December 27, 2019

The Honorable Tani Cantil-Sakauye
and Honorable Associate Justices
350 McAllister Street, Room 1295
San Francisco, CA 94102

RE: *Carroll v. City and County of San Francisco*
Nos. S259558, A155208, CGC-17-562580

Dear Chief Justice Cantil-Sakauye and Associate Justices:

AARP and AARP Foundation ("Foundation") file this letter brief as Amici Curiae pursuant to Rule 8.500(g) of the California Rules of Court. For the reasons stated herein, AARP and AARP Foundation respectfully request that the Court deny the petition for review filed on December 10, 2019 in the above-referenced case.

Identity and Interest of Amici Curiae AARP and AARP Foundation

AARP is the nation's largest nonprofit, nonpartisan, organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members, including 3.3 million in California, and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virginia Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and the Foundation litigate and file amicus curiae briefs to address employment practices and other conduct that threaten the financial security and well-being of older Americans. In California, Amici have a long history of supporting efforts to eliminate age discrimination in employment. As part of those efforts, AARP filed amicus curiae briefs urging the California Court of Appeal and subsequently this Court to declare that age discrimination in employment violates a fundamental public policy of the state of California, which this Court did in *Stevenson v. Superior Court of Los Angeles County* (1997) 16 Cal. 4th 880. In the wake of *Marks v. Loral* (1997) 57 Cal. App. 4th 30, which held that an employer did not discriminate on the basis of age by making decisions based on salary

differentials, even if the result was to choose younger employees, AARP's California state office successfully advocated for an amendment to the California Fair Employment and Housing Act (FEHA), that rejected the *Marks* decision and declared that age discrimination victims may bring disparate impact claims challenging such layoffs in a manner comparable to prohibitions against sex and race discrimination.

In *Arnett v. CALPERS* (9th Cir. 1999) 179 F.3d 690, AARP filed an amicus brief challenging the formula for calculating disability retirement benefits, which like the formula in this case, was enacted by legislation. The statutory scheme at issue in *Arnett*, Cal. Gov't Code § 21417, "impose[d] a statutory ceiling of 55 – a presumed, but not mandatory retirement age under California law – and calculated an employee's 'potential years of service' by subtracting the employee's age at hire from 55." 179 F.3d at 693. The U.S. Court of Appeals for the Ninth Circuit ruled that because "potential years of service" under section 21417 was "*entirely* a function of the employee's age at hire," plaintiffs established a disparate treatment age claim. 179 F.3d at 694. The significant victory in *Arnett* ensuring greater financial security for older state employees who became disabled while employed was jeopardized by the U.S. Supreme Court's decision in *Kimel v. Florida Bd. of Regents* (2000) 528 U.S. 62, which held that the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, did not validly abrogate states' Eleventh Amendment immunity. However, the result was preserved when the Equal Employment Opportunity Commission (EEOC) intervened and achieved a historic settlement that compensated more than 1,700 retired state and local public safety officers with benefits estimated at $250 million most of which was "paid in increments over the lifetimes of the individual recipients."[1] In 2008, we filed an amicus brief with the California Supreme Court in *Reid v. Google, Inc.* (2010) 50 Cal 4th 512, a case in which this Court recognized that ageist comments are evidence of discrimination and rejected the "stray remarks" doctrine that has crippled age discrimination victims' chances for prevailing in federal courts.

One of Amici's principal areas of concern is ensuring that people over 50 have an adequate income and receive the employee benefits to which they are entitled. Public retirement plans, like the one in this case, are critical lifelines to older Americans. More than 4.5 million retired public employees rely on a pension

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[1] https://www1.eeoc.gov//eeoc/newsroom/release/1-30-03.cfm?renderforprint=1.

to make ends meet.[2] A 2019 survey by AARP revealed that a majority of U.S. adults may be at risk of a retirement savings gap.[3] The ability of public employees and retirees to challenge discriminatory retirement plans, and to recover damages when they succeed, is vitally important to the financial security of older Americans.

Support for Denying the Petition for Review

The Court of Appeal's decision in this case that Petitioners are not immune from suit under FEHA pursuant to section 818.2 of the Government Tort Claims Act, Cal. Govt. Code §§ 810 *et seq.*, is wholly consistent with this Court's prior decisions as well as other Court of Appeals decisions. Accordingly, review by this Court is not necessary to promote uniformity of decision.

The California legislature expressed it clear intent that California government employers be subject to FEHA's broad remedial prohibitions against age discrimination by defining "employer" to include "any political or civil subdivision of the state, and cities . . . ." Cal. Govt. Code § 12926(d). Courts of Appeal have uniformly agreed that government employers are liable for damages under FEHA. *See State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal. 3d 422, 429, 431 (FEHA "clearly manifests an intent to include both public and private employees within its scope" and "to give public employees the same tools in the battle against employment discrimination that are available to private employees."); and *DeJung v. Superior Court* (2008) 169 Cal. App. 4th 533, 546 (". . . the inclusion of 'the state or any political or civil subdivision of the state' within FEHA's definition of 'employer' constitutes an express declaration of the Legislature's intent to subject public entities to liability for violations of FEHA, and is a 'clear indication of legislative intent that immunity be withdrawn in the particular case.'") quoting *Caldwell v. Montoya* (1995) 10 Cal. 4th 972, 42 Cal. Rptr. 842.

Petitioners rely on *Esparza v. County of Los Angeles* (2014) 224 Cal. App. 4th 452, 462, to invent a conflict in appellate decisions. However, no such conflict exists. Here, the Plaintiff challenges the enforcement of a Charter formula that makes express distinctions based on age. In contrast, the challenged decision in

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[2] Frank Porell and Diane Oakley (2012) *The Pension Factor 2012: The Role of Defined Benefit Plans in Reducing Elder Hardships.* Washington, DC: National Institute on Retirement Security.

[3] https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2019/financial-resolutions-mistakes-accomplishments.doi.10.26419-2Fres.00309.001.pdf.

Esparza, a vote by the Los Angeles County Board of Supervisors to dissolve one office and merge it with another, was a facially neutral, "basic policy decision" which is typically immune from civil damage actions. *Caldwell*, 10 Cal. 4th at 983. Accordingly, the Court of Appeal in *Carroll* correctly held that *Esparza* did not conflict with its conclusion that section 818.2 did not apply to Petitioners' discriminatory disability retirement benefits formula. And finally, this Court has made clear that "FEHA creates *direct* statutory rights, obligations, and remedies between a covered 'employer,' private or public, and those persons it considers or hires for employment [citing § 12926, subd. (d)] . . . Accordingly, any personal immunity of a public employee against a particular FEHA claim does not necessarily accrue to the benefit of the public entity itself as a covered 'employer.'" *Caldwell*, 10 Cal. 4th at 989 n.9.

The importance of preserving FEHA's protection of state and local employees and retirees is amplified by the U.S. Supreme Court's decision in *Kimel*, which as stated above, deprived those employees of the right to bring ADEA lawsuits for monetary relief. In an effort to reassure state employees, the Supreme Court offered, "Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. . . . State employees are protected by state age discrimination statutes and may recover money damages from their state employers in almost every State of the Union." *Kimel*, 528 U.S. at 92 (citing to Cal. Govt. Code Ann. § 12900 *et seq.* and other state statutes). Amici respectfully urge this Court not to accept the Petitioners/Defendants' invitation to consider making that already weak reassurance from the U.S. Supreme Court a meaningless promise for state employees in California.

If government employers can cloak themselves with immunity whenever their discrimination originates in legislation, the remedial measures in FEHA will be rendered powerless for encouraging state and local legislatures in California "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." *McKennon v. Nashville Banner Pub. Co.* (1995) 513 U.S. 352, 358 quoting *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 417-18.

Conclusion

For the reasons stated above, Amici respectfully ask the Court to deny the petition for review in *Carroll v. City and County of San Francisco*. We thank you for considering the views of AARP and AARP Foundation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LAURIE A. MCCANN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed as a Senior Attorney with AARP Foundation Litigation, 601 E St., NW, Washington, DC 20049.

On December 27, 2019, I caused to be served the following document:

LETTER BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION

I caused this document to be served electronically via E-Service through the Court's approved E-Filing vendor TrueFiling and to be served on all counsel of record for all parties for this matter as listed below:

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On December 27, 2019, I also served one copy of the same document on the California Supreme Court using the U.S. Postal Service, in accordance with the rules of the Court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed December 27, 2019, in Washington, DC.

Laurie A. McCann