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No. S273630

In the Supreme Court of the State of California

KRISTINA RAINES ET AL.,
Plaintiffs and Petitioners,

v.

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

On Certification from the
United States Court of Appeals for the Ninth Circuit
Case No. 21-55229

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF PETITIONERS

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INTRODUCTION AND STATEMENT OF INTEREST

This case concerns whether California's Fair Employment and Housing Act (FEHA) permits a business entity acting as an agent of an employer to be held directly liable for employment discrimination. The Attorney General has a substantial interest in the Court's resolution of that question. As the state's chief law officer, the Attorney General has authority and responsibility to enforce California laws, including laws protecting workers from illegal discrimination, through investigation, litigation, and other advocacy.[1] A ruling that absolves all agents from complying with state anti-discrimination laws could undermine the state's ability to prevent and redress unlawful employment practices, including the use of pre-employment medical questionnaires that

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[1] See State of California, Department of Justice's Office of the Attorney General (OAG), *Attorney General Bonta Issues Second Annual Labor Day Report, Urges Workers Across California to Know Their Rights* (Sept. 1, 2022) <https://tinyurl.com/yda78dtx> [as of Oct. 3, 2022]; OAG, *Attorney General Bonta: There's No Room for Job Discrimination Loopholes in California* (June 17, 2021) <https://tinyurl.com/2yw3xr2u> [as of Oct. 3, 2022]; OAG, *Attorney General Becerra Establishes Workers Rights and Fair Labor Section* (Jan. 28, 2021) <https://tinyurl.com/2xx2pzhj> [as of Oct. 3, 2022]; OAG, *Attorney General Becerra, DFEH Director Kish File Lawsuit to Protect Access to Data Used to Combat Workplace Discrimination* (Oct. 30, 2020) <https://tinyurl.com/khn5x2zs> [as of Oct. 3, 2022]; OAG, *Attorney General Becerra, DFEH Director Kish Lead Multistate Coalition in Support of Lawsuit Protecting Access to Critical Information on Pay Discrimination* (Oct. 28, 2019) <https://tinyurl.com/dac4j6y6> [as of Oct. 3, 2022].

discriminate against job applicants on the basis of disability. The Attorney General's unique perspective and expertise in this area can assist the Court in deciding this matter.[2]

The Attorney General respectfully submits that this Court should hold that an entity that acts as an employer's agent for purposes of undertaking FEHA-regulated activities may be held directly liable for FEHA violations that it commits in the course of its agency. That holding would be most faithful to FEHA's text and the agency principles that it incorporates; consistent with its structure, history, and purpose; and harmonious with both this Court's precedent interpreting FEHA, and analogous federal case law. Adopting this rule would also advance FEHA's objective of "'preventing the deleterious effects of employment discrimination . . . .'" (*Faust v. Cal. Portland Cement Co.* (2007) 150 Cal.App.4th 864, 878, quoting *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 610.) A contrary rule would provide no deterrent to agents that engage in unlawful discrimination while carrying out employment-related activities that FEHA regulates.

ARGUMENT

This Court should hold that an entity that acts as an employer's agent for purposes of undertaking FEHA-regulated activities may be held directly liable for FEHA violations that it commits in the course of its agency.

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[2] The Attorney General also filed an amicus brief in this case before the Ninth Circuit for these reasons.

I. FEHA EXTENDS LIABILITY TO ENTITIES THAT ACT AS AN EMPLOYER'S AGENT FOR PURPOSES OF UNDERTAKING FEHA-REGULATED ACTIVITIES

FEHA's text, structure, and legislative purpose—in addition to case law from this Court and federal courts—support holding that FEHA extends liability to entities that act as an employer's agent for purposes of undertaking FEHA-regulated activities.

A. FEHA's Plain Text and Structure Provide for Agent Liability for Violations of FEHA's Protections

When interpreting statutes, this Court's ultimate goal is "'to ascertain the intent of the Legislature so as to effectuate'" the statute's purpose. (*Kim v. Reins Internat. Cal., Inc.* (2020) 9 Cal.5th 73, 83.) This Court "begin[s] by examining the words of the statute, affording them 'their ordinary and usual meaning and viewing them in their statutory context.'" (*People v. Colbert* (2019) 6 Cal.5th 596, 603, quoting *Fluor Corp. v. Super. Ct.* (2015) 61 Cal.4th 1175, 1198.) If the statutory text is "clear," then this Court "must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Segal v. ASCIS America Corp.* (2022) 12 Cal.5th 651, 662.)

FEHA defines "employer" as including "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).) The statute later relies on that definition in setting forth several unlawful practices that employers are forbidden from engaging in. These include, for example: (1) "refus[ing] to hire or employ [any] person" because of a protected

characteristic; (2) "discrimina[ting] against [any] person in compensation or in terms, conditions, or privileges of employment" because of a protected characteristic; and (3) as is relevant to the underlying proceedings here, subjecting job applicants to non-job-related medical or psychological inquiries. (Gov. Code, § 12940, subds. (a), (e).) FEHA's definition of "employer"—which encompasses "any person acting as an agent of an employer"—thus textually provides for agent liability.

FEHA's structure confirms that agents of employers may be held directly liable for unlawful employment practices. When this Court interprets one provision of a broader statutory scheme, it does not "examine that [provision's] language in isolation." (*Segal v. ASCIS America Corp.*, *supra*, 12 Cal.5th at p. 662.) Rather, it interprets a provision's language "in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Ibid.*)

Here, other provisions of the statute confirm the Legislature's intent that FEHA's employment-related protections do not depend on the existence of a direct employment relationship. Various FEHA provisions that regulate the conduct of employers protect not just "employees," but rather "any person" or "a person" in a broad range of employment-related contexts. For example, Section 12940, subdivision (a) forbids employers from discriminating against "any person" applying for a job or regarding participation in a training program leading to employment, on account of a protected ground. Government Code

section 12940 subdivisions (g) and (h) likewise proscribe retaliation by employers against "any person" who reports suspected patient abuse by health facilities or community care facilities, or has opposed unlawful employment practices, filed a complaint, testified, or assisted in a proceeding under FEHA.

Additionally, subdivision (l) prevents employers from refusing to hire, discharging, or discriminating in employment terms against "a person" due to "a conflict between the person's religious belief or observance and any employment requirement." And subdivision (o) forbids "an employer" from subjecting "any employee, applicant, or *other person* to a test for the presence of a genetic characteristic." (Italics added.) These provisions show that entities meeting FEHA's definition of "employer" (see Gov. Code, § 12926, subd. (d)) may be liable not just to their own employees but also to persons directly employed by a different employer. (Cf. *Assn. of Mexican-Am. Educators v. State of Cal.*, (9th Cir. 2000) 231 F.3d 572, 580-581 (en banc).)

FEHA also regulates conduct by entities other than direct employers. Section 12940, subdivision (b), for example, makes it illegal for a labor organization to discriminate against any person on account of a protected characteristic. Subdivision (c) of that section bars "any person" from discriminating "in the selection, termination, training, or other terms of treatment . . . in any apprenticeship training program, [or] any other training program leading to employment . . . ." And Section 12940, subdivision (e) prohibits not just "any employer" from making non-job-related medical inquiries of applicants, but also any "employment

agency" as well. (See also § 12940, subds, (d), (f)-(h), (j) [similarly regulating the conduct of non-employers].) Further, subdivision (i) of Section 12940 makes it illegal for "any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part."

Taken together, these provisions show that FEHA does more than impose liability on employers for violations committed against their direct employees. Rather, FEHA provides a "comprehensive scheme" for preventing and remedying employment discrimination (see *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 428), and contemplates liability without necessarily requiring a direct employment relationship. Therefore, it would be entirely congruous with this framework to hold that entities that act as an employer's agent for purposes of undertaking FEHA-regulated activities in the course of their agency may be held directly liable for FEHA violations.

B. Liability for Employers' Agents is Consistent with Common Law Agency Principles

It is well-established that courts should not interpret statutes to alter the common law unless expressly provided, and should construe them to avoid conflict with common law rules. (See *People v. Ceja* (2010) 49 Cal.4th 1, 10 [collecting cases].) A court will construe a statute in light of the common law unless the statute's language "clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter." (*Ibid.*, internal quotation

marks and citations omitted.) Moreover, courts presume that a statute does not repeal the common law by implication. (*Ibid.*)

Contrary to Respondents' claim (see ABM 30-32), the common law rule shows that agents can be held liable for their own wrongdoing. According to the Restatement Third of Agency:

> An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment.

(Rest.3d Agency, § 7.01 (2006).)

Furthermore:

> when an agent's conduct violates a constitution, statute, regulation, or ordinance, the agent is subject to liability although the agent acted at the principal's direction or to further the principal's interests, unless the imposition of liability is inconsistent with the constitution, statute, regulation, or ordinance.

(*Id.* at Comment to § 7.01; see also 3 Witkin, Summary of Cal. Law (11th ed. 2022) Agency, § 210 ["An agent or employee is always liable for his or her own torts, whether the principal is liable or not, and in spite of the fact that the agent acts in accordance with the principal's directions."].)

California law embodies this principle as well. Specifically, Civil Code section 2343, subdivision (3) states: "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency . . . [w]hen his acts are wrongful in their nature." Civil Code Section 2343 subdivision (3) is a statement of the "elementary rule" that all are liable for their

torts. (*Mears v. Crocker First Nat. Bank of S.F.* (1950) 97 Cal.App.2d 482, 491).

This principle is reflected in numerous cases, in which courts have held that agents, in addition to principals, can be liable for the agents' wrongful acts that injure third parties. (See *Peredia v. HR Mobile Services* (2018) 25 Cal.App.5th 680 [workplace safety consultant hired by dairy could be held liable to dairy employee killed by tractor on jobsite]; *Crawford v. Nastos* (1960) 182 Cal.App.2d 659, 665 [real estate broker who negotiated sale of ranch for owner could be held liable to purchaser for misrepresenting water supply]; *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [real estate broker for owner could be held liable for concealing property's defects]; *McNeill v. State Farm Life Ins. Co.* (2004) 116 Cal.App.4th 597, 603 [agent for life insurance company could be held liable to purchaser of insurance for intentional misrepresentations].)

Although the Legislature may abrogate or depart from this common law rule, there is no indication of any intent to do so in FEHA's language. To the contrary, as explained above, the statute expressly imposes liability on agents of employers.

C. FEHA's History and Remedial Purpose Support Agent Liability

Agency liability is also consistent with FEHA's history and purpose. Importantly, the Legislature has not changed the agent language in FEHA's "employer" definition since the statute's enactment in 1959. (See Fair Employment Practice Act, Stat. 1959, c. 121, p. 2000, § 1 (current version at Gov. Code, § 12926

subd. (d)).) [3] If the Legislature had intended to narrow the definition of "employer," to exclude all agents, it would have removed this agent language over the statute's nearly 63-year history. [4]

FEHA's remedial purpose further supports the conclusion that the Legislature did not intend to exempt all agents from FEHA liability. The Legislature has declared that it is the public policy of the state to protect and safeguard the right and

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[3] The Legislature enacted the predecessor of FEHA, which was the Fair Employment and Practices Act (FEPA), in 1959. (Fair Employment Practice Act, Stat. 1959, c. 121, p. 2000, § 1 (current version at Gov. Code, § 12900 et seq.).) FEPA contained a definition of "employer." (Lab. Code, § 1413(d).) Nearly thirty years later, the Legislature changed the name of the statute to the "Fair Employment and Housing Act" and moved the definition of "employer" to its present-day location at Government Code section 12926, subdivision (d). (Stat. 1980, c. 992, p. 3166, § 11.)

[4] The original statute expressly exempted from liability people who employ agricultural workers residing on the land where they worked, social clubs, fraternal, and educational entities. (Fair Employment Practice Act, Stat. 1959, c. 121, p. 2000, § 1 (current version at Gov. Code, § 12926, subd. (d)); see also *Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 9.) After several legislative changes, each of these entities can now be considered an "employer" under FEHA. (See Gov. Code, § 12926 subd. (d).) Administrative decisions and opinions after the enactment of FEHA similarly expanded the type of entities subject to FEHA. (Fair Employment Practice Act, 39 Ops. Cal. Atty. Gen. 244 (1962) [stating that the University of California is an employer]; *In the Matter of the Accusation of the Dep't of Fair Employment & Hous.* (June 4, 1981) FEHC Dec. No. 81-12, p. 8 [holding that the City of Napa's Housing Authority was an "employer" and reasoning that "[a]s such, it is well within the Act's broad definition of employer, as explained in 39 Ops.Atty.Gen. 244, 46"].)

opportunity of all persons to seek employment without discrimination. (Gov. Code, § 12920.) It has further declared the right to seek employment without discrimination to be a civil right. (Gov. Code, § 12921, subd. (a).) To promote this civil right, the Legislature has stated the need to provide effective remedies that will not only redress the adverse effects of discrimination but also prevent and deter future unlawful employment practices. (Gov. Code, § 12920.5.) To accomplish this purpose, courts have consistently held that FEHA must be liberally construed. (See, e.g., *City of Moorpark v. Super. Ct.* (1998) 18 Cal.4th 1143, 1157-1158; *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 367-368; *State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal.3d at p. 429.) Construing the statute to ensure that people who experience discrimination can have recourse against agents effectuates California's public policy to protect the right of all people to seek employment without discrimination.

Construing FEHA to cover entity-agents like Respondents, moreover, would not unduly expand FEHA beyond its intended limits. When an entity enters into an agency relationship for purposes of undertaking FEHA-regulated activities for an employer, the entity is tasked with carrying out employment-related functions that the employer would otherwise have to perform itself. An entity-agent in such a relationship is positioned to cause harms that the Legislature intended FEHA to protect against. These agents are also positioned to know that the tasks they undertake for an employer are FEHA-regulated and

that, if done improperly, can violate FEHA. Liability for entity-agents undertaking FEHA-regulated tasks for an employer promotes compliance with the statute. But that liability is specific to when they fail to lawfully perform such tasks.

II. THIS COURT SHOULD NOT EXTEND *RENO* TO IMMUNIZE ALL ENTITY-AGENTS FROM FEHA LIABILITY

In *Reno v. Baird*, this Court held that individual supervisory employees cannot be held liable for discrimination under FEHA. (1998) 18 Cal.4th 640, 663. Likewise, in *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, this Court held that "nonemployer *individuals* are not personally liable" for retaliation under FEHA. (*Id.* at p. 1173, italics added.) This Court should not extend the reasoning of those cases here.

In holding that FEHA does not impose liability on individual supervisors, this Court observed that the Legislature, through its definition of "employer" in Section 12926, subdivision (d), "'clearly intended to protect employers of less than five [employees] from the burdens of litigating discrimination claims.'" (*Reno v. Baird*, *supra*, 18 Cal.4th at 651, quoting *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 72.) As a result, the Court found it "'inconceivable'" that the Legislature would have exempted smaller employers while "simultaneously intend[ing] to subject individual nonemployers to the burdens of litigating such claims." (*Id.* at p. 651.) Reading the statute that way "would be incongruous and would upset the balance struck by the Legislature." (*Ibid.*, internal quotation marks omitted.)

This Court also stressed that permitting individual-supervisor liability "would do little to enhance the ability of

victims of discrimination to recover monetary damages." (*Reno v. Baird*, *supra*, 18 Cal.4th at pp. 651-652, internal quotation marks omitted.) But on the other side of the ledger, this Court explained, "if every personnel manager risked losing his or her home, retirement savings, hope of children's college education, etc., whenever he or she made a personnel management decision," the consequences for "management of industrial enterprises and other economic organizations" would be dramatic. (*Id.* at p. 652.)

These rationales do not apply to all entity-agents that are carrying out activities regulated by FEHA on behalf of their employer-principal—or at least not those entity-agents that themselves have five or more employees. Holding that liability extends to at least entity-agents that are themselves employers under FEHA would respect the Legislature's choice to exempt from FEHA liability entities that employ fewer than five people. And it would do so while still giving effect to Section 12926, subdivision (d)'s plain-text dictate that "'[e]mployer' includes . . . any person acting as an agent of an employer." Moreover, holding that at least those entity agents with five or more employees can be held liable under FEHA will not risk chilling effective management by attaching personally ruinous potential consequences to individuals' management decisions. (See *Reno v. Baird*, *supra*, 18 Cal.4th at pp. 651-652.) And the victims of illegal employment practices may well have an "enhance[d] . . . ability . . . to recover monetary damages" from agents that themselves meet the definition of "employer." (*Id.* at pp. 651-652,

internal quotation marks omitted; see also Gov. Code, § 12920.5 ["to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons"].)[5] Thus, extending FEHA liability to entity-agents carrying out activities regulated by FEHA on behalf of their principals would further, not undermine, the purposes of the statute.

III. FEDERAL CASE LAW ALSO SUPPORTS AGENT LIABILITY UNDER FEHA

When interpreting FEHA, this Court may consult federal-court decisions construing similarly worded provisions of federal anti-discrimination statutes. (*Chavez v. City of L.A.* (2010) 47 Cal.4th 970, 984.) Doing so here provides further support for holding that entities that act as an employer's agent for purposes of undertaking FEHA-regulated activities in the course of their agency may be held directly liable for FEHA violations.

Federal courts have interpreted analogous provisions of federal law as extending liability to agents that themselves have sufficient employees to meet the statutory definition of

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[5] Respondents note that Government Code section 12925, subdivision (d), defines "person" as including individuals and entities. (ABM 19.) This, they say, means that *Reno* must extend to entity-agents, because the "[t]his text does not permit different treatment for individuals or entities." (*Ibid.*) This argument ignores that, in *Reno*, this Court relied extensively on considerations unique to individuals. And it also ignores that FEHA itself recognizes a distinction between agents and supervisors. (See Gov. Code, § 12940, subd. (j)(1), [addressing harassment "by an employee, other than an *agent or supervisor*"], italics added.)

"employer." FEHA is like Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA) in that its definition of "employer" includes a minimum number of employees, but also encompasses the agents of an employer. (Compare § 12926, subd. (d) ["'Employer' includes any person regularly employing five or more persons, or any person acting as an agent of an employer . . . ."] with 42 U.S.C. § 2000e(b) and ["The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . ."], 42 U.S.C. § 12111(5)(A) [same].)

Federal courts have interpreted the definition of "employer" in Title VII to foreclose individual-supervisor liability for the same reason that this Court reached the same conclusion about FEHA. (See, e.g., *Kachmar v. SunGard Data Systems, Inc.* (3d Cir. 1997) 109 F.3d 173, 184; *Miller v. Maxwell's Internat. Inc.* (9th Cir. 1993) 991 F.2d 583, 587-88.) And federal courts have concluded that entity-agents that themselves meet the statutory definition of "employer" *can* be held liable. (See *DeVito v. Chicago Park Dist.* (7th Cir. 1996) 83 F.3d 878, 882 ["[A]n 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."].)[6]

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[6] Some federal cases state that this definition of "employer" in Title VII was meant solely to codify the principle of respondeat superior (See, e.g., *Gary v. Long* (D.C. Cir. 1995) 59 F.3d 1391, 1399, quoting *Miller v. Maxwell's Internat. Inc.*, *supra*, 991 F.2d

Two district court cases holding that employers' agents were proper defendants are particularly illuminating. In *Nealey v. Univ. Health Services, Inc.* (S.D. Ga. 2000) 114 F.Supp.2d 1358, 1366, the district court determined that a company hired by a home health care facility to "run the day-to-day administrative operations" of the facility—despite not being the plaintiff's employer—could be held liable under Title VII [internal quotation marks and citation omitted]. The district court recognized that—despite the statute defining "employer" to include an employer's agent—it "has long been established that Title VII authorizes recovery only from 'employers' and not the employees who actually carried out the discrimination." (*Id.* at pp. 1368-1369.) The district court highlighted that a "difficulty arises," though, "when the employee who discriminated also falls within the literal definition of an 'employer' under § 2000e(b)." (*Id.* at 1369.) In such a situation, the district court reasoned—at least when the "discriminating employee/agent" was, like the defendant, "not a natural person"—Title VII's plain text and

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at p. 587.) But those cases do not bear on the certified question because they—like *Reno*—held only that liability does not extend to individuals not meeting the statutory definition of "employer," and did not consider the possibility of liability for agents that also qualify as employers. (See, e.g., *ibid.*; see also *Healy v. Henderson* (D. Mass. 2003) 275 F.Supp.2d 40, 44 & fn. 39 [explaining that "[t]he phrase 'and any agent of such a person,' was intended by Congress to establish traditional respondeat superior liability" but citing for support cases involving only liability for individual non-employers].) Thus, those cases do not detract from the conclusion that Title VII extends liability to agents that satisfy the statute's definition of employer.

policy considerations both supported holding that entity liable. (*Id.* at pp. 1369-1370.)

More recently, the Western District of Pennsylvania similarly determined that a non-employer agent could be held liable under the ADA. (See *Equal Employment Opportunity Com. v. Grane Healthcare Co.* (W.D. Penn. 2014) 2 F.Supp.3d 667, 682.) The defendant in *Grane* was a management-consulting company responsible for "recruiting and hiring more than 300 employees" for a nursing and rehabilitation center. (*Id.* at p. 675.) The defendant required all applicants—even those for non-medical-staff positions—to complete a questionnaire about their medical history and submit to a medical examination. (*Id.* at pp. 675-76.)

This district court disagreed with the defendant that because it had acted in an agency capacity, it was therefore not an employer "subject to the ADA's prohibitions." (*Id.* at p. 682.) The court acknowledged the consensus among some federal courts that the ADA's definition of "employer" does not provide for individual liability—consistent with "the desire of Congress to 'str[ike] a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims.' " (*Ibid.*, quoting *Equal Employment Opportunity Com. v. AIC Security Investigations, Ltd.* (7th Cir. 1995) 55 F.3d 1276, 1281.) But, the court explained, "[t]hose objectives are not in conflict when the 'agent' engaging in discriminatory conduct falls within the applicable statutory definition." (*Ibid.*) The court was "convinced that an 'agent' independently satisfying the ADA's coverage

criteria is amenable to suit by an individual formally 'employed' by a different entity," and held that the defendant could therefore be held liable.[7] (*Id.* at pp. 684-686.)

These cases fortify the conclusion that FEHA's materially identical definition of "employer" extends liability to agents that themselves satisfy that definition.[8]

IV. EXEMPTING ALL AGENTS FROM DIRECT LIABILITY UNDER FEHA WOULD IMPAIR EFFORTS TO PREVENT UNLAWFUL EMPLOYMENT PRACTICES

Despite FEHA's protections, employment discrimination of all types persists in California's workplaces. In 2020, the California Civil Rights Department (Department) received 18,130 reports of employment discrimination in California. (Civil Rights

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[7] Respondents' incorrectly assert that *Grane* has limited applicability here. (See ABM 46-47 [citing *Equal Employment Opportunity Com. v. Grane Healthcare Co.*, *supra*, 2 F.Supp.3d at pp. 675-676].) *Grane* held that the defendant agent was liable because it met the statutory definition of "employer." (*Ibid.*) That the defendant had also contracted with its own agent to conduct applicants' medical examinations was irrelevant. (See *id.* at pp. 682-684.)

[8] *Nealy* and *Grane* also undercut Respondents' assertion that an affirmative answer to the certified question would bring about a sea change in settled law and risk untold consequences. (See, e.g., ABM 9, 29, 36.) As these cases demonstrate, this Court would not break new ground by holding that entity-agents may be held liable. Numerous federal courts, moreover, have stated that Title VII liability can extend to those entity-agents that are—like Respondents—capable of interfering with individual employment opportunities. (See, e.g., *Anderson v. Pacific Maritime Assn.* (9th Cir. 2003) 336 F.3d 924, 930-931; *Bender v. Suburban Hospital, Inc.* (4th Cir. 1998) 159 F.3d 186, 188 [collecting cases].)

Department, 2020 Annual Report Department of Fair Employment and Housing at pp. 21-22 <https://tinyurl.com/bdtwyc43> [as of Oct. 3, 2022].)[9] Of those, 4,422 requested investigation by the Department; 13,708 of them requested a right-to-sue letter. (*Id.* at p. 22.) Out of all bases for discrimination, whether race, gender, age, or another protected group, complainants most often complained of disability discrimination. (*Id.* at pp. 21-22.)

People with disabilities face particularly significant barriers to employment. For example, in 2021, the unemployment rate for a person with a disability was 10.1 percent, compared with 5.1 percent for people without a disability. (U.S. Department of Labor, Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics—2021 at p. 1 <https://tinyurl.com/3er9mxyw> [as of Oct. 3, 2022].) Despite changes in the law to protect the rights of people with disabilities, "many other people with disabilities—in economic good times and bad—have remained persistently locked out of employment." (National Council on Disability, 2020 Progress Report on National Disability Policy: Increasing Disability Employment July 24, 2020 at p. 11 <https://tinyurl.com/kydt6x56 > [as of Oct. 3, 2022].)

Immunizing business entities from agency liability under FEHA would undermine efforts to "both prevent and deter" unlawful employment practices, including discrimination against

[9] The Civil Rights Department was formerly named the Department of Fair Employment and Housing.

people with disabilities. (Gov. Code, § 12920.5.) Employers delegate their work to a wide variety of agents that significantly affect how applicants, employees, and others are treated in the workplace, including with respect to hiring, firing, and discipline. For example, agents can process job applications, determine language proficiency of employees, conduct applicant background checks and pre-employment medical examinations, and perform similarly important tasks for employers. Unlawful performance of such tasks by the employer itself could form the basis for FEHA liability. It is logical that an agent should be held liable for performing the same unlawful employment practices in the course of its agency on behalf of the employer.

This case illustrates the concerns with exempting agent business entities from FEHA liability for employment discrimination regarding persons with disabilities and medical conditions undergoing unlawful pre-employment inquiries and medical exams. Petitioners allege that Respondents violated FEHA because—acting as agents for employers—Respondents conducted intrusive, non-job-related, and discriminatory "pre-placement" inquiries and medical examinations as a condition of hiring Petitioners and class members. (Excerpts of Record-74 (hereafter ER).) Petitioners allege that "[t]he referring employers delegated to [Respondents] certain aspects of the employers' employment decisions as to Class Members" and that "[t]he employers advised [Respondents] that the purpose for the exam was to determine whether the job applicant would be able to get the job." (ER-70.) Further, Petitioners allege that the "employers

adopted the 'recommendations' of [Respondents] as a matter of course" and, according to Petitioners, "[t]his had the effect of discriminatorily attempting to dissuade workers considered to have a disability from taking the job." (ER-70.) This example shows how agents themselves in the course of their agency can engage in unlawful employment practices that prevent people with disabilities from obtaining employment.

CONCLUSION

This Court should hold that entities that act as an employer's agent for purposes of undertaking FEHA-regulated activities in the course of their agency may be held directly liable for FEHA violations.

Respectfully submitted,

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October 6, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Curiae Brief of the Attorney General in Support of Petitioners uses a 13 point Century Schoolbook font and contains 5,264 words.

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October 6, 2022

DECLARATION OF ELECTRONIC SERVICE

Case Name: *Kristina Raines et al., v. U.S. Healthworks Medical Group et al.*
No.: S273630

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically.

On October 6, 2022, I electronically served the attached **Amicus Curiae Brief of the Attorney General in Support of Petitioners** by transmitting a true copy via this Court's TrueFiling system to:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 6, 2022, at San Diego, California.

Sean Puttick	*/s/ Sean Puttick*
Declarant for eFiling	Signature

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 10/6/2022 by M. Alfaro, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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10/6/2022

Date

/s/Sean Puttick

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