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April 15, 2022

Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

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

Dear Chief Justice Cantil-Sakauye
and Associate Justices:

In accordance with California Rule of Court 8.548(e)(2), Defendants provide this response to the April 5, 2022 letter submitted by Plaintiffs regarding the Ninth Circuit's Order Certifying Question to this Court (March 16, 2022) ("Order").

There is no reason to grant review because the portrayal of the issue as unsettled is inaccurate. Any clarification of the issue should be left to the California Legislature, not this Court, for three reasons.

First, the text of the statutory provision at issue is identical to the text construed 24 years ago in *Reno*¹ and that text draws no distinction between individuals and business agents – both are included in the definition of "person."² The Court also did not draw a distinction

¹ *Reno v. Baird*, 18 Cal. 4th 640, (1998).

² Cal. Gov't Code § 12926 provides that "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."

Cal. Gov't Code § 12925 states "as used in this part, unless a different meaning clearly appears from the context: (d) **"Person" includes one or more individuals,**

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in *Jones v. Lodge at Torrey Pines*.³ The plain language of FEHA allows for no such distinction between different types of “persons,” which includes both individuals and corporation. The Legislature is presumed to be aware of *Reno* and *Jones*, yet in the 24 years since *Reno*, it has never sought to amend the FEHA to draw the distinction Plaintiffs are proposing. Any such distinction would be a dramatic expansion of the law that should come from the California Legislature.

Second, the proposed expansion of the law makes no sense and is unworkable for all of the reasons discussed in *Reno*.⁴ The FEHA is an employment liability statute and liability thus attaches to adverse employment actions – hiring, firing, or in the context of health screening, how or whether the *employer* uses the health screening to make employment decisions. To impose FEHA *employer* liability on a *medical provider* who did not employ Plaintiffs because the provider acted as an agent of the employer erroneously inverts the principle of *respondeat superior*, which makes a principal liable for its agent’s conduct, but which cannot make an employer’s agent bear a statutory liability directed at the employer.⁵

Third, the proposed expansion of the law is unnecessary. Under the FEHA, the employer is liable for its agent’s actions.⁶ There is no sound reason to create a redundant additional cause of action against business agents, and plenty of reasons not to – the very reasons this Court gave long ago in *Reno* in declining to create a redundant cause of action under the FEHA that would make agents liable, in addition to their employers.⁷

Accordingly, this Court need not rule again on an issue it has twice already ruled. The law is clear here: “The person-as-agent language of section 12926, subdivision [is]

partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.

³ *Jones v. Lodge at Torrey Pines P’ship*, 42 Cal.4th 1158 (2008).

⁴ *Reno v. Baird*, 18 Cal. 4th 640, 651-564 (1998).

⁵ *Reno v. Baird*, 18 Cal. 4th 640, 658 (1998).

⁶ *Reno v. Baird*, 18 Cal. 4th 640, 655 (1998) (“The fact that the employer is liable via the respondeat superior effect of the ‘agent’ language provides protection to employees.”).

⁷ *Reno v. Baird*, 18 Cal. 4th 640, 651-564 (1998).

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‘intended only to ensure that employers will be held liable.’⁸ As this Court said: “until the Legislature provides for punishing [agents], [the courts] should leave that task to the employers.”⁹ The Court should not grant review here.

Very truly yours,

Raymond A. Cardozo

Raymond A. Cardozo

RAC:ekk

cc: See Proof of Service

⁸ *Jones v. Lodge at Torrey Pines P’ship*, 42 Cal. 4th 1158, 1163 (2008).

⁹ *Reno v. Baird*, 18 Cal. 4th 640, 662 (1998).

PROOF OF SERVICE

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

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105-3659; ekroll@reedsmith.com. On April 15, 2021, I served the following document(s) by the method indicated below:

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Rob Bonta Michael L. Newman Christine Chuang Srividya Panchalam Francisco V. Balderrama CALIFORNIA ATTORNEY GENERAL'S OFFICE 300 South Spring Street, Suite 1702 Los Angeles, CA 90013 Srividya.panchalam@doj.ca.gov	Attorneys for Amicus Curiae State of California

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 15, 2022, at San Francisco, California.

Eileen Kroll

Eileen Kroll

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:

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4/15/2022

Date

/s/Raymond A. Cardozo

Signature

Cardozo, Raymond A. (173263)

Last Name, First Name (PNum)

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