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April 5, 2022

By Electronic Case Filing & USPS

Chief Justice and Associate Justices
Supreme Court of the State of California
Earl Warren Building, Civic Center Plaza
350 McAllister Street
San Francisco, CA 94102

Re: *Raines v. U.S. Healthworks Medical Group, et al.*
Supreme Court Case No. S273630
Ninth Circuit Case No. 21-55229

Chief Justice Tani Cantil-Sakauye and Associate Justices:

We represent Plaintiffs-Appellants Kristina Raines and Darrick Figg ("Plaintiffs") against Defendants-Appellees U.S. Healthworks *et al*. ("Defendants") in the above-referenced case. Pursuant to California Rule of Court 8.548(e)(1), Plaintiffs submit this letter in support of the Ninth Circuit Court of Appeals Order Certifying Question to this Court (March 16, 2022) (hereinafter the "Order").

The Ninth Circuit's Order certified the following question to this Court:

Does California's Fair Employment and Housing Act, which defines "employer" to include "any person acting as an agent of an employer," Cal. Gov't Code § 12926(d), permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination?

Plaintiffs urge this Court to decide the certified question without reformulation. This legal question meets the standard set by C.R.C. 8.458(a) because (1) this Court's decision could determine the outcome of the matter pending before the Ninth Circuit, (2) there is no controlling precedent, and (3) resolution of the question has significant public policy ramifications. *See* Order at 8; Plaintiffs' Opening Brief, ECF No. 10 at 34-37; *Kremen v. Cohen* (9th Cir. 2003) 325 F.3d 1035, 1037 ("The certification procedure is reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts.").

First, this Court's interpretation of FEHA will determine the outcome of this appeal with respect to Plaintiffs' FEHA claim. The only basis for the dismissal of that claim was the District Court's erroneous legal conclusion that no agent *of any kind* is subject to FEHA liability.

Second, this is a matter of first impression: the applicability of FEHA to corporate agents like Defendants is a question of California law for which there is no controlling precedent. Indeed, the certified question was expressly reserved by this Court in *Reno v. Baird* (1998) 18 Cal.4th 640, 658, which "specifically express[ed] no opinion on whether the 'agent' language merely incorporates respondeat superior principles," as the District Court erroneously held, "or has some other meaning." Nor was this question resolved in *Jones v. Torrey Pines* (2008) 42 Cal.4th 1158.

Third, the certified question has significant public policy ramifications. FEHA expresses California's fundamental public policy against arbitrary discrimination. *See City of Moorpark v. Sup. Ct.* (1998) 18 Cal.4th 1143, 1156–57 ("FEHA broadly announces 'the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek … employment without discrimination or abridgment'"). It must be liberally construed in order to carry out its purposes. *See id.* at 1157-58. Whether FEHA's prohibition on unlawful employment practices applies to corporate agents has important public policy ramifications for millions of California workers—not just the hundreds of thousands of putative class members forced by Defendants in this case to disclose their entire health histories, from birth to present, regardless of the job in question and in clear violation of FEHA.

Further, here it was Defendants—not the direct employers—who developed the illegal health questionnaire and set the policies requiring all questions be answered. Especially in cases like this, where a corporate agent is the active wrongdoer and profits from its illegal and discriminatory practices, that agent should be held to account. *See Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 78 (comparing supervisors, who do not profit "from the fruits of the enterprise" and are not liable under FEHA, with the corporation itself, which does and is). Indeed, this Court's jurisprudence in *Reno* and *Jones* teaches that analysis of the scope of agency liability under FEHA is a fundamentally policy-driven endeavor. *See Reno*, 18 Cal.4th at 651-53; Order at 10.

Last, the California Attorney General's contrasting positions in this case and in *Reno* further illustrate the need for this Court to decide the question. In *Reno*, the Attorney General supported the narrow exception this Court carved out to FEHA liability for individual supervisors, pointing—just as this Court did—to the absurd and "inconceivable" consequences that would flow from holding individual supervisors liable. *See Reno*, 18 Cal.4th at 650-51 n.3. Here, by contrast, the Attorney General (along with leading disability rights groups) supports liability against corporate agents—this time by highlighting the absurd and unintended consequences flowing from *not* holding such agents liable. "Upholding the district court's decision … would hinder effective remedies to eliminate discrimination under FEHA" and "barriers to employment will only deepen." *See* Amicus Curiae Brief of the State of California,

ECF No. 16 at 9-14, 17 (cleaned up). The certified question here is thus no less consequential than the questions presented and decided in *Reno*.[1]

Respectfully Submitted,

R. Scott Erlewine

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[1] Should Defendants here ultimately prove that they were not in fact acting as agents (which Plaintiffs allege but Defendants dispute) and therefore have no liability under FEHA, Plaintiffs contend Defendants may nevertheless be liable under the Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq*. The Ninth Circuit did not certify to this Court related questions of first impression arising under Plaintiffs' alternatively pled Unruh claim. *Cf.* Plaintiffs' Opening Brief, ECF No. 10 at 54-55 (requesting certification of Unruh questions). Nevertheless, in "exercising its discretion to grant or deny the request," this Court may consider "any other factor" it "deems appropriate." C.R.C. 8.548(f)(1). FEHA and Unruh were passed in the same legislative session for the identical goal of eradicating arbitrary discrimination. Whether there is a gap between the statutes permitting Defendants to discriminate with impunity similarly presents important public policy concerns that this Court should consider. Like the certified FEHA question, these Unruh questions involve important public policy concerns, are unresolved, and could dispose of the Unruh claim in the Ninth Circuit.

PROOF OF SERVICE

Raines et al. v. U.S. Healthworks Medical Group et al.
Ninth Circuit Case No. 21-55229
California Supreme Court Case No. S273630

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 39 Mesa Street, Suite 201, San Francisco, CA 94129.

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Ninth Circuit Court of Appeals 95 7th Street San Francisco, CA 94103	Requesting Court

BY U.S. MAIL

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

Executed on April 5, 2022 at San Francisco, California.

By: 

Kyle P. O'Malley
Attorney for Plaintiffs-Appellants

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RAINES v. U.S. HEALTHWORKS MEDICAL GROUP**
Case Number: **S273630**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **kpo@phillaw.com**

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

4/5/2022
Date

/s/Kyle O'Malley
Signature

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