No. 21-55229

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTINA RAINES ET AL.,

Plaintiffs-Appellants,

v.

U.S. HEALTHWORKS MEDICAL GROUP ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:19-CV-01539-DMS
Hon. Dana M. Sabraw

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Because FEHA defines an "employer" to include an "agent" (Cal. Gov. Code § 12926(d)), this Court should hold as a matter of law that corporate agents like Defendants are liable for violating FEHA. Defendants' position that *Reno v. Baird,* 18 Cal. 4th 640 (1998) bars Plaintiffs' FEHA claim is wrong. *Reno* carved out a narrow exception for individual supervisors based upon public policy considerations that do not apply to Defendants and "specifically express[ed] no opinion on whether the agent language merely incorporates respondeat superior or has some other meaning." 18 Cal. 4th at 658. If the Court harbors any doubt, it should refer this important, undecided state law issue to the California Supreme Court.

Defendants' challenge to Plaintiffs' alternative Unruh Act claims is misplaced. Defendants ignore *Alch v. Sup. Ct.*, 122 Cal. App. 4th 339 (2004), which holds that employment-related discrimination against a non-employee is actionable under Unruh. And Defendants concede that both forms of discrimination separately alleged in this case—gender and perceived disability—are encompassed by Unruh. On gender, Defendants arbitrarily discriminated by requiring male and female

jobseekers to undergo different sets of irrelevant gender-specific inquiries as a condition of being cleared for work, yet point to no public policy justifying such discrimination. On perceived disability, the myriad disability-related questions on Defendants' Questionnaire evince that Defendants perceived and treated all applicants as disabled or having a potentially disabling condition. Based on that perception, Defendants discriminated against jobseekers both by forcing them to submit to an illegal Questionnaire and to verbal follow-up questioning concerning any positive answer on the Questionnaire. Each constitutes intentional discrimination and not, as Defendants contend, non-actionable disparate impact discrimination based on a facially neutral policy. Asking these questions to all jobseekers is consistent with this theory, since Defendants perceived all of them to be disabled or potentially so. Again, if there is any question, the Court should refer these important and unresolved state law issues to the California Supreme Court.

Finally, the lower court erred in dismissing the intrusion upon seclusion claim. Defendants' view that these were "routine medical examinations" such that applicants should reasonably expect to disclose

their entire medical profiles is mistaken. These were employer-mandated, coerced examinations conducted by employer-selected doctors. Applicants were forced to answer all questions because they would otherwise be denied the job. FEHA prohibits questions in this setting unless they are job-related and consistent with business necessity. That prohibition embodies the very expectation of privacy at the core of this common law claim. Defendants' conduct also was highly offensive. Defendants' invasive inquiries unquestionably violated FEHA and sought intimate and private health information having nothing to do with any job, *e.g.*, history of venereal disease, penal discharge, vaginal discharge, menstrual problems, pregnancy, etc. Defendants also impermissibly forced applicants to sign an Authorization purportedly permitting Defendants to disclose their private health information to employers and other third persons with the threat that refusing to sign would result in denial of the job. Taking into account "all circumstances," as required by California courts, Defendants unlawfully intruded into Plaintiffs' privacy.

ARGUMENT IN REPLY

I. THIS COURT SHOULD REFER THE FEHA AND UNRUH ACT QUESTIONS TO THE CALIFORNIA SUPREME COURT

When exercising diversity jurisdiction, a federal court applies substantive state law as the state courts have interpreted it; a federal court cannot create new state law. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 44 (1997); *Ingenco Holdings v. ACE American Ins.*, 921 F.3d 803, 815 (9th Cir. 2019) (at best, this Court may predict what the State courts would do). As amici curiae demonstrate, this case presents pure questions of state law with broad public policy ramifications undecided by the California courts. Because Defendants failed to raise any counterargument in their Answering Brief ("AAB"), they have waived it. *U.S. v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015).

Contrary to Defendants' position, *see* AAB at 1-2, new rules of substantive state law will be made *however* these questions are resolved because the California courts have never weighed in on whether corporate agents like Defendants can be held liable for violating FEHA. As Plaintiffs previously briefed, the California Supreme Court carved out only one narrow exception to FEHA agency liability, limited to

individual supervisory employees, and it "specifically express[ed] no opinion on whether the agent language [in Cal. Gov. Code § 12926(d)] merely incorporates respondeat superior or has some other meaning."[1] *Reno*, 18 Cal. 4th at 658. Under these circumstances, this Court should permit the state courts to decide the question. *Philadelphia v. Lead Industries*, 994 F.2d 112, 123 (3d Cir. 1993); *see also Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003).

The same is true for the closely-related Unruh Act question. FEHA and the Unruh Act were enacted in the same legislative session for the identical purpose of eradicating arbitrary discrimination—the former governing the workplace and the latter business establishments. *Alcorn v. Anbro*, 2 Cal. 3d 493, 500 (1970); *see also Rodriguez v. Disney*, 2018 WL 3201853, at *3 (C.D. Cal. June 14, 2018) ("making impermissible medical inquiries is discrimination"). The only relevant

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[1] As the State of California explains, "California courts have carved out only specific exceptions to agent liability under the statute without providing a complete exemption for agents." Attorney General Brief ("AG Br.") at 9. Defendants cannot "read into the statute a complete exemption for agent liability that the Legislature did not intend 'in the context of the statutory framework as a whole.'" *Id*. at 8-9 (citation omitted).

difference between the statutes is how the parties' relationship may be characterized. Yet Defendants' argument, if adopted, would create a gap between the two statutes, permitting otherwise prohibited discrimination by one of the largest businesses in California to flourish. Were this Court to decide that there is no agency liability under FEHA and at the same time that Plaintiffs claims are not governed by Unruh, then there would be no redress against Defendants for their own otherwise illegal conduct. The California Supreme Court is best suited to definitively resolve the question of whether the Legislature intended such a gap and to better define the scope of each statute. That court is also best equipped to resolve the questions of whether a "rare" public policy exception to otherwise plain gender discrimination exists and whether discrimination against patrons Defendants perceived to be disabled is not actionable merely because Defendants perceived all patrons to be disabled and correspondingly subjected all to discriminatory inquiries.

II. AS AGENTS OF EMPLOYERS, DEFENDANTS ARE LIABLE UNDER FEHA FOR THEIR ILLEGAL PRACTICES

Defendants concede that FEHA defines an "employer" to include an "agent," and that their conduct violates FEHA's prohibitions on

untailored pre-employment screenings. *See* AAB at 18. Nevertheless, Defendants argue that they are immune from liability because, by exempting one kind of agent from FEHA liability to avoid an absurd or unintended consequence flowing from otherwise plain statutory language, *Reno* must ineluctably have exempted all agents from liability. *Id.* at 19-21. This argument ignores *Reno*'s narrowly-circumscribed holding and the policy reasons the court provided for that holding.

A. Defendants Ignore Two Explicit Limitations on *Reno*'s Holding

Defendants' argument proceeds from a misstatement of *Reno*'s holding. In *Reno*, the California Supreme Court was presented with a precise question: "whether persons claiming discrimination may sue *their supervisors individually* and hold them liable for damages if they prove their allegations." *Reno*, 18 Cal. 4th at 643 (emphasis added). The California Supreme Court gave a narrow answer: Individual supervisory employees cannot be liable under FEHA for discrimination. *Id.* at 663.

The California Supreme Court made the limited scope of its decision clear. "The issue in this case is *individual* liability for

discrimination," *Id.* at 658 (original emphasis). Its conclusion that individual supervisors could not be liable did not rely, as Defendants argue, on the theory that FEHA's "agent" language merely incorporates respondeat superior principles; it "**specifically express[ed] no opinion on" that subject**.[2] *Id.*; *see also* AAB at 23.

Thus, *Reno* did not address the question presented here, *i.e.*, whether corporate agents like Defendants can be liable for violating FEHA. Nor did that court address the alternative question Defendants argue *Reno* conclusively answered, *i.e.*, whether *any* agent can be liable under FEHA. No California court has addressed these issues.

Given these unequivocal limitations on the holding in *Reno*—limitations not addressed, let alone eliminated, by *Jones v. Torrey Pines*, 42 Cal. 4th 1158 (2008)—the onus on Defendants was to address

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[2] Defendants' assertion that the California Supreme Court "explained that the agent language in FEHA protects employees by making 'the employer liable via the *respondeat superior* effect'" is a bald misreading of *Reno*. AAB at 23 (quoting *Reno*, 18 Cal. 4th at 655). The portion of the *Reno* decision Defendants quote is itself a quotation from *Janken*—one that *Reno* clarified: "The Court of Appeal [in *Reno*] interpreted *Janken* as concluding that the 'agent' language merely incorporated respondeat superior principles." *Reno*, 18 Cal. 4th at 657. The California Supreme Court, however, explicitly declined to answer that question.

them and to provide a rationale to this Court for why the California Supreme Court would remove those limitations. *See Ingenco*, 921 F.3d at 815. Defendants failed to do that.

B. Defendants' "Textual" Argument Ignores the Text of FEHA and *Reno*'s Public Policy Rationale

Defendants posit that there can be no agent liability of any kind because FEHA's definition of "employer" "does not distinguish between different types of agents" and therefore, absent any "authority to support any distinction," this Court "must treat all agents the same, just as the statute does." AAB at 19. But this purportedly "textual" argument ignores *Reno's* qualified holding and the policy considerations underlying that holding. As discussed above, *Reno* carved out a distinction between individual, supervisory employee agents and all others. *Reno*, 18 Cal.4th at 658. *Reno* refers to "individual supervisory employees" and "individuals who do not themselves qualify as employers" throughout. *See, e.g.*, *id.* at 663. It does not refer indiscriminately to "[agents]" as Defendants suggest. *See* AAB at 21-22, 25.

Setting aside that "FEHA's plain language [] compels an interpretation of 'employer' that includes all agents within its scope of

liability" (*see* AG Br. at 6), *Reno*'s distinction between individual supervisors and all other kinds of agents does not turn on the statutory text, but rather on the public policy consequences pertaining to one type of agent, *i.e.*, individual supervisors.

As *Janken* stated, the "question of whether the FEHA exposes individual supervisory employees to the risk of personal liability for discrimination … is one of legislative intent." *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55, 59 (1996) (citing *California Teachers Assn. v. San Diego Community College Dist.*, 28 Cal. 3d 692, 698 (1981)). While "the primary determinant of legislative intent is the words used by the Legislature," a "literal reading" that would "result in absurd consequences" should be avoided. *Id.* at 60 (citing *Whitman v. Sup. Ct.*, 54 Cal. 3d 1063, 1072 (1981)). Thus, "the consequences of differing possible constructions must be evaluated." *Id.* "If the language of a statute supports more than one reasonable construction, then [the courts] may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history." *Los Angeles County Metro v. Alameda Produce*, 52 Cal. 4th 1100, 1107 (2011).

In *Reno*, the California Supreme Court noted "two possible constructions of the 'agent' language" as it specifically applies to individual supervisory employees—both reasonable:

> One construction is … that by this language the Legislature intended to define every supervisory employee in California as an "employer," and hence place each at risk of personal liability whenever he or she makes a personnel decision which could later be considered discriminatory. The other construction is … that by the inclusion of the 'agent' language the Legislature intended only to ensure that employers will be held liable if their supervisory employees take actions later found discriminatory.

Reno, 18 Cal. 4th at 647 (quoting *Janken*, 46 Cal. App. 4th at 65-66).

Reno observed that *Janken* "adopted the latter construction for several reasons." *Id.* Those reasons were policy-related, not textual.

Reno's holding has no application here because this case does not involve individual supervisors. Instead, Plaintiffs ask a different question, arising in the wake of *Reno*'s interpretation of FEHA, and guided by the same public policy rationales: Can non-individual, corporate agents—for whom *Reno*'s public policy justifications for exempting individual supervisory agents from liability plainly do not apply—be liable under FEHA? That construction, and the policy

implications flowing from its adoption, have explicitly not been considered. *Id*. at 658.

Defendants' ancillary argument based on the fact that "the California Legislature has never since amended FEHA" following *Reno* is irrelevant. *See* AAB at 25. To the extent that legislative inaction here might arguably signal approval of *Reno*—which it does not necessarily, *see People v. Whitmer*, 59 Cal. 4th 733, 741 (2014)—it could only be approval of *Reno*'s actual holding (*i.e.,* a narrow exception for individual supervisory employee liability justified by public policy rationales), and not approval of what *Reno* explicitly declined to hold.

C. Defendants Fail to Explain Why *Reno*'s Public Policy Justifications for Excepting Individual Supervisory Agent Liability Should Apply to Corporate Agents Like Defendants

Rather than attempting to explain how *Reno*'s public policy rationale justifies expanding the narrow exception immunizing individual, supervisory agents from FEHA liability to immunize all agents of any kind, Defendants simply ignore it altogether. No wonder: The public policy rationale animating *Reno* (and *Jones*, and many of the analogous federal cases on which they relied) does not apply to corporate agents. *See also* AG Br. at 9.

Among the "absurd" or "unintended consequences" as to individual supervisors the California Supreme Court sought to avoid for public policy reasons were:

First, federal courts interpreting analogous federal statutes have held that "supervisors cannot be held personally liable for employment discrimination." *Reno*, 18 Cal. 4th at 648. Those federal cases "based their decisions in part on the incongruity that would exist if small employers were exempt from liability while individual non-employer supervisors were at risk of personal liability." *Id.* at 651-52.

Second, because "FEHA exempts small employers [any person employing five or more persons] from liability for discrimination," "it is 'inconceivable' that the Legislature simultaneously intended to subject individual nonemployers to the burdens of litigating such claims." *Id.* at 650-51.

Third, individual supervisory employee liability "adds mostly an *in terrorem* quality to the litigation, threatening individual supervisory employees with the spectre of financial ruin for themselves and their families." *Id.* at 651-53.

Fourth, "individual supervisory employees would bear a greater personnel management risk than the owners of the corporation who benefit from the fruits of the enterprise, but who are not exposed to personal liability because of the limited liability nature of a corporation." *Janken*, 46 Cal. App. 4th at 78. It is the "entity ultimately responsible for discriminatory actions" that the Legislature sought to subject to liability. *Jones*, 42 Cal. 4th at 1167 (citing *Reno*, 18 Cal. 4th at 663).

Fifth, "sound policy favors avoiding conflicts of interest [between supervisors and their employers] and the chilling of effective management." *Id.*

As detailed in Plaintiffs' Opening Brief and amici's briefs, none of these rationales militates in favor of exempting Defendants from agency liability. *See* AOB at 27-31; AG Br. at 9 ("underlying public policy" does not support Defendants' argument "that agents can never be independently liable under FEHA"). Defendants have not argued and cannot argue otherwise.

D. Defendants Ignore Federal Cases Construing Similar "Agent" Language in the ADA and Title VII

As set forth in the brief of amici curiae L.A.A.W. *et al.* at 6-12, federal cases interpreting the agency language in both FEHA and analogous federal statutes hold that agents like Defendants can be liable for employment discrimination. Yet Defendants say nothing about these cases or about amici's arguments.

The only case cited by Plaintiffs or amici that Defendants address is *Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12, 17 (1st Cir. 1994). Defendants say that *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113, fn. 48 (9th Cir. 2000) noted the "repudiation of the test Plaintiffs seek to adopt" from *Carparts*. AAB at 22-23, fn. 8. But *Weyer* cited to *Bloom v. Bexar County*, 130 F.3d 722, 725, fn.2 (5th Cir. 1997), which, although it called the authority upon which *Carparts* relied in part "questionable," noted that those "cases do not rule out the possibility that a plaintiff may maintain an action against a defendant who is not, technically, the plaintiff's direct employer." In other words, *Weyer* and *Bloom* do not hold that the basic holding in *Carparts* has been repudiated.

In any event, Plaintiffs do not rely exclusively on *Carparts* to argue that federal cases interpreting federal statutes have permitted liability for non-employee, non-supervisory agents like Defendants. *See* L.A.A.W. Br. at 7-10; AG Br. at 12-14. Unsurprisingly, Defendants fail to mention, much less distinguish, any of those cases.

III. AS BUSINESS ESTABLISHMENTS, DEFENDANTS ARBITRARILY DISCRIMINATED AGAINST PLAINTIFFS ON THE BASES OF GENDER AND PERCEIVED DISABILITY

A. Plaintiffs' Unruh Act Claim Is Properly Pled as an Alternative to Their FEHA Claim

Defendants mischaracterize Plaintiffs' Unruh Act claim as "an employment claim" and argue that it can only be brought under FEHA. AAB at 26-28. This misstates Plaintiffs' pleadings and the law. It likewise ignores the district court's holding that, under *Alch*, 122 Cal. App. 4th at 391, a "business establishment which provides 'employment-related' services" is not exempt from Unruh, and, under *Leach v. Drummond Med. Grp., Inc.* 144 Cal. App. 3d 362, 370 (1983), "medical practices and physician services" are considered business establishments. *See* ER-13.

Plaintiffs' operative pleading alleges, in the alternative and solely for purposes of the Unruh claim, that Defendants are a "business establishment" providing the service of evaluating whether jobseekers (whom Defendants misled to believe were their "patients") could presently perform the essential functions for the job position they had been offered so they could get the job. ER-84.

Plaintiffs are "entitled to plead alternative [] theories of recovery on the basis of the *same conduct*." *MB Financial v. USPS*, 545 F.3d 814, 819 (9th Cir. 2008) (emphasis added); *see also* Fed. R. Civ. P. 8(d)(2). The Unruh Act and FEHA each prohibit the *same conduct*: discriminatory treatment. Both were passed in the same legislative session as part of a comprehensive effort to redress that conduct. *See Alcorn*, 2 Cal. 3d at 500 (1970) (FEHA enacted to prohibit discrimination); *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 167 (2007) (Unruh enacted to eradicate discrimination). The only difference between the two statutes relevant here is not what conduct each prohibits but how the parties' relationship is characterized: If the parties are in an "employer"/employee relationship, FEHA governs; if

the parties are in a business establishment/patron relationship, Unruh governs. *Alch*, 122 Cal. App. 4th at 391.

Nevertheless, Defendants argue that, because the challenged discrimination is "an employment claim," the "rule of *Rojo*" bars their Unruh Act claims. AAB at 25-26, 28. But *Alch* rejected precisely that argument. *See* 122 Cal. App. 4th at 391; AAB at 28. "Nothing in *Rojo* or *Alcorn*" or *Sprewell v. Golden State Warriors*, 266 F.3d 979, 989 (9th Cir. 2001), also cited by Defendants here, "suggests that a business establishment which provides 'employment related' services, or services 'in the employment context,' is exempt from the Act." *Id.* The "rule of *Rojo*" is "confined to claims by an employee against his employer, or against an entity in the position of the employer." *Id.*

Defendants' attempt to negate the applicability of *Rodriguez v. Disney*, 2018 WL 3201853, at *3 (C.D. Cal. June 14, 2018) to Plaintiffs' Unruh Act claims therefore fails. *See* AAB at 27-28. *Disney* understood that the same conduct alleged here "is discrimination." *Id.*

B. Defendants Identify No Public Policy Justification Permitting Their Gender Discrimination

Plaintiffs pled two distinct kinds of discrimination under Unruh—gender and perceived disability. ER-57, 74, 85–6. Defendants devote no

effort whatsoever to contesting that Plaintiffs' gender discrimination claim is well-pled or to substantiating a public policy exception to that discrimination and therefore again waive any counterarguments. *Dreyer*, 804 F.3d at 1277.

Plaintiffs' gender claim is straightforward: By requiring only women to answer certain arbitrary and irrelevant questions (*e.g.*, "Do you have irregular menstruation?") and only men to answer others (*e.g.*, "Do you have penile discharge?") to receive a "passing" medical screening, Defendants engaged in disparate treatment discrimination on the basis of gender.

Unlike with Plaintiffs' perceived disability discrimination claim, Defendants do not assert that Plaintiffs' gender discrimination claim is non-actionable disparate *impact* discrimination. Despite Plaintiffs adequately pleading disparate *treatment* gender discrimination, Defendants asserted below that "strong public policy" permits it—*i.e.*, because "males have different parts than females." *See* ER-62–63.

This statement ignores the California Supreme Court's admonition that "'public policy' exceptions to the Unruh Act are rare." *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 32 (1985). It also ignores *Koire*'s

observation that public policy exceptions, when they do exist, are usually based in and justified by some other statutory scheme, and that "few cases have held" discrimination is not arbitrary "based solely on the special nature of the business establishment." *Id.* at 30-32, fn.8; *Pines v. Tomson*, 160 Cal. App. 3d 370, 387 (1984); *see also Leach*, 144 Cal. App. 3d at 370. Except for generalizing about binary anatomical sex differences (*see* ER-61-63), Defendants do not articulate how such differences justify the arbitrary requirement that Plaintiffs respond to irrelevant gender-based questions in a pre-employment screening where those questions have no bearing on assessing any applicant's ability to perform the essential functions of any job. And Defendants do not point to any statutory basis justifying that practice.

As *Koire* demonstrates, FEHA serves as a source for assessing whether public policy exceptions to Unruh exist. *See Koire*, 40 Cal. 3d at 38 (citing FEHA as justification for price discounts for the elderly that would otherwise violate Unruh). Given that FEHA and Unruh were passed in the same legislative session and both target arbitrary discrimination, few statutes provide more relevant guidance than FEHA on whether a public policy exception to Unruh exists. If FEHA

prohibits the discriminatory conduct alleged here, it cannot be the case that Unruh allows it.

Defendants' parade of horribles is no answer. ER-61-62, fn.3. Prohibiting Defendants from making arbitrary and irrelevant gender-based medical inquiries in the pre-employment context will not preclude other medical professionals from making those inquiries in contexts where doing so would not be arbitrary and irrelevant. Their failure to acknowledge that the purpose, setting, and nature of pre-employment medical screenings are vastly different than for routine medical examinations cannot be reconciled with the fact that the former are regulated in ways that the latter are not—fundamentally, in what inquiries may be made.

C. Plaintiffs Adequately Alleged Intentional Perceived Disability Discrimination

Defendants acknowledge that perceived disability discrimination is covered by the Unruh Act, but argue that 1) their Questionnaire and related follow-up inquiries are not disparate treatment but rather a facially neutral policy disparately impacting disabled applicants; and 2) requiring that all applicants answer the same discriminatory questionnaire negates any discrimination. This argument

misapprehends Plaintiffs' allegations and, if accepted, would excise perceived disability discrimination from the ambit of Unruh's protections.

1. Plaintiffs Allege Disparate Treatment—Not Disparate Impact—Discrimination

The Unruh Act prohibits discrimination but does not "confer any right or privilege on a person … that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status." Cal. Civ. Code § 51(c). Courts interpret this provision of the Act to mean that only disparate *treatment*—not disparate *impact* discrimination—is actionable. *Turner v. Ass'n of Am. Med. Colleges*, 167 Cal. App. 4th 1401, 1408 (2008); *Harris v. Capital Growth Investors*, 52 Cal. 3d 1142, 1149, 1172-73 (1991) (citing § 51(c)).

Unlike disparate *treatment* discrimination, which requires proof of discriminatory intent, in a claim of disparate *impact* discrimination, "the disproportionate impact of a facially neutral policy on a protected class *is a substitute for* discriminatory intent." *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 854 (2005) (emphasis added). In

Koebke, a gay couple sued a country club, alleging the club's adoption of a facially neutral policy restricting membership benefits to legal spouses, without more, served on its own to establish intent to discriminate. *Id.* For this proposition, the plaintiffs relied on *Roth v. Rhodes*, 25 Cal. App. 4th 530, 538 (1994), which held that an otherwise "permissible" facially neutral policy "may nevertheless be illegal if it is merely a device employed to accomplish prohibited discrimination." *Id.* Without overruling *Roth*, *Koebke* rejected this argument on summary judgment because "plaintiffs do not point to any evidence" that the purpose of the country club's policy was "to accomplish discrimination on the basis of sexual orientation." *Id. Koebke* explained that, without that evidence of intent, the plaintiffs' theory amounted to disparate impact because it "relies on the *effects* of a facially neutral policy on a particular group and would require us to infer *solely* from such effects a discriminatory intent." *Id*. (original emphasis).

That is not Plaintiffs' theory here. Plaintiffs allege that Defendants intentionally discriminated against job applicants based on their perceived disability. Unlike in *Koebke*, Plaintiffs do not rely on the *effects* of a facially neutral policy or require this Court to infer *solely*

from such effects a discriminatory intent. Nor are Defendants' policies facially neutral. *See* AOB at 48-49; ER-82–83, 86 (Defendants' inquiries were "designed to bring any and every health condition to the surface," to "regard every applicant as having a disability," to "ferret[] out" disabilities or potentially disabling conditions, and the inquiries "express[ed]" an "intent to" discriminate on the basis of perceived disability). The district court acknowledged this. ER-14 ("Plaintiffs allege that the questionnaire on its face is discriminatory").

Moreover, this appeal does not arise, like *Koebke*, from summary judgment proceedings; Plaintiffs have not had the opportunity to exhaust discovery supporting their allegations of intentional discrimination. Even if, *arguendo*, Defendants' policies are facially neutral, Plaintiffs' perceived disability discrimination claim cannot be dismissed on the pleadings. "If [facially neutral] policies are subterfuges for invidious discrimination" then Plaintiffs have a viable Unruh Act claim. *Roth*, 25 Cal. App. 4th at 538.

2. Discrimination Against Every Member of a Protected Class Is Actionable

As discussed above, Cal. Civ. Code § 51(c) makes disparate impact discrimination non-actionable. But this rule does not mean that

intentional discrimination directed at every patron in a protected class is not actionable.

For example, a policy that discriminates against every member of a protected class—*e.g.*, against all women, or all Catholics, or all bankruptcy attorneys—is prohibited by Unruh. *See*, *e.g.*, *White v. Square*, 7 Cal. 5th 1019, 1024 (2019). Plaintiffs' perceived disability claim is no different: All persons whom Defendants perceived to be disabled were subjected to Defendants' discriminatory treatment. The fact that Defendants perceived or regarded all applicants to be disabled in the first instance does not turn their conduct into disparate impact discrimination—or make it not discrimination—as a matter of law.

Granted, perceived disability is unique among the "personal characteristics" on the basis of which Unruh forbids discrimination. Unlike various other antidiscrimination laws, Unruh's reach is not limited to "immutable characteristics": "The 'personal characteristics' protected by the Act are not defined by immutability, since some are, while others are not [immutable], but [instead] represent traits, conditions, decisions, or choices fundamental to a person's identity,

beliefs and self-definition." *Candelore v. Tinder*, 19 Cal. App. 5th 1138, 1145 (2018) (citation and quotation omitted).

Perceived disability status, by contrast, is not a trait, condition, decision, or choice fundamental to a person's identity, beliefs and self-definition; it is instead a trait imposed externally by another. Thus, as a conceptual matter, perceived disability discrimination, unlike other kinds of discrimination, can be directed against *anyone and everyone*. But this does not make perceived disability discrimination categorically non-actionable: Unruh extends "to those who are regarded by others as living with such a disability"—even if they are "wrongly perceived to be." *Maureen K. v. Tuschka*, 215 Cal. App. 4th 519, 529 (2013). By regarding Plaintiffs as disabled and requiring them to answer arbitrary and irrelevant questions designed to ferret out disabilities or potentially disabling conditions, Defendants engaged in prohibited discrimination on the basis of perceived disability. That it was possible for Defendants to do this to all of their patrons perceived as disabled serves only to highlight that this is classic discrimination against every member of a protected class. Defendants' argument to the contrary would mean that perceived disability discrimination is categorically not actionable; but

that argument cannot be reconciled with *Maureen K* or the text of the statute.

3. Defendants' Policies Did Not Apply Equally to All Persons

Defendants' argument that "practices and policies that apply equally to all persons" are not actionable is simply a restatement of their disparate impact argument. AAB at 28 (citing *Greater Los Angeles Agency on Deafness v. CNN*, 742 F.3d 414, 425 (9th Cir. 2014) and Cal Civ. Code § 51(c)). However, even assuming that requiring every jobseeker complete the Questionnaire in the first instance was facially neutral (it was not), Defendants' practice of subjecting jobseekers to further verbal questioning on a case-by-case basis constitutes as-applied intentional discrimination.

Defendants ignore that a facially neutral policy or practice, if applied unequally, is actionable. *See* AOB at 42-44; *see also Everett v. Sup. Ct.*, 104 Cal. App. 4th 388, 394 (2002) (reversing summary judgment for defendants where plaintiffs presented evidence to support inference that defendants' facially neutral policy was applied in a discriminatory manner); *Turner*, 167 Cal. App. 4th at 1411 (noting no allegation defendant applied its facially neutral policy in an

intentionally discriminatory manner) (citing *Koebke*, 36 Cal. 4th at 854); *Koire*, 40 Cal. 3d at 29 (the scope of Unruh "is clearly not limited to exclusionary practices").

Here Plaintiffs allege that after filling out the Questionnaire, each jobseeker was subjected to unique, additional, in-person questioning probing more deeply, on a case-by-case basis, into any condition for which a jobseeker provided a positive response. ER-74, 77, 90. The overbreadth of the Questionnaire (e.g., "Have you ever had a fever?" "Have you ever had a surgery or been hospitalized?" "Are you currently on any medications?") meant that each applicant gave at least one positive response. ER-86 ("As such, all Class Members were required to and did disclose one or more health conditions."). Given that the additional questioning necessarily varied according to each individual's medical profile, Defendants, in executing their policy in this way, intentionally engaged, on a case-by-case basis, in discriminatory treatment. Theirs was not a policy that "applied equally to all persons," but a policy that applied *unequally* to all persons.

IV. DEFENDANTS' INTRUSIVE AND ILLEGAL CONDUCT CONSTITUTES INTRUSION UPON SECLUSION

To state a claim for intrusion upon seclusion, Plaintiffs must allege (1) intrusion into a private matter in which they have a reasonable expectation of privacy (2) in a manner highly offensive to a reasonable person. *Shulman v. Group W Productions*, 18 Cal. 4th 200, 231 (1998). These two elements largely overlap, as does the court's analysis of each element. *See Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286-87 (2009).) The district court ruled that the intrusion was not highly offensive as a matter of law but did not rule that Plaintiffs had no reasonable expectation of privacy in their medical profiles. ER-15–19. Defendants now argue, however, that it is unreasonable for Plaintiffs to have any expectation of privacy in any aspect of their medical profiles during a pre-employment screening and for similar reasons that their conduct is not offensive. AAB at 30-34.

A. Jobseekers Have a Reasonable Expectation of Privacy in Their Medical Profiles During Compelled Pre-Employment Medical Screenings

Defendants' argument that Plaintiffs had no reasonable expectation of privacy in their medical profiles ignores that "a person's medical profile is an area of privacy infinitely more intimate, more

personal … than many areas already judicially recognized and protected," *Hill v. NCAA*, 7 Cal. 4th 1, 41 (1994). It also ignores that FEHA, to protect jobseekers' privacy, forbids even the act of inquiring into these subjects (let alone obtaining the information) except where it is necessary to assessing present ability to do the specific job in question. *See* Cal. Gov. Code § 12940(e)(3).

Defendants do not seriously contest the illegality of their medical inquiries under FEHA. Nor can they: Inquiries must be "tailored to assess the employee's ability to carry out the essential functions of the job." Cal. Code Regs., tit. 2, § 11065(k); see also *Disney*, 2018 WL 3201853, at *4 ("medical inquiries must be narrowly tailored and job-related."). Defendants concede that they made no attempt to tailor their questions and instead opted for an omnibus, one-size-fits-all approach in violation of FEHA.

Nor do Defendants comment on, let alone contest, the significance of FEHA's legislative history, clarifying that Cal. Gov. Code § 12940(e)(3)'s tailoring requirement goes further than the ADA to give teeth to "this state's long history of *strong protections for the privacy rights of Californians*." Assem. Com. on Lab. and Emp., Analysis of

Assem. Bill No. 2222 (1999-2000 Reg. Sess.) *as amended* April 5, 2000, p. 4 (the "Legislative Analysis") (emphasis added).

Instead, Defendants urge that the coerced post-job offer screenings challenged in this case are as a matter of law no different than a patient's "routine" medical examination performed by her own doctor. AAB at 6, 14, 34. But this argument ignores the California Supreme Court's mandate that, in making "preliminary determination[s]," courts consider "all circumstances of the intrusion" as alleged. *Shulman*, 18 Cal. 4th at 231; *see also Hernandez*, 47 Cal. 4th at 286-87. It also fails to acknowledge that "privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." *Sanders v. ABC*, 20 Cal. 4th 907, 915–16 (1999).

Applying "all circumstances" and considering the "degrees and nuances" present here, the post-offer examinations, conducted by medical personnel of the employer's choosing solely as a condition of getting hired, are simply not comparable to routine medical

examinations performed by personal physicians chosen by their patients. The coerced exams challenged here had to be completed as a condition of working; routine medical exams do not. The coerced exams here must, by law, be "narrowly tailored and job related" (*Disney*, 2018 WL 3201853, at *4); routine medical exams need not be. The coerced exams here are the subject of a specific statute adopted by the Legislature that goes above and beyond the ADA precisely because the Legislature was concerned with protecting Californians' privacy (*Legislative Analysis* at 4); routine medical exams are not subject to FEHA's privacy protections. The coerced exams here were undertaken by applicants for the sole purpose of assessing their present ability to do the specific job in question; routine medical exams are undertaken by patients for many reasons, *e.g.*, diagnosis of unknown conditions, prognosis of known conditions, treatment, and maintenance of long-term health. Defendants may refer to themselves as an "occupational healthcare provider," but in no sense is the service they provide to Plaintiffs "healthcare" in the same way that the services provided to Plaintiffs by their personal physicians are.

Nor, as Defendants argue, were Plaintiffs in a position to "decide[] what information to provide" in response to Defendant's illegally overbroad inquiries. *See* AAB at 36. Plaintiffs and class members were required to answer every question, and every class member disclosed one or more health conditions. *See* ER-86. If they did not disclose their ***entire health histories***, Defendants would refuse to complete the screening and inform the employer that the applicant refused to complete the exam, whereupon the employment offer would be revoked. ER-75. Compare this to a routine medical exam, where a patient is truly free to decide what information to provide to his or her personal and personally-selected physician and where refusing to disclose certain information does not lead to revocation of a job offer. *See also* L.A.A.W. Br. at 14 ("these overbroad inquiries … force [applicants] to disclose medical details that they would otherwise keep private"). And unlike the court's observation in *Hill* (which involved similarly coerced exams) that athletic participation is not "an economic necessity that society has decreed must be open to all," 7 Cal. 4th at 42-43, here, working is without question an economic necessity. Indeed, "it is the public policy

of the State of California [] to safeguard the right of all persons to seek … employment." AG Br. at 1 (citing Cal. Gov. Code § 12920).

Defendants do not address these different circumstances as *Shulman* and *Sanders* require. *See* 18 Cal. 4th at 231; 20 Cal. 4th at 915–16. Instead, Defendants cite three cases challenging pre-employment blood and urinalysis tests to argue that Plaintiffs here had no reasonable expectation of privacy in their medical profiles as a matter of law. **But far from helping Defendants, those cases support Plaintiffs.**

Defendants cite *Leonel v. Am. Airlines*, 400 F.3d 702, 712 (9th Cir. 2005) for the unremarkable proposition that "job applicants should anticipate that a preemployment medical examination may be required." AAB at 32. But Plaintiffs here do not contend it was reasonable to expect *no* medical inquiries; instead, they contest the overbreadth of those inquiries, which is entirely consistent with *Leonel*. Although the *Leonel* plaintiffs "consent[ed] to preemployment blood tests," the court held that they "did not consent to any and all medical tests that American wished to run on their blood samples." *Id.* at 713. Thus, Plaintiffs' consent to pre-employment medical inquiries in the

first instance does not mean they consented to "any and all" of the dozens of invasive and overbroad medical inquiries alleged here.

Consistent with *Shulman*'s requirement that all circumstances be considered, *Leonel* explained that "in the specific context of preemployment medical examinations, the question of what tests plaintiffs should have expected or foreseen depends in large part upon what preplacement medical examinations usually entail, and what, if anything, plaintiffs were told to expect." *Id.* (quotation omitted). In California, pre-employment screenings usually entail—and indeed *may legally only entail*—narrowly tailored inquiries. Cal. Gov. Code § 12940(e)(3); Cal. Code Regs., tit. 2, § 11065(k). And despite Defendants' insinuation to the contrary (*see* AAB at 34), Plaintiffs were *not* told to expect such broad questioning before they were subjected to it and there is no allegation to the contrary.

For the same reasons, *Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998) and *Loder v. Glendale*, 14 Cal. 4th 846

(1997) also support Plaintiff's position.[3] *Bloodsaw* and *Loder* were also decided prior to the amendment of FEHA to require narrow tailoring of medical inquiries—limitations imposed by the Legislature to protect applicants' privacy. *See Legislative Analysis* at 4. After those amendments to FEHA took effect, a pre-employment screening questionnaire could only legally entail narrowly tailored inquiries. Plaintiffs' expectation that the screening would be so-tailored cannot be unreasonable *as a matter of law*.

B. Plaintiffs Have Sufficiently Alleged Offensive Conduct

Defendants argue that the inquiries were not highly offensive because they occurred in the medical office setting. This again fails to

[3] Defendants imply that *Bloodsaw* found a questionnaire containing three questions to be a "minor intrusion" "by way of comparison" to a blood draw or urinalysis. AAB at 33. Not so. *Bloodsaw* reasoned: "The fact that plaintiffs acquiesced in the minor intrusion of checking or not checking three boxes on a questionnaire does not mean that they had reason to expect further intrusions in the form of having their blood and urine tested for specific conditions that corresponded tangentially if at all to the written questions." *Id.* at 1268. *Bloodsaw* merely accords with *Leonel*'s observation that consent to a test or inquiry in the first instance does not constitute consent to tests or inquiries of any kind or amount.

take into consideration "all circumstances of the intrusion" as alleged. *Shulman*, 18 Cal. 4th at 231. Those circumstances here are as follows:

- Defendants—healthcare providers selected by ***employers*** to conduct medical screenings of ***applicants***—subjected applicants to deeply invasive, overbroad questions about their ***entire health history***—regardless of the potential job or capabilities required for it. These included, *inter alia*, questions about past and present venereal disease, vaginal and penile discharge, prostate problems, diarrhea, painful/frequent urination, hemorrhoids, menstruation, etc.;
- Any written health questions answered affirmatively by applicants were then followed up with equally invasive verbal questioning;
- Applicants were threatened with failing the medical screening—and therefore being denied the job—if they did not answer every single question;
- Applicants were also threatened with failing the medical screening—and therefore being denied the job—if they did not sign the Authorization form purporting to permit Defendants to

disclose the information they provided through the Questionnaire to prospective employers and third parties;

- This all occurred "at a time of vulnerability and confusion," given that these screenings were conducted as a condition of receiving gainful employment, under illegal threat of disclosure to prospective employers and unknown third parties, by random providers not of applicants' choosing, and in a highly invasive and overbroad manner. *Miller v. NBC*, 187 Cal. App. 3d 1463, 1484 (1986); and
- FEHA prohibits employers from subjecting applicants to such broad medical or psychological inquiries that are not "job related and consistent with business necessity." Cal. Gov. Code § 12940(e)(3).

Taken together, these circumstances show that applicants had a reasonable expectation of privacy in their non-job-related medical profiles and that Defendants' acts constitute "highly offensive" conduct.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the District Court's judgment on all causes of action.

With respect to the FEHA and Unruh Act claims, Plaintiffs respectfully request that, in the alternative, this Court certify those issues to the California Supreme Court.

Date: October 5, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appellants' Reply Brief

Signature s/ R. Scott Erlewine
Date October 5, 2021