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, Judge

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTRODUCTION AND STATEMENT OF INTEREST

This case poses the question of whether an employer's agent may be held independently liable under the California Fair Employment and Housing Act (FEHA), Cal . Gov't Code §§ 12900-12999. Because FEHA's plain language and broad enforcement scheme support independent agent liability, the district court improperly dismissed Appellants' FEHA claim on the basis that agents are not themselves liable under FEHA, even though Appellants had sufficiently pled an agency relationship.[1]

It is the public policy of the State of California (State) to safeguard the right of all persons to seek, obtain, and hold employment in the State without discrimination, including discrimination based on physical disability, mental disability, and medical condition. Cal. Gov't Code § 12920. As the State's fair employment statute, FEHA is an important tool for ensuring individuals' access to employment, free from unlawful and discriminatory practices that impact Californians. The State therefore has a substantial interest in ensuring that the

[1] The Attorney General takes no position on Appellants' non-FEHA claims under California's Unruh Civil Rights Act, California Civil Code § 51, and Unfair Competition Law, California Business and Professions Code §§ 17200-17210 (UCL), and for invasion of privacy. To the extent that Appellants have predicated their UCL claim on underlying statutory violations of FEHA, this brief would bear on Appellants' UCL claim.

broad remedial purposes and strong employment protections of FEHA and similar state laws are properly effectuated.

Under the California Constitution, the California Attorney General has authority to enforce FEHA, among other State statutes enacted to protect California residents from unfair and discriminatory practices. Cal. Const., art. V, § 13. With nearly 20 million people in California employed in industries ranging from agriculture and construction to information technology and entertainment, protecting and enhancing the rights of workers is vital to the well-being of California, its communities, and its economy.[2] The California Attorney General has a long history of protecting employment rights and holding employers and their agents accountable for unlawful practices, on behalf of California's residents and the State.

For example, the California Attorney General and the California Department of Fair Employment and Housing (DFEH) recently led a multi-jurisdiction lawsuit challenging the U.S. Equal Employment Opportunity Commission's arbitrary and unlawful decision to revoke full access to federal employment data used by state and local fair employment practice agencies, including DFEH, to monitor and

[2] *See* Press Release, State of California Department of Justice's Office of the Attorney General (OAG), *Attorney General Establishes Workers Rights and Fair Labor Section* (Jan. 28, 2021), https://tinyurl.com/2xx2pzhj.

combat workplace discrimination.[3] The Attorney General has also led or participated in multistate amicus briefs in support of a lawsuit seeking to protect the collection of demographic information critical to combating pay discrimination,[4] and in the successful defense of protections under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2000e-17, that limit workplace discrimination based on sexual orientation or transgender status.[5] And the Attorney General has defended numerous FEHA employment discrimination actions on appeal for DFEH.[6]

Appellants in this case allege that Defendants U.S. HealthWorks, the largest provider of occupational health services in California, and its successors, are liable under FEHA as agents of Appellants' prospective employers because Defendants

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[3] Press Release, OAG, *Attorney General Becerra, DFEH Director Kish File Lawsuit to Protect Access to Data Used to Combat Workplace Discrimination* (Oct. 30, 2020), https://tinyurl.com/khn5x2zs.

[4] Press Release, OAG, *Attorney General Becerra, DFEH Director Kish Lead Multistate Coalition in Support of Lawsuit Protecting Access to Critical Information on Pay Discrimination* (Oct. 28, 2019), https://tinyurl.com/dac4j6y6.

[5] Press Release, OAG, *supra* note 3.

[6] *See, e.g.*, *Dep't of Fair Emp. & Hous. v. FloraTech Landscape Mgmt., Inc.*, No. A139762, 2016 WL 3644624, at *1 (Cal. Ct. App., June 30, 2016); *Dep't of Fair Emp. & Hous. v. Pagonis*, No. H044903, 2019 WL 1389228, at *1 (Cal. Ct. App., Mar. 27, 2019).

conducted intrusive, non-job-related, and discriminatory "pre-placement" inquiries and medical examinations as a condition of hiring.[7]

Discriminatory employment practices by employers and their agents, such as unlawful pre-employment inquiries and exams, not only harm individual workers, but also have damaging effects on Californians, and especially further barriers to employment or advancement for Californians with disabilities and medical conditions who already experience significant barriers to seeking, obtaining, and holding employment. It is therefore critical that plaintiffs are able to bring FEHA actions to redress the pernicious effects of employment discrimination. As such, the State has an important interest in the Court's resolution of the questions before it and respectfully submits this brief as amicus curiae. *See* Fed. R. App. P. 29(a)(2).

[7] Appellants allege that these intrusive questions asked, for example, whether the job applicant has and/or has ever had venereal disease, painful or irregular vaginal discharge, problems with menstrual periods, penile discharge, prostate problems, genital pain or masses, cancer or tumors, HIV, mental illness, disabilities, painful/frequent urination, hair loss, hemorrhoids, diarrhea, black stool, constipation, tumors, organ transplant, stroke, or a history of tobacco or alcohol use. ER-65. Defendants also allegedly asked whether the applicant was pregnant, for every prescription medication (which would include, for example, birth control and medication evidencing non-job related disabilities and illnesses) they took, and for information about prior on-the job-injuries or illnesses. ER-74.

ARGUMENT

I. FEHA'S STATUTORY LANGUAGE PROVIDES FOR AGENT LIABILITY

Both the plain language of FEHA and its broad enforcement scheme are clear that agents themselves may be liable for violations of the statute. When interpreting a state statute, federal courts must look to the state's rules of statutory interpretation. *Bass v. Cnty. of Butte,* 458 F.3d 978, 981 (9th Cir. 2006). Further, federal courts determine what meaning the state's highest court would give the statute in question. *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1026 (9th Cir. 2003). According to the California Supreme Court, a court must "'look first to the words of [a] statute, which are the most reliable indications of the Legislature's intent.'" *Kim v. Reins Int'l Cal., Inc.*, 9 Cal. 5th 73, 83 (2020) (quoting *Cummins, Inc. v. Super. Ct.*, 36 Cal. 4th 478, 487 (2005)). Further, a court must "'construe the words of a statute in context, and harmonize the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole.'" *Kim,* 9 Cal. 5th at 83 (quoting *Cummins*, 36 Cal. 4th at 487); *Phelps v. Stostad*, 16 Cal. 4th 23, 32 (1997)). Similarly, a court must accord meaning to every word and phrase in a regulation and read regulations as a whole to give all parts of a regulation effect. *Butts v. Bd. of Tr. of Cal. State Univ.*, 225 Cal. App. 4th 825, 835 (2014).

FEHA's plain language defines an "employer" as including "any person regularly employing five or more persons, or *any person acting as an agent of an employer, directly or indirectly*." Cal. Gov't Code § 12926(d) (emphasis added). Further, FEHA's regulations expressly state, "[a]ny person or individual *acting as an agent of an employer, directly or indirectly, is also an employer*." Cal. Code Regs., tit. 2, § 11008(d)(3) (emphasis added). Indeed, since the inception of the statute in 1959, the State Legislature has included agents within FEHA's "employer" definition. Fair Employment Practices Act, Stat. 1959, c. 121, p. 2000, § 1 (current version at Cal. Gov't Code § 12926(d)).[8] FEHA's plain language therefore compels an interpretation of "employer" that includes agents themselves within its scope of liability. *See* Cal. Gov't Code §§ 12920, 12921, 12993(a); *Vernon v. State of Cal.*, 116 Cal. App. 4th 114, 123 (2004) ("'Because the FEHA is remedial legislation, which declares '[t]he opportunity to seek, obtain and hold employment without discrimination' to be a civil right, and expresses a legislative policy that it is necessary to protect and safeguard that right, the court[s] must construe the FEHA broadly, not . . . restrictively.") (internal

[8] This section, which contained the definition of "employer," was formerly Cal. Lab. Code § 1413(d) of the "California Fair Employment and Practices Act," the predecessor statute to FEHA. The Legislature changed the name of the statute to the "Fair Employment and Housing Act" and moved the definition of "employer" to its present day location at Government Code section 12926(d). Stat. 1980, c. 992, p. 3166, § 11.

citations omitted). And no language in the statute or its implementing regulations exempts agents from independent liability, nor differentiates between "employer" and "agent" liability. *See Kim*, 9 Cal. 5th at 83 (applying general statutory interpretation principles to Private Attorneys General Act); *see Butts,* 225 Cal. App. 4th at 835 (applying general regulatory interpretation principles to California State University regulations). Lastly, FEHA's express prohibition on "aid[ing], abet[ting], incit[ing], compel[ling], or coerc[ing]" a violation of the statute further shows that the Legislature intended to subject entities that are not direct employers to FEHA. Cal. Gov't Code § 12940(i). For these reasons, FEHA's plain language makes clear that agents can themselves be liable for violations of the statute.

II. FEHA'S LEGISLATIVE HISTORY SUPPORTS AGENT LIABILITY

According to the California Supreme Court, analysis of legislative history is unnecessary if the statutory language is clear: "If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history." *Los Angeles Cnty. Metro. Transp. Auth. v. Alameda Produce Mkt., LLC*, 52 Cal. 4th 1100, 1107 (2011) (quoting *In re Young*, 32 Cal. 4th 900, 906 (2004)). As discussed, FEHA's statutory language defining "employer" is clear, and its plain meaning therefore controls. *Id.* Nevertheless, FEHA's legislative history further

supports a reading of the "employer" definition that includes agents within FEHA's scope of liability. Since the Legislature first adopted FEHA in 1959, it has expanded the types of entities subject to the statute, in line with its original intent for broad coverage. The original statute "[s]pecifies that its provisions extend to *all natural persons and all types of organizations*" with limited exceptions, none of which exempted agents from separate liability. *See* Cal. Off. of Legis. Couns.'s Rep. on Assembly Bill No. 91, Reg. Sess. at 4 (1959) (emphasis added). For example, the original statute expressly exempted from liability people that employ agricultural workers residing on the land where they worked, social clubs, and fraternal, charitable, and educational entities. Cal. Gov't Code § 12926(d);[9] *see also Bohemian Club v. Fair Emp. & Hous. Comm'n*, 187 Cal. App. 3d 1, 9 (1986). After several legislative amendments, each of these entities may now be considered an "employer" under FEHA. *See* Cal. Gov't Code § 12926(d).

Had the Legislature intended to exempt agents from independent liability under FEHA, it could have simply created an exception when it amended the statute to adjust its coverage. Instead, for nearly 62 years, the Legislature has maintained the same agent-inclusive "employer" definition. The district court's holding would read into the statute a complete exemption for agent liability that the

[9] *Supra* note 8.

Legislature did not intend "in the context of the statutory framework as a whole." *Kim*, 9 Cal. 5th at 83 (internal quotations and citations omitted).

III. EXCEPTIONS FOR INDIVIDUAL SUPERVISORS CANNOT EXEMPT AGENTS FROM FEHA LIABILITY IN TOTAL

California courts have carved out only specific exceptions to agent liability under the statute without providing a complete exemption for agents.[10] The district court improperly extends *Janken*, *Reno*, and *Jones*—cases limited to non-liability for the everyday actions of individual supervisory employees under the employer's direct control—to a corporate entity alleged to have been delegated certain decision-making authority to operate on the same footing as the direct employer. These cases and underlying public policy do not support the district court's broad conclusion that agents can never be independently liable under FEHA.

Unlike Appellants' case, each of these cases is limited to subordinate employee's FEHA claims against an individual supervisory employee under the employer's direct control for personnel decisions made during employment, and therefore, specifically tested whether an individual supervisor could be liable as an

[10] *See, e.g., McCoy v. Pac. Mar. Ass'n*, 216 Cal. App. 4th 283 (2013) (labor contract negotiator was not liable as agent for harassment and retaliation); *Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55 (1996) (individual supervisory employees not liable as agent for age discrimination); *Reno v. Baird*, 18 Cal. 4th 640 (1998) (individual supervisory employees not liable as agent for medical condition discrimination); *Jones v. Lodge at Torrey Pines P'ship*, 42 Cal. 4th 1158 (2008) (individual supervisory employee is not liable as agent for retaliation).

agent under the statute. *Janken*, 46 Cal. App. 4th at 61-62; *Reno*, 18 Cal. 4th at 643-644; *Jones*, 42 Cal. 4th at 1160-1161 (2008).

For example, in *Jones*, the court reasoned that liability for an individual supervisor is inappropriate since "supervisors can avoid harassment but cannot avoid personnel decisions . . . sound policy favors avoiding conflicts of interest and the chilling of effective management, corporate employment decisions are often collective, and it is bad policy to subject supervisors to the threat of a lawsuit every time they make a personnel decision." *Jones*, 42 Cal. 4th at 1167. Similarly, in *Janken*, the court determined that "[i]mposing personal liability on supervisory employees would create conflicts of interest [with the employer] and chill effective management while providing little or no additional protection to victims of discrimination." *Janken*, 46 Cal. App. 4th at 72 (emphasis omitted). In *Reno*, the California Supreme Court adopted *Janken* and held that the issue before the court was "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; *see also Jones*, 42 Cal. 4th at 1167 (quoting *Reno*, 18 Cal. 4th at 663 ("We do not decide merely whether individuals should be held liable for their wrongdoing, but whether all supervisors should be subjected to the ever-present threat of a lawsuit each time they make a personnel decision.").

Indeed, the *Reno* court expressly noted the inapplicability of its decision to other cases of direct employer and agent liability:

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

Reno, 18 Cal. 4th at 658.

Such policy is sound to protect individual supervisory employees simply doing their job under the employer's direct control, while simultaneously allowing for "effective remedies to eliminate discrimination" by continuing to hold the employer accountable in furtherance of FEHA's purpose. Cal. Gov't Code § 12920. Upholding the district court's decision, on the other hand, would hinder "effective remedies to eliminate discrimination" under FEHA. *Id.* It would create an overly broad exception that would absolve even agents that have been empowered to stand in the shoes of the direct employer to determine employment opportunities when they are also an "entity ultimately responsible for discriminatory actions." *See Jones*, 42 Cal. 4th at 1167 (quoting *Reno*, 18 Cal. 4th at 663). Such agents would be able to evade liability for their own unlawful actions simply by claiming that they were executing the employer's directives.

This Court's well-established precedent determining that entities that are not direct employers liable for Title VII employment discrimination is instructive. In the absence of cases interpreting FEHA, California courts look to federal decisions interpreting Title VII because its "antidiscrimination objectives and relevant wording . . . are similar to those of . . . FEHA." *Reno*, 18 Cal. 4th at 647-48 (internal quotations omitted); *see also Los Angeles Cnty. Dep't of Parks & Rec. v. Civil Servs. Comm'n*, 8 Cal. App. 4th 273, 280 (1992). Title VII's definition of "employer" is similar to FEHA's definition of "employer," and includes agents. *Compare* 42 U.S.C. § 2000e(b) ("'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . *and any agent of such a person*") (emphasis added), *with* Cal. Gov't Code § 12926(d) ("'[e]mployer' includes any person regularly employing five or more persons, or *any person acting as an agent of an employer, directly or indirectly*") (emphasis added).

This Court has consistently held that "an entity [who] is not the direct employer of a Title VII plaintiff" may be held liable where it "'interferes with an individual's employment opportunities with another employer.'" *Ass'n of Mexican-Am. Educators v. State of Cal.* (*AMAE*), 231 F.3d 572, 580 (9th Cir. 2000) (State agency's requirement of passing score for a pre-employment teacher credentialing exam interfered with plaintiff educators' employment opportunities

with school districts) (quoting *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021 (9th Cir. 1983) (hospital's discriminatory refusal to contract with plaintiff doctor "denied him the opportunity to be employed by [his professional corporation] as director of defendants' emergency room")). And an entity can be liable under Title VII if it has "actual '[c]ontrol over access to the job market,'" even if the entity is not a direct employer of the job applicant or employee. *AMAE*, 231 F.3d at 581 (quoting *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973)).

Here, Appellants allege that "[t]he referring employers delegated to USHW certain aspects of the employers' employment decisions as to Class Members" and that "[t]he employers advised USHW that the purpose for the exam was to determine whether the job applicant would be able to get the job." ER-70. Further, Appellants allege that the "employers adopted the 'recommendations' of USHW as a matter of course." *Id*.

For example, "[i]n response to [Appellant] Raines declining to provide the date of her 'Last menstrual period,' she was threatened by USHW staff members that she couldn't pass the exam and get the job without answering all of the questions, and the USHW physician terminated the examination and USHW forced Ms. Raines to leave the premises." ER-77. Then, "[s]hortly after Ms. Raines left the USHW facility, Front Porch verbally told Ms. Raines that it was revoking the job offer because Ms. Raines had refused to answer questions about her menstrual

cycle." *Id*. Also, "[d]uring this conversation, Front Porch's Human Resources manager informed Ms. Raines that all Front Porch job applicants, including the Human Resources manager herself, had to answer the exact same USHW questions Ms. Raines had been asked in order to get their jobs." *Id*. Whereas in Appellants' case, an agent of the employer is alleged to be so intertwined with the employer's decision-making process that it interferes with an individual's employment prospects or controls access to the job market, Title VII caselaw suggests grounds for independent agent liability that further FEHA's statutory objectives. Liability for such agents under the statute would provide "effective remedies" against entities that share ultimate responsibility for discriminatory actions with the direct employer to safeguard the rights of all persons to seek, obtain, and hold employment in the State without discrimination. Cal. Gov't Code § 12920; *see Jones*, 42 Cal. 4th at 1167; *Reno*, 18 Cal. 4th at 663.

IV. CALIFORNIANS EXPERIENCE HARMS FROM DISCRIMINATORY EMPLOYMENT PRACTICES LIKE UNLAWFUL PRE-EMPLOYMENT MEDICAL INQUIRIES PROHIBITED UNDER FEHA

Californians experience significant harms from discriminatory employment practices, such as unlawful pre-employment medical inquiries and exams, which underscore the importance of FEHA actions. FEHA prohibits employers and their agents from making non-job-related pre-employment medical inquiries of an employee or applicant as to their physical disability, mental disability, or medical

condition. Cal. Gov't Code § 12940(d)-(e). With limited exceptions, FEHA also prohibits employers and their agents from requiring that applicants undergo medical or psychological examinations. *Id.* In enacting these restrictions, the Legislature intended 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.'"[11]

Use of unlawful pre-employment inquiries and exams can especially impact Californians with disabilities, who have historically faced lower employment rates than people without disabilities and experience significant barriers to employment.[12] According to the 2018 American Community Survey for California, the employment rate in California for non-institutionalized working-age people (ages 21 to 64) with disabilities was 37.1% as compared to a 78% employment rate for working-age people without disabilities—a 40% gap.[13] The percentage of working-age people with disabilities who were not working but

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[11] Assem. Com. on Judiciary Rep. on Assem. Bill No. 2222, as amended April 5, 2000, at 13 (quoting a Feb. 29, 2000, press release by the bill's author Assemblymember Sheila Kuehl).

[12] Erickson, W., Lee, C., & von Schrader, S., *2018 Disability Status Report: California* (2020), Cornell University Yang-Tan Institute on Employment and Disability (YTI), https://tinyurl.com/e7deypep (analyzing American Community Survey - California (2018), U.S. Census Bureau, https://tinyurl.com/45yc2c4j (last visited May 24, 2021).

[13] *Id.*

actively looking for work was 7.9% as compared to 56.8 % for working-age people without disabilities—a 34% gap.[14] And the poverty rate of working-age people with disabilities was 23.8% as compared to 9.9% for working-age people without disabilities—a 13.9% gap.[15] National statistics from the Bureau of Labor Statistics suggest that these numbers have only worsened since 2018 due to the coronavirus (COVID-19) pandemic and efforts to contain it.[16]

Workplace discrimination is a prevalent problem for people with disabilities,[17] including discrimination resulting from disclosure of a disability that can occur during unlawful pre-employment inquiries. Disclosing a disability, or sharing a disability status, often results in experiences of discrimination.[18]

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[14] *Id.*
[15] *Id.*
[16] News Release (Feb. 24, 2021), U.S. Dep't of Labor, Bureau of Labor Statistics, https://tinyurl.com/um6ep23f (In 2020, nationally, 17.9% of persons with a disability were employed, down from 19.3% in 2019. For comparison, for persons without a disability, 61.8% were employed in 2020, down from 66.3% in the prior year. *Id.* The unemployment rates for persons with and without a disability both increased from 2019 to 2020, to 12.6% and 7.9%, respectively, from the previous year. *Id.* This means that the jobless rate for persons with a disability continued to be much higher than the rate for those without a disability.).
[17] Persons with a Disability: Barriers to Employment and Other Labor-Related Issues News Release (May 1, 2020), U.S. Dep't of Labor, Bureau of Labor Statistics, https://tinyurl.com/ehpvmpts; Harris, Sarah Parker, Gould, R., and Mullin, C., *Experience of Discrimination and the ADA: An ADA Knowledge Translation Center Research Brief*," ADA National Network (2019) (ADA Research Brief), https://tinyurl.com/wrja3tpx.
[18] Harris, *supra* note 17.

Employees with disabilities hide their disability status for many reasons, including fear of teasing, harassment, potential changes in coworker relationships, being perceived as less capable, and reduced progress in their careers.[19] By not disclosing a disability status, people with disabilities are allowed "to be employed 'without fear of prejudice or discrimination.'"[20] Unlawful pre-employment medical exams that seek information regarding a job applicant's disability or medical conditions would only further barriers to employment or advancement resulting from unnecessary disability disclosure.

In sum, the harms inflicted by discriminatory employment practices, such as unlawful pre-employment medical inquiries and exams, are far-reaching. If not properly redressed by FEHA actions, existing inequities in the workplace and barriers to employment will only deepen, resulting in detrimental impacts on Californians with disabilities and the State's interest in ensuring fair opportunities for all its residents.

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[19] Jain-Link, P. & Taylor Kennedy, J. (Jun. 2019), *Why people hide their disabilities at work*, HARVARD BUSINESS REVIEW, https://tinyurl.com/6j6tp7zu (last visited May 24, 2021).

[20] Goldberg, S. G., Killeen, M. B., & O'Day, B., *The disclosure conundrum: How people with psychiatric disabilities navigate employment*, PSYCHOLOGY, PUBLIC POLICY, AND LAW, 11(3), 463 (2005), https://tinyurl.com/y67r56w8.

CONCLUSION

The district court's judgment dismissing Appellants' FEHA claim should be reversed.

Dated: June 16, 2021

Respectfully submitted,

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STATEMENT OF RELATED CASES

The State of California is not aware of any related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court and are not already consolidated here.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Dated: June 16, 2021

Sean Puttick

Sean Puttick