support in the FEHA for Plaintiffs' proposal to hold a business entity "person" directly liable as a "person acting as an agent of an employer," notwithstanding this Court's holding in *Reno* that the identical language does not permit direct liability against an individual "person" who acts as an agent of an employer. Plaintiffs' proposed distinction rewrites the statute to create a distinction that the Legislature has not seen fit to add in the decades since this Court's 1998 decision in *Reno*. Moreover, in those decades, no California appellate court has held that an entity-agent is directly liable under the FEHA. As Defendants now explain, there are sound reasons for leaving this issue to the Legislature and not rewriting the statute in the manner plaintiffs propose.

1. The Reasoning in *Reno* and *Jones* Applies to All Agents – Individuals and Entities

a. Reasoning in *Reno*

In *Reno*, this Court noted *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55 had identified two alternative constructions for why the FEHA has defined an "employer" to include a "person acting as an agent of the employer":

> "One construction is that argued for by plaintiffs here: that by this language the Legislature intended to define every supervisory employee in California as an 'employer,' and hence place each at risk of personal liability whenever he or she makes a personnel decision which could later be considered discriminatory. The other construction is the one widely accepted around the country: that by the inclusion of the 'agent' language the Legislature intended only to ensure that *employers* will be held liable if their supervisory employees take actions later found discriminatory, and that *employers* cannot avoid liability by arguing that a supervisor failed to follow instructions or deviated from the employer's policy."

(*Reno*, *supra*, 18 Cal.4th at p. 647, quoting *Janken,* at pp. 65-66.) In adopting the latter construction, this Court provided reasons that also apply to entity-agents.

Discrimination Claims Rest On Decisions Made Collectively For Which Only The Principal, Not Agent, Is Responsible. This Court explained, "[c]orporate decisions are often made collectively by a number of persons. Different individuals might have differing levels of awareness and participation in the decisions." (*Reno*, *supra*, 18 Cal.4th at p. 662.) Thus, "[a]ssessing individual blame might be difficult, in contrast to simply placing blame on the corporation, on whose behalf the individuals acted." (*Ibid.*) "Moreover, to make collective decisions possible, individuals often must rely on information or evaluations that others supply. Imposing individual liability for collective decisions might place the individuals in an adversarial position to each other (as well as to the corporation). . . . For these reasons, imposing liability on the corporate whole rather than each individual who participated in the corporate decision is sensible." (*Ibid.*)

Policy to Avoid Conflicts of Interest and Chilling of Effective Management. This Court also noted "[t]he minimal potential for benefit to an alleged victim juxtaposed with the potentially severe adverse effects of imposing personal liability on individual supervisory employees is an additional reason for our conclusion that this is not the result intended by the Legislature." (*Reno*,

supra, 18 Cal.4th at p. 652.) This Court explained that an agent has a duty of loyalty to its principal, but would have conflicting duties if the agent also bore direct employment liability:

> The employee would thus be placed in the position of choosing between loyalty to the employer's lawful interests at severe risk to his or her own interests and family, versus abandoning the employer's lawful interests and protecting his or her own personal interests. The insidious pressures of such a conflict present sobering implications for the effective management of our industrial enterprises and other organizations of public concern. We believe that if the Legislature intended to place all supervisory employees in California in such a conflict of interest, the Legislature would have done so by language much clearer than that used here.

(*Id.* at p. 653.)

This Court also saw little need to create a redundant cause of action against the agent because the employer is liable for the agent's conduct, so the plaintiff already has an adequate remedy. (*Reno*, *supra*, 18 Cal.4th at p. 653.) The Court rejected the notion that the absence of direct liability would enable agents to discriminate because the employer's liability gives it an incentive to deter and discipline unlawful conduct by its agents, and the

employer's control over its agent gives it the power to make such deterrence and discipline effective. (*Id.* at pp. 653-654.)

Agent Language And Doctrine Of Respondeat Superior. This Court also noted that most federal courts had concluded that Congress did not intend similar language in Title VII to impose direct liability for discrimination on agents but instead intended to codify the doctrine of *respondeat superior* and ensure the employer is liable for its agent's actions. (*Reno*, *supra*, 18 Cal.4th at pp. 647-651.) This Court rejected the argument that this construction rendered the "agent" language superfluous, stating:

> The issue in this case is *individual* liability for discrimination. Therefore, we express no opinion on the scope of *employer* liability under the FEHA for either discrimination or harassment. We specifically express no opinion on whether the "agent" language merely incorporates respondeat superior principles or has some other meaning. We need not because, whatever that language means precisely, it is not surplusage. The Legislature may reasonably have chosen to define the scope of employer liability expressly rather than to leave it to judicial interpretation.

(*Id.* at p. 658.)

Textual Exemption for Small Employers Inconsistent With Imposing Direct Liability. The FEHA defines an employer as a person employing five or more individuals, and this definition spares small businesses from the burdens of discrimination claims. Accordingly, this Court found it incongruous that the Legislature intended to impose such a burden on individuals. (*Reno*, *supra*, 18 Cal.4th at p. 651.)

b. Reasoning in *Jones*

In *Jones v. Lodge at Torrey Pines Partnership*, (1998) 42 Cal.4th 1158 (*Jones*), this Court relying on its reasoning in *Reno*, held that individuals are not liable for retaliation under FEHA. (*Id.* at pp. 1162-1164.) This Court held that the same concerns underlying *Reno* applied with equal or greater force when the conduct at issue was retaliation. (*Id.* at pp. 1167-1168.)

Compared To FEHA's Clear Personal Liability For Harassment, FEHA's Retaliation Language Is Less Equivocal. The FEHA provision prohibiting harassment, states, "[a]n employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee . . . ." (Gov. Code, § 12940, subd.

(j)(3).) This Court observed, "[t]his is clear language imposing personal liability on all employees for their own harassing actions." (*Jones*, *supra*, 42 Cal.4th at p. 1162.) Neither the discrimination nor retaliation language were as clear in imposing direct liability on agents as the personal liability language relating to harassment. (*Id.* at pp. 1162-1163.)

Conflicts Of Interest, Collective Decisionmaking. This Court further noted that all concerns discussed in *Reno* why only the employer, and not its agent, should be liable for discrimination also applied to retaliation. (*Jones*, *supra*, 42 Cal.4th at pp. 1163-1169.)

Unlikely Legislature Intended Such A Dramatic Change In Law Without Discussing That Intention. This Court also found instructive *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, which considered an argument that certain legislation significantly changed the law even though the supposed change left no trace in the legislative history. This Court quoted the following passage from *Ailanto*: "It is difficult to imagine that legislation that would have [created individual liability for retaliation where none had existed] could properly be characterized as "noncontroversial [or technical]." And we think

it highly unlikely that the Legislature would make such a significant change in the [potential liability of individuals] without so much as a passing reference to what it was doing. The Legislature "does not, one might say, hide elephants in mouse-holes." (*Whitman v. American Trucking Assns., Inc.* (2001) 531 U.S. 457, 468.)'" (*Jones*, *supra,* 42 Cal.4th at p. 1169, quoting *Ailanto* at p. 589.)

c. *Reno/Jones* Reasoning Applies Here

Compared To Clear Personal Liability For Harassment, FEHA's Discrimination Language Is Less Clear As To Whether Agents Bear Direct Liability. FEHA's anti-discrimination provisions, including those that restrict medical examinations, expressly target an "employer" and it is only through the "person acting as agent" language that plaintiffs contend the employer's liability extends to agents as well. Thus, on point is the observation in *Jones* that the "person acting as agent" language in the definition of "employer" is far less explicit than the direct personal liability language applicable to harassment claims.

Only The Employer Is Responsible For The Collective Corporate Action; The Agent Performs Only A Component. Just

as an individual often performs only one component of a collectively made personnel decision, entity-agents similarly do so in carrying out but one part of an employer's collectively made decision. For example, with regard to the medical examinations at issue, it is undisputed that defendants did not require the exams, nor did they make any employment decision based on such exams. The FEHA provisions governing examinations apply only if the *employer* required the exam or takes an adverse employment action—neither of which defendants did. "For these reasons, imposing liability on the corporate whole rather than each [agent] who participated in the corporate decision is sensible." (*Reno*, *supra*, 18 Cal.4th at p. 662.)

Policy to Avoid Conflicts of Interest, Chilling of Effective Provision Of Services, With Minimal Benefit Because Cause Of Action Is Redundant. Just as an individual would be in a position of conflict if the FEHA made an individual-agent directly liable for employment discrimination, an entity-agent also has a duty of loyalty to its principal. The conflict problem discussed in *Reno* is the problem of having two masters, and the adverse impact that arises from such a conflict. That problem is similar whether the agent is an entity or an individual.

For example, with regard to the medical examinations at issue, the agent's responsibility is to report to the employer on the putative employee's ability to perform the essential functions of the job or if the putative employee might pose a danger to others on the job. If the agent bore direct liability to the putative employee, the agent might skew its assessment to avoid liability. The medical provider might pass employees with infectious or other conditions to avoid the risk of a lawsuit. The threat to organizational decision-making is similar to that which concerned this Court in *Reno*, particularly since Plaintiffs' construction applies to *any* entity-agent and thus could inject innumerable conflicts of interest into organizational functions.

In fact, as discussed pp. 30-34, *post*, to prevent such conflicts of interest, settled law disfavors holding an agent directly liable to third parties other than the agent's principal.

Moreover, just as when the agent is an individual, there is no need to inject such conflicts into the agency relationship. The employer remains liable for the agent's conduct in all events. And because an essential element of any agency is the principal's control over the agent, an agent of an employer acts at the control and direction of the employer, as plaintiffs alleged the defendants

did here. (ER-71-72, ¶ 32.) Thus, the employer has the power to discipline and deter any agent who acts unlawfully and the employer's liability provides it an incentive to do so.

The lack of necessity for imposing direct *employment* discrimination liability on a business entity that act as an agent of an employer is also apparent when one considers that such an entity remains potentially liable if the entity breaches any duty the agent owes directly to the plaintiff. The certified question here concerns only whether entity-agents should bear the duties that *the FEHA* imposes on *employers*. A "No" answer to that question will have no bearing on whether a business entity providing services to an employer could be liable on a *non-employment*-based theory. It would simply give the logical answer that *employment* liability is reserved for *employers*.

Unlikely Legislature Intended Such A Dramatic Change In Law Without Discussing That Intention. As discussed in the next section, a rule holding an agent directly liable for employment discrimination would change the law of agency. As this Court noted in *Jones*, it is unlikely that the Legislature intended to impose such a dramatic change in the law, given the absence of any legislative history discussing such a substantial change.

2. Plaintiffs' Proposed FEHA Expansion Confounds Settled Agency Law in a Way the Legislature did not Contemplate

Plaintiffs' interpretation also conflicts with long-settled California agency law. First, an agent can only be liable to a third party for the agent's misfeasance, which only occurs when the agent has breached a duty it owes directly to the third party, and such duty must exist independent of the agency relationship. Here, however, plaintiffs seek to hold defendants liable based on a duty that arises only by virtue of their agency relationship to plaintiffs' employers. Second, FEHA imposes a non-delegable duty on employers to meet the statute's obligations. Thus, the employers could not delegate to Defendants the duty to comply with the FEHA. Plaintiffs' theory violates this principle as well. Nothing in FEHA's text or legislative history suggests the Legislature intended to disturb these settled agency principles.

a. An Agent is not Liable to a Third Party, Except for Duties Independently Owed that do not Arise From the Agency

An agent is not liable to a third party for the agent's failure to perform duties owed to its principal. (*See Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal. App. 4th 52, 65 (*Ruiz*) [agent not

liable to third parties "for the failure to perform duties owed to its principal."]; *Mears v. Crocker First Nat'l Bank* (1950) 97 Cal.App.2d 482, 485, 491-492 (*Mears*); see also Rest.2d Agency, § 352 ["An agent is not liable for harm to a person other than his principal because of his failure adequately to perform his duties to his principal . . . ."].)

The agent only is liable to a third party for "the breach of a duty owed individually to third parties *independent of such agency relation*." (*Mears*, *supra*, 97 Cal.App.2d at p. 485, italics added.) Thus, "*agents are protected from vicarious liability for the torts of their principals*, but are held responsible for their own actions that constitute a tort . . . ." (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 693, italics added.)

Moreover, California law generally limits an agent's duties as owing only to its principal, and not to a third party, to avoid placing the agent in a position of conflict. Thus, in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, this Court analyzed an accounting firm's duty of care in preparing an independent audit of a client's business. The Court found the accounting firm not liable to a third party for the firm's negligence in conducting the audit. (See *id.* at p. 406 ["[A]n auditor's liability for general

negligence in the conduct of an audit of its client financial statements is confined to the client, i.e., the person who contracts for or engages the audit services."].)

Similarly, in *Ruiz*, *supra*, 130 Cal.App.4th at p. 67, the plaintiff alleged an agent was liable for failure to undertake adequate rescue measures after a construction accident. Plaintiff alleged that the principal had a duty under the California Code of Regulations and industry standards to have an adequate rescue plan in place in the event of an injury, and that the principal's agent breached this duty by failing to effectively rescue an injured construction worker. (*Ibid.*) The Court refused to hold the agent liable for such a claim, stating "the fact that [principal] had certain duties to [the injured worker] does not mean that [agent] also owed him those duties." (*Ibid.*)

Exactly. That the FEHA imposes certain duties on an "employer" with regard to job-related medical examination, or imposes other duties on the "employer," does not mean that the employer's agent also owed those duties to the Plaintiffs.

b. The Employer's FEHA Duties are Non-Delegable to its Agents

"The nondelegable duties doctrine prevents a party that owes a duty to others from evading responsibility by claiming to have delegated that duty to an independent contractor hired to do the necessary work. The doctrine applies when the duty preexists and does not arise from the contract with the independent contractor." (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600-601.)

"Ordinarily, the duty imposed by statutes upon employers is non-delegable, so that the employer is subject to liability if any person to whom he entrusts the task of compliance with the statute is negligent." ." (Rest.2d Agency, § 520 (Statutory Duties), com. a.) By contrast, an agent is not liable for the breach of a principal's non-delegable duty. (*See Ruiz, supra*, 130 Cal.App.4th at p. 64 ["assuming that [principal] had a nondelegable duty . . ., the [plaintiff] cites us no authority, and we find none, to establish that [principal]'s attempt to delegate such a duty to an agent creates liability on the part of the agent."]; *Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727 ["[T]he nondelegable duty rule is a form of vicarious

liability because it is not based on the personal fault of the landowner who hired the independent contractor. Rather, the party charged with a nondelegable duty is '*held liable for the negligence of his agent*, whether his agent was an employee or an independent contractor.'"].)

Similar principles underlay the holding in *Reno*, where this Court acknowledged that, while an employer can delegate the authority to make personnel decisions to an agent, it is "the *employer* [that] ultimately does the [discrimination]," and not the agent that performs the personnel decision later deemed discriminatory. (*Reno*, *supra*, 18 Cal.4th at p. 657.)

c. Nothing in the FEHA Legislative History Suggests the Legislature Intended to Upend These Settled Legal Principles

The FEHA direct its nondelegable anti-discrimination duties at the employer, not the employer's agent. The employer, not its agent, decides whether to require a medical examination. The employer, not its agent, decides what to do with the exam's results. The agent does not control its principal's decision to require either the exam, or how to use it. Although the employer can delegate to a medical provider the performance of the medical

examination, by definition, the medical provider can only qualify as an "agent of an employer" if the medical provider acts under the direction and control of the employer. Plaintiffs alleged "[t]he referring employers also had the right to control USHW in how it conducted the pre-placement medical exams." (ER-71, ¶ 22.)

Thus, to paraphrase *Reno*, it is "the employer [that] ultimately does the [discrimination]," and not the agent that is delegated authority from the employer to perform the act later challenged as discriminatory. (*Reno*, *supra*, 18 Cal.4th at p. 657.) Moreover, as also noted in *Reno*, only the employer is responsible for all the acts that constitute the collective decision-making at issue in a discrimination claim. The agent is not responsible for the decision to require the medical examination, nor the decision regarding what to do with the examination's results. The agent performs only the examination itself.

Plaintiffs' proposed theory presumes that the Legislature intended when it inserted the "agent" language in the FEHA to rewrite the law to impose a duty on agents that does not arise independent of the agency relationship. Contrary to *Bily* and comparable precedents, Plaintiffs' proposed theory places the agent in the position of conflict of having two masters. The

proposed theory renders the agent liable for employment decisions that the agent's principal collectively has made, even though the agent only performed a component of that collective employment action. And the proposed theory delegates the employer's non-delegable duties to its agent. Nothing in the FEHA's legislative history indicates that the Legislature contemplated such a complete upheaval in settled agency law.

Accordingly, the more reasonable construction of the agent language is that which this Court referenced in *Reno* but declined to express an opinion on: the Legislature merely intended to assure application of the doctrine of *respondeat superior*, so that the employer is liable for its agent's actions. The Legislature did not intend to turn that doctrine on its head to create an unprecedented new liability that holds agents liable for statutory duties imposed on their employers.

3. This Court Should Leave Plaintiffs' Proposed FEHA Expansion to the Legislature

More than two decades ago, this Court admonished "[u]ntil the Legislature provides for punishing [agents], [the courts] should leave that task to the employers." (*Reno*, *supra*, 18 Cal.4th at p. 662.) That admonition is even more apt now, given

that the Legislature since *Reno* has not amended the FEHA to specify that it intended either to impose direct liability on agents or to differentiate between types of agents.

On one hand, those intervening decades have not included any appellate decisions imposing directly liability on entity-agents. The sky has not fallen. The FEHA has worked well by limiting the cause of action to employers—who have remained liable throughout those decades for the conduct alleged in this case, or in any other case based on an agent's actions.

On the other hand, there is no telling what will follow if agents are directly liable for the duties that the FEHA imposes on employers. Our law has never before held the servant liable for its master's duties. And with good reason—given the agent's lack of control over its principal, one cannot predict the problems that could arise if this Court recognized a redundant additional cause of action against entity-agents.

"When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*Townzen v. County*

of El Dorado (1998) 64 Cal.App.4th 1350, at 1357-1358, internal quotation marks omitted, quoting *People v. Bouzas* (1991) 53 Cal.3d 467, 475; see also *In re Jenson* (2018) 24 Cal.App.5th 266, 278-281 [presuming Legislature acquiesced in judicial construction of statute providing parole leniency to individuals who committed crimes in their youth, and relying on that presumption to extend holding to apply to persons who committed crimes as adult].)

Just as *In re Jenson* presumed legislative acquiescence in an earlier judicial construction of the statute, and used that presumption to extend that judicial construction to facts on which the earlier decision expressed no opinion, but logically embraced, this Court should presume the Legislature's many post-*Reno* FEHA amendments that did not disturb *Reno* show its acquiescence in the proposition that the "person acting as an agent" language in FEHA's definition of an "employer" was not intended to impose direct liability on an employer's agents. That presumption is a further reason to hold that entity-agents are not directly liable for employment discrimination.

B. Plaintiffs' Arguments do not Support their Proposed Expansion of the FEHA

Plaintiffs never grapple with most of the above-discussed problems with their interpretation: their theory renders the agent liable for collective corporate action of which the agent's acts are but one component, it creates a conflict of interest with an agent's duty of loyalty to its principal, it upends settled agency law, and it distinguishes individuals and entities even though FEHA's definition of a "person" does not draw such a distinction.

Instead, plaintiffs make arguments that this Court already has rejected in *Reno* and *Jones*. For example, plaintiffs argue that if this Court construed the "agent" language to merely incorporate *respondeat superior* principles, that language "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." (AOB 23-24.) This Court rejected this precise argument in *Reno*, explaining:

> Express statutory language defining the scope of employer liability is not surplusage. Rather, it may eliminate potential confusion and avoid the need to research extraneous legal sources to understand the

> statute's full meaning. Legislatures are free to state legal principles in statutes, even if they repeat preexisting law, without fear the courts will find them unnecessary and, for that reason, imbued with broader meaning.

(*Reno*, *supra*, 18 Cal.4th at p. 658.)

Similarly, plaintiffs argue FEHA's plain language compels their construction. (AOB 19-20.) But as this Court explained in *Reno* that identical language plausibly supports two alternative constructions, one of which is that the FEHA does not impose direct liability on agents. (*Reno*, *supra*, 18 Cal.4th at p. 647.) Moreover, the plain language rules of construction that plaintiffs cite forbid drawing a distinction between individual and entity agents, since the FEHA's definition of "person" draws no such distinction. Plaintiffs never address the absence of distinction between individuals and entities in FEHA's definition of "person."

Plaintiffs also attempt to portray the concerns discussed in *Reno* and *Jones* as applicable solely to individuals and not to entity-agents. (AOB 30-32.) But that is incorrect. As discussed at pp. 20-30 *ante*, *almost* all the concerns discussed in *Reno* and Jones apply to entity-agents as well: (a) the Legislature directed the liability at the "employer," but did not express personal

liability for the agent with the kind of specificity with which it directed personal liability for harassment, (b) the action alleged to be discriminatory involves collective action of which the agent's role is but one part, (c) direct liability injects a conflict of interest into the agency relationship, (d) there is minimal need for a redundant cause of action against the agent, given the employer's undisputed responsibility for its agent's conduct, and (e) direct liability would be a major change in the law that would be expected to prompt more discussion in the legislative history.

The only concerns discussed in *Reno* or *Jones* that may or may not apply to entity-agents (depending on the entity in question) are the incongruity between direct liability and the FEHA exemption for persons who employ less than 5 individuals, and the degree to which direct personal liability might impose a ruinous burden. But these concerns were hardly the sole or even most important justification for the holdings in *Reno* and *Jones*. Moreover, to draw a non-textually supported distinction between individual and entity agents based on these concerns would in turn require further distinctions to be drawn within the entity-agent category as well (e.g. to exclude entities that employ less than 5 persons or to whom the burden might be ruinous).

Because such further distinctions would require further contortion of the statutory text, the more reasonable, coherent and consistent construction would be to hold that all agents are not directly liable for employment discrimination, and the "person acting as agent" language merely holds the employer liable for its agent's conduct.

While ignoring the public policy concerns discussed in *Reno* and *Jones*, plaintiffs instead assert other supposed policy grounds for their interpretation. They argue entity-agents are experts in their respective field and should shoulder the burden of liability if they break the law, often set the policies they follow in performing their specialized task, and may be in the best position to change discriminatory practices across industries. (AOB 22-23.) These arguments ignore that the "person acting as an agent" language applies to all obligations that the FEHA imposes on an "employer," that only the employer is responsible for all acts that collectively comprise each of those obligations, and an agent is responsible only for a component of the collective action. If *any* "person acting as an agent of an employer" was liable for *all* obligations the FEHA imposes on an "employer," innumerable

entity-agents would be liable for actions that go well beyond their area of expertise and well beyond their control.

For example, with regard to the PEPO examinations at issue, a medical service provider has no expertise in deciding whether to require a medical examination as a condition of employment, has no control over whether all applicants are asked to undergo an examination, and has no control over employment decisions that are made based on the examination results. The same is true of the countless other entity-agents that would be swept under plaintiffs' proposed rule—the agent performs a specialized task at the request of and under the control of the employer, but the agent lacks any expertise or control in the portions of the collective employment action of which their specialized task was but one component. Thus, the employer is in the best position to change any discriminatory practices, because only the employer controls the collective whole of the disputed action. Moreover, the employer's control over the agent gives the employer the power to direct lawful action and the employer's liability gives the employer the incentive to do so.

Plaintiffs also argue that all agents should be directly liable for employment discrimination because some agents may be the

chief financial beneficiary of the challenged conduct. (AOB 23.) Not only is that not necessarily true of the vast number of agency relationships that would get swept under plaintiffs' proposed rule, but it ignores the employer's undisputed paramount role in the conduct at issue. The employer decides whether to retain an agent and for what purpose, pays for the agent's services, and has the power to control the agent's actions. The agent performs a task for hire but does not control the employer's *employment* decision. Liability for *employment* discrimination, therefore, must be directed at its source—the employer.

Plaintiffs also argue that limiting the FEHA to an expression of *respondeat superior* only "would be inconsistent with common law agency principles" (AOB 24.) and that the common law of agency ordinarily requires agents to "bear liability for their wrongful conduct." As explained at pp. 30-34, *ante*, however, the common law of agency (a) does not hold the agent vicariously liable for the principal's torts, yet plaintiffs' theory proposes to impose on the agent the duties that the FEHA directs at the employer, (b) does not permit a principal to delegate the duties imposed on the principal by statute to an agent, yet plaintiffs' proposed theory would effectuate such a delegation, (c)

holds an agent liable only for breaches of a duty that arise independent of the agency relationship, but here plaintiffs' theory would impose a duty that arises by virtue of that relationship.

Plaintiffs also claim support in outdated and inapposite federal cases. (AOB 26-27.) But this Court in *Reno* reviewed the federal case law in 1998 and stated such cases "overwhelmingly" found similar "agent" language in federal statutes was not intended to impose direct liability on agents of the employer. (*Reno*, *supra*, 18 Cal.4th at p. 659.) Moreover, the cases that Plaintiffs cite are inapposite because they involved agents that acted as a de facto employer by making *employment* decisions.

In *Williams v. City of Montgomery* (11th Cir. 1984) 742 F.2d 586, the City of Montgomery created a Board and delegated the employer's control over personnel issues to it. The Eleventh Circuit held the Board could be liable because of the "Board's power to exercise duties traditionally reserved to the employer: establishing a pay plan, formulating minimum standards for jobs, evaluating employees, and transferring, promoting, or demoting employees." (*Id.* at p. 589.)

Similarly, in *Spirt v. Teachers Insurance Annuity Association* (2d Cir. 1982) 691 F.2d 1054, the court found agents

could be liable because they were "so closely intertwined with those [principals], that they must be deemed an "employer" because 1) employee participation in the retirement plans was "mandatory" and 2) the principal "share[d] in the administrative responsibilities that result from its" employees' ongoing participation with the agent." (*Id.* at p. 1063.) Thus, the case again turned on the fact that the agents acted as the de facto employer and assumed the control and direction of the employer.

In *Association of Mexican-American Educators*, potential teachers challenged a mandatory test shown to be discriminatory as to certain minority groups. Defendants (the State of California and its employees and agencies) argued Title VII did not apply to them – since the local school districts employed the teachers. The court held otherwise, finding that they performed an analogous function to an employment agency. (See *Assoc. of Mexican-American Educators v. State of California* (9th Cir. 2000) 231 F.3d 572, 581-582.)

In *Equal Employment Opportunity Commission v. Grane Healthcare Co.* (W.D.Pa. 2014) 2 F.Supp.3d 667, Grane, a management company, interviewed and hired approximately 300 employees to staff a care center. As part of the application

process (not post offer), Grane mandated all applicants take a drug test and record their medications. Grane contracted with a third party healthcare service provider to conduct pre-employment physical examinations for the same incoming employees. (See *id.* at pp. 675-676.) The third party indicated whether an applicant could perform the "essential functions" of a given position. (See *ibid.*)

Critically, the third party who conducted the examinations – the party directly analogous to Defendants here – did not get sued. As in the other cases discussed above, the management company that was held potentially liable made the *employment* decisions and exercised the employer's function.

Lastly, *DeVito v. Chicago Park District* (7th Cir. 1996) states: "the language designating 'any agent of such person' as an employer was intended to impose respondeat superior liability on employers for the acts of their agents — not to create liability for every agent of an employer." (83 F.3d 878, 882.)

In short, the federal cases that Plaintiffs cite do not help them. Defendants did not require a PEPO medical examination, nor did they make employment decisions based on the exam

results. Federal case law imposing liability on those who act as de facto employers and make employment decisions do not apply.

VI. CONCLUSION

The Court should hold that a person acting as an agent of an employer is not directly liable for employment discrimination to a plaintiff that the agent did not employ, and this rule applies to individuals, business entities and all others who fall under FEHA's definition of a "person."

DATED: July 26, 2022

REED SMITH LLP

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT 8.504(d)(1)

Pursuant to California Rules of Court, Rule 8.504(d)(1), this Answering Brief on the Merits contains 7,832 words. It is 1.5-spaced and is printed in 13-point Century Schoolbook font.

Executed on July 26, 2022, in San Francisco, California.

REED SMITH LLP

By /s/ Raymond A. Cardozo
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PROOF OF SERVICE
Raines v. U.S. Healthworks Medical Group
Supreme Court of California Case No. S273630
U.S. Court of Appeals for the Ninth Circuit, No. 21-55229

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/s/Silvia E. Escobar
Silvia E. Escobar

STATE OF CALIFORNIA
Supreme Court of California

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