Case No. S273630

SUPREME COURT OF THE STATE OF CALIFORNIA

KRISTINA RAINES ET AL.,
Plaintiff and Petitioner,
vs.

U.S. HEALTHWORKS MEDICAL GROUP ET AL.,
Defendant and Respondent,

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF AND PETITIONER KRISTINA RAINES ET AL.; PROPOSED AMICUS CURIAE BRIEF OF AIDS LEGAL REFERRAL PANEL, BET TZEDEK, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS CALIFORNIA, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS LEGAL CENTER, IMPACT FUND, AND LEGAL AID AT WORK, IN SUPPORT OF PLAINTIFF AND PETITIONER KRISTINA RAINES ET AL.

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

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, I hereby certify that no entity or person has an ownership interest of 10 percent or more in proposed *amicus curiae*. I further certify that I am aware of no person or entity, not already made known to the Justices by the parties or other *amici curiae*, having a financial or other interest in the outcome of the proceedings that the Justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

Executed on October 6, 2022, in San Francisco, California.

Alexis Alvarez
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Attorneys for *Amici Curiae*

I. INTRODUCTION

Pursuant to California Rule of Court 8.520(f), the following disability and civil rights organizations hereby apply for leave to file a brief as *amici curiae* in support of Petitioners' request that this Court answer the certified question in the affirmative and hold that 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: AIDS Legal Referral Panel, Bet Tzedek, California Employment Lawyers Association, Civil Rights Education and Enforcement Center, Disability Rights Advocates, Disability Rights California, Disability Rights Education and Defense Fund, Disability Rights Legal Center, Impact Fund, and Legal Aid at Work.

We submit this brief to show how FEHA's legislative history and statutory text make it clear that FEHA "employer" liability covers Respondents and other such third-party administrators, because FEHA defines "employer" to "include[ ] . . . any person acting as an agent of an employer." That reading also accords with how courts have read similar text in analogous federal statutes. And it best satisfies the Legislature's command to read FEHA liberally to accomplish its purpose of ensuring equal employment opportunities for employees and job applicants with disabilities.

II. STATEMENTS OF INTEREST

Amici curiae are public interest organizations dedicated to advancing and protecting the civil rights of California's workers and persons with disabilities. Here are brief descriptions of each of the *amicus curiae* that explain our interest in the case:

AIDS Legal Referral Panel ("ALRP") is a non-profit organization helping people living with HIV/AIDS maintain and improve their health by resolving their legal issues. ALRP provides legal assistance and education on virtually any civil matter to persons living with HIV/AIDS. This includes such widely disparate areas as housing, employment, insurance, confidentiality matters, family law, credit, government benefits or public accommodations, and immigration.

Bet Tzedek – Hebrew for the "House of Justice" – was established in 1974, and provides free legal services to seniors, the indigent, and people with disabilities. Bet Tzedek represents Los Angeles County residents on a non-sectarian basis in the areas of housing, welfare benefits, consumer fraud, and employment. Bet Tzedek's Employment Rights Project assists low-wage workers through a combination of individual representation before the Labor Commissioner and the Civil Rights Department, litigation, legislative advocacy, and community education. Bet Tzedek's interest in this case comes from over 20 years of experience advocating for the rights of low-wage workers in California. As a leading voice for Los Angeles's most vulnerable workers, Bet Tzedek has an interest in ensuring that workers receive all the workplace protections to which they are entitled, including their right to seek employment without discrimination, receive fair wages, secure adequate and safe working conditions, and build worker power.

The **California Employment Lawyers Association** ("CELA") is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including

actions enforcing California's laws prohibiting discrimination in employment. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. In particular, CELA's members prosecute California discrimination law claims on behalf of workers who have experienced discrimination based on disability. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus briefs and letters and appearing before the California Supreme Court and California appellate courts and the Ninth Circuit Court of Appeals in employment rights cases, including numerous cases involving the interpretation of the Fair Employment and Housing Act.

The **Civil Rights Education and Enforcement Center** ("CREEC") is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including employment and the rights of workers and job applicants with disabilities. We believe the arguments in this brief are essential to ensure that job applicants with disabilities are protected from discrimination by the Fair Employment and Housing Act.

Disability Rights Advocates ("DRA") is a non-profit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA has brought several lawsuits that have forced employers to abandon inappropriate medical examinations and

requirements that unjustly discriminate against job candidates on the basis of disability.

Disability Rights California ("DRC") is the non-profit P&A agency mandated under state and federal law to advance the legal rights of Californians with disabilities DRC was established in 1978 and is the largest disability rights legal advocacy organization in the nation. As part of its mission, DRC works to ensure that people with disabilities have access to necessary services and supports that enable them to live in the community and avoid institutionalization. In 2021 alone, DRC assisted more than 21,000 Californians with disabilities.

The **Disability Rights Education & Defense Fund** ("DREDF"), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy and law reform efforts. For over three decades, DREDF has received funding from the California Legal Services Trust Fund (IOLTA) Program as a Support Center providing consultation, information, training and representation services to legal services offices throughout the state as to disability civil rights law issues. DREDF is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws, including the Fair Employment and Housing Act. DREDF has participated as amicus and amici counsel in numerous cases addressing the scope of California civil rights mandates.

The **Disability Rights Legal Center** ("DRLC") is a national non-profit legal organization founded in 1975 to champion the rights of people with disabilities through education, advocacy, and litigation. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity, and lack of legal protection in their endeavors to achieve fundamental dignity and respect. DRLC assists people with disabilities in attaining the benefits, protections, and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and other state and federal laws. DRLC supports access to work in its mission, as people with disabilities continue to face unreasonable barriers in the workplace, a loss of important human capital throughout the country.

Impact Fund is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic and social justice. Impact Fund provides funding, offers innovative training, and serves as counsel for civil rights impact litigation across the country. The organization has served as class counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws, in order to ensure robust enforcement of our nation's anti-discrimination laws.

Legal Aid at Work (formerly known as the Legal Aid Society – Employment Law Center) is a San Francisco-based, non-profit public interest law firm that has for decades advocated on behalf of the rights of members of historically underrepresented communities, including persons of color, women, immigrants, individuals with

disabilities, and the working poor. Founded in 1916 as the first legal services organization west of the Mississippi, Legal Aid at Work frequently appears in state and federal courts to promote worker justice and the interests of people with disabilities. Legal Aid at Work is recognized for its expertise in the interpretation of state and federal antidiscrimination statutes, including the Fair Employment and Housing Act. Legal Aid at Work has expertise with respect to the portions of the Fair Employment and Housing Act at issue and is familiar with the corresponding legislative history.

III. PURPOSE OF PROPOSED BRIEF OF *AMICI CURIAE*

The proposed brief presents arguments that materially add to and complement Petitioner's brief on the merits. *Amici curiae* are experienced and knowledgeable about laws advancing worker and disability rights. We have helped the California Legislature to enact worker and disability rights legislation. We have litigated numerous cases of importance involving employment discrimination and the rights of workers and job applicants with disabilities. Thus, our perspectives will assist this Court and are relevant to the disposition of this matter.

The proposed brief will assist the Court. In it, we identify FEHA's salient legislative history and statutory text as well as courts who have read similar text in analogous federal statutes. We also explain how answering the certified question in the affirmative will advance the purposes of FEHA's protections for California's workers and job applicants with disabilities.

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IV. CONCLUSION

For all the foregoing reasons, *amici curiae* respectfully request that the Court grant *amici curiae's* application and accept the attached brief for filing and consideration.

Dated: October 6, 2022

Respectfully submitted,

Alexis Alvarez
Legal Aid at Work

Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.520(f)(4)

Amici curiae hereby certify under the provisions of California Rules of Court 8.520(f)(4)(A) that no party or counsel for any party authored the proposed brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief. *Amici curiae* further certify under California Rules of Court 8.520(f)(4)(B) that no person or entity other than *amici curiae* and their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

Executed on October 6, 2022, in San Francisco, California

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SUPREME COURT OF THE STATE OF CALIFORNIA

KRISTINA RAINES ET AL., *Plaintiff and Petitioner,* vs. U.S. HEALTHWORKS MEDICAL GROUP ET AL., *Defendant and Respondent,*	**No: S273630**

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INTRODUCTION

The Fair Employment and Housing Act ("FEHA") aims to provide equal access to employment opportunities for all Californians, including Californians with disabilities. By barring any "employer" from making medical inquiries of job-applicants that are not job-related, FEHA ensures that no Californian is denied a job because of assumptions based on their medical history or disability. As FEHA's broad definition of "employer" confirms, that purpose matters no less when third-party business entities like Respondents ("USHW"), not hiring employers themselves, conduct illegal medical inquiries of job applicants for those employers.

This Court should conclude that FEHA liability covers USHW and other such third-party administrators, because FEHA defines "employer" to "include[ ] . . . any person acting as an agent of an employer." This view accords with FEHA's legislative history, its statutory text, and how courts have read similar text in analogous federal statutes. This reading also best satisfies the Legislature's command to read FEHA liberally to accomplish its purpose of ensuring equal employment opportunities for job applicants with disabilities. The rival view – that FEHA's "agent" provision just codifies respondeat superior – collapses by comparison.

ARGUMENT

I. Business Entities Like USHW Are Subject to FEHA Liability as Persons Acting as Agents of FEHA-Covered Employers.

FEHA prohibits an "employer" from engaging in unlawful discrimination, including subjecting a job applicant to a pre-

employment medical examination or inquiry that is not job related or consistent with business necessity. (See Gov. Code, § 12940, subd. (e)). Business entities like USHW administer pre-employment medical exams and inquiries at the hiring employer's direction. Where such exams or inquiries unlawfully discriminate, FEHA "employer" liability covers such third-party administrators, because FEHA defines "employer" to "include[ ] . . . any person acting as an agent of an employer, directly or indirectly." (Gov. Code § 12926, subd. (d)). This reading of FEHA accords with (1) FEHA's legislative history, (2) its statutory text, and (3) how courts have read similar text in analogous federal employment discrimination statutes.

A. Legislative History Confirms that the Legislature Intended Agents of FEHA "Employers" To Be Subject to FEHA "Employer" Liability.

FEHA's legislative history supports reading "as an agent" in FEHA's definition of "employer" to cover business entities like USHW. In 1959, the Legislature enacted the statutory predecessor to FEHA, *i.e.*, the California Fair Employment Practice Act ("FEPA"). (Stats. 1959, ch. 121, § 1, p. 2000.) FEPA provided that the term "'[e]mployer' . . . includes . . . any person acting as an agent of an employer, directly or indirectly." (*Ibid.*, former Lab. Code, § 1413, subd. (d); see also *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 235.) The Legislature borrowed this definition's text from the definition of "employer" in the National Labor Relations Act ("NLRA"). At the time, it was settled that, unless expressly exempted, any person acting "as an agent of" a NLRA-covered employer was also an "employer" subject to the NLRA. Because the

Legislature reenacted this part of FEPA's definition of "employer" into FEHA without change, this Court should "strong[ly]" presume that this settled reading governs what FEHA's "agent" language means. (*Robinson*, *supra*, 2 Cal.4th at p. 235.)

As an early "forerunner" to FEPA, Assembly Bill No. 3 (1945) defined the term "employer" therein to include "any person acting *in the interest* of such employer, directly or indirectly, with or without his knowledge." (*Robinson*, *supra*, 2 Cal.4th at pp. 235-236, italics added.) This definition mirrored how the 74th Congress in 1935 had originally defined "employer" in NLRA § 2(2). (See National Labor Relations Act, Pub. L. No. 74-198 (July 5, 1935) § 2(2), 49 Stat. 449, 450, codified at 29 U.S.C. (1940) § 152(2) ["The term 'employer' includes any person acting *in the interest* of an employer, directly or indirectly . . . ." (Italics added.)].) In 1947, the 80th Congress amended this definition by replacing "in the interest" with "as an agent." (See Labor Management Relations Act, Pub. L. No. 80-101 (1947) 61 Stat. 136, 137, codified as amended at 29 U.S.C. (1952) § 152(2) ["The term 'employer' includes any person acting *as an agent* of an employer, directly or indirectly . . . ." (Italics added.)].)

Despite this NLRA amendment, FEPA bills introduced in 1947, 1949, 1951, 1953, and 1955 all continued to define "employer" to follow the older pre-1947 NLRA definition of "employer." (See Assem. Bill No. 2211 (1947 Reg. Sess.), Assem. Bill No. 3027 (1949 Reg. Sess.), Assem. Bills Nos. 2251, 3436 (1951 Reg. Sess.), Assem. Bills Nos. 900, 917, 1526 (1953 Reg. Sess.); and Assem. Bill No. 971 (1955 Reg. Sess.).) That changed in 1957, when Assembly Bill No. 2000 (1957 Reg. Sess.) proposed to define employer to include "any

person acting *as an agent* of an employer, directly or indirectly." (*Id.*, italics added.) Soon thereafter, the bill that became FEPA defined "employer" in this way as well. (Assem. Bill No. 91 (1959 Reg. Sess.).) From this parallel drafting, we infer that, in 1959, AB 91's drafters were borrowing directly from the NLRA's post-1947 definition of "employer", see 29 U.S.C. (1958) § 152(2), in sharp contrast with other State fair employment statutes that, like the pre-1947 NLRA, had defined "employer" to include any person acting "in the interest of" an employer.[1]

This legislative history matters because, between 1947 and 1959, the National Labor Relations Board had repeatedly read "any person acting as an agent of an employer" in NLRA section 2(2) to deem any person who acted as "an agent" of an employer to be an NLRA "employer" in their own right and thus subject to NLRA liability. (E.g., *Hudson Pulp & Paper Corp.* (1958) 121 NLRB 1446, 1450-1451 ["Hudson thus designated Pioneer (acting through Weinstein) to act as its agent with respect to the operation of the leased equipment and the hiring, discharging, and supervision of its driver employees. As Section 2 (2) of the Act provides that 'any person acting as an agent of an employer, directly or indirectly' is an 'employer' within the meaning of the Act, we find that Pioneer is an 'employer' . . . ."] [citation omitted]; *Baker, Hugh J., & Co.* (1955)

[1] E.g., Act of Mar. 17, 1949, ch. 161, 1949 N.M. Laws 366, 367; Law Against Discrimination in Employment, ch. 183, 1949 Wash. Sess. Laws 506, 507; Act of Apr. 1, 1949, ch. 2181, 1949 R.I. Acts & Resolves 157, 158; Act of June 29, 1955, No. 251, 1955 Mich. Laws 411, 411.

112 NLRB 828, 838 ["under Section 2 (2) of the Act, this Committee was the agent of the Employers and hence an employer subject to the jurisdiction of the Board"]; *Hearst Corp.* (1952) 101 NLRB 643, 648, fn.3 [affirming NLRA liability of managing agent of physical properties of Brooklyn plant for respondent Hearst Corporation: "Its liability herein is that as agent of Hearst, and not as principal. See Section 2 (2) of the Act."]; *W. Ass'n of Engineers, Architects & Surveyors* (1952) 101 NLRB 64, 64 [employer association "is an agent of the member employers within the meaning of Section 2 (2) of the Act while such membership subsists. We therefore find that the Association is an employer . . . ."]; *Jewell, J. D., Inc.* (1952) 99 NLRB 61, 64, fn.15 [finding that "the individual Respondents . . . acted as agents of the corporate Respondent at all times material herein, and hence individually constituted an 'employer' within the meaning of Section 2 (2) of the Act"); *Southland Mfg. Co.* (1951) 94 NLRB 813, 829 [affirming finding that "Strickland and Levinson were acting as agents of the Respondent Southland in making their remarks and may therefore be regarded as employers within the meaning of Section 2 (2) of the Act."]; *Jackson Daily News, Inc.* (1950) 90 NLRB 565, 565 [affirming finding that in making coercive statements, "Dortch directly or indirectly acted as the agent of the Respondent, Jackson Daily News, . . . [B]y reason of such agency, Dortch was himself an Employer, for the purposes of this case, within the meaning of Section 2 (2) of the Act . . . ."] [footnote omitted]; *Assn. of Mot. Picture Producers, Inc.* (1949) 85 NLRB 902, 903 ["Section 2 (2) of the amended Act defines 'employer' as including 'any person acting as an agent of an employer.' Section 2 (1) defines 'person' as including

'associations.' . . . [T]he Association has acted as agent of its members in negotiating labor contracts, and we find, therefore, that it is an employer."] [footnote omitted].)

"'It is a cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment. ...'" (*Buchwald v. Katz* (1972) 8 Cal.3d 493, 502, citations omitted.) That "very strong presumption" also applies "where a statute is patterned after legislation of . . . the federal government." (*Union Oil Associates v. Johnson* (1935) 2 Cal.2d 727, 735 [citations omitted]; *id.* ["the adoption of the words of the federal enactment evinces an intent to adopt the federal construction thereof"]; accord *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [reading Labor Code § 1160.8 in light of NLRA § 10(f)]; see, e.g., *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1399-1400 ["Because the FEPA when first enacted had the identical language and procedure as the NLRA, it can reasonably be presumed that the Legislature intended the state agency to have the same powers—and only those powers—as its federal counterpart."].)

This very strong presumption applies here. Thus, in 1959, when the Legislature borrowed the "as an agent" language from NLRA § 2(2) to define a FEPA "employer", this Court must presume the Legislature intended to import that text's settled meaning as well, *i.e.*, any "person" who acted "as an agent" of a FEPA-covered "employer" would also qualify as a FEPA "employer" themselves. This inference

is stronger still given that FEPA also copied the NLRA's definition of "person" almost verbatim.[2] And because the Legislature "readopted without change" the "as an agent" part of FEPA's definition of employer into FEHA, there is a "very strong presumption" that the Legislature intended that settled meaning of "as an agent" to govern FEHA's definition of employer. (*Robinson*, 2 Cal.4th at 235 [applying this presumption to another part of FEHA's definition of employer].)

Nothing in the text or legislative history of FEPA or FEHA overcomes that very strong presumption in favor of Petitioner's reading. To the contrary, had the Legislature in 1959 wanted to restrict FEPA liability to accord with respondeat superior, as Respondents contend, it could have done so more plainly by borrowing from other parts of federal labor law. (See 29 U.S.C. § 185(b) ["any employer . . . shall be *bound by the acts of its* agents," italics added.]; *id.* § 185(e) ["[I]n determining whether any person is acting as an 'agent' of another person so as to make *such other person responsible for his acts*, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not

[2] (Compare FEPA, Stats. 1959, ch. 121, § 1, p. 2000, former Lab. Code, § 1413, subd. (a) ["'Person' includes one or more individuals, partnerships, associations or corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."] with 29 U.S.C. (1946) § 152(1) ["The term 'person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."] and 29 U.S.C. (1958) § 152(1) ["The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."].)

be controlling." (Italics added.)]; *id.* § 152(13) [same].)[3] Years later, the Legislature did just that for the law on agricultural work. (See Lab. Code § 1165, subd. (b) ["any agricultural employer shall be bound by the acts of its agents"]; *id.* § 1165.4 ["For the purpose of this part, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."].) Yet, when enacting FEPA, the Legislature chose not to use such language. Respondents' view implies, however, that in 1959 the Legislature intended "as an agent" in FEPA's definition of "employer" to do nothing but accomplish the same aim as these other provisions, albeit more obliquely. That seems both highly unlikely and not likely enough to overcome the very strong presumption that the Legislature intended FEHA's "agent" language to subject third parties like USHW to FEHA "employer" liability.

B. FEHA's Statutory Text Indicates That Persons Acting as Agents of FEHA "Employers" Are Themselves Subject to Liability as FEHA "Employers."

FEHA provides that "[a]s used in this part in connection with unlawful practices . . . 'Employer' includes . . . any person acting as an *agent* of an employer, directly or indirectly." (Gov. Code, § 12926,

[3] Congress added these provisions in 1947 to supplant or sidestep US Supreme Court decisions reading the NLRA and the Norris-LaGuardia Act of 1932 to depart from common-law agency principles. (See Sachin S. Pandya, *What Taft-Hartley Did to Joint-Employer Doctrine* (2021) 25 Emp. Rts. and Emp. Pol'y Journal 161, 173-185.)

subd. (d).)[4] Although Respondents argue otherwise, see Answering Br. at 37, this text alone indicates that its purpose is not simply to codify respondeat superior doctrine for FEHA "employer" liability. Under Respondents' reading, a person's status as "agent" for a FEHA employer only matters to determine whether that FEHA employer may be bound by or liable for that person's actions. In contrast, by *defining* "employer" to "include[]" any "agent" of a FEHA employer, the text indicates that a person's status as "acting as an agent" subjects *that person* to the legal consequences of their own actions. When it writes statutes, the Legislature knows this difference. (Compare Civ. Code, § 2334 ["A principal is bound by acts of his agent . . . ."]; Civ. Code, § 2338 ["a principal is responsible to third persons for the negligence of his agent"]; Lab. Code, § 1165, subd. (b) ["any agricultural employer shall be bound by the acts of its agents"] with Bus. & Prof. Code, § 6157, subd. (a) ["'Licensee' . . . includes any agent of the licensee . . . ."]; *id.* § 6157, subd. (b) ["'Lawyer'" . . . includes any agent of the lawyer . . . ."]; *id.* § 6175, subd. (a) [same]; Veh. Code, § 6161, subd. (d) ["'Owner' . . . includes an agent of that owner . . . ."].)

FEHA's other textual cues confirm this reading. First, the word "includes" in FEHA's definition of "employer" indicates that the Legislature intended that definition to be expansive. (Gov. Code, §

[4] For similar text in other definitions of "employer", see, e.g., Government Code section 3562, subdivision (g) ("'Employer' or 'higher education employer' . . . includ[es] any person acting as an agent of an employer."); Public Utilities Code section 99560.1, subdivision (g)(1)-(4) ("'Employer' or 'transit district employer' . . . includ[es] any person acting as an agent of an employer.")

12926, subd. (d) (" 'Employer' includes . . . , except as follows . . . ."); see also *American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 608 ["Because in [FEHA's definition of "physical handicap"] the word the drafters chose was 'includes' (rather than 'means' or 'refers to,' say) we infer that the Legislature did not endorse a restrictive definition."]; *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 622 fn.6 ["In statutory drafting, the term 'includes' is ordinarily one 'of enlargement rather than limitation.'"].[5]) This inference is buttressed by the fact that FEHA's definition of "employer" uses the phrase "except as follows" to denote who falls outside it. Since "as an agent" comes after "includes" but precedes "except as follows," the person "acting as an agent" falls plainly inside, not outside, FEHA's definition of "employer."

Second, the Legislature used disjunctive words when listing, in FEHA's "employer" definition, the subsets of persons who fall within it, thereby marking each subset as an independent basis for qualifying as a FEHA "employer". Thus, after first referring to any "person regularly employing" at least five people, the Legislature then used the word "or" when it next referred to any "person acting as an agent of an employer." The word "or" usually denotes the disjunctive, and thus marks "acting as an agent" as an *independen*t ground for qualifying as a FEHA "employer", *In re Jesusa V.* (2004) 32 Cal.4th 588, 623 ("In its ordinary sense, the function of the word 'or' is to mark an alternative such as 'either this or that.'"), so long as the

[5] Compare, e.g., 42 U.S.C. § 2000e(b) (Title VII: "The term 'employer' *means* . . . .") (Italics added.).

putative "agent" is an agent "of" a person who is otherwise a FEHA "employer". Had the Legislature intended the "agent" language only to codify respondeat superior, the Legislature's use of the disjunctive here would have made no sense.[6]

Third, the Legislature used the term "person acting as" to describe the "agent" in question ("any person acting as an agent of an employer"). In so doing, the Legislature incorporated by reference how FEHA defines "person" to include "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)). Had the Legislature wanted only to codify respondeat superior for FEHA liability, it makes no sense to use "person" in this way. Respondeat superior requires an employer-*employee* relationship. (See *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296 ["The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its *employees* committed within the scope of the employment." (Italics added.)].) In contrast, by using the phrase "any person acting as", the Legislature included entities (e.g., associations, corporations, partnerships) that can act as, but cannot be employed as, agents of a FEHA employer. Had it intended to restrict "any person" only to employees, the Legislature

[6] The Legislature's use of the disjunctive further implies that a person who qualifies as an "agent' under FEHA's definition need not *also* "regularly employ" at least five people to be subject to FEHA "employer" liability. Since USHW does not dispute that it regularly employs at least five people, this Court can answer the certified question here without reaching this issue.

would have instead used the verb "employ" (e.g., any person "employed" as an agent), much as the Legislature used that verb to restrict the ambit of "persons" earlier in the same definition. (Gov. Code, § 12926, subd. (d) ["any person regularly *employing* five or more *persons*", italics added]; see *Robinson*, *supra*, 2 Cal.4th at p. 241 [construing this provision to refer to "total number of *employees*," including part-time employees, italics added]). That the Legislature chose "acting", not "employed", further confirms that it did not intend "any person acting as agent" only to codify respondeat superior.

Fourth, the Legislature added the "agent" language only to FEHA's definition of "employer", even though FEHA also covers unlawful employment practices by any "employment agency" (Gov. Code, § 12940, subd. (d)-(h), (j)-(k)), any "labor organization" (Gov. Code, § 12940, subd. (b), (g)-(h), (j)-(k)), and any other "person" engaged in certain activities (Gov. Code, § 12940, subd. (c), (h)-(i)). Each of these possible FEHA defendants, if not individuals, can only commit unlawful employment practices if held legally responsible for the actions of other individuals. The Legislature, however, did not add "as an agent of" to FEHA's definitions of "person", "employment agency", or "labor organization." (See Gov. Code, §§ 12925, subd. (d), 12926, subd. (e),(h).)[7] Nor did the Legislature use it in a stand-alone provision that governs FEHA liability generally. Had the Legislature intended "as an agent" only to clarify that respondeat

[7] Compare 42 U.S.C. § 2000e(c) (Title VII: "The term 'employment agency' means . . . . and includes an agent of such a person."); *id.* § 2000e(d) ("The term 'labor organization' means . . . and any agent of such an organization . . . .").

superior governs FEHA liability, it would not have added that language *only* to FEHA definition of "employer."

Fifth, *Reno v. Baird* (1998) 18 Cal.4th 640, does not require any different reading of FEHA's text. There, this Court concluded that an individual who is an "employee" of a FEHA "employer" *and* a supervisor[8] is not *also* a FEHA "employer" even if, as a supervisor, that individual thereby acts as the employer's "agent." (See *id.* at p. 658.) *Reno* has zero application here. Although USHW is a "person" under FEHA, it is neither an individual nor a FEHA "employee" nor a "supervisor." *Reno* expressly limited itself to "*individual* liability for discrimination . . ." and "specifically express[ed] no opinion on whether the 'agent' language merely incorporates respondeat superior principles or has some other meaning." (*Ibid.*)

C. Federal Statutes Analogous to FEHA Also Subject Agents to Liability as "Employers" for Discriminatory Actions Taken on Behalf of Covered "Employers."

Federal anti-discrimination statutes analogous to FEHA — Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA") (collectively, the "federal statutes") — include similar "agent" language in defining the term "employer" therein. (42 U.S.C. § 2000e(b) [Title VII: "'employer' means . . . . any

[8] A supervisor under FEHA is an individual by definition. (See Gov. Code, § 12926, subd. (t) [defining "supervisor" to mean "any *individual* having the authority, in the interest of the employer," to engage in certain activities that require "the use of independent judgment", italics added.].)

agent of such a person"]; 29 U.S.C. § 630(b) [ADEA: "'employer' also means . . . any agent of such a person"]; 42 U.S.C. § 12111(5)(A) [ADA: "'employer' means . . . any agent of such person"].)

Notably, although the federal statutes, unlike FEHA, use "means" rather than "includes" and, unlike FEHA, lack the expansive phrase "directly or indirectly", the Equal Employment Opportunity Commission — the primary enforcer of these statutes — has long read the term "employer" to cover, as an "employer", any business entity who acts for a covered employer. (EEOC Directives Transmittal No. 915.003: Section 2 Threshold Issues (May 12, 2000) EEOC Compliance Manual ("EEOCCM"), § 2–III-B-2-b ["An entity that is an agent of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity."], at <https://www.eeoc.gov/policy/docs/threshold.ht ml#2-III-B-2> [as of October 6, 2022].)

Many federal courts have similarly read the "agent" language in these statutory definitions. (See, e.g., *Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n* (1st Cir. 1994) 37 F.3d 12, 17 [vacating district court's dismissal of plaintiff's complaint, in part, on the ground that defendant third-party administrators could be liable as agents of the employer under the ADA]; *Brown v. Bank of Am., N.A.* (D. Me. 2014) 5 F.Supp.3d 121, 134, 137 [denying third-party administrator's motion to dismiss ADA claims based on plaintiff's allegations that it acted as the employer's agent]; *Nealey v. Univ. Health Servs., Inc.* (S.D. Ga. 2000) 114 F.Supp.2d 1358, 1369-1370 [denying summary judgment, in part, on the ground that defendant management corporation qualified as "employer" under Title VII by virtue of its

agency relationship with plaintiff's employer]; *Alam v. Miller Brewing Co.* (7th Cir. 2013) 709 F.3d 662, 668 [citing cases "for the proposition that Title VII plaintiffs may maintain a suit directly against an entity acting as the agent of an employer"]; *Satterfield v. Tennessee* (6th Cir. 2002) 295 F.3d 611, 617 [recognizing that agents may be subject to liability as "employers"]; *EEOC v. Grane Healthcare Co.* (W.D. Pa. 2014) 2 F.Supp.3d 667, 680-685 [management company could be sued under ADA as an agent of the entity that was to employ the plaintiff]; *Oliver v. Spartanburg Reg'l Healthcare Sys. Inc.* (D.S.C., Sept. 8, 2016, No. CV 7:15-4759-MGL-KFM) 2016 WL 5419459, at p. *4 [report and recommendation] [allegations suffice to show that healthcare organization that conducted pre-employment physicals was agent of employer and subject to ADA liability], adopted, (D.S.C., Sept. 27, 2016, No. CV 7:15-4759-MGL) 2016 WL 5390312, at *1. Nothing about FEHA indicates that the Legislature intended FEHA's definition of "employer" to be read more narrowly than the definitions in these analogous federal statutes.

II. Failing to Recognize FEHA "Employer" Liability for Agents Will Undermine FEHA's Purpose by Impeding Job Applicants with Disabilities from Securing Employment.

By reading FEHA "employer" liability to cover an entity like USHW as a "person acting as an agent of an employer," this Court would satisfy the Legislature's command to read FEHA "liberally for the accomplishment of [its] purposes." (Gov. Code, § 12993, subd. (a)). Doing so will deter entities like USHW from the kind of pre-employment inquiries that FEHA undisputedly declares illegal if done

by hiring employers on their own. This advances FEHA's purpose of ensuring "that no Californians are denied the opportunity to prove themselves at jobs they are capable of doing just because of assumptions made on the basis of their medical history." (Assem. Com. on Judiciary, Analysis of Assem. Bill 2222 (1999-2000 Reg. Sess.) as amended Apr. 5, 2000.)

To avoid any stigma attached to disability, job applicants often conceal their disability if possible. However, if third parties like USHW administer overbroad medical questionnaires and evaluations to job applicants, they force those applicants to decide whether to disclose information likely to reveal a disability, even if it is unrelated to their ability to do the job they seek. Some choose to refuse such medical screening, causing them to become disqualified for the job. Others submit to such screening, thereby increasing the risk of being rejected for hire because of disability-related information that a third-party administrator disclosed to the hiring employer.[9]

A. Due to Anti-Disability Bias, People with Disabilities Are Underemployed.

Employment of individuals with disabilities tends to be

[9] We focus here on job applicants with disabilities. But because FEHA protects all job applicants, this Court's answer to the certified question will also affect women, people of color, and other groups of job-applicants who fear that pre-employment medical inquiries would reveal information about an applicant's race, ethnicity, gender, or pregnancy status. Those job applicants, like applicants with disabilities, would then either have to refuse medical screening and thereby disqualify themselves for a job, or hand over information to third parties like USHW and risk not being hired as a result.

relatively low,[10] substantially because, despite the ADA, FEHA, and similar laws, anti-disability biases, stereotypes, and misconceptions persist.[11] "Employers may be hesitant to hire workers with disabilities because of negative attitudes about disability, perceived lack of skills among people with disabilities, or perceptions that accommodation or other costs are too high."[12]

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[10] U.S. Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics Summary*, Feb. 24, 2021, https://www.bls.gov/news.release/disabl.nr0.htm [hereinafter 2021 BLS Labor Force Summary]. In 2019, the employment rate of people with disabilities was 19.3% as compared to 66.3% for non-disabled individuals. U.S. Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics News Release, Feb. 26, 2020, https://www.bls.gov/news.release/archives/disabl_02262020.htm. In 2020, it was 17.9% as compared to 61.8%. 2021 BLS Labor Force Summary, supra. Among Californians with disabilities, the employment rate as of August 2021 was 18.1%, as compared to the 65.4% employment rate of those without disabilities. California Workforce Development Board, Unified Strategic Workforce Development Plan: Economic and Workforce Analysis 2020-2023, Nov. 3, 2021, at pp. 44-46.

[11] I.E. van Beukering et al., *In What Ways Does Health Related Stigma Affect Sustainable Employment and Well-Being at Work? A Systematic Review*, J. of Occupational Rehabilitation (2021), https://doi.org/10.1007/s10926-021-09998-z; Mason Ameri et al., *The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior* (2018) 71 ILR Rev. 329; Crosby Hipes et al., *The Stigma of Mental Illness in the Labor Market* (2016) 56 Soc. Sci. Rsch. 16.

[12] Sarah von Schrader et al., *Perspectives on Disability Disclosure: The Importance of Employer Practices and Workplace Climate* (2014) 26 Emp. Resps. and Rts. J. 237, 237-38.

Given the stigma they face, applicants who disclose their disability tend to suffer disadvantage as a result.[13] A 2018 study found that applicants with mental health disabilities "who request a modification or accommodation during the hiring process were less likely to be hired than others."[14] Another study evaluated potential employers' response to cover letters, some of which disclosed a disability and others which did not.[15] Letters that disclosed a disability were 26% less likely to receive employer interest than were letters that did not.[16]

Applicants with disabilities are all too aware of anti-disability bias and stigma. One-third of people with disabilities have reported that "[s]tigma and negative attitudes of employers toward people with disabilities are major barriers" to employment.[17] Thirty-six percent of job seekers with disabilities surveyed in a 2018 study reported that employers' incorrect assumption that they were unable to perform the job because of their disability was a barrier to employment.[18]

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[13] *Id*. at p. 241.

[14] Vidya Sundar et al., *Striving to Work and Overcoming Barriers: Employment Strategies and Successes of People with Disabilities* (2018) 48 J. of Vocational Rehab. 93, 94.

[15] Ameri, *supra* note 11, at 15.

[16] *Id.*

[17] Sundar, *supra* note 14, at 95, citing 2013 BLS Economic News Release.

[18] *Id*. at 101.

Consequently, applicants often choose not to disclose their disability during the hiring process. Seventy-three percent of respondents in a 2014 study indicated that the fear of not being hired or of being fired was a "very important" factor influencing their decision to conceal their disability from an employer or prospective employer.[19] Many respondents reported that "they preferred to wait until hired to disclose."[20] However, by coercing job seekers to respond fully to the overbroad health questionnaires, Respondents strip job applicants of their ability to decide whether or when to disclose a disability.

B. The Medical Screening Tools of Business Entities Like USHW Solicit Information Likely to Reveal a Disability.

Although the FEHA bars employers from making disability-related inquiries unless job-related and consistent with business necessity (Gov. Code, § 12940, subd. (e)(3)), third-party administrators like USHW nonetheless often screen job applicants by asking them for far more than FEHA allows.[21] Here, Respondents

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[19] von Schrader, *supra* note 13, at 244.

[20] *Id*. at 250.

[21] See Joseph Pachman, *Evidence Base for Pre-employment Medical Screening* (2009) 87 Bull. of the World Health Org. 529, 529, https://apps.who.int/iris/bitstream/handle/10665/270462/PMC270403 4.pdf?sequen ce=1&isAllowed=y ("Indiscriminate [pre-employment medical] testing inevitably yields findings that are not relevant. The required follow-up or 'clearance' for these findings can delay employment, result in the spurious rejection of a candidate, divert resources from efforts that might be beneficial to health outcomes, as well as cause unnecessary expense.").

asked job applicants to disclose a wide range of health information that was neither job-related nor consistent with business necessity. (See AER 70-71 and 75 at 31a., 42.)[22] If job applicants refused, they would not be hired. (AER 70-71 at ¶ 31a.) If disclosed to the hiring employer, that information would allow that employer to determine that an applicant likely had, or would likely get, a disability. USHW required applicants to sign an authorization permitting the third-party administrator to disclose to their potential employer *any* health information obtained through the Questionnaire or subsequent exam. (AER 74-75 at ¶ 41.) Indeed, one plaintiff chose not to respond to a question asking her to reveal the date of her last menstruation, primarily because she understandably questioned why that was relevant to the job she sought. (AER 77 at ¶ 52).

In general, hiring discrimination is already hard enough for job applicants to detect. Job applicants "typically have little or no information" about how employers screen resumes or evaluate other applicants; and employers rarely explain to an applicant why they

[22] See AER 74 at ¶¶ 37, 38 (explaining that questionnaire inquired broadly about intimate medical information, including but not limited to the following: venereal disease, painful or irregular vaginal discharge or pain, irregularity of or other problems with menstrual periods, penile discharge, prostate problems, genital pain or masses, cancer, tumors, mental health disabilities, HIV, permanent disabilities, painful or frequent urination, hair loss, hemorrhoids, diarrhea, black stool, constipation, organ transplant, stroke, a history of tobacco or alcohol use, pregnancy status, all over-the-counter and prescribed medication, and prior on-the-job injuries or illnesses).

were not hired.[23] That is no less true when job applicants are not hired because a third-party administrator disclosed job-irrelevant medical information to the hiring employer. Here, Respondents were thereby authorized to disqualify applicants based on their unwillingness to provide highly intimate medical information, regardless of its relevance to the job. If third-party administrators with such authority do not tailor their pre-employment medical screenings to the jobs at issue, they are actively facilitating discriminatory hiring decisions.

C. FEHA's Purpose Is to Safeguard the Right of *All* Californians to Seek, Obtain and Hold Employment Without Experiencing Discrimination.

FEHA's purposes are plain. When it enacted FEHA in 1980, the Legislature first declared what is today the long-standing "civil right" to the "opportunity to seek, obtain, and hold employment without discrimination because of . . . physical disability, mental disability, [and] medical condition," (Gov. Code, § 12921, subd. (a).), as well as the "public policy" that "it is necessary to protect and safeguard" that right and opportunity (*ibid.* § 12920). FEHA's express purpose is "to provide effective remedies that will both prevent and deter [such] unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." (Gov. Code, § 12920.5.)

The FEHA has long made it an unlawful employment practice "for any employer … to make any non-job-related inquiry, either

[23]Yang and Liu, Econ. Pol'y Inst., Strengthening Accountability for Discrimination: Confronting Fundamental Power Imbalances in the Employment Relationship (Jan. 15, 2021) 10-11, https://files.epi.org/pdf/218473.pdf.

verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to … physical disability [or] mental disability." (Gov. Code, § 12940, subd. (d).) When the FEHA was amended in 2000, the Legislature made the limitations on "an employer's ability to require medical or psychological examinations, or make … medical or disability-related inquiries" more explicit, permitting them only where they are necessary and meet requirements designed to minimize bias and protect privacy. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2222 (1999-2000 Reg. Sess.) as amended Aug. 28, 2000.) The Legislature intended FEHA's restrictions on medical inquiries and examinations to "appropriately build upon the ADA's provisions in this area, especially given this state's long history of strong protections for the privacy rights of all Californians," Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2222 (1999-2000 Reg. Sess.) as amended Apr. 5, 2000 (citing Cal. Const., art. 1, § 1),[24] and to ensure that "no Californians are denied the opportunity to prove themselves at jobs they are capable of doing just because of assumptions made on the basis of their medical history." (*Id.* [author of AB 2222's arguments in support of the bill)].)

When third-party administrators like USHW conduct otherwise illegal pre-employment inquiries and examinations, they undermine FEHA's purposes no less than if the hiring employers had done the same on their own. Accordingly, to read FEHA "liberally" to

[24] The phrase "and privacy" was added to the state Constitution when California voters adopted the Privacy Initiative of 1972. (*White v. Davis* (1975) 13 Cal.3d 757, 773.)

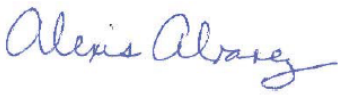
accomplish its purposes, (Gov. Code, § 12993(a)), this Court should read FEHA to subject to FEHA "employer" liability any entity like USHW who is a "person acting as an agent of an employer."

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative and hold that California's Fair Employment and Housing Act permits a business entity acting as an agent of an employer to be held directly liable for employment discrimination.

Dated: October 6, 2022

Respectfully Submitted,



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STATEMENT OF COMPLIANCE WITH CAL. RULES OF COURT RULE 8.204(c)(1)

The text in this proposed *Amicus Curiae* brief consists of 5988 words, including footnotes, as counted by the word processing program used to generate this document.

Executed on October 6, 2022 in San Francisco, California.

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PROOF OF SERVICE

I am employed in the County of San Francisco. I am over the age of eighteen years and not a party to the within entitled action. My business address is 180 Montgomery Street, Suite 600, San Francisco, CA 94104.

On October 6, 2022, I served the following documents described as:

- **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF AND PETITIONER KRISTINA RAINES ET AL.;**

- **PROPOSED AMICUS CURIAE BRIEF OF AIDS LEGAL REFERRAL PANEL, BET TZEDEK, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS CALIFORNIA, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS LEGAL CENTER, IMPACT FUND, AND LEGAL AID AT WORK, IN SUPPORT OF PLAINTIFF AND PETITIONER KRISTINA RAINES ET AL.,**

on the interested parties in this action as follows:

BY Electronic Transmission (TrueFiling 3.0): I electronically uploaded a true and correct PDF copy of the above document(s) by filing via TrueFiling 3.0, an Electronic Filing Service Provider designated for this matter by the Court.

Case No. S273630
Service List

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 6, 2022

Tishon Smith-Bennett