IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FRANCISCO COLMENARES, Plaintiff and Appellant, **v.** **BRAEMAR COUNTRY CLUB, INC.,** Defendants and Appellants.	SO98895

Second Appellate District, No. B142962
Los Angeles County Superior Court No. BC206527
The Honorable RONALD E. CAPPAI, Judge

BRIEF OF ATTORNEY GENERAL BILL LOCKYER AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT FRANCISCO COLMENARES

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND
TO THE HONORABLE ASSOCIATE JUSTICES
OF THE CALIFORNIA SUPREME COURT:

INTEREST OF ATTORNEY GENERAL BILL LOCKYER

Pursuant to California Rules of Court, rule 29.3(c), Attorney General Bill Lockyer submits this amicus curiae brief in support of plaintiff-appellant Francisco Colmenares ("appellant" or "Colmenares"), in order to advocate the appropriate interpretation of the provisions within California's Fair Employment and Housing Act defining the term "physical disability."

As the chief law officer of the state, the Attorney General must ensure that California's laws are uniformly and adequately enforced. (Cal. Const., art. V, § 13.) The Attorney General has appeared before this Court in numerous cases in which the Court has interpreted the employment provisions of the Fair Employment and Housing Act, Government Code section 12900 et seq. ("FEHA" or "Act"), or has decided issues that relate to enforcement of the rights that are guaranteed by that law.

For example, the Attorney General has appeared before this Court as amicus both in his independent capacity[1/] and on behalf of the Fair Employment and Housing Commission ("Commission" or "FEHC").[2/] The Attorney General has also represented the Commission before this Court in cases in which the Commission was a party.[3/] Significantly, the Attorney General represented the Commission in *American National Ins. Co. v. Fair Employment and Housing Com.* (1982) 32 Cal. 3d 603 ("*ANI v. FEHC"* or *"ANI"*), a seminal case in FEHA jurisprudence in which this Court interpreted a FEHA provision defining "physical handicap," the predecessor to the term "physical disability" which this Court has now been asked to interpret.

It is respectfully submitted that the Attorney General's participation in these cases and his role as California's chief law officer demonstrate his continuing interest in FEHA and the appropriate interpretation of California's fair employment law.

For these reasons, it is important that the Attorney General present argument on the issue of whether FEHA, in 1997, defined "physical disability" as a condition[4/] which merely "limits"– as opposed to "substantially limits"–

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1. See *Armendariz v. Foundation Health Psychcare Serv.* (2000) 24 Cal.4th 83, and *Brown v. Superior Court* (1984) 37 Cal.3d 477.

2. See *Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, and *Peatros v. Bank of America* (2000) 22 Cal.4th 147.

3. See *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, *Peralta Community College Dist. v. Fair Employment and Housing Com*. (1990) 52 Cal.3d 40, and *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379.

4. For purposes of this brief, the term "condition" is defined to mean having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. (Gov. Code, §

a major life activity. The Court's decision in this case will guide trial courts and administrative agencies in adjudicating cases involving alleged violations of FEHA's prohibition of employment discrimination based upon "physical disability" that accrued prior to January 1, 2001, the effective date of the Prudence Kay Poppink Act ("Poppink Act") (Stats. 2000, ch. 1049, § 5 (A.B. 2222)), which respondents claim substantially revised FEHA's definition of "physical disability."

SUMMARY OF ARGUMENT

In this brief, the Attorney General makes four arguments.[5/] First, the Attorney General will demonstrate that the plain language of the FEHA, as it existed in 1997 (the relevant time period in this appeal), defined "physical disability" as a condition which "limits" (as opposed to "substantially limits") a major life activity. The Legislature elected to reject the more restrictive "substantively limits" language defining "disability" contained in the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12101 et seq.). (42 U.S.C. § 12102; 29 C.F.R. § 1630.2(g).) In addition, the Legislature intended that the term "physical disability" be given a broad meaning consonant with the definition of "physical handicap" in *ANI v. FEHC, supra*, 32 Cal. 3d 603.

12926, subd. (k)(1)(A).)

5. The Attorney General limits this discussion to the issue of whether the FEHA, in 1997, required that a condition only "limit" a major life activity to constitute a physical disability. The Attorney General does not opine on any remaining issues raised by appellant or respondents.

Second, the Attorney General will show that the Commission, both in its regulation interpreting 1992 amendments to the FEHA ("1992 Amendments") (the law in effect in 1997) and in its precedential decisions, was equally consistent in applying these amendments to define "physical disability" as a condition which "limits" a major life activity.

Third, the Attorney General will demonstrate that respondents misconstrue this Court's holding in *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050 ("*Cassista"*). The *Cassista* Court did not hold that the 1992 Amendments define "physical disability" as a condition which "substantially limits" a major life activity under Government Code section 12926.

Finally, the Attorney General will establish that respondents misconstrue the impact of the Poppink Act on the definition of "physical disability," as it existed prior to the Poppink Act. The Attorney General will demonstrate that extensive consideration of the Poppink Act is unnecessary because the plain language in 1997 under Government Code section 12926 defined "physical disability"as a condition which "limits"major life activities.

The Attorney General respectfully submits that the issue before this Court – whether the determination of a "physical disability" required a condition which "limits" a major life activity – is in fact quite simple, and can be resolved by examining the plain language of Government Code section 12926 as it existed in 1997.

ISSUES PRESENTED

Whether the FEHA, as it existed in 1997, required that a condition "limit," as opposed to "substantially limit," a major life activity in order to constitute a "physical disability."

ARGUMENT

I.

IN 1997, THE PLAIN LANGUAGE OF THE FEHA REQUIRED ONLY THAT A CONDITION "LIMIT" A MAJOR LIFE ACTIVITY TO CONSTITUTE A "PHYSICAL DISABILITY"

This Court is being asked to resolve a conflict between two decisions of the California Courts of Appeal regarding the correct definition of "physical disability" as it existed following 1992 amendments that were effective January 1, 1993, and prior to 2000 amendments to the FEHA that were effective January 1, 2001. The Court of Appeal below determined that the FEHA, as it existed during this time required that a condition "substantially limit" – rather than "limit" – a major life activity in order to constitute a physical disability. (*Colmenares v. Braemar County Club, Inc.* (2001) 89 Cal. App. 4th 778, 783 [107 Cal. Rptr. 2d 719] review granted and opn. ordered nonpub. August 22, 2001, S098895 (*Colmenares*).)

The Court of Appeal in *Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, 1212 [109 Cal.Rptr.2d 543] review granted and opn. ordered nonpub. October 10, 2001, S100231 (*Wittkopf*) came to the opposite conclusion.[6/]

The Attorney General respectfully submits that the Court of Appeal in *Wittkopf* correctly held that the FEHA, at all times relevant, required only that a condition "limit," rather than "substantially limit" a major life activity to constitute a physical disability, and that the Poppink Act did not alter this standard.

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6. On October 31, 2001, this court stayed review of *Wittkopf* pending resolution of *Colmenares.*

A. The 1992 Amendments Provided That A Condition Need Only "Limit" A Major Life Activity To Constitute "Physical Disability."

In 1992, the Legislature enacted sweeping legislation covering many California laws addressing discrimination based upon disability. (Stats. 1992, ch. 913, § 21.3 (A.B. 1077).) A.B. 1077, effective January 1, 1993, amended Government Code section 12926. At this time, the Legislature replaced the term "physical handicap" with the term "physical disability." (*Ibid.*) Government Code section 12926 defined "physical disability" as follows:

> "(k) "Physical disability" includes, but is not limited to, all of the following:
> "(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
> "(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
> "(B) ***Limits*** an individual's ability to participate in major life activities.
> "(2) Any other health impairment not described in paragraph (1) that requires special education or related services.
> "(3) Being regarded as having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2).
> "(4) Being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2)." (Former Gov. Code, § 12926, subd. (k), Stats. 1992, ch. 913, § 21.3 (A.B. 1077), emphasis added.)

Nowhere in this definition is the term "substantially limits" found.

It is a cardinal rule of statutory construction that courts need not consider the legislative history of our statutes unless the statutory language in question is ambiguous, uncertain or unclear. The plain meaning of a statute must be respected. (See *Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.) As this Court has explained:

> "The applicable principles of statutory construction are well settled. 'In construing statutes, we must determine and effectuate legislative intent.'[Citation.] 'To ascertain intent, we look first to the words of the statutes' [citation] 'giving them their usual and ordinary meaning' [citation] If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not 'interpret away clear language in favor of an ambiguity that does not exist.' [Citation]." (*Lennane v. Franchise Tax Bd., supra,* 9 Cal.4th at p. 268 [citations omitted].)

On its face, California's FEHA, as amended in 1992, did not qualify the standard for establishing the existence of a physical disability. It was enough that the condition "limits" an individual's ability to participate in major life activities. No *degree* of limitation need be shown on the basis of the plain words of the statute. And it is the plain words of the statute that the Court should look to discern the Legislature's intent. (See e.g., *Lennane v. Franchise Tax Bd., supra,* 9 Cal.4th 263, 268.)

B. The Legislature Conspicuously Omitted The Qualifying Adverb "Substantially" In Modifying "Limits" From The California Definition.

Indeed, the absence of any qualifying adverb is significant when the California statute is compared with its federal counterpart, the ADA. Although in almost every other respect, the Legislature adopted the ADA's definition of "physical disability," the Legislature conspicuously omitted the qualifying adverb "substantially" from the California definition. (Compare 42

U.S.C. § 12102; 29 C.F.R. § 1630.2(g), and former Gov. Code, § 12926, subd. (k)(1)(B); Stats. 1992, ch. 913, § 21.3, p. 4308 (A.B. 1077).)[7/]

"While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." (*Arden Carmichael, Inc. v. County of Sacramento* (2001) 93 Cal.App.4th 507, 516, citing 2A Singer, *Statutes and Statutory Construction* (6th ed. 2000), Intrinsic Aids, § 47.24, pp. 319-320.) Furthermore, "'[w]here a statute, with reference to one subject contains a given provision, the omission of such a provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. [Citations].'" (*Bunner v. Imperial Ins. Co.* (1986) 181 Cal.App.3d 14, 22.)

Legislative history of the 1992 Amendments discloses that this omission reflected two deliberate legislative choices: first, to avoid the more restrictive language of the ADA; and second, to incorporate this Court's definition of "physical handicap" as discussed in *ANI v. FEHC, supra*, 32 Cal.3d at pp. 609-610.

As noted above, the ADA, as it read in 1992, defined "physical disability" as a condition that "substantially limits" a major life activity. (42 U.S.C. § 12012; 29 C.F.R. § 1630.2(g).) The statutory revisions of the FEHA had not previously required a showing that a limitation be "substantial" in order to sustain a claim of disability discrimination, and the Legislature expressly stated its choice to retain that less-restrictive standard:

> "It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 (Public Law 101-336)

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7. The near verbatim identity of the two statutes confirms the accepted presumption that the Legislature was aware of the existence of the ADA. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897; *People v. Chevron Chemical Co.* (1983) 143 Cal.App.3d 50, 54.)

> and to ***retain California law when it provides more protection for individuals with disabilities than the Americans with Disabilities Act of 1990.***" (Stats. 1992, ch. 913, § 1, p. 4282 (A.B. 1077), emphasis added.)[8/]

Considering the Legislature's second purpose, this Court in *ANI,* interpreting the existing statutory definition of the term "physical handicap" (former Gov. Code, § 12926, subd. (h)), ruled that high blood pressure was a "physical handicap" for purposes of the Act. (*ANI v. FEHC*, *supra*, 32 Cal.3d at p. 606.) This Court reasoned that, "for purposes of coverage under the FEHA, a 'physical handicap' is any physical impairment which is disabling in that it makes 'achievement unusually difficult.'" (*Id*. at p. 609.) The Legislature specifically referenced *ANI* in its revision to Government Code section 12926, explaining:

> "[i]t is the intent of the Legislature that the definition of 'physical disability' in this subdivision shall have the same meaning as the term 'physical handicap' formerly defined by this subdivision and construed in *American National Ins. Co. v. Fair Employment & Housing Com.,* 32 Cal.3d 603." (Former Gov. Code, §12926, subd. (k); Stats. 1992, ch. 913, §§ 21.3, p. 4308 (A.B 1077).)

The Legislature's reference to *ANI* indicates its intention not to retreat from the broad definition of "physical handicap" adopted by this Court in *ANI*, which is broader than the more restrictive definition adopted in the

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8. This intention is expressed throughout the legislative history of AB 1077. During the course of the Legislature's deliberation on AB 1077, legislative committees consistently analyzed that the bill would "conform California state law to federal law where state law is weaker and ***retain California law where it provides more protections***." (Sen. Appropriations Analysis, Assem. Bill No. 1077 (1992-93 Reg. Sess.) Aug. 10, 1992, par. 4; Sen Judiciary Analysis, Assem. Bill No. 1077 (1992-93 Reg. Sess.) June 9, 1992, par. 5; Assem. Ways and Means Analysis, Assem. Bill No. 1077 (1992-93 Reg. Sess.) Jan. 28, 1992, par. 5; Assem. Transport. Analysis, Assem. Bill No. 1077 (1992-93 Reg. Sess.) Jan. 27, 1992, par. 5, emphasis added.) (See Attorney General's Request for Judicial Notice, Exhibit A.)

ADA. Further, by referencing this landmark decision declaring the expansive scope of the FEHA respecting disability discrimination in employment, the Legislature declared that the purpose behind the 1992 Amendments was *not* to adopt the more restrictive definitions of the ADA, but rather to adopt a broader and more liberal definition of "physical disability" consonant with this Court's definition of "physical handicap" in *ANI.*

II.

THE COMMISSION HAS INTERPRETED AND APPLIED THE 1992 AMENDMENTS TO REQUIRE THAT A CONDITION ONLY "LIMIT" A MAJOR LIFE ACTIVITY IN ORDER TO CONSTITUTE A "PHYSICAL DISABILITY"

As demonstrated above, through its 1992 amendments to the FEHA, the Legislature defined "physical disability" to require only that a condition "limit" a major life activity. Subsequent to the 1992 Amendments, the FEHC amended its relevant regulation to conform to the statutory definition of "physical disability." It also issued two precedential decisions applying the "limits" standard adopted by the 1992 Amendments.

A. The Commission Regulation Implementing The Definition Of "Physical Disability" Contained In The 1992 Amendments Requires That A Condition "Limit" A Major Life Activity.

In 1995, the FEHC issued a regulation to interpret the 1992 Amendments' definition of "physical disability." This regulation mirrors the "limits" language contained in Government Code section 12926 and references *ANI v. FEHC*. In doing so, the FEHC interpreted the 1992 Amendments to adopt a broader definition of "physical disability" than the definition set forth in the ADA.

The construction of a statute by the state agency responsible for its

administration and enforcement is entitled to great weight and should not be overturned by the courts in the absence of a showing that the construction is clearly erroneous. (*Robinson v. Fair Employment and Housing Com., supra,* 2 Cal. 4th 226, 234.) The Commission is authorized under Government Code section 12935, subdivision (a), "[t]o adopt, promulgate, amend, and rescind suitable rules, regulations, and standards . . . to interpret, implement, and apply all provisions of [the FEHA]." The FEHC defined the term "physical disability," in light of the 1992 amendments to the FEHA, as follows:

> "(1) '**Physical disability**' includes, but is not limited to, all of the following:
> "(A) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
> "1) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
> "2) ***Limits*** an individual's ability to participate in major life activities."[9/] (Cal. Code of Regs., tit. 2, § 7293.5, subd. (e), Register 95, No. 38, emphasis added.)

Accordingly, since at least 1995, the Commission's regulation defining "physical disability" has, consistent with the 1992 Amendments, required that a condition only "limit" major life activities in order to constitute a "physical

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9. Prior to the 1992 Amendments, the Commission's regulations defined a physically handicapped individual as one who "[h]as a physical handicap which ***substantially limits one or more major life activities***." (See former Cal. Code Regs., tit. 2, § 7293.6, subd. (i), Register 88, No. 18; former Cal. Admin. Code, tit. 2, § 7293.5, subd. (l), Register 86, No. 45; former Cal. Admin. Code, tit. 2, § 7293.5, subd. (l)(2), Register 80, No. 25, emphasis added.) (See Appellant's Request for Judicial Notice of FEHC Regulations and FEHC Decisions and Attachments thereto, pp. 8, 14 and 19.)

disability."

B. The Commission's Precedential Decision Apply The 1992 Amendments To Require That A Condition "Limit" A Major Life Activity.

The Commission has issued two precedential decisions,[10/] which apply the definition of "physical disability" adopted by the 1992 Amendments to require only that a condition "limit" a major life activity in order to qualify as a "physical disability." These decisions "serve as precedent in interpreting and applying provisions of [the FEHA]." (Gov. Code, § 12935, subd. (h).)

In 1997, in *DFEH v. Silver Arrow Express, Inc.* (Maniago) (1997) FEHC Dec. No. 97-12, at pp. 7-8 [1996-97 CEB 2; 1997 CAFEHC LEXIS 11], a case involving a physical disability (post-bypass heart surgery and a ruptured disc), the FEHC defined the term "physical disability" as follows:

> "The Act provides that the term "**physical disability**" includes, among other things, having a physiological disease or disorder which: 1) affects the musculoskeletal or cardiovascular system, and 2) **limits** an individual's ability to participate in major life activities." (Gov. Code § 12926, subd. (k) (1).)" (*Id.* at pp. 7-8, emphasis added.)

In 2000, in *DFEH v. Seaway Semiconductor* (Hensley) (2000) FEHC Dec. No. 00-03P, at p. 13 [2000 CEB 1; 2000 CAFEHC LEXIS 2], a case involving a physical disability (Graves' disease), the FEHC declared:

> "Government Code section 12926, subdivision (k), states in part:"
> "***Physical disability***" includes, but is not limited to, all of the following:
> "(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

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10. See Attorney General's Request for Judicial Notice, Exhibit B.

> "(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
> "(B) ***Limits*** an individual's ability to participate in major life activities." (*Id.* at p. 13, emphasis added.)

Therefore, prior to the Poppink Act amendments, the FEHC had amended its relevant regulation to conform to the 1992 Amendments, which required that a condition need only "limit" major life activities. It also applied that requirement to two precedential decisions.

This Court has considered the FEHC's regulations and precedential decisions in interpreting the FEHA. (*Robinson v. Fair Employment and Housing Com.*, *supra*, 2 Cal. 4th at 234, 238.) Both the FEHC's 1995 regulations and its precedential decisions, issued prior to the enactment of the Poppink Act, support the conclusion that the Poppink Act did not introduce the requirement that a condition limit a major life activity to qualify as a "physical disability."

III.

THE CASSISTA COURT DID NOT HOLD THAT THE 1992 AMENDMENTS REQUIRE THAT A CONDITION "SUBSTANTIALLY LIMIT" A MAJOR LIFE ACTIVITY IN ORDER TO QUALIFY AS A PHYSICAL DISABILITY

Respondent relies on this Court's decision in *Cassista v. Community Foods, Inc., supra,* 5 Cal.4th 1050, 1060, to support its position that applicable law in 1997 required that a condition "substantially limit" a major life activity in order to constitute a "physical disability." Such reliance, however, is misplaced.

In *Cassista,* the Court considered whether the FEHA prohibited employment discrimination on the basis of an employee's obesity. (*Cassista v. Community Foods, Inc., supra,* 5 Cal.4th at p. 1052.) As the Court explained, the question presented was narrow:

> "It is important to emphasize at the outset the limited nature of our inquiry. We do not intend, nor indeed are we at liberty, to define 'physical handicap' in terms we believe to be morally just or socially desirable. Our task, rather, is to determine the boundaries of that provision which the Legislature intended." (*Id*. at p. 1056.)

Because the 1992 amendments to the FEHA changing the term "physical handicap" to "physical disability" had just taken effect, the *Cassista* court reviewed both pre-1992 amendment and post-1992 amendments language in the FEHA as well as the FEHC's 1988 regulation defining "physical handicap" to determine if obesity constituted a "physical handicap." (*Cassista v. Community Foods, Inc., supra*, 5 Cal.4th at pp.1056-1060.) The Court considered both the relevant pre-existing statute and regulation defining "physical handicap" and newly enacted Government Code section 12926 definition of "physical disability" because it felt constrained by the

Legislature's stated intent that there be continuity between the two definitions and, most importantly, that the definition of "physical disability" not retreat from the broad definition given "physical handicap" in *ANI*. The *Cassista* Court stated:

> "This express reference to [*ANI*], suggests that the Legislature intended to avoid the creation of two standards for discrimination claims, depending upon whether the cause of action arose before or after the effective date of the amendment." (*Cassista v. Community Foods, Inc., supra*, 5 Cal.4th at p. 1059.)

In attempting to harmonize the old and new definitions, the Court commented on the definition for "physical handicap" that was set forth in the FEHC's 1988 regulation.[11/] This Court stated:

> "[The FEHA] has finally caught up with its implementing regulation; the new definition of 'disability' in section 12926, subdivision (k), and the long-standing interpretation of 'handicap' in the California Code of Regulations (Cal. Code Regs., tit. 2, § 7293.6) are in harmony. Each requires an actual or perceived physiological disorder, disease, condition, cosmetic disfigurement or anatomical loss affecting one or more of the body's major systems and ***substantially limiting one or more major life activities***." (*Cassista v. Community Foods, Inc., supra,* 5 Cal.4th 1050, 1060, emphasis added.)

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11. The 1988, 1986 and 1980 FEHC regulations included language conforming to that of the pre-ADA federal definition of disability embodied in Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794. These definitions described a physically handicapped individual as one who "[h]as a physical handicap which ***substantially limits one or more major life activities***." (See former Cal. Code Regs., tit. 2, § 7293.6, subd. (i), Register 88, No. 18; former Cal. Admin. Code, tit. 2, § 7293.5, subd. (l), Register 86, No. 45; former Cal. Admin. Code, tit. 2, § 7293.5, subd. (l)(2), Register 80, No. 25, emphasis added.) (See Appellant's Request for Judicial Notice of FEHC Regulations and FEHC Decisions and Attachments thereto, pp. 8, 14 and 19.)

This dicta has, unfortunately, been construed by respondents, the trial court, and the Court of Appeal to suggest that, in *Cassista*, this Court held that the 1992 Amendments require that a condition "substantially limit a major life activity" in order to qualify as a physical disability. Such construction is in error.

This passage from the *Cassista* decision is dicta because the issue of whether a condition must "limit" or "substantially limit" a major life activity was not before or decided by the Court. Rather, the issue before the Court was whether obesity was a condition that was covered by the FEHA's prohibition of discrimination based upon physical handicap or physical disability. (*Cassista v. Community Foods, Inc., supra,* 5 Cal.4th at 1052.) The Court held that an individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological systemic basis for the condition. (*Id.* at p. 1065.)

Moreover, although the *Cassista* court made reference to the FEHC's regulation containing the "substantially limits" language, prior to such reference it stated:

> "Thus, to qualify as **physically 'disabled'** under the new statute the claimant must have, or be perceived as having, a 'physiological' disorder that affects one or more of the basic bodily 'systems' and **limits** the claimant's ability 'to participate in major life activities.'" (*Cassista v. Community Foods, Inc., supra*, 5 Cal.4th at p. 1059, emphasis added.)

Also, after making reference to the FEHC's regulation, the Court again stated that the new law (the 1992 Amendments) require that a condition limit a major life activity. The Court stated:

> "Thus, it is a relatively simple matter to harmonize the current and former versions of section 12926. Under both, the touchstone of a qualifying handicap or disability is an

> actual or perceived physiological disorder which affects a major body system and **limits the individuals ability to participate in one or more major life activities**." (*Cassista v. Community Foods, Inc., supra*, 5 Cal.4th at p. 1061, emphasis added.)

In view of these statements, the court's earlier reference in its decision to the FEHC 1988 regulation's harmony with the definition of "physical disability" contained in the 1992 Amendments can only be viewed as dicta. For this reason, *Cassista* cannot be reasonably construed to hold that the 1992 Amendments required that a condition "substantially limit" a major life activity to qualify as a "physical disability."[12/]

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12. Notwithstanding this clear rejection of the ADA's more restrictive definition, some courts have concluded that the FEHA, like the ADA, requires a "substantial limitation" with respect to proving the existence of a "physical disability." (See, e.g., *Hobson v. Raychem Corp*. (1999) 73 Cal.App.4th 614, 627 [former section 12926, subd. (k) adopted the ADA's requirement that a physical impairment is not a covered disability unless it substantially limits one's participation in a major life activity]; *Gosvener v. Coastal Corp*. (1996) 51 Cal.App.4th 805, 813 [FEHA incorporates ADA's definition of physical disability]; *Diffey v. Riverside County Sheriff's Department* (2000) 84 Cal.App.4th 1031, 1035-1036 [to qualify as a disability, both "the ADA and FEHA require that an impairment . . . substantially limit a major life activity."] It is respectfully submitted that these cases should be disapproved by this Court.

IV.

THE POPPINK ACT AMENDMENTS DO NOT ALTER THE DEFINITION ADOPTED IN THE 1992 AMENDMENTS THAT A CONDITION NEED ONLY "LIMIT" A MAJOR LIFE ACTIVITY TO CONSTITUTE "PHYSICAL DISABILITY"

The Poppink Act amendments left unchanged the definition that a condition need only "limit"a major life activity to constitute a "physical disability" under the FEHA. As contained in the Poppink Act, Government Code section 12926, subdivision (k), states:

> "(k) 'Physical disability' includes, but is not limited to, all of the following:
> "(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
> "(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
> "(B) Limits a major life activity. For purposes of this section:
> "(i) 'Limits' shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.
> "(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult." (Gov. Code, § 12926, subd. (k).)

Although the Poppink Act did not, as respondents argue, inject for the first time the definition that a "physical disability" need only "limit"a major life activity under the FEHA, it did add language to the FEHA that is intended to provide guidance in determining whether a condition "limits a major life activity." The Poppink Act added language that provides that a condition "limits" a major life activity if it "makes the achievement of the

major life activity difficult." (Gov. Code, §12926, subds. (k)(1)(B)(ii) & (i)(1)(B).)

This clarification of the phrase "limits a major life activity" is similar to language in *ANI*, in which the Court determined that a "physical handicap" was a physical condition which "makes achievement unusually difficult." (*ANI v. FEHC, supra,* 2 Cal. 3d 603, 609.) While the *ANI* case was previously referenced in the FEHA (former Gov. Code §12926, subd. (k)(4)), the Poppink Act deleted this reference and incorporated this concept into the statutory definition.[13/]

The only other provision in the Poppink Act that, arguably, requires brief consideration in determining whether the Poppink Act replaced the term "substantially limits" with "limits" is Government Code section 12926.1. Respondents contend that certain language in subdivisions (c) and (d) of this section supports their contention that, prior to the effective date of the Poppink Act amendments, the FEHA required that a condition "substantially limit" a major life activity. Government Code section 12926.1, subdivision (c) states in relevant part:

"(c) . . .[T]he Legislature has determined that the

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13. Although not relevant to the disposition of the narrow issue presented in this case, the Poppink Act addressed several other important issues that, in some cases, must be resolved in determining whether a person has a physical disability within the meaning of the FEHA. For example, in response to the United States Supreme Court's trilogy of cases holding that disabilities should be defined after consideration of any mitigating or corrective measures (*Sutton v. United Air Lines, Inc.* (1999) 527 U.S. 471; *Murphy v. United Parcel Service, Inc.* (1999) 527 U.S. 516; and *Albertson's, Inc. v. Kirkingburg, supra,* 527 U.S. 555, 565), the Legislature amended Government Code section 12926 to expressly provide that a determination of whether an individual's disability limits a major life activity must be made *without* regard to the beneficial effects of mitigating or corrective measures. (Gov. Code, § 12926, subd. (k)(1)(B)(i).)

> definitions of 'physical disability' and 'mental disability' under the law of this state require a "limitation" upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act."

Government Code section 12926, subdivision (d) states in its entirety:

> "Notwithstanding any interpretation of law in *Cassista v. Community Foods* (1993) 5 Cal.4th 1050, the Legislature intends (1) for state law to be independent of the Americans with Disabilities Act of 1990, (2) to require a "limitation" rather than a "substantial limitation" of a major life activity, and (3) by enacting paragraph (4) of subdivision (i) and paragraph (4) of subdivision (k) of Section 12926, to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity."

Respondents argue that the Legislature's declaration in these subdivisions of Government Code section 12926.1, that the definition of physical disability requires only a "limitation" and not a "substantial limitation" upon a major life activity evidences the Legislature's acknowledgment that, prior to its passage of the Poppink Act amendments to Government Code section 12926, subdivision (k), the FEHA required that a condition "substantially limit" a major life activity. Such argument rings hollow in view of the plain language of the Legislature's 1992 amendments to the FEHA that adopted the term "limits" and not the term "substantially limits" for the definition of "physical disability."

If anything, the Legislature's declaration in Government Code section 12926.1 is intended to restate the intent expressed by the Legislature in 1992 when it adopted the definition that a condition need only "limit" a major life activity to constitute "physical disability." It is evident from the reference to

Cassista in Government Code section 12926.1, subdivision (d), that the Legislature felt compelled, for a second time in eight years, to further clarify that whether a condition qualifies as a physical disability under the FEHA is to be determined by the more liberal "limits" term that it adopted in 1992.

CONCLUSION

In 1992, the California Legislature amended the FEHA to define "physical disability" as a condition that "limits" a major life activity. Although the Poppink Act contained numerous amendments affecting various provisions of the FEHA, the applicability of those amendments is not at issue in this case.

Given the plain language of the definition of "physical disability" under former Government Code section 12926, subdivision (k) in effect in 1997 – requiring only that a condition "limit" a major life activity in order to constitute a "physical disability" – the Attorney General respectfully submits that the Court of Appeal erred in holding that the Poppink Act changed this term from "substantially limits" to "limits." For these reasons, the Attorney General respectfully submits that this Court should reverse the decision of the Court of Appeal.

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