No. S158965
(Court of Appeal No. H029602)
(Santa Clara County Superior Court No. CV023646)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIAN REID,

Plaintiff and Appellant,

v.

GOOGLE, INC.

Defendant and Respondent.

BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF AND APPELLANT

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QUESTION PRESENTED

Should California law recognize the "stray remarks" doctrine, which permits the trial court in ruling on a motion for summary judgment to disregard isolated discriminatory remarks or comments unrelated to the decisionmaking process as insufficient to establish discrimination?

INTRODUCTION AND STATEMENT OF INTEREST

This case presents the question whether this Court should create a special rule of evidence, specific to employment discrimination cases, that permits trial courts to disregard on a categorical basis otherwise relevant anecdotal evidence of discrimination in summary judgment proceedings. The answer is clearly, "No." Were this Court to adopt Google's "stray remarks" exception to the California Evidence Code, a vast array of probative evidence would thereafter be unavailable for consideration, and plaintiffs with meritorious FEHA cases would be denied their fundamental right to trial by jury. Categorical rules that exclude evidence on a *per se* basis, independent of context, are inconsistent with this Court's duty to liberally construe the FEHA and contrary to the California Evidence Code.

The California Employment Lawyers Association ("CELA") is an organization composed of attorneys who represent plaintiffs in discrimination and employment cases, and are familiar with the many ways in which discrimination can occur in the workplace. CELA's experience and familiarity with the practical realities of the American workplace provide a unique perspective on the issues presented in this case. CELA members also regularly confront summary judgment motions in which employers seek to exclude evidence probative of discrimination. CELA thus has a strong interest in the development of law in this area. CELA has sought leave of Court to submit this brief.

In this brief, CELA argues that if the Court adopts the stray remarks doctrine proposed by Google in this case, key evidence of discrimination will be unavailable to employees to meet their burden of proof, and plaintiffs with meritorious cases will be deprived of their right to a jury trial. Narrowing the evidence available to prove discrimination

violates the Legislative mandate that the Fair Employment and Housing Act be liberally interpreted to effectuate its purpose of eliminating discrimination in the State.

ARGUMENT

I.

CATEGORICAL RULES THAT EXCLUDE RELEVANT EVIDENCE ON A *PER SE* BASIS, INDEPENDENT OF CONTEXT, ARE INCONSISTENT WITH THIS COURT'S DUTY TO LIBERALLY CONSTRUE THE FEHA.

Google urges this Court to adopt a rule deeming certain categories of evidence *per se* irrelevant to the issue of discriminatory intent. *See* Respondent's Opening Brief ("OB") at page 20, characterizing stray remarks as "not probative," "irrelevant," "insufficient … to create a triable fact," and "entitled to virtually no weight" on the issue of whether discrimination occurred.

Although the breadth of Google's proposed "stray remarks doctrine" is not entirely clear, at least three categories of evidence are subsumed under it: (1) "remarks made by nondecisionmakers" (OB 14); (2) "remarks made by the decisionmakers outside the decisionmaking context" (OB 15); and (3) "general or ambiguous remarks … including comments about the process of aging and generational change" (OB 15-17). The stray remarks doctrine proposed by Google would make such remarks *per se* inadmissible to defeat a motion for summary judgment, independent of content or context: "Stray remarks, by their very nature, are irrelevant to the allegedly discriminatory decision at issue, and should be excluded as inadmissible evidence." OB 22.

Google's proposed rule should be rejected as inconsistent with the statutory mandate to liberally construe the FEHA. In every disparate treatment case, the employer's motivation is a question of fact. Weighing the sufficiency of evidence offered to prove bias—whether it comes from the mouth of the ultimate decisionmaker or other employees—is normally the province of the jury. Since the stray

remarks doctrine would sharply limit the evidence available to prove discrimination, it will prevent meritorious cases from proceeding to trial.

A. The FEHA Must Be Liberally Construed.

The Fair Employment and Housing Act, Government Code Sections 12900, *et seq*. (hereinafter "FEHA"), is a remedial statute articulating a fundamental civil right—"[t]he opportunity to seek, obtain and hold employment without discrimination." GOV'T CODE §12921. The Legislature has mandated that the statute "shall be construed liberally for the accomplishment of [its] purposes." GOV'T CODE §12993(a).

As this Court acknowledged almost a quarter of a century ago, in *Brown v. Superior Court*, 37 Cal. 3d 477, 485-86 (1984):

> The FEHA establishes a comprehensive scheme for combating employment discrimination. As a matter of public policy, the FEHA recognizes the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination. ([GOV'T CODE] § 12920.) This court has declared that policy to be "fundamental."
>
> Moreover, the opportunity to be free from discriminatory practices in seeking, obtaining, and holding employment is a "civil right." (§ 12921.) Employment discrimination "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." (§ 12920.) The express purpose of the FEHA is "to provide effective remedies which will eliminate such discriminatory practices." (*Ibid*.) In addition, the Legislature has directed that the FEHA is to be construed "liberally so as to accomplish its purposes." (§ 12993.). *Brown*, 37 Cal. 3d at 485-86 (internal citations omitted).

B. Liberal Construction Requires Consideration Of Workplace Context.

In accord with the mandate to liberally construe the FEHA, this Court requires that claims brought under the Act be considered in context, and that plaintiffs' allegations be evaluated under a totality of the circumstances approach. This principle of statutory construction is evident in *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1052 (2005), in which the Court adopted a flexible, context-dependant approach to retaliation claims:

> Retaliation claims are inherently fact-specific, and *the impact of an employer's action in a particular case must be evaluated in context*. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, *the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim*. *Id*. (emphasis added).

The United States Supreme Court likewise emphasized the primacy of context, when construing retaliation claims under Title VII in *Burlington Northern Santa Fe Railway Co. v. White*, 548 U.S. 53, 69 (2006):

> *Context matters*. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used …. *Id*. (emphasis added; citation and internal quotation marks omitted).

The stray remarks doctrine mandates exclusion or disregard of evidence on a categorical basis, *without* regard to workplace context, and thus cannot be reconciled with this Court's well established totality of the circumstances approach to FEHA claims.

1. The Stray Remarks Doctrine Prevents Consideration Of The Bias Of Individuals Whose Actions Influenced The Decisionmaking Process.

Among its other defects, Google's stray remarks doctrine narrows the reach of the FEHA by erroneously equating "employer" with "ultimate decisionmaker." In disparate treatment cases, the ultimate liability issue is whether the protected status was a motivating factor for the *employer's* adverse action. Embedded in Google's "stray remarks doctrine" is the erroneous principle that *only* the bias of the *ultimate decisionmaker* is relevant to the "motivating factor" determination. This Court has never adopted such a restrictive interpretation of "motivating factor," and the lower courts have rejected it. *See, e.g., Reeves v. Safeway Stores, Inc.*, 121 Cal. App. 4th 95, 108 (2004) (permissible for a jury to conclude that an evaluation, if based on discrimination, infected the ultimate decision); *Clark v. Claremont Univ. Ctr. & Graduate Sch.*, 6 Cal. App. 4th 639, 665-66 (1992).

In the modern corporate workplace, multi-actor decisionmaking is the norm. Ultimate decisionmakers rarely act entirely on their own—they may receive recommendations from subordinate individuals or committees, they may be part of a consensus-based decisionmaking process, and they usually rely on performance information provided by others. The very structure of the large company provides ample opportunity for bias to be introduced into the decisionmaking process at multiple levels. For example, the bias of a lower level manager may infect an employee's performance ranking; a biased supervisor may "set up" an employee for disciplinary action, etc. When a supervisor makes the ultimate decisionmaker his tool for carrying out a discriminatory action, the original actor's bias may be attributed to the employer under an established theory of liability known as "cat's paw." *Reeves*, 121 Cal. App. 4th at 113; *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990).

To prevail on an employment discrimination claim, an employee must prove a causal link between the protected status and the treatment complained of. This causal link is demonstrated through a variety of means, including, but not limited to, disproving the "official" reason for the decision (pretext), undermining the credibility of defense witnesses,

and/or proving that bias played a part. Limiting the evidence available to plaintiffs to prove this causal link by excluding biased statements of anyone other than the ultimate decisionmaker is particularly inappropriate in the multi-actor decisionmaking context.

2. The Stray Remarks Doctrine Prevents Consideration Of Workplace Culture.

In cases like the one before the Court, evidence that the workplace maintained a "culture of bias," while not dispositive, is certainly relevant to the plaintiff's theory of liability. Reid alleges that Google's stated reason for termination, "You are not a cultural fit," is a proxy for "You're too old."

In *Mattenson v. Baxter Healthcare Corp*., 438 F.3d 763 (7th Cir. 2006), Judge Posner wrote:

> [I]n this day and age, for executives at the vice-presidential level of a major business enterprise to be talking openly about the desirability of getting rid of old employees is at least some evidence of the discriminatory workplace culture …. [T]estimony based on the personal knowledge of the testifying employees can provide a basis for an inference that discriminatory attitudes permeate a firm's employment policies and practices. *Id*. at 770.

See, e.g., Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 356 (6th Cir. 1998) (Circumstantial evidence of discriminatory atmosphere may serve as evidence of individualized discrimination.)

Co-worker comments frequently are offered as evidence of a "culture of bias." Evidence that age bias is expressed openly in a given workplace, with no concern for adverse consequences, also supports a theory that the organization tolerates discrimination on the basis of age. General statements made by opinion leaders (*e.g.*, founders, directors and high level managers) expressing a preference for younger workers or a concern for "graying" of the workforce is also probative, whether or not such leaders personally were involved in the specific decision at issue. Biased remarks by intermediate supervisors, investigators, or others whose acts may have influenced the ultimate decision, constitute probative evidence that should be considered by a trial court when

determining whether there is a triable issue of fact as to *employer* liability for discrimination.

The stray remarks doctrine proposed by Google prevents consideration of all such evidence. The effect of adopting it would be to narrow the field of provable discrimination cases to a very small universe, inconsistent with the statutory mandate to eliminate discrimination in the workplace.

II.

SPECIAL CATEGORICAL RULES OF EXCLUSION ARE NOT PERMITTED BY THE CALIFORNIA EVIDENCE CODE, AND SHOULD NOT BE APPLIED TO DEPRIVE PLAINTIFFS OF THEIR RIGHT TO A JURY TRIAL.

In the workplace context described above, biased statements of alleged non-decisionmakers, and statements made by decisionmakers outside the context of the decisionmaking process, may or may not be relevant to the employer's motive, depending on such factors as the contents of the statement, the context in which it is made, and the ability of the speaker to influence the decision. Whether such statements are "much ado about nothing" or constitute "the proof of the pudding," is normally the province of the jury.

A. The Stray Remarks Doctrine Violates The California Evidence Code.

Google asserts "Stray remarks, *by their very nature*, are irrelevant to the allegedly discriminatory decision at issue, and *should be excluded as inadmissible evidence.*" OB 22 (emphasis added). This is contrary to law.

Evidence Code Section 351 plainly states:

> Except as otherwise provided *by statute*, all relevant evidence is admissible. (emphasis added).

The 1965 Law Revision Commission Notes affirm that "Section 351 *abolishes all limitations* on the admissibility of relevant evidence *except those that are based on a statute*, including a constitutional provision" (emphasis added).

Evidence Code Section 210 defines relevant evidence as follows:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having *any tendency in reason* to prove or disprove *any disputed fact that is of consequence* to the determination of the action. (emphasis added).

Similar language is found in the Federal Rules of Evidence:

> "Relevant evidence" means evidence having *any tendency to make the existence of any fact that is of consequence* to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401 (emphasis added).

In *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), a unanimous Supreme Court, considering a proposed evidentiary rule of exclusion for "other supervisor" evidence in an age discrimination case brought under the ADEA, held that determinations of relevance and prejudice may *not* be made without *individualized consideration of context*:

> Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules. See Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U.S.C. App., p. 864 ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case"). 128 S. Ct. at 1147.

The Court noted that if the trial court *had* applied a blanket rule, it would have committed an abuse of discretion:

> The question whether evidence of discrimination by other supervisors is *relevant* in an individual ADEA case is *fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case*. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. 128 S. Ct. at 1147 (emphasis added).

Accordingly, the Court held that testimony regarding supervisors who played no role in the adverse employment decision challenged by the plaintiff is "neither *per se* admissible nor *per se* inadmissible." *Id*. at 1143.

Trial courts already have discretion to exclude evidence that creates *substantial* danger of undue prejudice under both state and federal law. Evid. Code §352; Fed. R. Evid. 403. The standard for doing so is both context dependent and high. *See, e.g., Mattenson*, 438 F.3d at 771:

> The admissibility of 'stray remarks,' as the cases call them, is governed by Rule 403 of the evidence rules, which establishes a standard ... that *tilts in favor of admissibility*; the probative value of the evidence must not merely be outweighed, it must be *substantially* outweighed, by its negative consequences, to be excludable. *And that will depend on context* …. (emphasis added).

Significantly, the "other supervisor" evidence considered by the United States Supreme Court included remarks denigrating older workers by supervisors not involved in the decision to terminate the plaintiff—precisely the type of remark that would be excluded from consideration under Google's "stray remarks doctrine." *Sprint/United Mgmt. Co.*, 128 S. Ct. at 1143.

The Supreme Court's reasoning in *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), is fully applicable to the stray remarks doctrine at issue in this case. The statutory language of the Federal Rules of Evidence and the California Evidence Code track each other. The statutory purpose of the ADEA and the FEHA's prohibition against age discrimination are the same. The United States Supreme Court's fact-specific, context-dependent approach to evidence mirrors the approach to FEHA cases consistently employed by this Court in the past. Accordingly, the Court should apply the same reasoning to this case, and reject the stray remarks doctrine as a *per se* rule of exclusion inconsistent with the California Evidence Code.

B. Application Of The Stray Remarks Doctrine To Summary Judgment Proceedings Will Deprive Plaintiffs With Meritorious Cases Of Their Fundamental Right To Trial By Jury.

The stray remarks doctrine also runs afoul of another rule of liberal construction—*i.e.*, the one pertaining to summary judgment motions. When evaluating evidence in the context of summary judgment proceedings, trial courts must liberally construe *all* evidence in favor of the nonmoving party and resolve doubts in that party's favor. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1037 (2005).

As a special rule of probative value that affords *no* weight to (*i.e.*, disregards) relevant evidence in the determination of summary judgment motions, the stray remarks doctrine improperly restricts the ability of plaintiffs to survive summary judgment. The handling of evidence in summary judgment proceedings is particularly important to FEHA cases, because summary judgment is routinely sought by employers in virtually every case.

This Court should adopt the approach taken by the Court below, and the First District in *Harvey v. Sybase, Inc.*, 161 Cal. App. 4th 1547 (2008). In *Harvey*, the employer argued for a "same actor" rule of evidence that would create a "strong inference" of nondiscrimination when the same person hired and fired the plaintiff. The court emphatically rejected Sybase's attempt to create a special category of "super" probative evidence.

> Clearly, same actor evidence will often generate an inference of nondiscrimination. But whether or not the inference so drawn is a *strong* inference should not be an a priori determination, divorced from its factual context. Among the factors that influence the strength of such an inference are (1) the nature of the benefits(s) conferred and the adverse employment action taken by the actor; (2) the length of time between the positive and negative actions taken; and (3) the existence and nature of any motivating factors for the adverse action that arose after the benefit was conferred.

* * * *

> Evidence that the same actor conferred an employment benefit on an employee before discharging that employee *is simply evidence and should be treated like any other piece of proof*. Placing it is a special category as a "rule" or "presumption" or stating it creates a "strong inference" attaches *undue influence* to same actor evidence and *threatens to undermine the right to a jury trial by improperly easing the burden on employers in summary judgment* and postverdict motions. *Id*. at 1562-63 (citations omitted).

Giving *no* weight to evidence deemed "stray remarks" is equivalent to giving *super* weight to "same actor" evidence. It, too, would ease the burden on employers in summary judgment motions—by giving zero weight to plaintiff's evidence of biased remarks—and thereby undermine the fundamental right to trial by jury.[1]

C. Each Of The Three Categories Screens Out Evidence That May Be Probative Of Bias.

1. Disregarding "Ambiguous" Remarks And Remarks Deemed "Not Clearly Related To" Protected Status Will Screen Out Probative Evidence Of Hostile Animus And Stereotype Bias.

Google's stray remarks doctrine would exclude consideration of "ambiguous comments—open to interpretation and unrelated to age" to establish discriminatory animus. OB 26.

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[1]It is important to note that both the "stray remarks doctrine" and the "same actor inference" are examples of evidentiary rules premised upon assumptions about the nature of bias that are inconsistent with contemporary social psychology. *See generally* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997 (July 2006). This Court should be very wary of doctrines that restrict consideration of evidence based upon naïve psychological theories in conflict with thirty years of peer-reviewed, replicated empirical social science research.

Google includes in this category age-stereotyped remarks made by Reid's replacement and supervisor, Director of Operations Urs Hoelzle. Hoelzle criticized Reid publicly on numerous occasions, calling him "slow," "fuzzy," "sluggish," "lethargic," and telling him that his ideas were "obsolete" and "too old to matter." OB 25-29. Repeated criticism by a supervisor couched in the language of age-stereotyping is relevant to whether bias infected Google's evaluation of Reid's performance and the decision to terminate him. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), discussed below in Section II.C.2.

A doctrine that disregards such evidence on grounds that it is not *clearly* related to protected status squarely conflicts with the holding of *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006), another unanimous United States Supreme Court decision. In *Ash*, the Court held that it was error to disregard use of the word "boy" in reference to the black plaintiffs as evidence of discriminatory animus:

> The Court of Appeals [held] that "[w]hile the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone is not evidence of discrimination." Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous. *Id*. (internal citations omitted).

In addition, the fact that stereotyped assumptions about members of a protected class are a common source of discrimination has been widely recognized, and is not subject to debate. *See, e.g., Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003). The Ninth Circuit bluntly has instructed trial courts to become familiar with common stereotypes, to recognize coded language, and to treat it as probative evidence of motive and pretext:

> [M]anagement repeatedly echoed the all too familiar complaints about assertive, strong women who speak up for themselves: "difficult," "negative attitude," "not a team player," "problematic." The district courts must reject such sexual stereotypes and learn to identify the oft employed rhetoric that could reveal illegitimate motives. *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1072 (9th Cir. 2003).

Accord Kelly v. Stamps.com Inc., 135 Cal. App. 4th 1088 (2005) (summary judgment reversed, remark describing pregnant plaintiff as "checked out" probative of discriminatory animus); *see also Ramirez v. Allright Parking El Paso, Inc.*, 970 F.2d 1372, 1377 (5th Cir. 1992) (statement that worker was "less energetic" and "less motivated" can be construed as pretext for age discrimination); *Meschino v. International Tel. & Tel. Corp.*, 563 F. Supp. 1066, 1071 (S.D.N.Y. 1983) (statement that worker was "droopy with no pizazz" and a "sleepy kind of guy" were "consistent with discriminatory stereotypes of older people …").

Hoelzle's comments to Reid were neither isolated nor ambiguous, and they were directly related to plaintiff's theory of the case, *i.e.*, that Hoelzle instigated Reid's removal from a position in which plaintiff was performing well, to a "position" without a job description, staff or budget that "disappeared" shortly thereafter. If indeed, there *were* some ambiguity as to whether Hoelzle's remarks were intended as a negative comment on Reid's age, then the task of "disambiguating" them should be left for the jury, not disposed of on summary judgment. *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir. 1990).

2. Disregarding The Remarks Of Decisionmakers "Outside Of The Decisionmaking Context" Will Screen Out Even Direct Evidence Of Discrimination.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the United States Supreme Court held that is was error to discount age-related comments "on the ground that they 'were not made in the direct context of Reeve's termination.'" *Id*. at 152.

Reeves introduced striking evidence of age-based animus—remarks that plaintiff "was so old [he] must have come over on the

Mayflower" and "was too damn old to do [his] job." *Id*. at 151. In reversing a grant of judgment as a matter of law, the United States Supreme Court criticized the Fifth Circuit for discounting "critical evidence favorable to petitioner" and "fail[ing] to draw all reasonable inferences in [his] favor." *Id*. at 152.

Since the stray remarks doctrine would require that California trial courts disregard precisely this type of evidence, it should be rejected on the same grounds.

3. Disregarding The Remarks Of Non-Decisionmakers Will Screen Out Virtually All Evidence Probative Of Pretext.

Once a defendant articulates a legitimate nondiscriminatory reason for termination, plaintiff has the burden of proving pretext. By definition, evidence of pretext "strays" from the official story, and may well come from the mouths of individuals who are not official decisionmakers. Since the stray remarks doctrine treats anyone other than the ultimate decisionmaker as a "non-decisionmaker," the doctrine sanctions complete disregard of any remarks that challenge the official position. This puts plaintiffs in an impossible position—required to challenge the credibility of the "official story" to defeat summary judgment, yet prevented from relying on key evidence to meet their burden of proof.

Such a result not only erroneously disregards probative evidence, it is also inconsistent with the duty to liberally interpret the FEHA so as to fulfill its fundamental purpose: "to provide effective remedies" that will eliminate discrimination. *See* Section I.A, *supra*.

CONCLUSION

For all of the above reasons, this Court should reject the stray remarks doctrine. The doctrine places a "thumb on the scale" in favor of employers' motions for summary judgment, by permitting trial courts to disregard as "stray" even highly probative evidence of discrimination on a *per se*, categorical basis, without consideration of workplace context or the employee's theories of liability. Both California's strong public

policy in favor of elimination of discrimination and an employee's fundamental right to a jury trial are too important to be undermined in this way.

DATED: July __, 2008

Respectfully submitted,

CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.520(c), I certify that this Brief of Amicus Curiae California Employment Lawyers Association In Support Of Plaintiff And Appellant contains 4,216 words, not including the Tables of Contents and Authorities, this Certificate, the caption page, signature blocks, or attachments.

DATED: July __, 2008

Respectfully submitted,

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DECLARATION OF SERVICE

I declare that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above entitled action. My business address is 100 Pine Street, 33rd Floor, San Francisco, California 94111. I am a citizen of the United States and am employed in the City and County of San Francisco. On July 30, 2008, I served the following documents:

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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 and that this declaration was executed on July 30, 2008, at San Francisco, California.

_____
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