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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' REPLY BRIEF ON THE MERITS

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INTRODUCTION

The exception to agent liability under FEHA established by this Court in *Reno v. Baird* and *Jones v. Torrey Pines*—immunizing individual supervisors for claims of discrimination and retaliation—is just that, an exception. It does not compel this Court to ignore the plain language of the statute, its remedial purpose, and public policy, and immunize *all other agents*.

Defendants continue to insist otherwise because: (1) the exception for individual supervisor liability subsists, as the Legislature did not overhaul FEHA in response to *Reno* and *Jones*; (2) even though "agent" is part of FEHA's definition of "employer," declining to apply the statute to agents would not upset the narrowest possible interpretation of respondeat superior principles, which Defendants say this Court adopted in *Reno*; and (3) their preferred outcome allows Defendants to avoid a conflict of interest between following the law and maximizing their profit.

For the reasons that follow, none of these arguments are viable. The text of FEHA, construed liberally in accordance with its remedial purposes, as well as public policy and federal caselaw, all support direct liability on business entity agents like Defendants.

ARGUMENT IN REPLY

I. FEHA MAKES BUSINESS ENTITY AGENTS LIABLE FOR THEIR OWN UNLAWFUL PRACTICES

A. *Reno* and *Jones* Created an Exception for Individual Supervisors

Defendants argue that this Court found in *Reno* that FEHA's agent language "merely" codified principles of respondeat superior, which they take to mean that no agent could ever be liable under FEHA—no matter how large, no matter how culpable. (Defendants' Answering Brief ["DAB"] at pp. 20-29.) Contrary to Defendants' view, this Court did not foreclose agent liability under FEHA.

The plain language of FEHA makes agents like Defendants liable for their own violations of the statute. (Cal. Gov. Code, § 12926, subd. (d); *see also* Cal. Code Regs., tit. 2, § 11008(d)(3) ["an agent of an employer [] *is also an employer*"] [emphasis added]. All further statutory references are to the Government Code unless otherwise specified.) The Court's inquiry here could end right there: "If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." (*Kobzoff v. Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 860.)

In *Reno*, the Court considered whether an exception for individual supervisor liability subsisted in the case of claims of discrimination under section 12940, subd. (a). In finding that it did, the Court refused to interpret the "agent" language in section 12926, subd. (d) to mean "merely" that respondeat superior

liability applied. (*Reno v. Baird* (1998) 18 Cal.4th 640, 658.) And it left open the statute's application to other agents acting in ways contrary to the statute, as Defendants do here. (*Ibid*.)

The Court in *Reno* (and subsequently *Jones*) did not say that FEHA's agent language serves "merely"—that is, "only"—to hold employers liable for agents' acts in respondeat superior, absolving the agent in every instance. Rather, the Court drew a narrow public policy exception, grounded in statutory language limiting liability to those "regularly employing five or more persons," to decide those two cases. In the more than two decades since then, no court has extended that twice-stated holding beyond that exception. (*See Raines v. U.S. Healthworks* (9th Cir. 2022) 28 F.4th 968, 971 ["The California Supreme Court [] has *twice limited the reach* of the phrase 'person acting as an agent of an employer' in FEHA's definition of the term 'employer.' *Both decisions exempt individuals*."] [emphasis added.])

There the exception must remain.

B. Principles of Statutory Construction Require the Individual Supervisor Exception Not Be Extended as Defendants Urge

Though Defendants ignore that *Reno* and *Jones* articulated an exception to liability, the Court should treat it that way.

While this Court's construction in *Reno* "becomes as much a part of [FEHA] as if it had been written into it originally" (*People v. Hallner* (1954) 43 Cal.2d 715, 720), any exception to a general rule of an enactment—whether "written into" the statute by the Legislature or by the courts—must be strictly construed. (*See*

Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal.App.4th 1351, 1358.) Other exceptions, like those Defendants press, are necessarily excluded. (*See In re James H.* (2007) 154 Cal.App.4th 1078, 1084.)

The idea that the Legislature created an exception so broad as to become the rule is belied by FEHA's text and context. Courts must assume the Legislature knows how to create exceptions. (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992.) FEHA does, but not the broad exception Defendants urge. (*See*, *e.g.*, § 12926, subd. (d)–(e), (h) [excluding small employers; nonprofit religious associations; and agents of "employment agencies" and "labor organizations."].) "Under the familiar rule of construction, [] where exceptions to a general rule are specified by statute [or the Court], other exceptions are not to be implied or presumed." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195.)

Thus, except to avoid absurd results, the Court should not construe FEHA to create exceptions to liability not specifically made. (*Stockton Theatres v. Palermo* (1956) 47 Cal.2d 469, 476.) Nor should it construe its own precedents as embracing a maximalist statutory interpretation those precedents explicitly declined to endorse. To the extent that the statute's meaning is in question, then "it must be so construed as to extend the remedy" (*Wittenburg v. Beachwalk HOA* (2013) 217 Cal.App.4th 654, 666)—not to extend the exception to that remedy.

1. To the Extent Common Law Principles Conflict, They Must Yield to Remedial Principles

FEHA "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." (*Fitzsimons v. Cal. Emergency Physicians* (2012) 205 Cal.App.4th 1423, 1429 [citing §§ 12920–12921; cleaned up].) The Legislature enacted FEHA to "provide effective remedies that will *both prevent and deter* unlawful employment practices *and redress* the adverse effects of those practices on aggrieved persons." (§ 12920.5 [emphasis added].) Accordingly, "the court must construe the FEHA broadly, … not restrictively." (*Fitzsimmons*, *supra*, 205 Cal.App.4th at p. 1429 [citation omitted]; § 12993, subd. (a); *see also Raines*, *supra*, 28 F.4th 968 at p. 971.)

Defendants ignore these guiding principles—their brief does not address them.

Remedial statutes like FEHA target wrongs that existing statutory and common law has not remedied. Although "to the extent possible," courts "construe statutory enactments as consonant with existing common law and reconcile the two bodies of law" (*McMillin Albany v. Sup. Ct.* (2018) 4 Cal.5th 241, 249), "common law rules are subject to legislative revision" (*Heimlich v. Shivji* (2019) 7 Cal.5th 350, 363). In a conflict, "the statute prevails, and settled common law principles must yield." (*Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, 818 [cleaned up].) This

is especially so where, as here, the Legislature expressed its "intention [] to occupy the field of regulation of discrimination in employment." (§ 12993, subd. (c); *see also I. E. Associates v. Safeco Title* (1985) 39 Cal.3d 281, 285 [statute will "supplant" common law where Legislature intended statutory law to "occupy the field"]; *Environmental Law Foundation v. State Water Resources* (2018) 26 Cal.App.5th 844, 863.)

Whether FEHA supplants or enhances the common law, the Legislature did not "merely" "codify the doctrine of respondeat superior" as it existed in the employment context in 1959. (*Cf.* DAB at pp. 23, 36.) And whereas in *Reno* this Court remained agnostic—refusing to interpret the "agent" language as incorporating *only* respondeat superior liability (*see Reno*, *supra*, 18 Cal.4th at p. 658)—Defendants boldly go where none have gone before. But if Defendants were right—that FEHA's "agent" language "merely" ensures respondeat superior liability for direct employers (and absolves the agent)—then the "agent" language would be either superfluous or ornamental. (*Cf.* DAB at pp. 23, 39-40.) That is, unless its purpose was to make FEHA *less protective* than the common law, an absurd result given the remedial statutory intent.

2. Defendants' Interpretation of "Agent" Does Violence to FEHA

If Defendants are right that the "agent" language serves no purpose other than codifying exclusive principal employer liability (*see*, *e.g.*, DAB at p. 36), then the Legislature necessarily

and logically would have defined any others subject to FEHA's prohibitions to include their respective agents as well. It didn't.

FEHA defines the "state or any political or civil subdivision of the state, and cities" as an "employer," but excludes the "agent" language from that clause. (§ 12926, subd. (d).) It also defines "employment agencies" and "labor organizations" without reference to their "agents"—let alone "direct or indirect" agents. (§ 12926, subd. (e), (h).)

Defendants do not contest the proposition that employment agencies, labor organizations, and public employers can be liable in respondeat superior for prohibited acts that their agents undertake. The contrary would be an absurd result—but one necessarily implied by Defendants' interpretation that "agent" = "respondeat superior liability only." It would result in entities FEHA expressly subjects to liability being immunized for no good reason.

Much more reasonable is that the Legislature intended that respondeat superior principles would apply by default because they do. (*See Presbyterian Camp v. Sup. Ct.* (2021) 12 Cal.5th 493, 502 ["For nearly 150 years, the long-standing history of respondeat superior [] 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."] [citing *Hull v. Sacramento Valley R. Co.* (1859) 14 Cal. 387 and *Wilson v. Southern Pac. R. Co.* (1882) 62 Cal. 164].) It follows that employers, labor organizations, employment agencies, the State and its political subdivisions—principals—

would be liable whenever their respective agents violated FEHA within the scope of the agency relationship even without any "agency" language in those provisions. By going further to include the "agent" language in the definition of "employer"—but not in the definitions of other principals—the Legislature ensured that, where appropriate, an employer's responsible agent would also be directly liable under FEHA.[1]

Here, Defendants' focus on the definition of "persons" in FEHA is also misguided. (*See*, *e.g.*, DAB at p. 11.) "Person," defined at section 12925, subd. (d), includes a broad range of individuals and entities. The breadth of that definition ensures consistency with the statute's remedial purposes and underscores its intended reach. (*See* § 12993, subd. (c).) Indeed, the word is used 68 times in sections 12926 and 12940 alone. The Legislature defined "person" broadly precisely because the word must be flexible enough to be effective in diverse contexts and to sweep within its meaning the widest set of remedial outcomes.

That kind of expansive language is not limiting, as Defendants assume. The Court's exception for individual supervisors removed those kinds of "persons" from the reach of FEHA liability for certain acts. But it does not follow from that

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[1] Defendants also claim that because they "did not employ plaintiff," FEHA does not apply to them. (DAB at p. 7.) But FEHA applies not only to "employers" and their agents but also to (a) "labor organizations," (b) "employment agencies," (c) public entities; and not only to "employees" but to (a) "applicants," (b) "unpaid interns and volunteers," and (c) "persons providing services pursuant to a contract." (*See* §§ 12926, 12940.)

exception that all other kinds of "persons" acting as agents are or were necessarily immune from liability under the statute.

3. Defendants' Reliance on FEHA's (Amended) Harassment Provisions Is Misplaced

Defendants say that because the Legislature "did not express personal liability for the agent with the kind of specificity with which it directed personal liability for harassment," there can be no agent liability, *ever*, unless such language is included. (*See* DAB at pp. 24-26, 40-41 [citing § 12940, subd. (j)(3)].)

That is neither accurate nor helpful.

The harassment provision Defendants cite, now at section 12940, subd. (j)(3), was amended in response to *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132. When *Carrisales* was decided, subd. (j)(3) was subd. (h). It provided that harassment by an employee "shall be unlawful" *only* "if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (*Carrisales*, *supra*, 21 Cal.4th at p. 1136.) Pursuant to that language, an "unlawful employment practice" only occurred—liability only arose—when the *employer* failed to immediately take appropriate corrective action in response to actual or constructive notice of the employee's harassment. (*Id.* at pp. 1135–1136.) The Court therefore reasoned the Legislature could only have intended for the employer to be held liable in respondeat superior. (*Id.* at p. 1136 ["If the employer fails to take

such action, there may be an unlawful employment practice, but it is by the employer, not the coworker."].)

In enacting the current harassment provision at section 12940, subd. (j)(3), the Legislature abrogated *Carrisales*. FEHA's harassment provision now reads that employees are "personally liable for any harassment [] *perpetrated by the employee, regardless* of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action." (§ 12940, subd. (j)(3) [emphasis added].)

In response to *Carrisales*' curtailing of remedies in FEHA which were otherwise consistent with common law principles holding agents liable for their own wrongdoing, the Legislature expanded the statute. It does not follow, however, that by amending FEHA in this way the Legislature intended to immunize all other agents unless language identical to section 12940, subd. (j)(3) is enacted.

4. The Labor Code Definition of "Employer" Is Textually Distinct from FEHA's, Demonstrating a Different Legislative Intent

The Labor Code's definition of "employer" for Labor Code § 1194 wage claims is a helpful comparator. (*See Hayes v. Temecula Valley Unified* (2018) 21 Cal.App.5th 735, 752.)

For those purposes, an "employer" is "any person [] who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working

conditions of any person." (Cal. Code Regs., tit. 8, § 11090, subd. 2(F) ["Wage Order No. 9"]; *see also Martinez v. Combs* (2010) 49 Cal.4th 35, 66 [affirming *Reynolds v. Bement* (2005) 36 Cal.4th 1075 insofar as it construed the definition of "employer" in Wage Order No. 9 to exclude individual agent liability for wage theft].) Thus, under the Labor Code definition, individual agents are not individually liable for wage theft.

Compare that language to FEHA's. Whereas the Labor Code defines an "employer" as one "*who* directly [] *or through an agent* [] exercises control over [] the working conditions of any person" (*see* Wage Order No. 9), FEHA defines an "employer" as one "regularly employing five or more persons, *or* any person acting as an agent of an employer" (*see* § 12926, subd. (d)). That is, the Labor Code defines "employer" as one *who acts through its agents*; whereas FEHA defines agents *as* employers. (*See also* Cal. Code Regs., tit. 2, § 11008(d)(3) ["an agent of an employer [] *is also an employer*."].)

5. Any Legislative Inaction Following *Reno* and *Jones* Shows Acquiescence to the Individual Supervisor Exception, Nothing More

Defendants assert that the Legislature acquiesced to "the proposition that that the 'person acting as an agent language' in FEHA's definition of 'employer' was not intended to impose direct liability on an employer's agents." (DAB at p. 38.) Although "[i]n some circumstances, legislative inaction might indicate

legislative approval of a judicial decision" (*People v. Whitmer* (2014) 59 Cal.4th 733, 741), these are not those circumstances.

First, for there to be legislative acquiescence, there must be *a particular judicial construction* to which to acquiesce. (*See, e.g., People v. Ledesma* (1997) 16 Cal.4th 90, 100–101.) No court—including *Reno*—has endorsed the proposition Defendants espouse. That's why we're here. (*Raines*, *supra*, 28 F.4th at p. 971.)

Second, even if Defendants were right about that phantom proposition, there was no acquiescence. Compare the circumstances here (*i.e.*, two cases declining to construe the statute in a particular manner, necessitating a federal court's certification of the question to this Court) against those in *Cel–Tech v. L.A. Cellular* (1999) 20 Cal.4th 163, 178 (finding acquiescence after decades of legislative inaction and unanimity of this Court's multiple judicial decisions restating particular interpretation) and *People v. Williams* (2001) 26 Cal.4th 779, 789 (finding acquiescence because Legislature did not overturn this Court's statutory construction or this Court's opinion re-affirming original judicial construction, and instead enacted statutory provisions approving that construction).

In re Jenson (2018) 24 Cal.App.5th 266, cited by Defendants, does not help them. Unlike here, the courts in *In re Jenson*, *Cel-Tech*, and *Williams* had an uncontested, clear, and controlling judicial interpretation; the parties in *In re Jenson* conceded it. (*Id.* at p. 281; *cf. Raines*, *supra*, 28 F.4th at p. 971.) Moreover, *In re Jenson* and *Williams* had affirmative Legislative

approval to rely on. (*See*, *e.g.*, *In re Jenson*, *supra*, Cal.App.5th at p. 280 [Legislature reacted to court's judicial construction by broadening statute's reach further, not by narrowing it].)

Nevertheless, Defendants assert that "direct liability would be a major change in the law that would be expected to prompt more discussion in the legislative history." (DAB at p. 41.) But

> The fact legislative history materials do not reflect discussion on a particular topic does not necessarily mean the Legislature did not intend to change the law. The objective manifestation of the legislative intent (the words of the statute) controls over silence in the legislative history record. The plain meaning of words in a statute may be disregarded only when that meaning is repugnant to the general purview of the act.

(*Hayes*, *supra*, 21 Cal.App.5th at p. 753 [cleaned up].) As Plaintiffs, the Attorney General, and leading disability rights groups have demonstrated: The text is clear. (*See*, *e.g.*, Amicus Brief of the Attorney General, 2021 WL 2604301 (C.A.9), at p. 2; *see also Raines*, *supra*, 28 F.4th at pp. 971-72.) And as discussed further below, the plain meaning cannot be disregarded on any public policy ground.

C. Public Policy Requires Holding Business Entity Agents Liable for Their Own Wrongful Acts in Violation of FEHA

Defendants declare that "*almost* all the concerns discussed in *Reno* and *Jones* apply to entity-agents as well." (DAB at p. 40.) Plainly, they don't. Unlike in *Reno* and *Jones*, public policy favors entity agent liability.

Defendants' arguments amount to an acknowledgment of FEHA's reach and its limited exceptions. And they highlight the underlying reasons why the latter shield individuals and small employers—but not Defendants.

1. Defendants Cannot Disclaim Responsibility for Risks Created by Their Own Lawless Enterprise

Unlike the supervisors in *Reno* and *Jones*, Defendants do not contend that their liability "might impose a ruinous burden" on them and similar entity agents. (DAB at p. 41.) Nor do they contest the operative pleading's allegation that they have market dominance or profit immensely from their role as exam administrators and gatekeepers to employment. (ER-65, 68–70, 93.) Instead, they argue it shouldn't matter whether an agent is the "chief financial beneficiary of the challenged conduct." (DAB at pp. 43-44.)

To be clear, Plaintiffs do not oppose Defendants—or any agent—profiting from lawful employment-related services. Plaintiffs oppose Defendants profiting from providing unlawful services. Defendants benefit from their unlawful conduct by saving time and resources otherwise required to tailor inquiries to the job (*see* ER-37, 75)—to the detriment of those the Legislature sought to protect and their competitors who pay the price to obey the law.

Properly understood, Plaintiffs' argument advances the goals and purposes of the doctrine of respondeat superior. The doctrine derives from "a 'deeply rooted sentiment' that it would

be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208 [citation omitted].) Because some enterprises create "inevitable risks as a part of doing business" (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [citations omitted]), "a rule of policy, a deliberate allocation of a risk" (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959), is required to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury. (*See also Mary M.*, *supra*, 54 Cal.3d at p. 209.)

The doctrine requires enterprises like Defendants bear the foreseeable resulting losses "because, having engaged in an enterprise and sought to profit by it, it is just that they should bear them." (*Hinman*, *supra*, 2 Cal.3d at p. 959 [cleaned up]; *see also Janken v. GM Hughes Elec.* (1996) 46 Cal.App.4th 55, 78-79.) Defendants' insistence on immunity for all agents—no matter how responsible for the risks—turns the risk-allocation function of respondeat superior on its head.

2. Defendants' Liability Facilitates Lawful Decision-Making and Causes No Conflict for Employers

Defendants assert that imposing liability on them would deter them from acting in their clients' interest and thereby undermine employers' decision-making. (DAB at 41.) But the notion that an agent's interests might deviate from his principal's is not new. That conflict is inherent in the agent/principal

relationship. To place liability on agents like Defendants—who succumb to their own interests and thereby sacrifice the interests of not only referring employers but of the applicants and employees FEHA is designed to protect—does nothing to create those conflicts. Those conflicts already exist. Instead, it aligns incentives among the actors to follow the law.

Defendants also say that if they bear direct liability to applicants, they might "skew" their assessment to avoid liability, *e.g.*, "The medical provider might pass employees with infectious or other conditions to avoid the risk of a lawsuit." (DAB at p. 28.) That blinks reality: Defendants would really "pass" employees with infectious diseases, abandoning their "Hippocratic Oath" and incurring potentially even greater liability, to avoid the consequences of their blatant (and easily corrected) FEHA violations? No. As Defendants' counsel acknowledged at oral argument in the Ninth Circuit, they will "tailor" their inquiry as the law requires. (*See* Plaintiffs' Opening Br. at pp. 31-32 & fn. 2.)

3. Requiring Plaintiffs to Sue Tens of Thousands of Employers Rather than One Agent Conflicts with Remedial Principles

The need to hold agents like Defendants liable in cases like this one is very real. They are the ones at fault. They are the ones spreading this practice like a pandemic across California—infecting employers and prospective employees alike.

Defendants have nothing to say about the consequences, for the courts and industrial enterprise alike, were this Court to hold

that hundreds of thousands of applicants must sue their respective employers—numbering in the thousands—to remedy what can be remedied in one lawsuit.

Set aside the inefficiencies it would create for the courts and litigants in derogation of California's policy favoring class resolution (*see Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434, *as modified* (Aug. 9, 2000)), Defendants' approach would also create confusion and disunity in the marketplace and exacerbate inequalities between and across workplaces. As Amici in the Ninth Circuit attest: "Hiring discrimination continues to be a pervasive problem, yet it is perhaps one of the most difficult types of employment discrimination cases to prove." (*See* Amicus Brief of Legal Aid at Work et al. ["L.A.A.W. Br."] at p. 14 in *Raines*, *supra*, 28 F.4th 968.) Failing to hold Defendants accountable would "result in discriminatory failures-to-hire that applicants are less likely to recognize or pursue." (*Id.* at p. 22.)

Defendants deny that agents are ever "in the best position to change any discriminatory practices"—in part because "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." (DAB at p. 43.)

But the employer always has the *power* to "direct lawful action." Defendants concede that "the employers [] advised USHW that the purpose for the exam was to determine whether the applicant could perform the job." (DAB at p. 12.) Defendants acknowledge that in some circumstances, even with a right to direct lawful conduct and after directing it, other conditions make

it impractical or counterproductive to ensure that the agent's conduct is lawful. (*See* DAB at pp. 12-13 [An "outside provider of medical services" assures "that the examination would occur in a confidential and private medical setting rather than in the workplace."].) Thus, even where the employer has the power to direct—and actually directs—lawful action, it does not follow that the employer is best positioned to change or stop the prohibited conduct taking place in that setting.

Further, no doubt the "employer's liability gives it the incentive" to "direct lawful action" or to "deter and discipline unlawful conduct." (DAB at pp. 22-23, 43.) But as Defendants acknowledge, "to make such deterrence and discipline effective," the employer must not just have the right, but the practical ability to do so. (DAB at pp. 22-23.) For an individual employee agent, the solution is apparent: "a 'free pass' to the unemployment line." (*Reno*, *supra*, 18 Cal.4th at 654–55.)

Not so here. Unlike in *Reno* and *Jones*, where the Court reasoned that an employer's liability will incentivize it to terminate and replace supervisors, who in turn will be deterred by the specter of the "unemployment line," here most employers don't have the expertise, experience, or personnel to perform such exams themselves and trust and assume that the entity agent knows and follows the law governing its characteristic activities. One employer terminating the relationship with Defendants over unlawful conduct, when thousands don't, will not deter with the same efficacy as terminating an employee from their job.

Asking innocent applicants to wait for the market to develop sufficient competitive incentives for agents like Defendants to follow the law makes no sense when FEHA's purpose is to safeguard civil rights. The law should see to it that these rights are vindicated with all deliberate speed as the Legislature intended. (§ 12920.5.)

4. The Employee-Numerosity Requirement Sets a Workable Standard

Defendants admit that the reasoning in *Reno* and *Jones* concerning the incongruity and injustice resulting from immunizing small employers but not individual employees does not apply to entity agents—particularly not of Defendants' size. (*See* DAB at pp. 24, 41.) They are right. But they also say that to hold *any* agent liable would require the Court to draw "further distinctions within the entity-agent category as well (*e.g.*, to exclude entities that employ less than 5 persons…)." (DAB at p. 41.) Perhaps again they are right. But as in *Reno* and *Jones*, the employee-numerosity requirement provides a text-based, easily-applied standard to litigants and courts for evaluating which business entity agents can be liable as "employers" under FEHA, should one be needed.

D. Defendants' "Nondelegation" Argument Is Circular

Defendants say that employers' duties under FEHA are "nondelegable." (*See* DAB at pp. 33-34.) That sometimes a principal's duties are nondelegable at common law doesn't

answer the question of whether the agent also has duties under FEHA. If the agent has an independent duty, then the agent can be liable. (*See* Cal. Civ. Code, § 2343.)

The conclusion assumed but not supported by Defendants' argument is that FEHA imposes no such "independent duty" on agents—despite the plain language of the statute, its implementing regulations, and its remedial purposes. (*See* Cal. Code Regs., tit. 2, § 11008(d)(3); *Fitzsimons*, *supra*, 205 Cal.App.4th at p. 1429.) Defendants cite no authority holding that agents have no duties under FEHA or that all duties FEHA imposes are nondelegable and remain the direct employer's. They just repeat some variation of the same assumption, *i.e.*, an agent cannot be liable "for the principal's torts." (*See*, *e.g.*, DAB at pp. 31, 44.)

But as discussed above, the text of FEHA illustrates the Legislature's intent for broad and *effective* deterrence—targeting not only those who ultimately employ an applicant but also agents who engage in the wrongdoing while serving as gatekeepers to employment. This and similar language in FEHA reflect an intent to place duties on the kinds of agents who, unlike direct employers, routinely (and actually) engage in certain prohibited conduct. At the very least, section 12940 shows FEHA places independent duties upon agents who do not themselves employ Plaintiffs, but who instead control access to employment. And as discussed below, the federal caselaw illustrates nondelegation is a nonissue.

E. Defendants Fail to Meaningfully Distinguish Federal Authority

"Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections." (*See* § 12926.1, subd. (a).) Defendants ignore this. (*See* DAB at pp. 45-48.) Even so, the federal courts have repeatedly affirmed that an agent of an employer may be independently liable as an "employer" for certain unlawful conduct. The only limitation potentially relevant here appears to be whether the "agent" meets the employee numerosity requirement set out in the applicable statute.

While Defendants are correct that "this Court in *Reno* reviewed the federal case law in 1998," Defendants are wrong to say *Reno* found "overwhelming" agreement against direct liability on "agents of the employer" writ large. (DAB at p. 45.) On the contrary, the Court did not find *any* agreement—save where *individual supervisors* were involved. (*See Reno*, *supra*, 18 Cal.4th at p. 659 ["A clear consensus now exists. We find the cases concluding *supervisory employees are not individually liable* persuasive in both number and reasoning."] [emphasis added].)

Undeterred, Defendants contend the federal authorities "are inapposite because they involved agents that acted as a *de facto* employer by making *employment* decisions." (DAB at p. 45 [original emphasis].) Again, however, they ignore the TAC allegations that referring employers effectively delegated to Defendants the power to make traditional employment decisions and that Defendants' conduct significantly affected access to

employment opportunities. (*See*, *e.g.*, ER-70–71, 75, 86; *see also* L.A.A.W. Br. at pp. 21-22 & fn. 25 [emphasizing "the impossible decision of either opting out of the medical screening process and being disqualified for a job, or completing the process and providing information that they are uncomfortable sharing," and noting that "individuals with disabilities are even more likely to be screened out by these coerced disclosures."].)

The facts alleged here and in the federal cases align.[2]

The court in *Spirt v. Teachers Ins.* (2d Cir. 1982) 691 F.2d 1054, 1063 determined that a third-party non-employer agent could be liable as an "employer" under Title VII. Defendants say that result "turned on the fact that the agents acted as the *de facto* employer and assumed the control and direction of the employer." (DAB at p. 46.) But that's precisely what Plaintiffs allege here. (*See* ER-70–71, 75, 86.) Direct liability is appropriate here because, just as in *Spirt*, Defendants "exist solely for the purpose of enabling [referring employers] to delegate their responsibility" for these exams and applicants' "participation [] is mandatory." (*See Spirt*, *supra*, 691 F.2d at p. 1063.)

Defendants protest that "the third party who conducted the examinations" in *EEOC v. Grane Healthcare* (W.D. Pa. 2014) 2 F.Supp.3d 667, 675-76 "did not get sued." (DAB at pp. 46-47.) So? As Defendants point out, what matters is who "made the

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[2] Defendants call these federal authorities "outdated." (DAB at p. 45.) What that means in the absence of intervening contrary authority isn't clear. In any event, two of Plaintiffs' federal authorities post-date *Reno*.

employment decisions and exercised the employer's function." (DAB at p. 47.) As in *Grane*, Defendants here "indicate[d] whether an applicant could perform the 'essential functions' of a given position." (*See Grane*, *supra*, 2 F.Supp.3d at pp. 675-76; DAB at p. 47.) Like the "management company" that *was* sued and "potentially liable" in *Grane*, Defendants mandated applicants disclose medical information as part of the application process and made *de facto* employment decisions. (*See* ER-70–71, 75, 86.)

Defendants do not discuss *DeVito v. Chicago Park District* (7th Cir. 1996) 83 F.3d 878 except to note that the court stated the ADA's definition of "employer" was not intended to "create liability for *every* agent of an employer." (*Id.* at 882 [emphasis added]; *see also* DAB at p. 47.) Standing alone, that language stops far short of Defendants' preferred rule. But starting in the very next sentence, the Court wrote:

> Agents are liable under the ADA only if they otherwise meet the statutory definition of an "employer." *For example, an agent of an employer is not liable under the ADA unless it has the requisite number of employees and is engaged in an industry affecting commerce*. The record does not reflect whether the [agent] had 25 employees and otherwise qualifies as an employer under the statutory definition. Thus, on remand, the district court shall conduct further inquiry to determine the status of the [agent].

(*DeVito*, *supra*, 83 F.3d at 882 [citing *EEOC v. AIC Security* (7th Cir. 1995) 55 F.3d 1276, 1281-82] [cleaned up and emphasis added].) Here, Defendants meet the statutory definition of "employer" and do not fit into any of the statutory exceptions.

Defendants note that in *Williams v. City of Montgomery* (11th Cir. 1984) 742 F.2d 586, 588-589, the employer "delegated" its control over personnel issues to the agent. (DAB at p. 45.) How that helps Defendants is unclear. The court there held the agent could be liable because it had "power to exercise duties traditionally reserved to the employer," including "evaluating employees." (*Williams*, *supra*, 742 F.2d at p. 589.) Thus, not only do *Williams* and Plaintiffs' other federal authorities support liability in these circumstances, they dispose of Defendants' contention that agents cannot be liable for duties delegated to them by principals or that such duties are nondelegable in the first instance.

Defendants also attempt to distinguish *Assoc. of Mexican–American Educators v. State of California* (9th Cir. 2000) 231 F.3d 572, 581-82 ("*AMAE*"). There, as Defendants explain, the plaintiffs challenged "a mandatory test" required as a condition of employment. (DAB at p. 46.) "Defendants [] argued Title VII did not apply to them, since the local school districts employed the teachers." (*Ibid.*) As Defendants acknowledge, the court disagreed because the defendants (like those here) "performed an analogous function to an employment agency." (*Ibid.*; *see also AMAE*, *supra*, 231 F.3d at p. 581 ["Congress intended to close any loopholes in Title VII's coverage and to extend the statute's coverage to entities with actual control over access to the job market."] [cleaned up].) Because they "interfered with Plaintiffs' employment opportunities," they were liable "whether or not they

are direct employers" or even, "strictly speaking, an 'employment agency.'" (*AMAE*, 231 F.3d at p. 581.)

As Defendants' argument illustrates, what matters in the federal jurisprudence is conduct and function—not labels. This finds support in California law. For example, the "Rule of *Rojo*" on which Defendants relied in the Ninth Circuit (*see* Appellees' Answering Brief ["AAB"], 2021 WL 4781483 (C.A.9), at pp. 25-26, 28) is described as "confined to claims by an employee against his employer, *or against an entity in the position of the employer*."[3] (*Alch v. Sup. Ct.* (2004) 122 Cal.App.4th 339, 391 [emphasis added].) That is, FEHA permits claims against entities functioning "in the position of" an employer—especially agents like Defendants who "interfere with Plaintiffs' employment opportunities" or assume or are delegated control over traditional employment decision-making—"whether or not they are direct employers." (*See AMAE*, *supra*, 231 F.3d at p. 581.)

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[3] The "Rule of *Rojo*" derives from *Rojo v. Kliger* (1990) 52 Cal.3d 65, and is commonly used by defendants attempting to avoid liability under the Unruh Act on the grounds that "their services are 'employment related,' and claims under the Act are prohibited 'in the employment context.'" (*Alch v. Sup. Ct.* (2004) 122 Cal.App.4th 339, 392.) Defendants' invocation of the Rule of *Rojo* in this case (*see* AAB at pp. 25-26) directly contradicts their arguments that they are not "in the position of the employer."

II. ASSUMING, *ARGUENDO*, DEFENDANTS ARE IMMUNE FROM LIABILITY FOR THEIR FEHA VIOLATIONS BECAUSE THEY ARE NOT EMPLOYERS, THEY MUST BE LIABLE UNDER A NONEMPLOYMENT THEORY

Were this Court to hold an entity agent cannot be liable under FEHA, Defendants insist it "will have no bearing on whether a business entity providing services to an employer could be liable on a *nonemployment-based theory*." (DAB at p. 29.)

They cannot mean that.

Defendants argued in the referring federal courts that they are *not* liable under the nonemployment-based theories Plaintiffs alleged in the alternative.[4] In their view, the breadth of their conduct, as well as "strong public policy," supports immunity under the Unruh Act for conduct otherwise prohibited as discriminatory under FEHA. They also contend that their illegal conduct is also a reasonable and inoffensive invasion of privacy as a matter of law. (*See, e.g.*, ER-61–63 and fn.3; AAB at pp. 34-36.)

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[4] Plaintiffs alleged that Defendants' conduct constituted a common law claim for intrusion upon seclusion, and—in the alternative to their FEHA claims—asserted claims for gender and perceived disability discrimination in violation of the Unruh Act. (*See* ER-65, 70, 72–73, 84–91.) The District Court dismissed these claims, finding as a matter of law that (1) because Defendants asked all applicants the same impermissible questions, there was no perceived disability discrimination under Unruh; (2) asking different unlawful questions on the basis of gender is permissible under Unruh; and (3) asking unlawful and invasive medical questions in this context is not an invasion of privacy as a matter of law. (ER-12–19.)

Whether there is a gap between Unruh and FEHA or between FEHA and the law of privacy, permitting Defendants to discriminate and invade privacy with impunity, present important unanswered questions. The parties have fully briefed these issues in the District Court and Ninth Circuit.[5]

In short, if Defendants are not "employers" within the meaning of FEHA then they are business establishments liable under the Unruh Act. (*See Alch*, *supra*, 122 Cal.App.4th at p. 391; Plaintiffs' Opening Brief in Ninth Circuit ["POB"], 2021 WL 2483803 (C.A.9), at pp. 40, 50-55; Plaintiffs' Reply Brief in Ninth Circuit ["PRB"], 2021 WL 4781483 (C.A.9), at pp. 16-28.) And Defendants' conduct, constituting corporate invasion of worker privacy on a massive scale, cannot be prohibited by FEHA—on antidiscrimination as well as privacy grounds—but at the same time reasonably expected and inoffensive for the purposes of the tort of intrusion in California as a matter of law. (POB at pp. 55-66; PRB at pp. 29-38.)

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[5] Because these issues are fairly included in the Certified Question and Defendants raise them in support of their arguments, Plaintiffs discuss them briefly here. (*See* Cal. Rules of Court, rule 8.520(b)(3); rule 8.63(a)(1) [policy favors "complete submissions that assist the courts"]; *see also* Plaintiffs' April 5, 2022 letter in support of the certified question.) For example, Defendants cite facts alleged in the alternative in support of Plaintiffs' Unruh claims to undermine Plaintiffs' FEHA claims. (*See* DAB at p. 13 ["USHW operates as 'a third-party vendor providing services' and it led patients to believe it acted as their 'own physician.'"] [citing ER-84, TAC at ¶ 85].)

CONCLUSION

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

Respectfully submitted,

Dated: Sept. 6, 2022

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CERTIFICATE OF WORD COUNT

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

The text of this reply brief consists of **6,507 words** as counted by Microsoft Word, the word processing program used to generate this document. (Cal. Rules of Court, rule 8.520(c)(1).)

Respectfully submitted,

Dated: Sept. 6, 2022

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