IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE SIXTH APPELLATE DISTRICT

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, an agency of the State of California,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA,

Respondent,

CISCO SYSTEMS, INC.; SUNDAR IYER; AND RAMANA KOMPELLA,

Real Parties in Interest.

Case No. H048962

Santa Clara County Superior Court, Case No. 20-CV-372366 Honorable Drew Takaichi, Dept. 2 Tel. (408) 882-2120

Filing Fee Waived for Government Agencies Pursuant to Gov. Code, § 6103

PETITIONER'S REPLY TO PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

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I. INTRODUCTION

The issue before this Court is whether the trial court erred as a matter of law or abused its discretion in refusing to permit the use of a fictitious name for a non-party administrative complainant[1] in an action filed by Petitioner California Department of Fair Employment and Housing to enforce the Fair Employment and Housing Act ("FEHA"), Gov. Code § 12900 et seq. DFEH's enforcement action seeks to prevent and remedy workplace discrimination, harassment, and retaliation against its victim-witness, the complainant (John Doe, a Dalit or "Untouchable" Indian), and other caste-oppressed employees based on their religion, ancestry, national origin or ethnicity, and race or color, in violation of the FEHA. If Doe's

[1] John Doe has not intervened in this government enforcement action, and thus is not a party and not subject to any generally applicable requirement that parties to litigation be identified by their real names. As the court below recognized in its order denying compelled arbitration in this case, "the FEHA [Gov. Code, § 12965, subd. (a)] authorizes DFEH to file a civil action, and [to] pursue … that action in the interests of the state and public as well as the interests of the aggrieved individual," and the statute "expressly provid[es] that the real party in interest (aggrieved individual) 'shall have the right to participate as a party and be represented by that person's own counsel.'" (Petitioner's Appendix ("PA") 681 [footnote omitted].) Although Doe is not a party in this case, in its petition and in this reply DFEH relies on decisions allowing the use of pseudonyms by "parties" because Doe's case for anonymity is, if anything, even stronger than the cases of actual parties who have been allowed to use pseudonyms despite the general common law and statutory rules requiring parties to be identified by name. DFEH's reliance on these cases does not indicate that it accepts the mistaken notion that Doe is a "party" to this action.

name becomes public as a result of the extensive publicity this case has generated and is likely to generate in the future, he expects to be subjected to more of the caste-based discrimination, harassment, and retaliation DFEH seeks to prevent by bringing this action, thereby making Doe's situation even worse and deterring other victims of caste-based discrimination and harassment from coming forward with their claims. (See PA 117-118 (Declaration of John Doe ("Doe Decl."), ¶¶ 13-19); PA 205-206 (Declaration of Dr. Suraj Yengde ("Yengde Decl."), ¶¶ 7-8); PA 44-45 (Declaration of Dr. Laurence Simon ("Simon Decl."), ¶¶ 10-12.) [2]

The record in this case establishes (1) a risk that the victim-witness and members of his family would be subjected to retaliatory physical and mental harm if his name were made public and (2) that anonymity is necessary to preserve the victim-witness's privacy in a matter of a sensitive and highly personal nature. On February 11, 2021, the trial court denied DFEH's motion to proceed with the litigation using a fictitious name for Doe, but stayed its order for 60 days to allow DFEH to seek review. (PA 674.)[3] On April 1, 2021, DFEH filed its petition requesting relief from the

[2] Citations to "PA" refer to Petitioner's Appendix in Support of Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief.

[3] Citations to "Order" refer to the trial court's Order re: Motion To Proceed Using Fictitious Name, filed February 11, 2021.

trial court's order, and on April 9, 2021, this Court stayed the trial court's order to permit further consideration of the issues raised by the petition.

Defendants-Real Parties in Interest ("defendants") seek summary denial of DFEH's petition. (Opp., p. 12.) For the reasons stated in this reply and in the petition, the Court should instead grant the relief requested by DFEH.

II. ARGUMENT

A. Defendants Have Mischaracterized The Applicable Standard Of Review

Contrary to defendants' suggestion in their opposition (Opp., p. 8), the trial court's order may be reviewed either de novo as a matter of law, or for abuse of discretion. (Petn., p. 34.)[4] Under either standard of review, DFEH should prevail.

This is not a case, as defendants would have it, in which DFEH is asking this Court to substitute its judgment on a discretionary matter for that of the trial court. (See Opp., pp. 8-9.) Although many pretrial orders are subject to review only for abuse of discretion, when the propriety of an order "turns on ... a question of law," the appellate court "determine[s] the issue de novo." (*City of Los Angeles v. Super. Ct.* (2017) 9 Cal.App.5th

[4] Citations to "Petn." refer to the Petition for Writ of Mandate, Prohibition, or other Appropriate Relief and the Memorandum of Points and Authorities in support thereof.

272, 282 [quoting *Gilbert v. Super. Ct.* (2014) 224 Cal.App.4th 376, 380].) Alternatively, "[a]n abuse of discretion is shown when the trial court applies the wrong legal standard" (*Costco Wholesale Corp. v. Super. Ct.* (2009) 47 Cal.4th 725, 733), or when it "'transgresses the confines of the applicable principles of law.'" (*Horsford v. Bd. of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 393 ("*Horsford*") [quoting *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297].) [5] "If the trial court is mistaken about the scope of its discretion the mistaken position may be 'reasonable', *i.e.*, one as to which reasonable judges could differ. … But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law." (*City of Sacramento v. Drew, supra,* 207 Cal.App.3d at pp. 1297-1298.)

Judges do not exercise their discretion in the abstract, but in the context of the legal principles applicable in a particular case. (*Horsford,*

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[5] Defendants contend that the appropriate test for abuse of discretion is whether the trial court "exceeded the bounds of reason." (Opp., p. 8). "This description of the standard is complete, however, only if 'beyond the bounds of reason' is understood as something in addition to simply 'irrational' or 'illogical.' . . . 'The scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action...." Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion.'" (*Horsford, supra,* 134 Cal.App.4th at p. 393 [quoting *City of Sacramento v. Drew, supra,* 207 Cal.App.3d at p. 1297].)

supra, 132 Cal.App.4th at pp. 393-394.) For example, even though the trial court in *Horsford* had "discretion" to award attorney's fees to the prevailing plaintiffs in an action brought under the FEHA, the court of appeal reversed the trial court's award as an abuse of that discretion because the award was not sufficient to effectuate the purpose of the FEHA "'to safeguard the right of Californians to seek, obtain, and hold employment without experiencing discrimination' . . . " and "'to provide effective remedies that will eliminate these discriminatory practices." (*Id.* at p. 394 [quoting *Flannery v. Prentice* (2001) 26 Cal.4th 572, 582-583], internal quotations omitted.) Similarly, in the present case, the trial court's failure to protect Doe's identity constitutes an abuse of discretion because revealing Doe's identity will not effectuate the purpose of the FEHA. Rather, it will expose Doe and his family to a risk of unnecessary harm and invasion of privacy, as well as deter other victims of caste-based discrimination and harassment from asserting their rights and seeking effective remedies when those rights have been violated.

As set forth in DFEH's petition and this reply, the trial court erred as a matter of law and abused its discretion by transgressing the applicable principles of law. The Court should therefore grant the petition.

B. Defendants Now Concede That Anonymity Can Be Appropriate In A Range Of Circumstances Beyond Those Set Forth In Specific Statutes

In the trial court, defendants contended that the court had no discretion to allow even a party to litigation — much less John Doe, who is not a party — to proceed anonymously unless that party fell within "specific enumerated instances" delineated by the Legislature in a California statute. (PA 562, 575.) Since John Doe's claims do not involve crimes of sexual abuse, intimate or sexual imagery, sex trafficking, child molestation, or another of the limited situations covered by a specific statute, defendants argued below that the court did not have the authority to allow him to proceed using a fictitious name. (*Ibid.*)

Defendants have abandoned this argument in this Court. Instead, they appear to concede that there is no "categorical rule" limiting the use of pseudonyms to those situations set forth in specific statutes, and that the correct standard guiding the court's discretion in such cases is set forth in *Doe v. Lincoln Unified School District* (2010) 188 Cal.App.4th 758 ("*Lincoln Unified*") and *Does I thru XXIII v. Advanced Textile Corp.* (9th Cir. 2000) 214 F.3d 1058 ("*Advanced Textile*"). (See Opp., pp. 9-10.)

As set forth below, DFEH submits that, while the trial court articulated the correct legal standard under *Lincoln Unified* and *Advanced Textile* (see PA 671), it abused its discretion by misapplying that standard and erred as a matter of law in concluding that Doe could not proceed anonymously in the circumstances of this case.

C. DFEH Was Not Required To Prove That Doe Had *Already* Been Threatened With Actual Violence Or That His Privacy Had *Already* Been Violated To Justify Maintaining His Anonymity In This Litigation

Under the *Lincoln Unified/Advanced Textile* standard, parties to litigation — which, again, John Doe is not — are permitted to use pseudonyms in two situations that are relevant here: "(1) when identification creates *a risk* of retaliatory physical or mental harm . . . ; [and] (2) when anonymity is necessary 'to preserve privacy in a matter of sensitive and highly personal nature' . . . ." (*Lincoln Unified, supra,* 188 Cal.App.4th at p. 767 [emphasis added] [quoting *Advanced Textile, supra,* 214 F.3d at p. 1068, citations omitted].) Defendants, however, have faulted DFEH for failing to prove "actual threats of violence against Doe and/or his family" or "realistic danger of social stigmatization" (Opp., pp. 8, 11) — neither of which DFEH was required to prove. The point of proceeding under a fictitious name is to *prevent* actual threats of violence and social stigmatization, not to provide some sort of redress after the violence and stigmatization have already occurred.

Applying the standard adopted by the court in *Lincoln Unified*[6] and now endorsed by the defendants, the *Advanced Textile* court did not require the plaintiffs seeking anonymity[7] to establish either element postulated by defendants in their Opposition. Rather, the court in *Advanced Textile* found the trial court had abused its discretion by "failing to consider evidence of threatened retaliation by parties not before the court", "failing to consider as a factor plaintiffs' vulnerability to retaliation", "failing to identify specific prejudice to defendants", and "failing to decide whether the public's interest was best served by requiring plaintiffs to reveal their identities." (*Advanced Textile*, *supra*, 214 F.3d at p. 1069.) The court also found that "plaintiffs reasonably fear severe retaliation, and that this fear outweighs the interests in favor of open judicial proceedings" where, as in the case now before this Court, "[t]he public's interest in the case can be

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[6] The court in *Lincoln Unified* had no occasion to apply its standard because the defendants there did not present any argument as to why the plaintiff should not have been permitted to use a fictitious name under the circumstances of that case. (*Lincoln Unified, supra,* 188 Cal.App.4th at p. 767).

[7] The plaintiffs in *Advanced Textile* were garment workers on the island of Saipan, part of a U.S. commonwealth, who sued their employer for violations of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. "They used fictitious names in their complaint because they fear that, if their identities are disclosed to defendants and other nonparties to this action, they will be fired from their jobs, deported from Saipan, and arrested and imprisoned by the People's Republic of China." (*Advanced Textile*, *supra*, 214 F.3d at p. 1062).

satisfied without revealing the plaintiffs' identities." (*Ibid.*) Defendants have cited no case requiring persons seeking anonymity to prove either "actual threats of violence" or "realistic threats of social stigmatization," and the Ninth Circuit's application of the governing legal standard in *Advanced Textile* demonstrates that no such requirements exist.

D. DFEH Established That Identification Of John Doe Would Create A Risk Of Harm To Him And His Family And Would Reveal His Caste, A Matter Of A Highly Sensitive And Personal Nature

1. DFEH established a risk of harm

As the court in *Lincoln Unified* stated, a party may use a pseudonym in litigation "when identification creates *a risk* of retaliatory physical or mental harm . . . ." (*Lincoln Unified, supra,* 188 Cal.App.4th at p. 767 [emphasis added].) In the present case, DFEH provided ample evidence of such a risk to Doe and his family, but the trial court rejected that evidence as "speculative" (PA 672) and concluded that it did "not *establish* retaliatory physical or mental harm." (PA 673 [emphasis added].)[8] As a matter of law, however, DFEH was required to establish only a "risk" of such harm, not to establish that such harm had already occurred.

[8] As noted above, defendants similarly (and erroneously) contend in this Court that DFEH was required to establish "actual threats of violence." (Opp., p. 8; see Section III, *supra.*)

Consistent with the *Lincoln Unified/Advanced Textile* standard, the evidence DFEH submitted established that the use of Doe's real name in the litigation would create a risk of retaliatory harm to him and his family in the United States and in India. (See Petn., pp. 37-42.) That evidence includes the following:

- John Doe's declaration (PA 115-118) established that he had a reasonable fear of retaliatory harm based on his knowledge of anti-Dalit discrimination in Indian and Indian-American culture. The trial court dismissed this evidence on the grounds that it did not demonstrate "any threat" and "did not establish retaliatory physical or mental harm." (PA 673.) As discussed above, the evidence submitted by DFEH goes beyond speculation and demonstrates a reasonable and actual fear by Doe. (See Section III, *supra*; cf. *Advanced Textile, supra,* 214 F.3d at p. 1064, fn. 7);
- Declarations of experts on caste (PA 41-114, 119-206) demonstrated the risk of caste-based harm to persons who are identified as Dalit. The trial court dismissed this evidence as concerning only "discrimination and violence towards the Dalit in India." (PA 672.) However, those experts provided

substantial evidence regarding discrimination and harm directed at Dalit persons in the U.S.:

- Yengde Declaration, ¶ 4 ("many Dalits in America do not outrightly declare themselves for the fear of being attacked or assaulted by their fellow Indian friends or colleagues due to the historical abuse and subjugation of their ancestors and the experience of Dalits in India"); ¶ 5 ("India's caste system . . . migrated with the Indians who immigrated to the United States . . ."); ¶ 7 ("many Dalits . . . in the United States who have scaled the ladder of corporate success have chosen to remain silent about their caste") (PA 203-205);
- Simon Declaration, ¶ 10 ("Casteism in the United States manifests itself in much the same way as in India. Like racism in the U.S., casteism is an equivalent of white supremacy here. . . . Dalits in America who are brave enough to complain of their treatment can be subjected to retribution. . . . It is a reasonable fear that a Dalit in America taking legal action against caste prejudice may expose his family to

neighborhood shunning and his children to emotional and psychological harm.") (PA 44-45);

- Declaration of Thenmozhi Soundararajan ("Soundararajan Decl."), ¶ 4 (Equality Labs survey of Dalits in the U.S. "found that in America, 1 in 4 Dalits surveyed experienced physical assault, 1 in 3 experienced educational discrimination, and 2 out of 3 experienced workplace discrimination," and "over half of the Dalits who responded . . . reported being afraid of being outed as Dalit out of fear of the consequences"); ¶ 8 (if Doe's identity is not kept private, "[w]e believe there would be professional harm to his career, unyielding harassment of him and his family in the U.S. and India, and attempts to discredit him and seek retribution against him in violent ways . . . .") (PA 120-122).

The trial court not only disregarded this evidence but suggested it did not exist. (PA 672 [experts' declarations "concern discrimination and violence towards the Dalit *in India*" (emphasis added)].) In addition, numerous news articles submitted by DFEH show a high level of media interest in this case, thereby demonstrating that, if revealed, Doe's name —

and therefore his caste — is likely to become widely known in both the U.S. and India. (See PA 238-380 [DFEH Request for Judicial Notice].) The trial court erred in declining to take judicial notice of these articles,[9] and DFEH has renewed its request for judicial notice in this Court. (DFEH Motion Requesting Judicial Notice, filed Apr. 1, 2021.)

The evidence provided by DFEH, much of which the trial court ignored, clearly established that revealing Doe's identity would create "a risk of retaliatory physical or mental harm" to him, his wife and children in the United States, and his extended family in India.[10] (*Lincoln Unified*,

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[9] Although the trial court gave no reason for denying DFEH's request for judicial notice of these articles (PA 672), defendants claim that the trial court denied the request because the articles contained "disputed contents." (Opp., p. 11.) However, DFEH offered the articles not to prove the truth of their contents, but to show the high level of press interest in this case and the corresponding likelihood that, if Doe's identity is revealed in public court records, his name — and therefore his caste — will become widely known in both the U.S. and India, thus increasing the risk of harm to him and his family. (See Petn., pp. 36-37.)

[10] The trial court indicated it was not aware of "any case authority . . . as to whether residents of another country or another country's discriminatory practices is a consideration" in a case such as this. (PA 673.) However, the Ninth Circuit in *Advanced Textile* — which the trial court cited and discussed in its Order (PA 671) — reversed the trial court's denial of a motion to proceed under fictitious names in just such a case. In *Advanced Textile*, Chinese garment workers employed in a U.S. commonwealth sought to use pseudonyms in their litigation against their employer because they feared retaliation not only by the employer but also by the Chinese government against themselves *and their families back home*. (*Advanced Textile, supra,* 214 F.3d at pp. 1064-1065.) The Ninth

(continued…)

supra, 188 Cal.App.4th at p. 767.) The trial court erred in denying DFEH's motion to use a fictitious name for Doe in this litigation.

2. DFEH established that caste is a matter of a highly sensitive and personal nature

Under *Lincoln Unified*, a party may also proceed using a fictitious name "when anonymity is necessary 'to preserve privacy in a matter of sensitive and highly personal nature' . . . ." (*Ibid.* [quoting *Advanced Textile, supra,* 214 F.3d at p. 1068].) The trial court (PA 673-674) and defendants (Opp., pp. 9-10) appear to focus on cases involving sex, and the trial court concluded that Doe's interest in keeping his caste private was not "akin to the privacy interest of victims of sexual assault." (PA 674.)

Numerous courts, however, have found sufficient privacy interests in matters other than sex and sexual assault to justify use of a fictitious name in litigation, including cases involving pseudonymous authors, individuals with cognitive disabilities, anonymous political commentators, and patients' medical diagnoses and treatment. (PA 627, 630; Petn., pp. 44-45.) As the court observed in *Advanced Textile,* parties can use pseudonyms in "the 'unusual case' when nondisclosure of the party's identity 'is necessary … to protect a person from harassment, injury, ridicule or personal

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Circuit held that "the district court erred by failing to consider evidence of threatened retaliation by parties not before the court." (*Id.* at p. 1069.)

embarrassment.'" (*Advanced Textile*, *supra*, 214 F.3d at pp. 1067-1068 [quoting *United States v. Doe* (9th Cir. 1981) 655 F.2d 920, 922, fn. 1].)

The record contains ample evidence that this is such a case. For example:

- John Doe was born into India's caste system as a "Dalit" or "Untouchable," and in India he and his family were ostracized and discriminated against because of their caste. (PA 115-116 [Doe Decl., ¶¶ 3-7].) After living in the U.S. for many years, based on his experience in this country he has a reasonable fear that he, his wife, and their children will be socially isolated and ostracized by the Indian-American community because of their caste if he is publicly identified by name in this litigation. (PA 117-118 [Doe Decl., ¶¶ 14-19]);
- Those who openly challenge the caste system, even outside India, can be held in contempt and subjected to smear campaigns and threats to their dignity. (PA 205-206 [Yengde Decl., ¶ 8]);
- "Casteism in the United States manifests itself in much the same way as in India." (PA 44-45 [Simon Decl., ¶ 10].) For instance, Dalit and other low-caste Indian students in the U.S.

suffer an "emotional toll" when they are ostracized, socially excluded, and subjected to derogatory remarks by high-caste students from India. (PA 43-44 [Simon Decl., ¶¶ 6-8]);

- "[D]ominant caste people [in U.S. tech networks and the Indian Bay Area community] openly boast about their caste privilege and supposed biological superiority, which causes Dalits to hide [their] identities and stay silent in the workplace." (PA 122-123 [Soundararajan Decl., ¶ 9].)

DFEH has established that caste is "a matter of [a] sensitive and highly personal nature" to John Doe, as it is to many other Dalit Indians and Indian Americans living in the U.S. The trial court erred in refusing to allow Doe to use a fictitious name in this litigation in order to protect him and his family from further "harassment, injury, ridicule, and personal embarrassment." (*Advanced Textile, supra,* 214 F.3d at p. 1068.)

3. In the circumstances of this case, Doe's need for anonymity outweighs prejudice to the defendants and the public's interest in knowing his identity

The trial court failed to address a crucial element of the *Lincoln Unified/Advanced Textile* analysis: "A party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity." (*Advanced Textile,*

supra, 214 F.3d at p. 1068.) As discussed above and in DFEH's petition, the record establishes that Doe has a substantial need for anonymity, both to protect him and his family from retaliatory physical or mental harm and to preserve their privacy in a matter of a sensitive and highly personal nature.

Defendants, on the other hand, have offered no evidence that they will suffer any prejudice at all if Doe's name does not appear in the public record at this stage of the litigation. In fact, defendants themselves are fully aware of Doe's identity; this knowledge "only lessens their claims to be prejudiced by the use of pseudonyms." (*Advanced Textile, supra,* 214 F.3d at p. 1069, fn. 11.) As the case goes forward, the trial court will be able to determine the precise prejudice to defendants, if any, at each stage of the proceedings, and to structure the proceedings so as to mitigate any such prejudice. (*Id.* at p. 1068.) In some circumstances, anonymity can be maintained without prejudice to the opposing parties even during a jury trial. (See, e.g., *James v. Jacobson* (4th Cir. 1993) 6 F.3d 233, 240-241 [holding plaintiffs' proffers to limit proof of their claims and damages at trial, coupled with appropriate evidentiary rulings and jury instructions, could effectively avoid any prejudice to defendant resulting from anonymity].) At this early stage, defendants have not shown that they will suffer any prejudice whatsoever.

Finally, the public's need to know Doe's specific identity is minimal, if it exists at all, at this stage of the litigation. "'Party anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them.'" (*Advanced Textile, supra,* 214 F.3d at pp. 1068-1069 [quoting *Doe v. Stegall* (5th Cir. 1981) 653 F.2d 180, 185].) Moreover, the use of a fictitious name in this case will actually *serve* the public interest by allowing this civil rights enforcement action to go forward and by assuring other victims of discrimination that legitimate concerns about their privacy can be respected if they are brave enough to file a complaint.

On balance, Doe's need for anonymity far outweighs any prejudice to defendants and any interest of the general public in learning his name at this stage of the litigation. The trial court abused its discretion and erred as a matter of law by "failing to identify specific prejudice to defendants" and by "failing to decide whether the public's interest was best served" by requiring Doe to reveal his identity. (*Advanced Textile, supra,* 214 F.3d at p. 1069.)

III. CONCLUSION

For the reasons stated above and in its Petition for Writ of Mandate, Prohibition, or other Appropriate Relief, DFEH submits that this Court should grant the relief requested in the petition.

Dated: April 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court, the undersigned hereby certifies that the foregoing PETITIONER'S REPLY TO PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF uses a 13-point Times New Roman font and contains 4,225 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 23, 2021

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