Case No. 22-55060

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,
v.

ACTIVISION BLIZZARD INC., BLIZZARD ENTERTAINMENT, INC., ACTIVISION PUBLISHING, INC. KING.COM, INC., and DOES ONE through TEN, inclusive,
Defendant-Appellee,
v.

CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING,
Proposed Intervenor-Appellant.

On Appeal from the United States District Court for the
Central District of California
No. 2:21-CV-07682 DSF-JEM
Honorable Dale S. Fischer

PROPOSED INTERVENOR-APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal raises an important but limited procedural question: whether a state Fair Employment Practices Agency ("FEPA") (here, the Department of Fair Employment and Housing ("DFEH")) actively litigating state discrimination, harassment, and retaliation claims in state court may intervene in a federal case in which the Equal Employment Opportunity Commission ("EEOC") seeks to settle the very state law claims that the FEPA is litigating.

This situation involves overlapping investigation and litigation by state and federal agencies, brought about by the egregious misconduct of Defendants Activision Blizzard, Inc., Activision Publishing, Inc., Blizzard Entertainment, Inc., and King.com, Inc. ("Activision"). While Activision may see a benefit in creating and dramatizing a dispute between government agencies that typically coordinate enforcement actions, the question presented in this appeal is narrow and relatively dry – whether the limited requirements of Federal Rule of Civil Procedure 24 are met in these unprecedented circumstances, where a state FEPA is pursuing state law claims in state court, and the EEOC seeks to resolve them in a separate action.

The DFEH respectfully submits that proper application of Rule 24 results in only one answer: Yes, the DFEH must be allowed to intervene for the limited purpose of commenting on the federal consent decree and, if necessary, appealing.

Here, the DFEH appeals the district court's denial of its Motion to Intervene ("Motion"), which it filed to object to the consent decree settling claims between the EEOC and Activision. That consent decree covers not only Title VII claims that the EEOC has authority to bring, but also California claims that only the DFEH—not the EEOC—can bring, and has brought in an earlier-filed state court action, *Dep't. Fair Empl. & Hous. v. Activision Blizzard, Inc. et al.*, Case No. 21STCV26571 (Los Angeles Sup. Ct.) (the "State Action"). It also undermines the

DFEH's ongoing lawsuit in other ways, such as by removing or altering evidence the DFEH seeks to use in the State Action.

The DFEH readily satisfied all the elements of Rule 24 through its Motion below. The DFEH timely explained its interest in this litigation, how the consent decree may impair it, and how the EEOC does not adequately represent the DFEH's interests.

In a three-page order with a few paragraphs of conclusory discussion, the district court denied the DFEH's Motion. The district court's order made several grave errors misapplying Rule 24, including failing to accept the DFEH's well-pled allegations as true, asserting hypotheses about how the decree will function that are contradicted by the decree's plain text, redefining the DFEH's enforcement interests in contravention of the statements of the California Legislature, ignoring the text and structure of Title VII providing for enforcement of state laws only by state FEPAs, disregarding the Supreme Court's and this Court's authority regarding the application of Rule 24, and generally failing to conduct the intervention analysis broadly in favor of intervention. The district court's dismissive treatment of the DFEH's Motion caused it to reach the wrong conclusion, and its decision denying intervention should be reversed.

II. STATEMENT OF JURISDICTION

The district court exercised subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1343 and 1345, and 29 U.S.C. § 626(b) based on EEOC's assertion of claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

The EEOC did not assert state law claims, and the district court did not exercise supplemental jurisdiction over any state law claims. As *discussed infra* in § VIII(A)(4)(b), the district court did not have subject matter jurisdiction over the state law claims that the DFEH seeks to protect through intervention and appeal.

On December 20, 2021, the district court denied the DFEH's Motion. 1-ER-90. This Court has jurisdiction "over the denial of a motion to intervene as of right as a final appealable order pursuant to 28 U.S.C. § 1291." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 814 (9th Cir. 2001). Appeal is timely under 28 U.S.C.§ 2107(a) and Federal Rule of Appellate Procedure 3(a) and 4(a)(1). The DFEH filed a timely Notice of Appeal on January 7, 2022. 3-ER-613.

III. STATEMENT OF ISSUES

1. Whether the district court erred in denying the DFEH's motion for intervention as of right under Fed. R. Civ. P. 24(a).
2. Whether the district court abused its discretion in denying the DFEH's motion for permissive intervention under Fed. R. Civ. P. 24(b).
3. Whether a state or local FEPA such as the DFEH, has a protectable interest supporting intervention in an action where the EEOC seeks to extinguish the state law claims asserted by that FEPA in preexisting litigation, and where the EEOC lacks jurisdiction to assert or settle those state law claims.
4. Whether the DFEH has a protectable interest here in (a) enforcing California antidiscrimination claims against Activision, (b) protecting its ability to obtain discovery and prosecute claims on behalf of California Activision employees in its preexisting, ongoing State Action, and (c) protecting California workers against a process that encourages them to release California claims without adequate information about (i) the strength of their individual claims or (ii) the EEOC's lack of leverage to achieve a reasonable settlement value for those claims due to its lack of statutory standing, agency expertise, or discovery.
5. Whether the DFEH's interests may be impaired or impeded in these circumstances.

6. Whether EEOC does not adequately represent the DFEH's interests in these circumstances.
7. Whether the district court erred in failing to accept the DFEH's facts as alleged, and failing to make all inferences in the DFEH's favor as required under this Court's liberal standard on a motion to intervene.
8. Whether the district court lacks subject matter jurisdiction over the portion of the consent decree that purports to resolve California law claims that EEOC did not allege and has no standing or jurisdiction to allege or resolve.

IV. CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Constitutional provisions, statutes, and rules appear in the DFEH's addendum, per Fed. R. App. P. 28-2.7.

V. STATEMENT OF THE CASE

A. Statutory Framework

1. The California Legislature Granted the DFEH Plenary Authority to Enforce FEHA.

Since 1959, the DFEH has served as California's primary public prosecutor of civil rights violations against California workers. The DFEH is the only agency authorized to bring representative claims under California's Fair Employment and Housing Act, Cal. Gov. Code §§ 12900 *et seq.* ("FEHA").[1] The California Legislature has defined the DFEH's enforcement authority as "an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state." *Dep't of Fair Emp. & Hous. v. Sup. Ct.*, 54 Cal. App. 5th 356, 371 (2020) (quoting Cal. Gov. Code § 12920). The DFEH is tasked with protecting the rights "of all persons to seek, obtain, and hold employment without

[1] *See also* Cal. Gov. Code § 12925. The California Attorney General also has authority to prosecute FEHA violations, but intrastate allocation of authority is not at issue here. *Id.* § 12965(c).

discrimination," Cal. Gov. Code § 12920, with broad power to "prosecute complaints," *id.* § 12930, and discretion in how to do so, *id.* §§ 12930, 12965(a).

The DFEH asserts the interests both of (a) individual California workers and (b) the California public at large. *Dep't of Fair Emp. & Hous. v. Law Sch. Admission Council, Inc.*, 941 F. Supp. 2d 1159, 1169 (N.D. Cal. 2013) ("In bringing enforcement actions," the DFEH acts "not merely [as] a proxy for the victims of discrimination," but also "to vindicate the public interest in . . . preventing discrimination."); *Dept. of Fair Emp. & Hous. v. Cathy's Creations, Inc.*, 54 Cal. App. 5th 404, 410 (2020) (in enforcing FEHA, the DFEH "represent[s] the interests of the state and . . . effectuat[es] the declared public policy of the state to protect and safeguard the rights and opportunities of all persons from unlawful discrimination.").

2. By Contrast, Congress Structured Title VII to Limit the EEOC to Title VII Claims Only, Giving It No Power to Litigate or Settle State Law Claims, and Requiring EEOC to Defer to FEPAs When FEPAs Choose to Act.

a. In Balancing Federalism Concerns, Congress Chose to Give State and Local FEPAs Priority over EEOC in Enforcing Antidiscrimination Law.

In 1964, Congress enacted Title VII against a backdrop of pre-existing state and local civil rights laws like FEHA. Congress crafted Title VII to ensure that these (often stronger) state and local laws, and the agencies that enforced them, would be given priority over more limited federal law and federal enforcement. Congress's decision to create a relatively limited EEOC that must defer to stronger state enforcement efforts is evident from the legislative history of Title VII. Senator Clark gave a detailed explanation of the Senate's revisions of the House Bill, explaining:

> The Federal law will apply in all the States, but it will not override any State law or municipal ordinance which is not inconsistent.

> However, *the Federal authorities will stay out of any State or locality which has an adequate law and is effectively enforcing it*. This provision has two beneficial effects: (1) it will induce the States to enact good laws and enforce them, so as to have the field to themselves; and (2) it will permit the Federal [EEOC] to concentrate its efforts in the States which do not cooperate.

110 CONG. REC. 7216 (1964) (remarks of Senator Clark) (emphasis added); *see also EEOC v. Com. Office Prods. Co.*, 486 U.S. 107, 117 & n.3 (1988) (quoting remarks of Senator Humphrey who, like others, noted purpose of deferral period to give States a "reasonable opportunity to act under State law before the commencement of any Federal proceedings"); Stephen D. Shawe, *Employment Discrimination—the Equal Employment Opportunity Commission and the Deferral Quagmire*, 5 U. BALT. L. REV. 221, 243(1976), http://scholarworks.law.ubalt.edu/ublr/vol5/iss2/4 ("Congress contemplated not only that the EEOC would defer most charges of employment discrimination to state and local agencies, but also that the Commission would permit *final* resolution of many of its cases at the local level.").

The Supreme Court has since repeatedly emphasized the priority of state enforcement relative to the EEOC's more limited authority. *See Com. Office Prods.*, 486 U.S. at 120 (noting "dual purposes of the deferral provisions: deference to the States and efficient processing of claims"); *Kremer v. Chem. Constr. Corp*., 456 U.S. 461, 470 n.8 (1982) (Title VII is "directed at increasing, not reducing, the authority of state agencies to resolve employment discrimination disputes"); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (Title VII "give[s] state agencies a limited opportunity to resolve problems of employment discrimination [thereby making it unnecessary] to resort to federal relief by victims of the discrimination"); *cf. Alexander v. Gardner-Denver Co*., 415 U.S. 36, 47-49 (1974) (recognizing "congressional intent to allow an individual to pursue

independently his rights under both Title VII and other applicable state and federal statutes").

In short, Title VII actually grants *less* authority to the EEOC than it does to FEPAs like the DFEH. While this balance of power may seem counterintuitive at first, it reflects Congress's intent that the federal government, in the area of employment discrimination, respect and defer to state authority.

b. Title VII Provides Weaker Protection for Workers Than FEHA Does.

As part of the legislative compromises allowing its passage, Title VII is limited, compared to the laws of states like California in several ways. *See* 3-ER-448-49. For example:

1. FEHA has a three-year statute of limitations, compared to 300 days under Title VII. Cal Gov Code § 12960(e); 42 U.S.C. § 2000e-5(d)- 5(e)(1).
2. FEHA has no caps on compensatory and punitive damages, while Title VII does. 42 U.S.C. § 1981a.
3. Under FEHA, employers are "strictly liable" for their supervisors' workplace harassment, and can only assert a defense based on having taken reasonable steps to prevent workplace harassment (avoidable consequences) to avoid damages, not liability. *State Dep't. of Health Servs. v. Sup. Ct.*, 31 Cal. 4th 1026, 1034-41 (2003). In contrast, under Title VII, employers can avoid vicarious liability for sexual harassment claims based on a "reasonable care" defense pursuant to the Supreme Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 765 (1998).
4. FEHA provides stronger protections from sexual harassment than Title VII, for example, by stating that a "single incident" of harassment "is sufficient to create a triable issue regarding the existence of a hostile work

environment" if the harassment has interfered with the plaintiff's work performance, and expressly rejecting federal law applying Title VII more narrowly. Cal Gov. Code §§ 12923, 12940(j), 12950.

5. FEHA provides stronger protections against pregnancy discrimination. *See* Cal. Gov. Code §§ 12926(r)(1), 12940, 12945 (permitting up to four months of pregnancy leave); 42 U.S.C. §§ 2000e(k), 2000e-2(a)(1) (no such leave provided);
6. FEHA provides stronger protections against retaliation. *See* Cal. Gov. Code § 12940(h) (*compare Steele v. Youthful Offender Parole Bd.*, 162 Cal. App. 4th 1241, 1255 (2008), *with Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 359-62 (2013)).
7. FEHA prohibits conduct unaddressed by Title VII, such as failure to prevent discrimination and harassment, *see* Cal. Gov. Code § 12940(k); 42 U.S.C. §§ 2000e-2(a), 2000e-3(a).
8. FEHA protects all "persons," Cal. Gov. Code § 12940, including interns, volunteers and contractors in the case of harassment, *id.* § 12940(j)(1), whereas Title VII is limited to employees, *Murray v. Principal Fin. Group, Inc.*, 613 F.3d 943, 944 (9th Cir. 2010) (worker "is entitled to the protections of Title VII only if she is an employee").
9. FEHA covers employers of five or more persons, as opposed to 15 or more under Title VII. *Compare* Cal. Gov. Code § 12926(d) *with* 42 U.S.C. § 2000e(b).
10. Like FEHA, the California Equal Pay Act, Cal. Lab. Code § 1197.5 ("California EPA") is significantly stronger than the federal Equal Pay Act, 29 U.S.C. § 206 ("EPA") or Title VII. *Compare* Cal. Lab. Code § 1197.5(a) (allowing plaintiffs to establish pay disparities using comparators who perform "substantially similar work, when viewed as a composite of skill,

effort, and responsibility," without any establishment limitation) *with* 29 U.S.C. § 206(d)(1) (limiting plaintiffs to the use of comparators who perform "equal work" requiring "equal skill, effort, and responsibility" within the same "establishment").[2]

c. Title VII's Text Reflects Congress's Clear Intent to Prioritize State Antidiscrimination Enforcement Activities.

With strong federalism concerns in mind, Congress structured Title VII to give states with FEPAs like the DFEH priority in antidiscrimination enforcement within their state. 42 U.S.C. §§ 2000h-4, 2000e-5, 7-8.

For example, Title VII provides that no charge may be filed with the EEOC until 60 days after the charge has been filed with an authorized state or local FEPA, unless that agency's proceedings have been earlier terminated. 42 U.S.C. § 2000e-5(c); *see also* 29 C.F.R. § 1601.13 ("[T]itle VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days"); *Com. Office Prods. Co.*, 486 U.S. at 110-11; *see also Motorola v. E.E.O.C.*, 460 F.2d 1245, 1246 (9th Cir. 1972) (the "EEOC commissioner may not commence an unfair employment practice charge without first filing notice of such charge before a state agency which is authorized 'to grant or seek relief from such practice'"). In addition, Title VII requires that where a charge of discrimination is filed by an EEOC Commissioner in a state with a law like FEHA, the EEOC "shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, . . ., to act under such

[2] For ease of reference, "FEHA" will be used generally in discussing more powerful California state law liability standards and remedies compared to federal law, recognizing that this asymmetry is true for both FEHA and California EPA claims asserted by DFEH in the State Action.

State or local law to remedy the practice alleged." 42 U.S.C. § 2000e-5(d) (emphasis added).

d. EEOC's Own Policies Forbid It From Settling or Releasing Individual State Law Claims Through a Consent Decree.

Over the years, EEOC has developed a detailed document, "EEOC Settlement Standards and Procedures" ("Policy Manual"), to guide its action, consistent with its limited authority generally and the Congressional mandate to defer to state agencies specifically. First, the Policy Manual states, a "consent decree should contain a statement that it resolves only the claims raised in the Commission's complaint," with any other claims resolving a pending charge being "specifically identified." 3-ER-522. The Policy Manual elsewhere reiterates the prohibition on releases broader than the operative complaint:

> Individual relief . . . cannot be conditioned upon a waiver of legal claims other than those asserted in the Commission's complaint. . . . Even though the Commission is not a party to releases executed by claimants, EEOC attorneys are responsible for *ensuring* that no individual's relief is conditioned on waiver of any legal claim beyond those brought by the Commission.

Id.(emphasis added). The Policy Manual further specifies:

> *[I]ndividual waivers of common law claims or other statutory claims* (including claims *under state fair employment practices laws*) *are not permitted* even where the factual basis of the claim is identical to that pled in the Commission's action. This means that the release language must not only be limited to the factual claims in the Commission's complaint, but must also refer to the statute(s) under which the claims were brought.

3-ER-523 (emphasis added). The EEOC's own policies thus plainly prohibit it from settling or releasing state law claims that the EEOC has not asserted in a complaint.

B. Procedural Background

1. The DFEH and the EEOC Pursued a Joint Investigation into Far-Ranging Discrimination, Harassment, and Retaliation Against Women by Activision.

On October 12, 2018, pursuant to Cal. Govt. Code § 12960(b), the DFEH issued a Director's Complaint against Blizzard Entertainment, Inc. (later amended to add Activision Blizzard, Inc., and Activision Publishing, Inc.), alleging unlawful discrimination, harassment, and retaliation based on gender or sex. 3-ER-531, ¶ 3. The DFEH later learned that an EEOC Commissioner had signed a Commissioner's Charge a few weeks earlier. 3-ER-532, ¶ 5.

The DFEH and the EEOC then coordinated investigative efforts pursuant to their long-standing Worksharing Agreement, sharing confidential information and communicating regularly. 3-ER-532-34, 538-39, ¶¶ 5-9, 15. During its three-year investigation, the DFEH conducted significant discovery, taking seven depositions, propounding and responding to several sets of discovery requests, reviewing approximately 18,000 pages of discovery and seven years of employment data, exchanging several meet and confer letters, and interviewing hundreds of Activision victims and witnesses. 3-ER-531-32, ¶ 4. The record contains no mention of the exact scope of discovery conducted by EEOC during these three years. While the EEOC makes the conclusory statement that Activision provided it with "information, documents, and testimony," there is no evidence in the record of the number of pages of discovery the EEOC reviewed, the number of depositions the EEOC took, the amount and nature of the data the EEOC received and analyzed, the number of victims with whom the EEOC spoke, etc. *See* 3-ER-609, ¶ 16.

2. The DFEH Sued Activision in State Court.

During the summer of 2021, the DFEH invited Activision to participate in the DFEH's mandatory dispute resolution program to pursue settlement without

litigation, but Activision refused to participate. 3-ER-531, ¶ 3. Shortly thereafter, and following three years of investigation, the DFEH filed a complaint against Activision in the State Action to address egregious unlawful discrimination, harassment and retaliation that the DFEH had uncovered. *Id*. The DFEH filed an amended complaint one month later, asserting claims for sex-based pay discrimination under FEHA and the California EPA; discrimination in promotion, termination and constructive discharge under the FEHA; sexual harassment under FEHA; and retaliation under FEHA, among others. 3-ER-497-11.

The DFEH is unable to bring enforcement actions for every meritorious complaint it receives, but did so here due to the extreme and pervasive nature of Activision's violations. In its 35-page amended complaint, the DFEH detailed Activision's culture of allowing and encouraging blatant, widespread sexual harassment and even assault, systemic undercompensation of women, and other inequities. *See generally* 3-ER-477-511. The DFEH's complaint highlighted specific examples from its investigation showing that Activision had systematically assigned women to lower roles, paid them less for substantially similar work, promoted them more slowly, and terminated them more quickly than their male counterparts. 3-ER-479-81, 488-91, ¶¶ 3-4, 31-45. The DFEH further alleged that Activision fostered a workplace culture that sexualized women and excused misconduct by men, for example by encouraging excessive consumption of alcohol in the workplace through office "cube crawls," condoning sexual harassment, including groping and other unwanted advances, and failing to take remedial measures in response to repeated complaints, resulting most tragically in the death of a female Activision employee by suicide. 3-ER-481-82, 491-493, ¶¶ 5-7, 46-51.

3. The DFEH Sought to Collaborate with the EEOC to Achieve the Best Outcome for Workers.

From July to September 2021, the DFEH continued to seek collaboration

with the EEOC, including by inviting the EEOC to a mediation scheduled for December 2021, but the EEOC never accepted the invitation. 3-ER-538-39, ¶ 15. Instead, during July and August, Activision's counsel informed the DFEH that the EEOC and Activision were pursuing separate settlement talks without the DFEH. 3-ER-539, ¶ 16. DFEH asked the EEOC whether this was true, reiterating the DFEH's interest in collaborating. *Id*. On August 20, 2021, the agencies set a call for September 14, 2021. *Id*. ¶ 17. On September 10, 2021, the EEOC canceled that call. *Id*.

4. After Negotiating a Settlement Without DFEH Input, the EEOC Simultaneously Filed a Complaint and Consent Decree Purporting to Resolve State Law Claims Without a Commission Vote.

On September 27, 2021, while the DFEH's State Action was in litigation, the EEOC filed an overlapping lawsuit, submitting a bare-bones complaint and proposed settlement on the same day. 3-ER-552, 606-12; *see also* 3-ER-539, ¶¶17-18.

In contrast with the DFEH's extensive allegations detailing Activision's discrimination, harassment, and retaliation, the EEOC's 6-page complaint asserted conclusory allegations of sexual harassment, pregnancy discrimination, and retaliation. *See* 3-ER-610, ¶¶ 21-25.[3] The EEOC's complaint asserted claims under Title VII only, with no state law claims, in light of the EEOC's lack of statutory authorization or standing to assert such claims. 3-ER-610-11. The EEOC's consent decree provided for up to $18 million in relief, with any

[3] *See id.* ¶ 21 ("Since in or around September 2016, there have been instances where Defendants have engaged in unlawful employment practices in violation of §§ 701(k), 703(a) and 704(a) of Title VII, 42 U.S.C. 2000e-2(a) and 2000e-3(a) by subjecting a class of individuals to sexual harassment, to pregnancy discrimination and/or to retaliation.").

unclaimed amount reverting to Activision.[4] 3-ER-563, 572 (identifying a *cy pres* recipient as Activision's Diversity and Inclusion Fund).

Before filing a civil action alleging systemic or classwide claims, the EEOC's General Counsel is required to obtain approval from the EEOC Commission. *See* 42 U.S.C. § 2000e-5(f); 2-ER-210; 2-ER-215-18. This requirement is designed to promote efficiency and effectiveness in the EEOC's litigation efforts, including, presumably, to minimize duplication with ongoing FEPA actions. 2-ER-215. Notwithstanding this policy, the EEOC filed the complaint and consent decree in the action below without obtaining Commission approval, and thus without the requisite authority to initiate litigation. *See* 2-ER-210-11; 2-ER-215-18.

5. The DFEH Moved to Intervene to Protect California Workers and Restore the Balance of Interagency Deference, Consistent with Principles of Federalism.

On October 6 and 25, 2021, the DFEH moved to intervene, to object to the proposed consent decree and protect its enforcement interests and the interests of California workers in the district court, and, if necessary, on appeal. 3-ER-437.

In its Motion, the DFEH argued that the proposed consent decree would impair and impede its interest in enforcing California's antidiscrimination laws under FEHA and protecting California workers, with its arguments falling broadly into the following categories:[5]

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[4] DFEH's first motion, filed on October 6, was brought ex parte because EEOC had submitted the consent decree without requesting a hearing, so DFEH feared that the Court might approve the consent decree before allowing DFEH to participate in this new lawsuit. 3-ER-540. The Court instructed DFEH to bring the motion as a regular motion, which DFEH filed as instructed on October 25. 3-ER-437.

[5] Although EEOC and Activision subsequently filed two amended consent decrees, 2-ER-116, 282, neither amendment resolved the concerns that DFEH had raised. References to the consent decree herein refer to parallel provisions of the originally

a. Overbroad Scope and Release.

First, the consent decree impairs the DFEH's ability to protect California Activision employees and the California public by purporting to release FEHA claims that the DFEH is currently prosecuting in the State Action. Specifically, the consent decree purports to "finally resolve" and release state law claims, with Activision employees personally releasing all state law claims, including the FEHA claims asserted in the DFEH's State Action, in order to participate in the settlement. 1-ER-8, 11-12; 3-ER-557, 560, 570; *see also* 3-ER-473, ¶ 14. The decree creates a mechanism by which the EEOC and Activision can solicit individual waivers of California claims that were not asserted in the EEOC case, which the EEOC has no authority to litigate or settle. 3-ER-447-48, 457, 460-61.

b. Insufficient Representation and Unequal Transparency in Release Process.

Second, the consent decree interferes with DFEH's ability to prosecute the State Action, by subjecting California Activision workers to an asymmetric process whereby the EEOC and Activision collect sensitive individualized discovery and then secure overbroad releases of claimants' FEHA rights without claimants having access to information and advice from DFEH (the agency that has the power and expertise to litigate FEHA claims and is actually litigating them) to enable the claimants to make an informed, knowing, and voluntary choice as to whether to release them. 3-ER-568-69 (discussing one-sided claims process); *see also* 1-ER-61-76. In place of adequate counsel, the consent decree substitutes an hour of advice from a private lawyer paid for by Activision who has no experience in this litigation or access to the years of pre-suit investigation and formal litigation

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filed consent decree, filed September 27, 2021, and the final consent decree, approved on March 29, 2022.

discovery accumulated by the DFEH regarding the claims at issue. 3-ER-570; 1-ER-21.

c. Foreclosure, Removal, and Reclassification of Evidence.

Third, the consent decree impairs the DFEH's ability to gather discovery in its State Action in several ways. The decree requires Activision to remove highly relevant evidence of discrimination, harassment, and retaliation from victims' personnel files, creating a risk that such information may be lost or destroyed, or that it will become more difficult to obtain for discovery purposes in the State Action. 3-ER-574; 1-ER-25. The consent decree further impairs the DFEH's ability to prove retaliation by requiring Activision to alter its records to "[r]eclassify the terminations of any Eligible Claimant to voluntary resignations." 3-ER-574; 1-ER-25 (same). This rewriting of the past eliminates evidence crucial to the DFEH's retaliation claims and potentially prevents claims for wrongful termination.

On December 20, 2021, the district court denied intervention but allowed DFEH to file an amicus brief presenting objections to the consent decree. 1-ER-88-90. The DFEH timely appealed. 3-ER-613. On January 18, 2022, DFEH filed its objections in an amicus brief. 2-ER-236.

6. The District Court and Ninth Circuit Denied DFEH's Stay Motion

The DFEH then unsuccessfully moved to stay proceedings pending appeal, 2-ER-222; 1-ER-85. The DFEH also unsuccessfully moved this Court to stay the district court proceedings. Order Denying Emergency Stay Motion, *EEOC v. Activision Blizzard, Inc.*, Case No. 22-55060, Dkt. No. 17 (9th Cir. Mar. 28, 2022).

7. The District Court Denied Another Intervenor's Motion Based on Statutory Right.

On March 4, 2022, Jessica Gonzalez, an Activision worker whose claims are covered by the consent decree, also moved to intervene. 2-ER-201. Ms. Gonzalez had earlier filed a DFEH charge alleging sexual harassment and retaliation by Activision. 2-ER-202. She requested intervention to object to the proposed amended consent decree because, inter alia, the consent decree undermines her California claims and requires Activision "to move or destroy evidence that is pertinent to the ongoing DFEH lawsuit, which covers [her]." 2-ER-203. The Court denied her motion in a two-sentence order, even though Title VII unequivocally requires the court to allow her to intervene. 1-ER-84. 42 U.S.C. § 2000e-5(f)(1) (a "person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . in a case involving a . . . governmental agency").

8. The District Court Approved the Consent Decree with Almost No Analysis.

On March 22, the district court entered a three-page order, directing the parties to correct typos and asking a few questions about the decree. 1-ER-81-83. The court then stated,

> Though the Court may permit limited argument on other issues, many of the matters raised by the proposed intervenors, including the DFEH, are issues as to which the Court should – and will – defer to the Equal Employment Opportunity Commission. The parties have not specifically responded to the DFEH's Objections, though the Court notes that many of the statements in the Objections are simply inaccurate, based on speculation, or otherwise address issues that the DFEH should not be concerned with.

1-ER-83. In the next two sentences, the court discussed the EEOC Policy Manual. *Id.* The court conducted no other analysis of the decree's reasonableness or the DFEH's various objections. *Id.*

On March 25, the EEOC lodged a proposed second amended consent decree. 2-ER-116. On March 29, the district court signed the second amended consent decree that the parties had filed a few hours earlier, after the morning approval hearing, in a two-sentence order making no factual findings. 1-ER-55.

The DFEH has since moved to intervene again, for the purposes of challenging the substance of the final consent decree. 2-ER-93. That motion is pending.

VI. STANDARD OF REVIEW

This Court "review[s] a district court's decision allowing intervention as of right pursuant to Rule 24(a) *de novo*, except for the element of timeliness, which we review for an abuse of discretion." *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010); *see also Yorkshire v. U.S. IRS*, 26 F.3d 942, 944 (9th Cir. 1994); *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

This Court has "jurisdiction over a district court's denial of permissive intervention only if we conclude the district court abused its discretion." *Cooper v. Newsom*, 13 F.4th 857, 868 (9th Cir. 2021) (citations omitted). "An abuse of discretion occurs if the district court bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.* (quoting *Smith v. Marsh*, 194 F.3d 1045, 1049 (9th Cir. 1999)).

VII. SUMMARY OF ARGUMENT

The District Court erred in denying intervention as of right pursuant to Fed. R. Civ. P. Rule 24(a)(2), which states that a court "must permit" intervention to a movant who (1) files a timely motion; (2) claims a protectable interest relating to the subject of the action; (3) shows that the disposition of the action "may as a practical matter impair or impede" its interests; and (4) demonstrates that its interests are inadequately represented by the current parties. *Wilderness Soc'y v.*

U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011); *see also* Fed. R. Civ. P. 24(a)(2).

The DFEH plainly satisfies these elements. First, the DFEH's Motion, filed one month after the EEOC's complaint and consent decree, and at the earliest opportunity under the circumstances, was timely, and the district court did not find otherwise. Second, the DFEH has a protectable interest, codified by statue and evidenced by its first-filed State Action, in protecting California Activision employees and pursuing relief on their behalf, which the consent decree directly threatens. Third, the consent decree impairs and impedes the DFEH's interests by: (a) improperly purporting to resolve and potentially extinguish the DFEH's claims in the State Action; (b) harmfully incentivizing Activision employees, on whose behalf the DFEH is litigating in the State Action, to release and waive FEHA claims that the EEOC has no standing to bring, without adequate counsel and without any consideration; and (c) ordering Activision to remove and alter highly relevant evidence, and otherwise making it more difficult for the DFEH to obtain evidence necessary for its prosecution of the State Action. Fourth, by violating its own internal policies intended to protect FEPAs, and by opposing the DFEH's interests and arguments at each stage of the proceedings below, the EEOC has demonstrated that it cannot and will not adequately represent the DFEH's interests.

In denying the DFEH's Motion, the district court erred by failing to accept the DFEH's well-pled allegations and the plain text of the consent decree, instead stating, in conclusory fashion, that the decree "will not, and could not affect DFEH's ongoing litigation against Defendants," thereby failing to acknowledge the DFEH's interest. 1-ER-89. The district court has already been proven wrong by Activision's statements in the State Action, in which it has invoked the decree as a bar to liability and a limitation on remedies. It is difficult to conceive of a more direct way in which the "may impair or impede" element of Rule 24 is

satisfied. Under the de novo review applicable to intervention as of right, the lower court's departure from precedent requires reversal.

Furthermore, the district court abused its discretion in denying the DFEH's motion for permissive intervention under Rule 24(b). The district court agreed with the DFEH in finding that it "has substantive claims that share a common question of at least fact, and probably law, with the EEOC's claims," as the rule requires. 1-ER-89. However, the district court failed to consider any other relevant factors (including the required factor of delay or prejudice under Rule 24(b)(3)), and instead invented its own factor, finding intervention unwarranted because the DFEH is "litigating [its claims] in state court regardless of the outcome" of the consent decree. 1-ER-89-90. This factor is not part of the test, and in any event, it supports intervention, showing that the DFEH's interests are very much at stake in this litigation. The district court thus abused its discretion in denying permissive intervention.

VIII. ARGUMENT

A. The District Court Erred in Denying the DFEH's Motion for Intervention as of Right.

Rule 24(a)(2) provides a mandatory right to intervention if (1) the motion is timely, (2) the applicant claims a "'significantly protectable' interest relating to the property or transaction which is the subject of the action," (3) the applicant is so "situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest," and (4) the "applicant's interest [is] inadequately represented by the parties to the action." *Wilderness Soc'y.*, 630 F.3d at 1177 (quoting *Sierra Club v. United States EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)); *see also* Fed. R. Civ. P. 24(a)(2).

This Court has explained that Rule 24's requirements are construed "broadly in favor of proposed intervenors," because "[a] liberal policy in favor of

intervention serves both efficient resolution of issues and broadened access to the courts." *Wilderness Soc'y*, 630 F.3d at 1179 (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002)). In addition to applying a liberal construction, this Court is "'guided primarily by practical considerations,' not technical distinctions" in reviewing intervention motions. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818 (quoting *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986)). Further, courts must accept "all well-pleaded, nonconclusory allegations in [intervention motions] . . . as true." *Id.* at 820. This rule "requiring acceptance of the proposed intervenor's well-pleaded allegations makes particular sense where, as in this case, the propriety of intervention must be determined before discovery." *Id.* at 819-20.

Each requirement is readily met here.

1. The Motion to Intervene Was Timely.

Timeliness turns on: (1) "the stage of the proceeding"; (2) whether the parties would be prejudiced; and (3) "the reason for and length of the delay," if any, in moving to intervene. *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990). Here, the DFEH's intervention motion was timely because it was filed less than a month after the EEOC filed the decree, and the parties suffered no prejudice during those few weeks.

Indeed, the DFEH initiated meet and confer discussions with the EEOC two days after the decree filing, 3-ER-539, ¶ 18, and a week later, the DFEH moved *ex parte* to shorten the timeline for pursuing intervention, 3-ER-540.

This diligent action satisfies timeliness. *See, e.g.*, *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (motion filed "less than three months after the complaint was filed and less than two weeks after the [defendant] filed its answer to the complaint" was timely); *City of Los Angeles*,

288 F.3d at 398 (motion filed "approximately one and half months after the suit was filed" was timely).

2. DFEH Has a Protectable Interest in the Action and Consent Decree.

The existence of a protectable interest under Rule 24 is a "practical, threshold inquiry. No specific legal or equitable interest need be established." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) (citing *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 308 (9th Cir. 1989)). "It is generally enough that the interest [asserted] is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818 (9th Cir. 2001) (quoting *Sierra Club*, 995 F.2d at 1484). An applicant generally satisfies the "relationship" requirement if "the resolution of the plaintiff's claims actually will affect the applicant." *Donnelly*, 159 F.3d at 410. This is intended to serve as a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *City of Los Angeles*, 288 F.3d at 398 (quoting *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)).

As discussed throughout this brief, the DFEH has a clear, protectable interest in advocating for California workers, fully enforcing its FEHA claims in the first-filed State Action, and ensuring that those claims are not improperly extinguished or hindered by parties that have no standing or authority to bring them, for inadequate consideration, and without reasonable safeguards in place for impacted workers. This interest is acute in these extremely rare (or unprecedented) circumstances – where a state FEPA is pursuing state law claims in state court, and the EEOC seeks to resolve them in a separate action.

Courts have recognized that government agencies have a right to intervene in order to protect their enforcement interests, including to seek damages or

remedies that the parties cannot. For example, in a reverse situation, the U.S. Department of Justice ("DOJ") was allowed to intervene in a DFEH action asserting federal claims. *Dep't of Fair Emp. & Hous. v. Law Sch. Admission Council, Inc.*, No. 12 Civ. 1830, 2012 U.S. Dist. LEXIS 150413, at *4 (N.D. Cal. Oct. 18, 2012) ("*LSAC*"). In *LSAC*, the DFEH brought federal disability rights claims on behalf of Californian Law School Admission Test test-takers. *Id.* at *1. The DOJ sought to intervene to protect its interests in enforcing federal disability law nationally and seeking certain damages that only the DOJ had statutory authorization to seek. *Id.* at *4. The court agreed and granted intervention, finding that DOJ had a protectable interest "in enforcing the ADA and its implementing regulations on a national scale." *Id.*; *see also id.* at *3 ("A governmental agency has a significant protectable interest in defending its regulations from challenges and in ensuring that the interpretation of the statutes and regulations it is charged with enforcing are accurately presented to the Court in the course of litigation." (citing *Smith v. Pangilinan*, 651 F.2d 1320 (9th Cir. 1981); *Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967) and *Sec. & Exch. Comm'n v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 460 (1940)).

Applying these basic principles to states' rights regarding state law, the Supreme Court this year reemphasized the importance of allowing states to intervene in situations like these:

> [A] State "clearly has a legitimate interest in the continued enforceability of its own statutes, and a federal court must "respect . . . the place of the States in our federal system." This means that a State's opportunity to defend its laws [through intervention] in federal court should not be lightly cut off.

Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1011 (2022) (citations and quotations omitted).

Indeed, the DFEH's "interest" in, and "relationship to" the consent decree, is far more specific, actualized and proximate than others found by the Supreme Court and this Court to be sufficient to warrant intervention. *See, e.g.*, *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135-36 (1967) (State of California had protectable public interest to intervene in hearings relating to federal government's antitrust suit against private gas company for purposes of ensuring a competitive market for gas in the state); *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) (public interest group that had backed ballot initiative had sufficient interest to intervene in action challenging initiative); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-27 (9th Cir. 1983) (public interest groups involved in creating wilderness area had sufficient interest to intervene in action challenging federal statute under which area was created); *Johnson v. S.F. Unified School Dist.*, 500 F.2d 349, 353 (9th Cir. 1974) (interest of "all students and parents, whatever their race, . . . in a sound educational system and in the operation of that system in accordance with law" was sufficient to support intervention in school desegregation case); *see also Smuck v. Hobson*, 408 F.2d 175, 179-80 (D.C. Cir. 1969) (*en banc*) (parents' "concern for their children's welfare" was a sufficient interest in school desegregation case).

a. The District Court Erred in Finding That the DFEH Lacks a Protectable Interest.

The district court misunderstood the contours of the DFEH's interest in antidiscrimination law, holding that only individuals have those rights. Specifically, the court held that the DFEH has no protectable interest under Rule 24 in "upholding the rights of California citizens . . . [or] in protecting DFEH's ability to prosecute its own parallel state court case based on California law." 1-ER-88-89. According to the district court, any interest in challenging the consent decree's "release [of] California state law claims . . . belongs to individuals who

might make claims under the [consent decree's] claims process, not to DFEH." 1-ER-89. In the court's view, the interests that the DFEH asserts here would allow it to intervene "in almost any employment action in California" and therefore must be outside the bounds of Rule 24. *Id.*

First, as a general matter, the district court erred in failing to acknowledge the DFEH's interest in protecting Activision workers, enforcing FEHA claims in the State Action, and preventing an unauthorized release of California state law claims. The California Legislature has straightforwardly declared these to be DFEH interests. Specifically, the DFEH has a statutory mandate to protect California workers' right to "seek, obtain, and hold employment without discrimination" as an exercise of the State's police powers. Cal. Gov. Code §§ 12920, 12930. The DFEH can do that – and is doing so – through a FEHA enforcement action.

Second, the district court misstated the law in ruling that only aggrieved employees ("individuals who might make a claim"), and "not . . . DFEH," have an interest in challenging the consent decree's release of California state law claims. 1-ER-89. To establish a protectable interest, Rule 24 merely requires intervenors to show "a relationship between the legally protected interest and the claims at issue," *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818, such that "the resolution of the plaintiff's claims actually will *affect* the applicant," *Donnelly*, 159 F.3d at 410 (emphasis added). The DFEH has shown that relationship, and it is not diminished by the fact that aggrieved employees happen to have a similar related interest.

Here, the consent decree "affects" (and indeed directly undermines) the DFEH's State Action in several significant ways. Critically, as described further below, the decree includes language that Activision has used to argue that the DFEH's claims have been "released" or otherwise "resolved," and are therefore

barred, whether on preclusion, estoppel principles or otherwise. *See* 3-ER-557, 560. The decree further "affects" the DFEH's ability to obtain discovery in the State Action by requiring Activision to relocate and alter relevant records in its employees' personnel files, by potentially making discovery regarding settling employees more difficult to obtain, and by disincentivizing settling employees from cooperating with or providing discovery to the DFEH. 3-ER-574; 1-ER-25. Finally, the decree "affects" the DFEH in its statutory duty to protect California workers by including a waiver of California claims that were not asserted (and could not have been asserted) by the EEOC, and as to which no consideration could have been obtained, all without adequate counsel in light of DFEH's ongoing State Action. 1-ER-78-79. The inquiry on a Rule 24 motion is not, as the district court posited, whether "individual Californians have a right to settle their claims with or without counsel and without input from DFEH," 1-ER-89, but instead whether the DFEH has a protectable interest at stake. And indeed it does. Cal. Gov. Code §§ 12920, 12930. In other words, the district court failed to address the procedural question of intervention by jumping to the substantive question of the reasonableness of the decree (can individuals settle claims in this way under this decree?).

Third, the district court's characterization of the DFEH's interests as being solely of a "general" nature such that they could be asserted "in almost any employment action in California" improperly ignores the unique posture of this case, and DFEH's statements regarding its limited goal here. 1-ER-88-89. The DFEH's Motion is not predicated solely on a generalized interest in employment lawsuits. Rather, the DFEH points to the highly unusual situation here, where the EEOC seeks to settle state claims already being litigated by the DFEH (and where the EEOC has no authority to settle those claims). That is an extremely specific situation that appears to be unprecedented, and is readily distinguishable from

everyday employment litigation. Moreover, the refusal to permit intervention by the DFEH or other FEPAs seeking to protect their ongoing enforcement actions from interference threatens to substantially erode Rule 24 generally and the federalist balance of Title VII specifically.

The district court's failure to acknowledge the DFEH's significant protectable interest in the subject matter of this action was reversible error.

3. The Consent Decree May Impair or Impede the DFEH's Ability to Protect Its Interests.

Rule 24 merely requires a showing that the disposition of the action "*may* as a practical matter impair or impede the movant's ability to protect its interest." *Wilderness Soc'y*, 630 F.3d at 1177 (emphasis added) (quoting Fed. R. Civ. P. 24(a)(2)). In this Circuit, where the "absentee [intervenor] would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee's notes to 1966 amendments); *Citizens for Balanced Use*, 647 F.3d at 898 (same); *cf.* Wright & Miller, Federal Practice & Procedure § 1908.2 n.10 ("The rule is satisfied whenever disposition of the present action would put the movant at a disadvantage in protecting its interest.").

It is well-settled that the adverse effects of a settlement or consent decree on an intervenors' ability to protect its legal interests (including in litigation) constitutes "impairment" under Rule 24. In *United States v. Oregon*, for example, this Court addressed the "pivotal issue" of "whether the disposition of this action, as a practical matter, may impair or impede the intervenors' ability to protect their interests" in a different lawsuit. 839 F.2d 635, 638 (9th Cir. 1988). The Court concluded that the answer was **yes**, due to the potential for a "*stare decisis* effect in any parallel or subsequent litigation" and, "more important[ly]" the possibility that

the instant litigation "may impair appellants' ability to obtain effective remedies in later litigation." *Id.*; *see also City of Los Angeles*, 288 F.3d at 396-401 (9th Cir. 2002) (district court erred finding that the Police League's interest would not be impaired where U.S. government entered into consent decree with City that may have been applied in a manner contrary to the League's bargaining agreement with the City); *Stringfellow*, 783 F.2d at 827 ("Where, as here, a prospective intervenor has demonstrated a clear interest in the remedial scheme, and where the prospective intervenor seeks to obtain remedies that differ from those sought by the original plaintiffs, it is reasonable to conclude that disposition of the litigation may impair the prospective intervenor's ability to protect its interests."), *vacated and remanded on other grounds sub nom. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *United States v. Michigan*, No. G84-63, 1984 U.S. Dist. LEXIS 18315, at *21-22 (W.D. Mich. Mar. 23, 1984) (prison inmates who previously filed lawsuit challenging prison conditions had right to intervene in suit filed by DOJ against state prison system where resulting consent decree's provisions "may quite possibly impair and/or impede their efforts to seek relief" in the inmates' lawsuit).

In its Motion, the DFEH listed specific, substantial ways in which the decree impairs its ability to enforce FEHA, litigate its State Action, and protect California Activision workers. Contrary to this Court's instruction that it read Rule 24 "broadly" in favor of intervention and accept the movant's assertions as true, the district court summarily rejected the DFEH's showing, declaring, without explaining, that "the proposed consent decree will not, and could not, affect DFEH's ongoing litigation against Defendants." 1-ER-89. Without accepting, or even addressing, the DFEH's well-pleaded allegations, the court simply announced that "nothing in the consent decree would appear to prevent DFEH from reaching a separate agreement with Defendants in its own case to supplement the recovery to

individuals" who obtain relief under that decree. *Id.* In other words, the court found no risk of impairment to the DFEH's interests, on the logic that Activision might, someday, voluntarily pay more money to victims who had already released their California claims under the consent decree.

In so holding, the district court erred in failing to recognize the serious and substantial ways in which the consent decree impairs and impedes the DFEH's interests, as described further below.

a. The Decree's Overbroad Release Exposes the DFEH to Risks of Dismissal, Stay, Narrowing of Scope, and Limited Remedies.

As highlighted above, the consent decree includes language that Activision may use to seek a dismissal or stay of DFEH's claims in the State Action, particularly those relating to sexual harassment, pregnancy discrimination, and retaliation. Specifically, the decree's "Release" section purports to "completely and finally resolve[] *all allegations, issues, and claims* raised" in EEOC's *lawsuit and investigatory charge*,[6] including but not limited to allegations relating to "sexual harassment, pregnancy discrimination and/or related retaliation," such as those alleged in DFEH's State Action. 3-ER-557, 560; *see also* 1-ER-7-8, 11 (same). The decree not only fails to carve out state law claims; it expressly includes them. 3-ER-557 (stating the parties' intent to "resolve all issues through this Decree," whether "arising under Title VII *or analogous state and local laws*"); 1-ER-3; 1-ER-8; *see also* 1-ER-78 (requiring claimants to "waive any right [they]

[6] Notably, EEOC's administrative charge is broader than its complaint and includes, inter alia, allegations that Activision: "1. Subject[ed] female employees to sex-based discrimination, including harassment, based on their gender. 2. Retaliat[ed] against female employees for complaining about sex-based discrimination, based on their gender. 3. Pa[id] female employees less than male employees, based on their gender." 3-ER-609, ¶ 15.

may have to recover . . . relief . . . in the DFEH Lawsuit for sexual harassment, pregnancy discrimination or related retaliation").

Activision has already taken the position in the State Action that the federal decree bars the DFEH from litigating various FEHA claims in the State Action, in terms of both liability and remedies. In particular, Activision's State Action Amended Answer asserts that the DFEH's "Complaint . . . *is barred* . . . to the extent that any putative class members are covered by any . . . release of claims covering any claims alleged in this action." *See* Activision Answer to DFEH's First Amended Complaint,[7] 16th Affirmative Defense, ¶ 224; 21st Affirmative Defense, ¶ 234 (DFEH remedies "are *limited by the doctrine of estoppel*"); 26th and 28th Affirmative Defenses, ¶¶ 244, 248 (DFEH claims are subject to offset, and the DFEH "cannot recover monetary relief for any claims waived or released by any putative class member"); 30th Affirmative Defense, ¶ 252 ("DFEH's *request for injunctive relief is moot*, at least in part, to the extent the Consent Decree in the EEOC action remedies the claims asserted in this action.") (emphasis added).[8] The existence of these potential defenses – whether eventually meritorious or not – constitutes a quintessential impairment of the DFEH's interest. The DFEH's interest in pursuing these state claims *may* be impaired.

In light of this risk, the district court's unsupported declaration that the consent decree "will not, and could not affect the DFEH's ongoing litigation against Defendants," was erroneous.[9] 1-ER-89. The court ignored the impact on

[7] Activision's Amended Answer to DFEH's First Amended Complaint is attached as Exhibit A to the Declaration of Jahan C. Sagafi in support of DFEH's Request for Judicial Notice, filed simultaneously with DFEH's opening brief.
[8] Earlier, when asked if the decree contemplated dismissal of the DFEH's FEHA claims in the State Action, Activision replied, "Not in their entirety." 2-ER-364.
[9] Alternately, the district court's statement limits the scope of the release, preventing Activision from invoking the decree in the State Action, because the court approving the decree has limited its scope.

DFEH's State Action, instead hypothesizing that future action by Activision "to supplement the recovery to" decree claimants might minimize such impact. *Id.* The court's mistaken analysis inverts the Rule 24 standard. Looking past the current impairment, the court postulated Activision's possible future correction of the impairment. But "it is not enough to deny intervention under 24 (a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Nat. Res. Def. Council, Inc. v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977). Here, now, "as a practical matter," the decree "'may' impair rights" of the DFEH. *City of Los Angeles*, 288 F.3d at 401 (quoting Fed. R. Civ. P. 24(a)(2)).

b. The Decree's Explicit Release of Claimants' State Law Claims Impedes the DFEH's Efforts to Protect California Workers

Under the decree, claimants can receive money for Title VII claims *only if* they *also* waive state rights and remedies, including "**any right I may have to recover any monetary damages or other *relief the DFEH may recover in the DFEH Lawsuit* for sexual harassment, pregnancy discrimination or related retaliation**." 1-ER-78 (bold emphasis in original). The decree reiterates this by embracing "the release of claims to which the EEOC is not a party." 3-ER-570; 1-ER-21, 78; 3-ER-473, ¶ 14 (noting EEOC's counsel's stated intent to release sexual harassment, pregnancy, and retaliation claims under both federal and state law).

The consent decree puts claimants at a disadvantage by seeking a release in exchange for an amount of money determined by lawyers without familiarity with their and other victims' facts, while stripping the victims of the benefit of competent counsel. The claimants will be blind as to the DFEH's accumulation of evidence and years of legal expertise with FEHA claims. For example, a given claimant will not have access to evidence that her manager harassed another woman, that Activision promoted her male colleague prematurely, that Activision

underpaid her by 17.2% in 2017 but by 25.6% in 2018, and that three other women reported sexist comments and retaliation by a male colleague who was then given increased managerial responsibilities. Through this asymmetric process, claimants will have to accept or reject a settlement offer in a vacuum. Meanwhile, across the street in state court, the DFEH will have access to this information for the benefit of the victims, but will be unable to use it to help them.

This is the type of absurd result that Congress sought to prevent in designing Title VII to prioritize state enforcement, and that EEOC has long avoided through its wise policy of refusing to release claims that it does not, and could not, bring. The EEOC Policy Manual cautions EEOC lawyers from allowing this to happen: "[I]ndividual relief in Commission actions *cannot be conditioned upon a waiver of legal claims other than those asserted in the Commission's complaint*" (here, Title VII only), and "individual waivers of common law claims *or other statutory claims* (including claims under *state fair employment practices laws*) ***are not permitted*** even where the factual basis of the claim is identical to that pled in the Commission's action." 3-ER-522-23 (emphasis added); *see also id.* ("Conditioning an individual's relief in a Commission suit on the release of [state law] claims *would diminish rather than enhance his or her rights*. Further, because the Commission could not have recovered on these separate claims if it prevailed at trial, *the relief received in a Commission settlement cannot constitute consideration for a release of the claims*.") (emphasis added).

The Policy Manual's exception that "[a] claimant represented by private counsel can agree to a broader waiver" does not redeem the consent decree's curious structure here. 3-ER-522. That exception is no mere formality. The EEOC cautions: "However, this requires actual representation" and "an agreement" to expand the waiver to cover other claims; "[S]imply informing a claimant of his or her right to private counsel is not sufficient, even if the claimant

expressly declines to exercise the right." 3-ER-523. In other words, where an individual has counsel and wishes to negotiate a settlement that also releases state claims alongside an EEOC settlement, she can do so. The decree attempts to leverage this exception by offering one hour of advice by a lawyer unfamiliar with the litigation and claims, paid by Activision. 3-ER-570.

This is not "actual representation" by independent "private counsel." First, the provision does not guarantee or require "actual representation;" it simply makes representation available. Second, sixty minutes of work on a case of this magnitude and complexity is woefully inadequate. Here, claimants will be required to submit a 16-page claim form detailing incidents of sexual harassment, pregnancy discrimination, and related retaliation they have experienced or witnessed, including the names of all managers, supervisors, and employees involved; the reasons they believe their rights were violated; the emotions they felt as a result of those incidents; and the pay they believe they have lost as the result of those incidents. 1-ER-60-76. Reasonable "actual" representation would require not only a review of the claimant's answers but also an analysis of thousands of pages of document discovery, deposition transcripts, third-party witness interviews, and data, as well as extensive legal research, culminating in detailed discussions with the claimant. How could an attorney unfamiliar with the record in the State Action do more than scratch the surface in one hour? Third, an attorney advising Activision's victim, but paid for by Activision, would be ethically conflicted.[10]

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[10] *See* Model Rules of Pro. Conduct R. 1.8(f) (Am. Bar. Ass'n 2020) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."); *see also* Model Rules of Pro. Conduct R. 1.8 cmt. 11

To see the inadequacy of this arrangement, one need only note the EEOC's own arguments against it in another context. In 2011, the EEOC itself robustly argued against precisely this kind of jerry-rigged structure. It explained that departures from its policy against state law waivers cannot be cured by "[a] private attorney's post hoc review of the settlement agreement" – particularly where, as here, the claimants were deprived during the bargaining process of a "legal advocate [who could] seek[] greater relief for additional state and local claims during settlement discussions." 2-ER-272.

Here, the decree's effort to wiggle through a perceived loophole in its own Policy Manual, in contravention of the delicate balance established by Congress in crafting Title VII to respect considerations of federalism, readily satisfies the impairment prong.

c. The Decree Impairs DFEH's Ability to Secure Discovery From and About Settling Employees in the State Action.

The decree also hinders the DFEH's efforts to obtain discovery in the State Action. As a practical matter, the consent decree incentivizes claimants to waive their California law claims (by offering them money for federal claims to do so). Such waivers will predictably deprive the DFEH of the cooperation and participation of potential witnesses and claimants in the State Action; the victims of Activision's sexual harassment, pregnancy discrimination, and retaliation will

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("Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation . . . lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client."). Because one hour of consultation is plainly inadequate to review, evaluate and advise claimants on their claims and the benefits and drawbacks of accepting the settlement and release, appointed lawyers could not ethically accept this type of representation.

have no tangible incentive to provide evidence or to testify in the DFEH action once they have signed away their FEHA rights under the consent decree. In addition, the DFEH faces the risk that Activision will use the individual releases to try to limit the DFEH's access to discovery regarding the releasing employees, further impeding the DFEH's efforts to prosecute the State Action.

d. The Consent Decree Requires Activision to Remove, Alter, and Reclassify Evidence Important to the DFEH's State Action.

The decree may further impair the State Action by authorizing, and even requiring, Activision to remove or alter relevant evidence. Specifically, the consent decree requires Activision to remove highly relevant evidence of discrimination, harassment and retaliation from impacted employees' personnel files, significantly increasing the risk that such information may be lost or destroyed. 3-ER-574 (requiring Activision to "[r]emove from the personnel files of each Eligible Claimant any references to the allegations related to sexual harassment, pregnancy discrimination, and/or related retaliation except to the extent that Defendants must keep records of the allegations . . . in order to effectuate this Decree"); *see also* 1-ER-25 (materially similar language). Although Activision must "retain a record" of any "information removed," 1-ER-25, the decree is silent as to how or where this information will be recorded, who will have access to it, or how the DFEH may obtain the original records in discovery in the ongoing litigation. *Id.*

The consent decree further impairs the DFEH's ability to prove retaliation by requiring Activision to alter its records to "[r]eclassify the terminations of any Eligible Claimant to voluntary resignations." 3-ER-574 (requiring Activision to "[r]eclassify the terminations of any Eligible Claimant to voluntary resignations if they have been identified by the EEOC as being subjected to retaliation"); 1-ER-25 (same). This provision does not even include any requirement that Activision

retain the termination records it has altered. This erasure of history eliminates evidence crucial to DFEH's retaliation claims and potentially prevents claims for wrongful termination.

While acknowledging that DFEH has a "potentially valid interest" in "protecting evidence from being destroyed," the district court dismissed the DFEH's concerns regarding the removal and alteration of evidence in employees' personnel files, as "speculative." 1-ER-89. Specifically, the court declared: "there is no serious possibility that the Court would enter a consent decree that would purport to allow or mandate destruction of evidence relevant to litigation." 1-ER-89. The court reasoned that the "EEOC also denies that any evidence destruction *is intended* by the terms of the consent decree." *Id.* (emphasis added). In short, the court ignored the text of the decree, in favor of generalized hand-waving that the decree must not mean what it says. By substituting its own judgment, and the EEOC's self-interested intentions, in place of the plain text of the decree and the DFEH's assertions, the court failed to accept DFEH's allegations as true. *Id.*; *see also* 1-ER-83 (stating that the DFEH's concerns raised issues "as to which the Court should – and will – defer to the [EEOC]"). This was clear error. *Sw. Ctr. For Biological Diversity*, 268 F.3d at 820 (in evaluating a motion to intervene, courts much accept "all well- pleaded, nonconclusory allegations . . . as true.").

The district court compounded its error in dismissing the DFEH's interest in preserving relevant evidence as "speculative." 1-ER-89. Taking the decree at its word requires no speculation, and even a potential risk of loss of evidence supports intervention, as Rule 24 only requires that the action "may" impair or impede the movant's interest. *See City of Los Angeles*, 288 F.3d at 401 (rejecting United States' argument that intervenor's stated interest was "purely speculative" as "flawed" because "the relevant inquiry is whether the consent decree 'may' impair rights 'as a practical matter' rather than whether the decree will 'necessarily'

impair them." (quoting Fed. R. Civ. P. 24(a)(2)); *see also Citizens for Balanced Use*, 647 F.3d at 900 (stressing that "intervention of right does not require an absolute certainty that a party's interests will be impaired").

Notwithstanding the district court's assurance that it would not enter a consent decree that would allow or mandate the destruction of relevant evidence, *see* 1-ER-89, the decree here does precisely that. At a minimum, this language "may" impair or impede DFEH's tasks in conducting discovery, obtaining relevant evidence, and litigating the State Action.

4. The EEOC and Activision Do Not Adequately Represent the DFEH's Interests.

Adequate representation turns on a three-part test, requiring that: "(1) the interests of a present party to the suit are such that it will undoubtedly make all of the intervenor's arguments; (2) the present party is capable of and willing to make such arguments; and (3) the intervenor would not offer any necessary element to the proceedings that the other parties would neglect." *Cnty. of Fresno*, 622 F.2d at 438-39. "The most important factor in determining the adequacy of representation is how the interest [of the intervenor] compares with the interests of existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). The inadequacy requirement is "satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trobovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (citing 3B James W. Moore et al., Moore's Federal Practice ¶ 24.09-1(4) (1969)).

Here, the DFEH readily satisfies its minimal burden, because the EEOC's representation "may be" – in fact, actually is – "inadequate." The record demonstrates that all three factors weigh in the DFEH's favor. First, the EEOC and Activision undoubtedly will *not* make (and have not made) all of the DFEH's

arguments, but have instead vigorously opposed those arguments. *See, e.g.*, 3-ER-375; 3-ER-407. Second, because they are not authorized to bring FEHA claims in their own right or on behalf of California workers, they are *not* able or willing to make DFEH's arguments or to represent its interests. Third, the DFEH *will* add a necessary element to the proceedings that the EEOC and Activision would neglect, namely its objections seeking to ensure that the consent decree does not impinge on state law claims.

As approved, EEOC's consent decree forces impacted California employees to choose between obtaining federal relief (through the EEOC's settlement) or state law relief (through DFEH's suit), without providing a feasible option for them to obtain both.[11] The EEOC thus cannot adequately represent DFEH's interests in protecting such employees' right to obtain the full relief to which they are entitled. *Cf. Alexander*, 415 U.S. at 48 (consistent with congressional intent, Title VII "allow[s] an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.").

a. As an Agency of the Federal Government, the EEOC Is Inadequate to Represent a State's Interest, Especially Where the State Asserts a Contrary Interest.

The DFEH has substantially different objectives and interests from the EEOC, as the EEOC does not represent the public interest of California. Further, the DFEH is not an EEOC constituent, and the "EEOC cannot be viewed as a de facto representative for [a state] every time it enters into a consent order. . . . [T]he EEOC does not act 'merely [as] a proxy for victims of discrimination' but rather

[11] As the parties explained to denied-individual-intervenor Ms. Gonzalez, "in order to pursue a remedy for" both federal and state law claims, Ms. Gonzalez would be required to opt out of the consent decree, "file her own charge with the EEOC and then bring an individual lawsuit against Defendants" separately or in addition to participating in DFEH's State Action. 2-ER-206. This is not efficient or even feasible on a class-wide basis.

brings discrimination actions 'in its own name' for the enforcement of federal law and the effectuation of the public interest." *EEOC v. Fed. Express Corp*., 268 F. Supp. 2d 192, 203 (E.D.N.Y. 2003) (quoting *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980)). As the district court observed in *Federal Express*:

> [When state governments seek] to effectuate *their respective definitions of the public interest*, it is entirely possible that conflicts of interest or differing priorities will arise. In such cases, . . . our system of federalism, which is not based upon a monolithic view of the public interest, . . . embraces the notion that *states, in the exercise of their police power, may define the public interest with reference to the aspirations of their own citizenry*.

Id. (emphasis added).

Having directly opposed DFEH's objectives and arguments at every turn, with respect to its motion to intervene, amicus objections, and motion to stay, EEOC cannot now profess to represents DFEH's interests. *Cf. City of Los Angeles*, 288 F.3d at 402 (finding no presumption of adequacy where the parties have demonstrated "a marked divergence of positions concerning key elements of the decree and underlying theories of liability"); *Michigan*, 1984 U.S. Dist. LEXIS 18315, at *24 ("if the interests of the applicants and the party in question are divergent so that their interests are similar but not identical, intervention should ordinarily be allowed").

b. The EEOC Is Inadequate Because It Lacks Standing to Assert DFEH's Claims, and the District Court Lacks Jurisdiction to Resolve Them.

Federal courts must assure themselves of litigants' Article III standing, and "[t]hat obligation extends to court approval of proposed class action settlements." *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019). "A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing." *Id.*; *see also Simon v. Eastern*

Ky. Welfare Rights Org., 426 U.S. 26, 40, n.20 (1976). The same is true of government settlements. Although the EEOC is not subject to class certification requirements, a district court cannot approve a proposed consent decree that purports to release claims not before it. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992) (consent decrees are subject to the rules generally applicable to other judgments and decrees); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) ("A consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction.").

Here, the EEOC lacks standing to allege, let alone extinguish, FEHA and other state law claims that the consent decree purports to release. Without a plaintiff with standing to assert those claims, the district court lacks subject matter jurisdiction to resolve such claims through the consent decree. 42 U.S.C. § 2000e-5 (granting EEOC authority over only Title VII claims brought against private employers); *Victa v. Merle Norman Cosms., Inc*., 19 Cal. App. 4th 454, 463 (Cal. Dist. Ct. App. 1993) (the EEOC lacks standing to litigate FEHA claims); *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1507 (9th Cir. 1990) (the EEOC has no power to extinguish state claims or statutory rights); *Frank*, 139 S. Ct. at 1046 (2019). Without standing to confer jurisdiction over the DFEH's claims, the EEOC cannot adequately represent California interests.[12]

[12] EEOC's violation of its own policy and past litigation standards prohibiting it from settling state law claims that it lacks standing to assert, (which policy protects impacted workers, such that those DFEH represents in the State Action), further demonstrates its inadequacy. 3-ER-522 ("Conditioning an individual's relief in a Commission suit on the release of [state law] claims would diminish rather than enhance his or her rights.").

c. The EEOC's Failure to Demonstrate Due Diligence in Reaching the Settlement and Showing that the Settlement Amount Is a Reasonable Discount on the Total Value of the Claims Supports a Finding of Inadequacy.

Lastly, the EEOC failed to make the proper showing to allow the district court to make a fully informed decision about the reasonableness of the settlement amount. This failure has two components.

First, the EEOC did not describe in detail the discovery it had conducted to support the settlement. The EEOC merely stated that it had collected "information, documents, and testimony" from Activision, 3-ER-609, without specifying how many pages of discovery Activision produced and the EEOC reviewed, how many depositions the EEOC took of Activision management and other witnesses, how much data from what employees and time periods the EEOC received and analyzed, how many victims the EEOC spoke with, and then what that due diligence revealed about the strengths and weaknesses of the claims being released.

Second, the EEOC failed to calculate the total potential exposure Activision faces for the potential claims of the victims covered by the consent decree. Without having that starting point, the court was unable to assess whether the $18 million settlement figure was adequate. Was it an impressive 50% of a $36 million exposure, or a less impressive 10% of a $180 million exposure? In a vacuum, it is impossible for a court to know whether $18 million is an amazing or paltry amount.

By failing to perform this analysis, when releasing valuable claims being litigated by the DFEH in the State Action, the EEOC demonstrated its inadequacy in asserting the DFEH's and the California workers' interests.

B. The District Court Abused Its Discretion in Denying the DFEH's Motion for Permissive Intervention.

The district court abused its discretion by failing to allow the DFEH to intervene permissively, under both Rule 24(b)(1) and (b)(2). First, the DFEH satisfied the basic threshold requirements of (b)(1)[13] because its motion was clearly timely, *see* Section VIII(A)(1) *supra*, and, as the district court found, the DFEH "has substantive claims [in the State Action] that share a common question of at least fact, and probably law, with the EEOC's claims in this case." 1-ER-89. Second, the DFEH satisfied (b)(2) because it is a "state . . . agency" that seeks to intervene based on the EEOC's purported resolution of claims under a California statute that DFEH is charged with enforcing, namely FEHA.

Because the DFEH satisfied the basic permissive intervention requirements, the district court was required to "consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties." *Donnelly*, 159 F.3d at 412 (in exercising discretion, courts "must consider" undue delay and unfair prejudice); Fed. R. Civ. P. 24(b)(3) ("the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights" in exercising its discretion).

District courts have also considered additional discretionary factors, including, "the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case" as well as "whether the intervenors' interests are adequately represented by other parties" and "whether parties seeking intervention

[13] Permissive intervention sometimes requires "an independent ground for jurisdiction." *Freedom from Religion Found., Inc. v. Geithner,* 644 F.3d 836, 843 (9th Cir. 2011). However, this requirement "does not apply to proposed intervenors in federal-question cases when [as here] the proposed intervenor is not raising new claims." *Id.* at 844. Because the DFEH is not seeking to assert new claims, this jurisdictional requirement "drops away." *Id.*

will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

In denying permissive intervention here, the court did not address delay and prejudice (as it was required to), or the additional *Spangler* factors (as it was permitted to), but instead denied intervention in a non sequitur, noting that the DFEH is "litigating [its claims] in state court regardless of the outcome" of the consent decree. 1-ER-90. The pendency of another case is no basis to deny intervention; rather, here it supports intervention. The court's unreasoned analysis was an abuse of discretion. *See City of Los Angeles*, 288 F.3d at 403 (reversing and remanding where district court "did not specifically apply the standards for permissive intervention" but instead held, without support, that intervention for enforcement of a proposed government consent decree is impermissible).

C. After Reversal, the District Court Should Ensure that the Consent Decree Honors the Limits of the EEOC's Authority, and Be Approved Only on a Showing that the Relief Is Fair, Reasonable, and Adequate.

The DFEH requests that this Court reverse and remand with instructions that the district court allow the DFEH to intervene, assert argument at a new fairness hearing, and be allowed to appeal if it chooses. *See City of Los Angeles*, 288 F.3d at 404-05 (amicus status "is insufficient to protect" intervenors rights because it does not allow intervenor to "raise issues or arguments formally and gives it no right of appeal"); *Edwards v. City of Hous.*, 78 F.3d 983, 989 (5th Cir. 1996) (ordering, on remand, intervention "with the rights of full parties" and "another 'fairness hearing'").

Ultimately, the DFEH simply seeks to participate for the limited purpose of ensuring that this consent decree not be approved, and that any decree that is

eventually approved is faithful to the requirements of Title VII's respect for state rights and Article III's jurisdictional limits. Any such settlement will necessarily restore the balance between the DFEH and other states' FEPAs on the one hand, and the EEOC on the other, by ensuring that no government agency oversteps its proper statutory authority.

IX. CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's order denying DFEH's Motion.

Dated: May 18, 2022

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for Proposed Intervenor-Appellant California Department of Fair Employment and Housing states that I am unaware of any related cases currently pending in this court.

Dated: May 18, 2022

By: /s/ Jahan C. Sagafi
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,266 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: May 18, 2022

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ADDENDUM

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ADDENDUM

UNITED STATES CONSTITUTION

Article III

…

Section 2.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;— to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

…

UNITED STATES CODE

28 U.S. Code § 1291. Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S. Code § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S. Code § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S. Code § 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

28 U.S. Code § 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is--

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

29 U.S. Code § 626(b). Recordkeeping, investigation, and enforcement

(b) ENFORCEMENT; PROHIBITION OF AGE DISCRIMINATION UNDER FAIR LABOR STANDARDS; UNPAID MINIMUM WAGES AND UNPAID OVERTIME COMPENSATION; LIQUIDATED DAMAGES; JUDICIAL RELIEF; CONCILIATION, CONFERENCE, AND PERSUASION

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments

compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

29 U.S. Code § 206(d)(1). Minimum wage

(d) PROHIBITION OF SEX DISCRIMINATION

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by
paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

42 U.S. Code § 1981a. Damages in cases of intentional discrimination in employment

(a) Right of Recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e–2, 2000e–3, 2000e–16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief

authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter—

…

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe,

or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

…

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e–2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(a). Definitions

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

42 U.S.C. § 2000e-2(a). Unlawful employment practices

(a) EMPLOYER PRACTICES It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3(a). Other unlawful employment practices

(a) DISCRIMINATION FOR MAKING CHARGES, TESTIFYING, ASSISTING, OR PARTICIPATING IN ENFORCEMENT PROCEEDINGS

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S. Code § 2000e-5. Enforcement provisions

(a) POWER OF COMMISSION TO PREVENT UNLAWFUL EMPLOYMENT PRACTICES

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e–2 or 2000e–3 of this title.

(b) CHARGES BY PERSONS AGGRIEVED OR MEMBER OF COMMISSION OF UNLAWFUL EMPLOYMENT PRACTICES BY EMPLOYERS, ETC.; FILING; ALLEGATIONS; NOTICE TO RESPONDENT; CONTENTS OF NOTICE; INVESTIGATION BY COMMISSION; CONTENTS OF CHARGES; PROHIBITION ON DISCLOSURE OF CHARGES; DETERMINATION OF REASONABLE CAUSE; CONFERENCE, CONCILIATION, AND PERSUASION FOR ELIMINATION OF UNLAWFUL PRACTICES; PROHIBITION ON DISCLOSURE OF INFORMAL ENDEAVORS TO END UNLAWFUL PRACTICES; USE OF EVIDENCE IN SUBSEQUENT PROCEEDINGS; PENALTIES FOR DISCLOSURE OF INFORMATION; TIME FOR DETERMINATION OF REASONABLE CAUSE

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such

investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) STATE OR LOCAL ENFORCEMENT PROCEEDINGS; NOTIFICATION OF STATE OR LOCAL AUTHORITY; TIME FOR FILING CHARGES WITH COMMISSION; COMMENCEMENT OF PROCEEDINGS

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be

filed under subsection (a) [1] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) STATE OR LOCAL ENFORCEMENT PROCEEDINGS; NOTIFICATION OF STATE OR LOCAL AUTHORITY; TIME FOR ACTION ON CHARGES BY COMMISSION

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) TIME FOR FILING CHARGES; TIME FOR SERVICE OF NOTICE OF CHARGE ON RESPONDENT; FILING OF CHARGE BY COMMISSION WITH STATE OR LOCAL AGENCY; SENIORITY SYSTEM

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)

(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a

discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) CIVIL ACTION BY COMMISSION, ATTORNEY GENERAL, OR PERSON AGGRIEVED; PRECONDITIONS; PROCEDURE; APPOINTMENT OF ATTORNEY; PAYMENT OF FEES, COSTS, OR SECURITY; INTERVENTION; STAY OF FEDERAL PROCEEDINGS; ACTION FOR APPROPRIATE TEMPORARY OR PRELIMINARY RELIEF PENDING FINAL DISPOSITION OF CHARGE; JURISDICTION AND VENUE OF UNITED STATES COURTS; DESIGNATION OF JUDGE TO HEAR AND DETERMINE CASE; ASSIGNMENT OF CASE FOR HEARING; EXPEDITION OF CASE; APPOINTMENT OF MASTER

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political

subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b), is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government,

governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal

office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) INJUNCTIONS; APPROPRIATE AFFIRMATIVE ACTION; EQUITABLE RELIEF; ACCRUAL OF BACK PAY; REDUCTION OF BACK PAY; LIMITATIONS ON JUDICIAL ORDERS

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by
the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other

equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)

(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) PROVISIONS OF CHAPTER 6 OF TITLE 29 NOT APPLICABLE TO CIVIL ACTIONS FOR PREVENTION OF UNLAWFUL PRACTICES

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) PROCEEDINGS BY COMMISSION TO COMPEL COMPLIANCE WITH JUDICIAL ORDERS

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) APPEALS

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) ATTORNEY'S FEE; LIABILITY OF COMMISSION AND UNITED STATES FOR COSTS

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S. Code § 2000e-7. Effect on State laws

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S. Code § 2000e-8. Investigations

(a) EXAMINATION AND COPYING OF EVIDENCE RELATED TO UNLAWFUL EMPLOYMENT PRACTICES

In connection with any investigation of a charge filed under section 2000e–5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) COOPERATION WITH STATE AND LOCAL AGENCIES ADMINISTERING STATE FAIR EMPLOYMENT PRACTICES LAWS; PARTICIPATION IN AND CONTRIBUTION TO RESEARCH AND OTHER PROJECTS; UTILIZATION OF SERVICES; PAYMENT IN ADVANCE OR REIMBURSEMENT; AGREEMENTS AND RESCISSION OF AGREEMENTS

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed

under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

42 U.S.C. § 2000h-4. Construction of provisions not to exclude operate of State laws and not to invalidate consistent State laws

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

CODE OF FEDERAL REGULATIONS

29 C.F.R. § 1601.13 Filing; deferrals to State and local agencies.

(a) *Initial presentation of a charge to the Commission.*

(1) Charges arising in jurisdictions having no FEP agency are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(2) A jurisdiction having a FEP agency without jurisdiction over the statutory basis alleged in the charge (e.g., an agency that does not have enforcement authority over sex discrimination) is equivalent to a jurisdiction having no FEP agency. Charges over which a FEP agency has no jurisdiction over the statutory basis alleged are filed with the Commission upon receipt and are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(3) Charges arising in jurisdictions having a FEP agency with jurisdiction over the statutory basis alleged in the charge are to be processed in accordance with the Commission's deferral policy set in paragraphs (a)(3)(i) through (iii) and the procedures in paragraph (a)(4) of this section.

(i) In order to give full weight to the policy of section 706(c) of title VII, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by title VII, the ADA, or GINA and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as is permitted by law and as is practicable.

(ii) Section 706(c) of title VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days (or 120 days during the first year after the effective date of the qualifying State or local law). This right exists where, as set forth in § 1601.70, a State or local law prohibits the employment practice alleged to be unlawful and a State or local agency has been authorized to grant or seek relief. After the expiration of the exclusive processing period, the Commission may commence processing the allegation of discrimination.

(iii) A FEP agency may waive its right to the period of exclusive processing of charges provided under section 706(c) of title VII with respect to any charge or category of charges. Copies of all such charges will be forwarded to the appropriate FEP agency.

(4) The following procedures shall be followed with respect to charges which arise in jurisdictions having a FEP agency with jurisdiction over the statutory basis alleged in the charge:

(i) Where any document, whether or not verified, is received by the Commission as provided in § 1601.8 which may constitute a charge cognizable under title VII, the ADA, or GINA, and where the FEP agency has not waived its right to the period of exclusive processing with respect to that document, that document shall be deferred to the appropriate FEP agency as provided in the procedures set forth below:

(A) The document shall reflect the date and time it was received by the EEOC.

(B) The original document shall be transmitted by registered mail, return receipt requested, to the appropriate FEP agency, or by any other means acceptable to the FEP agency. State or local proceedings are deemed to have commenced on the date such document is transmitted.

(C) The person claiming to be aggrieved and any person filing a charge on behalf of such person shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the FEP agency pursuant to the provisions of section 706(c) of title VII.

(ii) Such charges are deemed to be filed with the Commission as follows:

(A) Where the document on its face constitutes a charge within a category of charges over which the FEP agency has waived its rights to the period of exclusive processing referred to in paragraph (a)(3)(iii) of this section, the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation.

(B) Where the document on its face constitutes a charge which is not within a category of charges over which the FEP agency has waived its right to the period of exclusive processing referred to in paragraph (a)(3)(iii) of this section, the Commission shall process the document in accordance with paragraph (a)(4)(i) of this section. The charge shall be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after deferral, or upon the termination of FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process the charge, whichever is earliest. Where the FEP agency earlier terminates its proceedings or waives its right to exclusive processing of a charge, the charge shall be deemed to be filed with the Commission on the date the FEP agency terminated its proceedings or the FEP agency waived its right to exclusive processing of the charge. Such filing is timely if effected within 300 days from the date of the alleged violation.

(b) *Initial presentation of a charge to a FEP agency.*

(1) When a charge is initially presented to a FEP agency and the charging party requests that the charge be presented to the Commission, the charge

will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the FEP agency by registered mail or was otherwise received by the FEP agency, or upon the termination of FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process the charge, whichever is earliest. Such filing is timely if effected within 300 days from the date of the alleged violation.

(2) When a charge is initially presented to a FEP agency but the charging party does not request that the charge be presented to the Commission, the charging party may present the charge to the Commission as follows:

(i) If the FEP agency has refused to accept a charge, a subsequent submission of the charge to the Commission will be processed as if it were an initial presentation in accordance with paragraph (a) of this section.

(ii) If the FEP agency proceedings have terminated, the charge may be timely filed with the Commission within 30 days of receipt of notice that the FEP agency proceedings have been terminated or within 300 days from the date of the alleged violation, whichever is earlier.

(iii) If the FEP agency proceedings have not been terminated, the charge may be presented to the Commission within 300 days from the date of the alleged violation. Once presented, such a charge will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the FEP agency by registered mail or was otherwise received by the FEP agency, or upon the termination of the FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process the charge, whichever is

earliest. To be timely, however, such filing must be effected within 300 days from the date of the alleged violation.

(c) *Agreements with Fair Employment Practice agencies.* Pursuant to section 705(g)(1) and section 706(b) of title VII, the Commission shall endeavor to enter into agreements with FEP agencies to establish effective and integrated resolution procedures. Such agreements may include, but need not be limited to, cooperative arrangements to provide for processing of certain charges by the Commission, rather than by the FEP agency during the period specified in section 706(c) and section 706(d) of title VII.

(d) *Preliminary relief.* When a charge is filed with the Commission, the Commission may make a preliminary investigation and commence judicial action for immediate, temporary or preliminary relief pursuant to section 706(f)(2) of title VII.

(e) *Commissioner charges.* A charge made by a member of the Commission shall be deemed filed upon receipt by the Commission office responsible for investigating the charge. The Commission will notify a FEP agency when an allegation of discrimination is made by a member of the Commission concerning an employment practice occurring within the jurisdiction of the FEP agency. The FEP agency will be entitled to process the charge exclusively for a period of not less than 60 days if the FEP agency makes a written request to the Commission within 10 days of receiving notice that the allegation has been filed. The 60-day period shall be extended to 120 days during the first year after the effective date of the qualifying State or local law.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3. Appeal as of Right – How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. §1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

Rule 4. Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

CALIFORNIA GOVERNMENT CODE

Cal. Gov. Code § 12920

It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious

creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.
It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.
Further, the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information in housing accommodations is declared to be against public policy.
It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.
This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

Cal. Gov. Code §§ 12923.

The Legislature hereby declares its intent with regard to application of the laws about harassment contained in this part.
(a) The purpose of these laws is to provide all Californians with an equal opportunity to succeed in the workplace and should be applied accordingly by the courts. The Legislature hereby declares that harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to

disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being. In this regard, the Legislature affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in Harris v. Forklift Systems (1993) 510 U.S. 17 that in a workplace harassment suit "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job." (Id. at 26).

(b) A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. In that regard, the Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in Brooks v. City of San Mateo (2000) 229 F.3d 917 and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act.

(c) The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination. In that regard, the Legislature affirms the decision in Reid v. Google, Inc. (2010) 50 Cal.4th 512 in its rejection of the "stray remarks doctrine."

(d) The legal standard for sexual harassment should not vary by type of workplace. It is irrelevant that a particular occupation may have been characterized by a

greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties. The Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision Kelley v. Conco Companies (2011) 196 Cal.App.4th 191.

(e) Harassment cases are rarely appropriate for disposition on summary judgment. In that regard, the Legislature affirms the decision in Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243 and its observation that hostile working environment cases involve issues "not determinable on paper."

Cal. Gov. Code § 12925

As used in this part, unless a different meaning clearly appears from the context:

…

(a) "Council" means the Fair Employment and Housing Council and "council member" means a member of the council.

(b) "Department" means the Department of Fair Employment and Housing.

(c) "Director" means the Director of Fair Employment and Housing.

(d) "Person" includes one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.

Cal. Gov. Code §§ 12926(d) & (r)

As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

…

(d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:
"Employer" does not include a religious association or corporation not organized for private profit.

…

(r)

(1) "Sex" includes, but is not limited to, the following:

(A) Pregnancy or medical conditions related to pregnancy.

(B) Childbirth or medical conditions related to childbirth.

(C) Breastfeeding or medical conditions related to breastfeeding.

(2) "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

…

Cal. Gov. Code § 12930

The department shall have the following functions, duties, and powers:
(a) To establish and maintain a principal office and any other offices within the state as are necessary to carry out the purposes of this part.
(b) To meet and function at any place within the state.
(c) To appoint attorneys, investigators, conciliators, mediators, and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(d) To obtain upon request and utilize the services of all governmental departments and agencies and, in addition, with respect to housing discrimination, of conciliation councils.

(e) To adopt, promulgate, amend, and rescind suitable procedural rules and regulations to carry out the investigation, prosecution, and dispute resolution functions and duties of the department pursuant to this part.

(f)

(1) To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Chapter 6 (commencing with Section 12940).

(2) To receive, investigate, conciliate, mediate, and prosecute complaints alleging a violation of Section 51, 51.5, 51.7, 51.9, 54, 54.1, or 54.2 of the Civil Code. The remedies and procedures of this part shall be independent of any other remedy or procedure that might apply.

(3) To receive, investigate, conciliate, mediate, and prosecute complaints alleging, and to bring civil actions pursuant to Section 52.5 of the Civil Code for, a violation of Section 236.1 of the Penal Code. Damages awarded in any action brought by the department pursuant to Section 52.5 of the Civil Code shall be awarded to the person harmed by the violation of Section 236.1 of the Penal Code. Costs and attorney's fees awarded in any action brought by the department pursuant to Section 52.5 of the Civil Code shall be awarded to the department. The remedies and procedures of this part shall be independent of any other remedy or procedure that might apply.

(4) To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1, except for complaints relating to educational equity brought under Chapter 2 (commencing with Section 200)

of Part 1 of Division 1 of Title 1 of the Education Code and investigated pursuant to the procedures set forth in Subchapter 5.1 of Title 5 of the California Code of Regulations, and not otherwise within the jurisdiction of the department.

(5) To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Section 1197.5 of the Labor Code. The department shall, in coordination with the Division of Labor Standards Enforcement within the Department of Industrial Relations, adopt procedures to ensure that the departments coordinate activities to enforce Section 1197.5 of the Labor Code.

(A) Nothing in this part prevents the director or the director's authorized representative, in that person's discretion, from making, signing, and filing a complaint pursuant to Section 12960 or 12961 alleging practices made unlawful under Section 11135.

(B) Remedies available to the department in conciliating, mediating, and prosecuting complaints alleging these practices are the same as those available to the department in conciliating, mediating, and prosecuting complaints alleging violations of Article 1 (commencing with Section 12940) of Chapter 6.

(g) In connection with any matter under investigation or in question before the department pursuant to a complaint filed under Section 12960, 12961, or 12980:

(1) To issue subpoenas to require the attendance and testimony of witnesses and the production of books, records, documents, and physical materials.

(2) To administer oaths, examine witnesses under oath and take evidence, and take depositions and affidavits.

(3) To issue written interrogatories.

(4) To request the production for inspection and copying of books, records, documents, and physical materials.

(5) To petition the superior courts to compel the appearance and testimony of witnesses, the production of books, records, documents, and physical materials, and the answering of interrogatories.

(h) To bring civil actions pursuant to Section 12965 or 12981 of this code, or Title VII of the Civil Rights Act of 1964 (Public Law 88-352; 42 U.S.C. Sec. 2000 et seq.), as amended, the federal Americans with Disabilities Act of 1990 (Public Law 101-336; 42 U.S.C. 12101, et seq.), as amended, or the federal Fair Housing Act (42 U.S.C. Sec. 3601 et seq.), and to prosecute those civil actions before state and federal trial courts.

(i) To issue those publications and those results of investigations and research as in its judgment will tend to promote goodwill and minimize or eliminate discrimination in employment on the bases enumerated in this part and discrimination in housing because of race, religious creed, color, sex, gender, gender identity, gender expression, marital status, national origin, ancestry, familial status, disability, veteran or military status, genetic information, or sexual orientation.

(j) To investigate, approve, certify, decertify, monitor, and enforce nondiscrimination programs proposed by a contractor to be engaged in pursuant to Section 12990.

(k) To render annually to the Governor and to the Legislature a written report of its activities and of its recommendations.

(l) To conduct mediations at any time after a complaint is filed pursuant to Section 12960, 12961, or 12980. The department may end mediation at any time.

(m) The following shall apply with respect to any accusation pending before the former Fair Employment and Housing Commission on or after January 1, 2013:

(1) If an accusation issued under former Section 12965 includes a prayer either for damages for emotional injuries as a component of actual damages, or for administrative fines, or both, or if an accusation is amended for the purpose of adding a prayer either for damages for emotional injuries as a component of actual damages, or for administrative fines, or both, with the consent of the party accused of engaging in unlawful practices, the department may withdraw an accusation and bring a civil action in superior court.

(2) If an accusation was issued under former Section 12981, with the consent of the aggrieved party filing the complaint, an aggrieved person on whose behalf a complaint is filed, or the party accused of engaging in unlawful practices, the department may withdraw the accusation and bring a civil action in superior court.

(3) Where removal to court is not feasible, the department shall retain the services of the Office of Administrative Hearings to adjudicate the administrative action pursuant to Sections 11370.3 and 11502.

(n) On a challenge, pursuant to Section 1094.5 of the Code of Civil Procedure, to a decision of the former Fair Employment and Housing Commission pending on or after January 1, 2013, the director or the director's designee shall consult with the Attorney General regarding the defense of that writ petition.

Cal. Gov. Code §§ 12940

It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic

information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

(5)

(A) This part does not prohibit an employer from refusing to employ an individual because of the individual's age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

(B) The provisions of this part relating to discrimination on the basis of age do not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the person becomes eligible for Medicare health benefits. This subparagraph applies to all retiree health benefit plans and contractual provisions or practices concerning retiree health

benefits and health care reimbursement plans in effect on or after January 1, 2011.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person, to exclude, expel, or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of the person discriminated against.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any nonjob-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as

to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status, or any intent to make any such limitation, specification, or discrimination. This part does not prohibit an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action.

(e)

(1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(f)

(1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee,

to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

(g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j)

(1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual

orientation, or veteran or military status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(4)

(A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly

receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit, except as provided in Section 12926.2.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

(5) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all

reasonable steps necessary to prevent discrimination and harassment from occurring.

(l)

(1) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This subdivision shall also apply to an apprenticeship training program, an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry.

(2) An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.

(3) An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.

(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(m)

(1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

(p) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

Cal. Gov. Code § 12945

(a) In addition to the provisions that govern pregnancy, childbirth, or a related medical condition in Sections 12926 and 12940, each of the following shall be an unlawful employment practice, unless based upon a bona fide occupational qualification:

(1) For an employer to refuse to allow an employee disabled by pregnancy, childbirth, or a related medical condition to take a leave for a reasonable period of time not to exceed four months and thereafter return to work, as set forth in the commission's regulations. The employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the employee is disabled on account of pregnancy, childbirth, or a related medical condition.

An employer may require an employee who plans to take a leave pursuant to this subdivision to give the employer reasonable notice of the date the leave shall commence and the estimated duration of the leave.

(2)

(A) For an employer to refuse to maintain and pay for coverage for an eligible employee who takes leave pursuant to paragraph (1) under a group health plan, as defined in Section 5000(b)(1) of the Internal Revenue Code of 1986, for the duration of the leave, not to exceed four

months over the course of a 12-month period, commencing on the date the leave taken under paragraph (1) begins, at the level and under the conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. Nothing in this paragraph shall preclude an employer from maintaining and paying for coverage under a group health plan beyond four months. An employer may recover from the employee the premium that the employer paid as required under this subdivision for maintaining coverage for the employee under the group health plan if both of the following conditions occur:

(i) The employee fails to return from leave after the period of leave to which the employee is entitled has expired.

(ii) The employee's failure to return from leave is for a reason other than one of the following:

(I) The employee taking leave under the Moore-Brown-Roberti Family Rights Act (Sections 12945.2 and 19702.3 of the Government Code).

(II) The continuation, recurrence, or onset of a health condition that entitles the employee to leave under paragraph (1) or other circumstance beyond the control of the employee.

(B) If the employer is a state agency, the collective bargaining agreement shall govern with respect to the continued receipt by an eligible employee of the health care coverage specified in subparagraph (A).

(3)

(A) For an employer to refuse to provide reasonable accommodation for an employee for a condition related to pregnancy, childbirth, or a related medical condition, if the employee so requests, with the advice of the employee's health care provider.

(B) For an employer who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant employee who so requests.

(C) For an employer to refuse to temporarily transfer a pregnant employee to a less strenuous or hazardous position for the duration of the pregnancy if the employee so requests, with the advice of the employee's physician, where that transfer can be reasonably accommodated. However, no employer shall be required by this section to create additional employment that the employer would not otherwise have created, nor shall the employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

(4) For an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section.

(b) This section shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth under any other provision of this part, including subdivision (a) of Section 12940.

Cal. Gov. Code § 12950

In addition to employer responsibilities set forth in subdivisions (j) and (k) of Section 12940 and in rules adopted by the department and the council, every employer shall act to ensure a workplace free of sexual harassment by implementing the following minimum requirements:

(a)

(1) The department's poster on discrimination in employment shall include information relating to the illegality of sexual harassment. One copy of the poster shall be provided by the department to an employer or a member of the public upon request. The poster shall be available at each office of the department, and shall be mailed if the request includes a self-addressed envelope with postage affixed. Each employer shall post the poster in a prominent and accessible location in the workplace.

(2) Post a poster developed by the department regarding transgender rights in a prominent and accessible location in the workplace.

(3) Provide sexual harassment training as required by Section 12950.1.

(b) Each employer shall obtain from the department its information sheet on sexual harassment, which the department shall make available to employers for reproduction and distribution to employees. One copy of the information sheet shall be provided by the department to an employer or a member of the public upon request. The information sheets shall be available at each office of the department, and shall be mailed if the request includes a self-addressed envelope with postage affixed. Each employer shall distribute this information sheet to its employees, unless the employer provides equivalent information to its employees that contains, at a minimum, components on the following:

(1) The illegality of sexual harassment.

(2) The definition of sexual harassment under applicable state and federal law.

(3) A description of sexual harassment, utilizing examples.

(4) The internal complaint process of the employer available to the employee.

(5) The legal remedies and complaint process available through the department.

(6) Directions on how to contact the department.

(7) The protection against retaliation provided by Title 2 of the California Code of Regulations for opposing the practices prohibited by this article or for filing a complaint with, or otherwise participating in an investigation, proceeding, or hearing conducted by, the department or the council.

(8) A link to, or the internet website address for, the sexual harassment online training courses developed pursuant to Section 12950.1 and located on the internet website of the department.

(c) The information sheet or information required to be distributed to employees pursuant to subdivision (b) shall be delivered in a manner that ensures distribution to each employee, such as including the information sheet or information with an employee's pay.

(d) The department shall make the poster, fact sheet, and online training courses available in English, Spanish, Simplified Chinese, Tagalog, Vietnamese, Korean, and any other language that is spoken by a "substantial number of non-English-speaking people," as that phrase is defined in Section 7296.2. The department shall make versions of the online training courses with subtitles in each language and shall orally dub the online training courses into each language other than English. Simplified Chinese shall be sufficient for subtitling purposes.

(e) The department shall make the poster, fact sheet, and online training courses required by this section, and the corresponding translations, available to employers

and to the public through its internet website in formats that may be streamed or downloaded.

(f) Notwithstanding subdivisions (j) and (k) of Section 12940, a claim that the information sheet or information required to be distributed pursuant to this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.

(g) If an employer violates the requirements of this section, the department may seek an order requiring the employer to comply with these requirements.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(l)

(1) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or

permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This subdivision shall also apply to an apprenticeship training program, an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry.

(2) An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.

(3) An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.

(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(m)

(1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2)

of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

(p) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

Cal. Gov. Code § 12960

…

(b) For purposes of this section, filing a complaint means filing an intake form with the department and the operative date of the verified complaint relates back to the filing of the intake form.

…

(e)

(1) A complaint alleging a violation of Section 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code shall not be filed pursuant to this article after the expiration of one year from the date that the alleged unlawful practice or refusal to cooperate occurred.

(2) A complaint alleging a violation of Section 52.5 of the Civil Code shall not be filed pursuant to this article after the expiration of the applicable period of time for commencing a civil action pursuant to that section.

(3) A complaint alleging a violation of Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 shall not be filed pursuant to this article after the expiration of three years from the date that the alleged unlawful practice occurred or refusal to cooperate occurred.

(4) A complaint alleging a violation of Section 1197.5 of the Labor Code shall not be filed pursuant to this article after the expiration of the applicable period of time for commencing a civil action pursuant to that section.

(5) A complaint alleging a violation of Section 51.9 of the Civil Code or any other violation of Article 1 (commencing with Section 12940) of Chapter 6 shall not be filed after the expiration of three years from the date upon which the unlawful practice or refusal to cooperate occurred.

(6) Notwithstanding paragraphs (1) through (5), inclusive, the filing periods set forth by this section may be extended as follows:

(A) For a period of time not to exceed 90 days following the expiration of the applicable filing deadline, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice during the 90 days following the expiration of the applicable filing deadline.

(B) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.

(C) For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.

(D) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.

(E) For the periods of time specified in Section 52.5 of the Civil Code for complaints alleging a violation of that section.

Cal. Gov. Code § 12965

(a)

(1) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation, mediation, or persuasion, or in advance thereof if circumstances warrant, the director in the director's discretion may bring a civil action in the name of the department on behalf of the person claiming to be aggrieved.

(2) Prior to filing a civil action, the department shall require all parties to participate in mandatory dispute resolution in the department's internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation.

(3) In a civil action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by that person's own counsel.

(4) A civil action under this subdivision shall be brought in a county in which the department has an office, in a county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices, in the county of the defendant's residence or principal office, or, if the civil action includes class or group allegations on behalf of the department, in any county in the state.

(5)

(A) A complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, mediation, or civil action pursuant to Section 12961, a civil action shall be brought, if at all, within two years after the filing of the complaint.

(B) For a complaint alleging a violation of Section 51.7 of the Civil Code, a civil action shall be brought, if at all, within two years after the filing of the complaint.

(C) For a complaint other than those specified in subparagraphs (A) and (B), a civil action shall be brought, if at all, within one year after the filing of a complaint.

(D) The deadlines specified in subparagraphs (A), (B), and (C), shall be tolled during a mandatory or voluntary dispute resolution proceeding commencing on the date the department refers the case to its dispute resolution division and ending on the date the department's

dispute resolution division closes its mediation record and returns the case to the division that referred it.

(b) For purposes of this section, filing a complaint means filing a verified complaint.

(c)

(1)

(A) Except as specified in subparagraph (B), if a civil action is not brought by the department pursuant to subdivision (a) within 150 days after the filing of a complaint, or if the department earlier determines that no civil action will be brought pursuant to subdivision (a), the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on request, the right-to-sue notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint.

(B) For a complaint treated as a group or class complaint for purposes of investigation, conciliation, mediation, or civil action pursuant to subdivision (b) of Section 12961, the department shall issue a right-to-sue notice upon completion of its investigation, and not later than two years after the filing of the complaint.

(C) The notices specified in subparagraphs (A) and (B) shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice.

(D) This paragraph applies only to complaints alleging unlawful employment practices under Article 1 (commencing with Section 12940) of Chapter 6.

(2) A city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting HIV/AIDS discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/AIDS discrimination, may also bring a civil action under this part against the person, employer, labor organization, or employment agency named in the notice.

(3) The superior courts of the State of California shall have jurisdiction of actions brought pursuant to this section, and the aggrieved person may file in these courts. An action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties, an action may be brought within the county of the defendant's residence or principal office.

(4) A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department. The remedy for failure to send a copy of a complaint is an order to do so.

(5) A civil action brought pursuant to this section shall not be filed as class actions and shall not be maintained as class actions by the person or persons claiming to be aggrieved if those persons have filed a civil class action in the

federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants.

(6) In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.

…

CALIFORNIA LABOR CODE

Cal. Labor Code § 1197.5

(a) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question,

and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential.

(4) Prior salary shall not justify any disparity in compensation. Nothing in this section shall be interpreted to mean that an employer may not make a compensation decision based on a current employee's existing salary, so long as any wage differential resulting from that compensation decision is justified by one or more of the factors in this subdivision.

(b) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than race or ethnicity, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a race- or

ethnicity-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential.

(4) Prior salary shall not justify any disparity in compensation. Nothing in this section shall be interpreted to mean that an employer may not make a compensation decision based on a current employee's existing salary, so long as any wage differential resulting from that compensation decision is justified by one or more of the factors listed in this subdivision.

(c) Any employer who violates subdivision (a) or (b) is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is deprived by reason of the violation, and an additional equal amount as liquidated damages.

(d) The Division of Labor Standards Enforcement shall administer and enforce this section. If the division finds that an employer has violated this section, it may supervise the payment of wages and interest found to be due and unpaid to employees under subdivision (a) or (b). Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (h).

(e) Every employer shall maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer. All of the records shall be kept on file for a period of three years.

(f) Any employee may file a complaint with the division that the wages paid are less than the wages to which the employee is entitled under subdivision (a) or (b) or that the employer is in violation of subdivision (k). The complaint shall be investigated as provided in subdivision (b) of Section 98.7. The division shall keep confidential the name of any employee who submits to the division a complaint regarding an alleged violation of subdivision (a), (b), or (k) until the division establishes the validity of the complaint, unless the division must abridge confidentiality to investigate the complaint. The name of the complaining employee shall remain confidential if the complaint is withdrawn before the confidentiality is abridged by the division. The division shall take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to these employees.

(g) The department or division may commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees to recover unpaid wages and liquidated damages under subdivision (a) or (b), and in addition shall be entitled to recover costs of suit. The consent of any employee to the bringing of any action shall constitute a waiver on the part of the employee of the employee’s cause of action under subdivision (h) unless the action is dismissed without prejudice by the department or the division, except that the employee may intervene in the suit or may initiate independent action if the suit has not been determined within 180 days from the date of the filing of the complaint.

(h) An employee receiving less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage.

(i) A civil action to recover wages under subdivision (a) or (b) may be commenced no later than two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs.

(j) If an employee recovers amounts due the employee under subdivision (c), and also files a complaint or brings an action under subdivision (d) of Section 206 of Title 29 of the United States Code which results in an additional recovery under federal law for the same violation, the employee shall return to the employer the amounts recovered under subdivision (c), or the amounts recovered under federal law, whichever is less.

(k)

(1) An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. An employer shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages.

(2) Any employee who has been discharged, discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this section may recover in a

civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief.

(3) A civil action brought under this subdivision may be commenced no later than one year after the cause of action occurs.

(l) As used in this section, "employer" includes public and private employers. Section 1199.5 does not apply to a public employer.

AMERICAN BAR ASSOCIATION MODEL RULES OF PROFSSIONAL CONDUCT

Rule 1.8f: Current Clients: Specific Rules

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Comment:

…

[14] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on

the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).