

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. \_\_\_\_\_

Santa Clara County  
Superior Court, Case  
No. 19-CV-000901  
Honorable Drew  
Takaichi, Dept. 2  
Tel. (408) 882-2120

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

**PETITION FOR WRIT OF MANDATE,  
PROHIBITION, OR OTHER APPROPRIATE  
RELIEF; MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF  
[EXHIBITS FILED UNDER SEPARATE COVER]**

**IMMEDIATE RELIEF REQUESTED / STAY  
REQUESTED**

Petitioner requests emergency stay be issued on or  
before April 7, 2021, of the Superior Court's February  
11, 2021, Order After Hearing Denying Plaintiff's  
Motion to Proceed Under a Fictitious Name.

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**Public – Redacts Material From Conditionally Sealed Record**

**CERTIFICATE OF INTERESTED PARTIES OR ENTITIES  
OR PERSONS Cal. Rules of Court, Rule 8.208)**

**INITIAL  
CERTIFICATE**

☒

**SUPPLEMENTAL  
CERTIFICATE**

☐

Please check the applicable box:

☐

There are no interested entities or persons to list in this Certificate  
per California Rules of Court, rule 8.208(d).

☒

Interested entities or persons are listed below:

Full Name of Interested Entity or Party	<i>Check One</i>		Nature of Interest ( <i>Explain</i> )
	Party	Non- Party	
John Doe <sup>1</sup>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Aggrieved individual

The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies), have either: (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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<sup>1</sup> Pursuant to California Rules of Court, rule 8.208(d)(2), DFEH concurrently applies to file a certificate of interested parties with John Doe's true name under seal.

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April 1, 2021

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## INTRODUCTION

Petitioner California Department of Fair Employment and Housing filed this civil rights action against Cisco Systems, Inc., Sundar Iyer, and Ramana Kompella in its own name to remedy workplace discrimination, harassment, and retaliation at Cisco's San Jose, California corporate headquarters.<sup>2</sup> In its complaint, the DFEH alleges that defendants failed to prevent discrimination in the workplace and engaged in unlawful practices against a Cisco employee in California (John Doe, a Dalit Indian) because of his caste-based characteristics of religion, ancestry, national origin/ethnicity, and race/color in violation of the Fair Employment and Housing Act (FEHA), Government Code sections 12900, et seq.

As a public prosecutor charged with eliminating workplace discrimination, DFEH seeks, inter alia, public injunctive relief to remedy, prevent and deter unlawful practices against Dalits and similar caste-oppressed employees on behalf of the state and the public interest. (Gov. Code, §§ 12920, 12920.5 [FEHA, including the DFEH, is an exercise of the police power and its purpose is to "provide effective remedies" that will

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<sup>2</sup> Gov. Code, § 12965 [DFEH "...bring[s] a civil action in the name of the department"]; *Dept. Fair Empl. & Hous. v. Cathy's Creations, Inc.* (2020) 54 Cal.App.5th 404, 410 ["the DFEH's task is to represent the interests of the state and to effectuate the declared public policy of the state"].

“both prevent and deter unlawful employment practices” in order to “eliminate discrimination.”].) As the trial court acknowledged when denying defendants’ motions to compel arbitration, “when testing a public right, the DFEH acts in the capacity of a public prosecutor.” (See Petitioner’s Appendix in Support of Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief (“PA”), at p. 680 (February 16, 2021, Order.) Moreover, its role is “more substantive than as a mere representative of the aggrieved individual.” (*Ibid.*)

Dalit Indians, a population once known as the “Untouchables” who are the most disadvantaged people under India’s millennia-old caste system, have been subjected to discrimination and harassment in the United States—particularly when working in majority-Indian workplaces, like Doe. (PA 8 (Complaint (“Compl.”) ¶ 6 n.11); *id.* 148.) When DFEH exercised its prosecutorial discretion to pursue Doe’s complaint, DFEH requested that the trial court protect Doe’s identity from public disclosure. DFEH argued that Doe has not intervened in this action and is thus not a party to it. Doe is the government’s victim-witness. DFEH also argued that the use of a fictitious name for Doe was necessary to protect the safety and privacy interest of him and his family, and also guard against threats of violence, retaliation, and harm to reputation. DFEH additionally argued below that no prejudice to the opposing party would occur because

defendants already possess the information that the government's victim-witness wishes to keep out of public records.

The trial court denied DFEH's motion and ruled that Doe is more than a witness and *cannot* proceed under a fictitious name. (See PA 669-674 (February 3, 2021, Order).) Because disclosure of Doe's identity would chill participation in this *and future* government enforcement actions, the DFEH requests the Court to issue a preemptory writ. Interlocutory review by writ is the only adequate remedy because there is no way to undo the harm of public disclosure of Doe's identity on appeal. Moreover, because the harm cannot be undone by an appeal and the trial court's sixty stay of its order will expire on or about April 12, 2021, a stay is warranted pending resolution on the merits.

Courts will grant interlocutory review of pretrial disputes such as this one that involve questions that cannot be remedied on appeal, particularly if they raise issues of first impression. Here, just as in cases involving issues of privilege, once Doe's identity is publicly revealed, it cannot be clawed back. The Court should therefore grant extraordinary relief to protect the identity of Doe and shield him from further harm, and mandate the Superior Court to issue an order protecting unnecessary

exposure of the government's victim-witness<sup>3</sup> and his family during litigation. Doe is an aggrieved individual whose very complaint involves exposure of his caste status, leading to discrimination and harassment on that basis. A stay of the order is the only way to protect Doe's identity from disclosure until the legal questions at hand, which are notably issues of first impression in the Sixth Appellate District, are resolved.

**PETITION FOR WRIT OF MANDATE, PROHIBITION,  
OR OTHER APPROPRIATE RELIEF**

**Authenticity of Exhibits**

1. The Exhibits filed concurrently with this Petition, under separate cover in three volumes as Petitioner's Appendix, are true and accurate copies of documents on file with the Respondent court in the action entitled *Department of Fair Employment and Housing v. Cisco Systems, Inc., et al.*, Santa Clara County Superior Court, Case No. 20-CV-372366, and are supplemented by a true and correct copy of the original Reporter's Transcript of the hearing held on January 26, 2021. Petitioner's Appendix is incorporated by reference as if it were set forth fully in this

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<sup>3</sup> Because Doe has not intervened, his role in the litigation is akin to that of a victim-witness in a criminal proceeding. (*Crump v. Appellate Div. of the Superior Court* (2019) 37 Cal.App.5th 222, 239 [discussing prosecutor's control over the criminal proceeding].)

Petition. Petitioner's Appendix is paginated consecutively and page references in this Petition are to the consecutive pagination.

### **Parties**

2. The DFEH is a California state agency charged with enforcing the state's civil rights laws. (Gov. Code, § 12900 et seq.) To that end, the Legislature has delegated to DFEH authority to investigate and prosecute complaints of discriminatory conduct, and to secure effective remedies that will prevent and deter unlawful practices. (*Id.*, §§ 12920.5, 12930, subd. (f).) This authority extends to issues that arise under the FEHA, to prosecute civil complaints on behalf of itself and persons aggrieved by discriminatory employment practices. (*Id.*, § 12930, subd. (f)(2).) The “‘DFEH is a public prosecutor testing a public right,’ when it pursues civil litigation to enforce statutes within its jurisdiction.” (*Dept. of Fair Empl. & Hous. v. Law Sch. Admissions Council* (N.D.Cal. 2013) 941 F.Supp.2d 1159, 1168 [quoting *State Pers. Bd. v. Fair Empl. & Hous. Com.* (1985) 39 Cal.3d 422, 444].)

3. Real party in interest-defendant Cisco Systems, Inc. is an

“employer” subject to the FEHA.<sup>4</sup> Cisco is a California corporation based in San Jose, California.

4. Real party in interest-defendant Sundar Iyer was, at all times relevant to this action, a “supervisor” within the meaning of Government Code section 12926, subdivision (t), and all other applicable statutes.

5. Real party in interest-defendant Ramana Kompella was, at all times relevant to this action, a “supervisor” within the meaning of Government Code section 12926, subdivision (t), and all other applicable statutes.

### **Relevant Factual and Procedural Background**

6. On or about July 30, 2018, John Doe filed an administrative complaint with DFEH. (PA 9 (Compl. ¶ 11).) Doe filed an amended administrative complaint, naming Iyer and Kompella as additional respondents, on or about October 9, 2018. (*Ibid.*)

7. As required by law, DFEH initiated an investigation into Doe’s allegations. (Gov. Code, § 12963; PA 9 (Compl. ¶ 12).)

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<sup>4</sup> The FEHA refers to the aggrieved individual as a “real party in interest.” (Gov. Code, § 12965, subd. (a).) However, the aggrieved individual in this case, John Doe, is not a party in either this Court or the court below. For clarity, this brief will refer to Cisco, Iyer, and Kompella (the real parties in interest in this petition and defendants in the court below) as “defendants.”

8. Based on its investigation, DFEH concluded that cause existed for believing that the allegations set forth in Doe’s administrative complaint were true. (PA 9 (Compl. ¶ 13).) Accordingly, on June 30, 2020, DFEH filed its initial complaint in the United States District Court for the Northern District of California. (See PA 9 (Compl. ¶ 14).) On October 16, 2020, DFEH voluntarily dismissed the federal complaint and refiled in the Santa Clara County Superior Court, raising only state-law claims. (PA 9-10 (Compl. ¶ 15).)

9. The Superior Court docketed the complaint on November 2, 2020. That same day, DFEH moved to allow the complaining party to proceed under a pseudonym, John Doe. (PA 24-382 (Notice of Motion and Memorandum of Points and Authorities, Declarations in Support).)

10. On November 3, 2020, defendants all demurred to the complaint and moved to compel arbitration. (PA 383-384, 393-400.) Cisco also moved to strike portions of the complaint. (PA 385-392.) In support of all its papers, Cisco submitted documents that could reveal John Doe’s identity.<sup>5</sup> (PA 401-402.) Iyer and Kompella, who joined Cisco’s motions

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<sup>5</sup> Because the Superior Court ordered Cisco’s Request for Judicial Notice to be removed from the docket and because none of these documents are essential to deciding the issues presented here, DFEH does not include the identifying documents themselves in the PA. However, DFEH did submit a proposed redacted version of the concerning exhibits. (PA 422-435.)



and filed both a supplementary motion to compel arbitration and their own demurrer, relied on these submissions in their filings. (PA 398.)

11. DFEH requested that Cisco withdraw the revealing documents, but Cisco refused. (PA 414-420.) DFEH asked the Superior Court to order the Clerk to seal the publicly filed documents and to maintain the seal over the documents submitted conditionally under seal until DFEH's Motion was decided. (PA 461.) The Superior Court granted DFEH's requests. (PA 554.)

12. On January 26, 2021, the Superior Court heard the DFEH's Motion. (PA 635-660 (Transcript (Tr.)).) Although DFEH challenged the tentative order issued by the Superior Court the prior day, it followed the Superior Court's instruction to not repeat arguments already presented in its briefing. (PA 642-643 (Tr. 7:22-8:3.)) DFEH requested the Superior Court to stay its order for sixty days. (*Ibid.*)

13. On February 3, 2021, the Superior Court adopted its tentative ruling and denied DFEH's Motion, finding that DFEH and Doe "fail[ed] to establish that identification of one's caste is per se a matter of sensitive and highly personal nature." (PA 674 (February 3, 2021, Order).) As requested by DFEH at the hearing, the Superior Court stayed its order for sixty days from February 11, 2021, the date the order was filed. (*Ibid.*)

Notwithstanding the stay of litigation imposed by defendants' arbitration-

related appeals, at the conclusion of the sixty days, the order will take effect, and the documents submitted by defendants in support of their motions will be publicly available.<sup>6</sup> (PA 554, 674.)

14. On February 16, 2021, the Superior Court denied defendants' motions to compel arbitration. (PA 677-683.) Cisco, Iyer, and Kompella have appealed the Superior Court's Order. (*DFEH v. Cisco Systems, Inc., et al.*, H048910.)

15. Following the denial of its Motion, DFEH requested that defendants voluntarily agree to a protective order so that Doe's identity would not be unnecessarily revealed through the litigation. Specifically, counsel for DFEH wrote "As we indicated, we intend to seek a writ from the Court's order denying DFEH's Doe Motion. Given the serious issues at stake, we believe there is a good chance the writ will be granted. But to potentially avoid additional litigation expenses and in keeping with Cisco's commitment to the eradication of 'systemic racism, xenophobia, inequality and all forms of bigotry in America' (<https://www.crn.com/news/networking/cisco-s-chuck-robbins-speaks-out-on-aborrent-racism-frustration-with-lack-of-change->), we thought we would first reach out to see if defendants will agree to a protective order.

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<sup>6</sup> The Superior Court did not rule on DFEH's motion to seal the documents submitted by Cisco. (PA 635-660.)

We ask that you make the proposal to your clients, and let us know by Friday, February 26, 2021, whether it would be useful to circulate a proposed stipulated order.”

16. Cisco, Iyer, and Kompella declined to agree to a protective order.

### **The Petition is Timely**

17. The Superior Court filed its order denying DFEH’s Motion to Use a Fictitious Name on February 11, 2021. (PA 669.) There is no applicable statutory time limit for filing this writ and it is well within the presumed 60-day period that normally applies. (See *Cal West Nurseries v. Superior Court* (2005) 129 Cal.App.4th 1170, 1173–1174 [“As a general rule, a writ petition should be filed within the 60–day period that applies to appeals [as triggered by] the service of an order or judgment”]; *Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701.) The trial court stayed its order for sixty days from the date it filed its order. Accordingly, this petition is timely.

### **No Other Petition Filed**

18. No other petition seeking the relief sought in this Petition has been filed.

## **Writ Relief is An Appropriate and Necessary Basis for Relief**

19. It is well established that writ review of an order is appropriate if “a ruling threatens immediate harm, such as loss of a privilege against disclosure, for which there is no other adequate remedy.” (*Doe v. Superior Court (Luster)* (2011) 194 Cal.App.4th 750, 754 (“*Doe*”), quoting *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493.) In *Doe*, the trial court ordered the plaintiff to verify discovery responses in her true name. (*Doe, supra*, 194 Cal.App.4th at p. 752.) The Second District Court of Appeal accepted the writ, noting that the Third District Court of Appeal had recently determined it was appropriate for a Doe plaintiff to verify a writ of mandate using a fictitious name. (*Id.* at p. 754, citing *Doe v. Lincoln Unified Sch. Dist.* (2010) 188 Cal.App.4th 758, 767 (“*Lincoln Unified*”).) Here, DFEH essentially sought an order of protection against public identification of Doe, who is not a party to the case. Appellate remedies are not adequate once the information sought to be protected has been disclosed. (*Maldonado v. Superior Court* (2010) 184 Cal.App.4th 739, 752-753 (“*Maldonado*”), quoting *O’Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1439; see also *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 330 (“*Kleitman*”), citing to *Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 685.)

20. The order below is akin to a discovery ruling. Courts generally review such orders under the abuse of discretion standard, but where “the propriety of a discovery order turns on statutory interpretation,” courts review the order *de novo*. (*Gilbert v. Superior Court* (2014) 224 Cal.App.4th 376, 380 [affirmed by *City of Los Angeles v. Superior Court* (2017) 9 Cal.App.5th 272, 282 (“*City of Los Angeles*”), as mod. March 20, 2017].) “A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand.” (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493-1494 [trial court abused its discretion when applying an overly restrictive standard for application of the attorney-client privilege to a corporate entity, writ relief granted], quoting *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 85; see also *Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96 [writ relief granted where discovery order erroneously ordered attorney to violate attorney-client privilege in answering deposition questions]; *Doe 2 v. Superior Court (Calkins)* (2005) 132 Cal.App.4th 1504, 1517 [abuse of discretion where trial court applied wrong standard on claim of clergy-penitent privilege, writ relief granted].)

21. Writ review may be granted on “questions of first impression that are of general importance to the trial courts and to the [legal] profession, and where general guidelines can be laid down for future

cases.” (*Oceanside Union Sch. Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185-186; *Kleitman, supra*, 74 Cal.App.4th at p.330-331.)

22. DFEH and Doe will be irreparably harmed if this Petition is not granted because, pursuant to the Superior Court’s February 3, 2021, order, the identity of a civil rights government victim-witness who was harassed and discriminated against based on his caste status will be publicly revealed. Such a result risks substantially chilling the willingness of future victim-witnesses who fear public disclosure from coming forward, undermining the State’s interest in public enforcement of rights secured under the FEHA. Once Doe’s identity is publicly disclosed, his ability to maintain anonymity as a victim-witness will be forever lost, even if DFEH is successful in a later appeal. Thus, writ review is warranted.

23. This same reason supports DFEH’s request for an immediate stay pending final disposition of this Petition. In the absence of a stay from this court, the trial court’s stay will expire on or about April 12, 2021, resulting in the identification of Doe in trial court filings. (PA 674.) Allowing the stay to expire would foreclose the relief sought through this writ, which is a clear basis for this Court to issue a stay pending resolution of these proceedings. (*Doe 2 v. Superior Court (Avongard Products U.S.A. Ltd.)* (2016) 1 Cal.App.5th 1300, 1310 (“*Avongard*”) [staying discovery order compelling exposure of anonymous email author in defamation suit

pending decision on writ]; *Glassdoor, Inc. v. Superior Court (Machine Zone, Inc.)* (2017) 9 Cal.App.5th 623, 628 (“*Machine Zone*”) [same].)

24. This writ presents critical issues of first impression for the Sixth Appellate District and California about the protections that should be allowed to civil rights complainants who would otherwise be chilled from exercising their rights to seek the protection of the State. This writ also presents an opportunity for the Court to declare as a matter of law that courts in California should follow the standards set forth in *Does I Thru XXIII v. Advanced Textile Corp.* (9th Cir. 2000) 214 F.3d 1058 to determine whether a party or witness should be allowed anonymity “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.” (*Id.* at p. 1068.)

25. The facts and circumstances here are exceptional, including legal questions of first impression and of great public importance, and there is undeniable need for a prompt resolution before protected information is irrevocably disclosed, all of which warrant issuance of the writ. (See, e.g., *Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1328; *Silva v. Superior Court* (1993) 14 Cal.App.4th 562, 573-574.) Like an interim discovery order, the order at issue is not immediately appealable, and there is no other adequate remedy at law. (See Code Civ. Proc., § 1086).

## **PRAYER**

Petitioner prays that this court:

1. Issue an immediate stay of the enforcement of the Santa Clara County Superior Court's February 3, 2021, Order After Hearing Denying Plaintiff's Motion to Proceed Under a Fictitious Name, pending the final disposition of this Petition.

2. Issue a peremptory writ of mandate and/or prohibition and/or such other extraordinary relief as is warranted, in the first instance (Code Civ. Proc., §§ 1088, 1105), directing the Respondent court to set aside and vacate its February 3, 2021, order and enter a new and different order granting the relief sought by DFEH; or

3. In the alternative to issuing a peremptory writ in the first instance, issue an alternative writ directing the Respondent court to set aside and vacate its order dated February 3, 2021, and enter a new and different order granting the relief sought by DFEH, or to show cause why it should not be ordered to do so; and, upon return to the alternative writ, issue a peremptory writ directing the Respondent court to enter a new and different order granting the relief sought by the DFEH.

4. Award Petitioner its costs pursuant to Rule 8.493 of the California Rules of Court and Government Code section 12965 subdivision (b).



5. Grant such other relief as may be just and proper.

## VERIFICATION

I, Melanie Proctor, declare:

I am one of the attorneys of record for Petitioner in the action before the Santa Clara County Superior Court, *DFEH v. Cisco Systems, Inc., et al.* (Case No. 20-CV-372366). I have read the foregoing Petition and know its contents. The facts alleged in the Petition are within my own knowledge, and I know these facts to be true.

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

Executed on March 30, 2021, at El Cerrito, California.

A handwritten signature in black ink that reads "Melanie J. Proctor". The signature is written in a cursive, flowing style.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

This matter turns on whether the identity of a government's victim-witness to civil rights violations must be publicly exposed when the Department of Fair Employment and Housing (DFEH) chooses to litigate claims involving that victim-witness on behalf of the State, and there is substantial risk of harm to the witness and his family from disclosing his identity.

The trial court below ruled that DFEH is foreclosed from seeking the protection of a pseudonym for the victim-witness of discrimination in this action that DFEH brings in its own capacity as public prosecutor. Rather than applying the three factors articulated by the Third District Court of Appeal in *Lincoln Unified, supra*, 188 Cal.App.4th 758, the court below effectively adopted a categorical rule limiting the ability to use pseudonyms to protect identities of witnesses unless they are victims of sexual assault. (PA 673-674.) If allowed to stand, the Superior Court's order will dramatically restrict both DFEH's ability to effectuate its statutory mandate to investigate and prosecute discriminatory practices that violate the FEHA and the ability of aggrieved individuals to seek relief through DFEH. The potential chilling effect of severely limiting the use of pseudonyms to only

cases of sexual assault would undermine the Legislature's intent in enacting FEHA.

DFEH's statutory duties mandate that it investigate alleged FEHA violations of public importance, and bring civil lawsuits to remedy substantiated wrongs on behalf of both itself *and* the aggrieved individual. Both state and federal courts have acknowledged that "DFEH acts as a public prosecutor when it pursues civil litigation under the FEHA and it may seek remedies to vindicate what it considers to be in the public interest in preventing ... discrimination." (*Dept. of Fair Employment & Hous. v. Superior Court of Kern Cty.* (2020) 54 Cal.App.5th 356, 373, citing *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal. 3d 422, 444), and *Dept. of Fair Empl. & Housing v. Law Sch. Admissions Council* (N.D.Cal. 2013) 941 F.Supp.2d 1159, 1172) (internal quotations omitted). The court below recognized the proper role of DFEH in this litigation in ruling on defendants' motions to compel arbitration when it observed that "the statutory rights established by the FEHA are 'for a public reason' [citation], and when testing a public right, the DFEH acts in the capacity of a public prosecutor. [citation] This supports DFEH's argument that DFEH's role and capacity in an action for violation of FEHA is more substantive

than a mere representative of the aggrieved individual.”<sup>7</sup> (PA 680; PA 681 [“The FEHA authorizes DFEH to file a civil action, and pursue that action in the interests of the state and public as well as the interests of the aggrieved individual.”]).

As discussed below, the Court should accept this Petition for Writ Review (“Petition”) of the Superior Court’s February 3, 2021, order that denied DFEH’s Motion, which sought to grant Doe protection from further harassment, discrimination, and harm. If not reversed, this decision will have wide-reaching and chilling effects on the DFEH’s ability to perform its statutory duties and protect the civil rights of Californians. This single Superior Court order risks gutting the beating heart of the FEHA – DFEH’s public complaint mechanism, – by setting a precedent in practice that the identity of nearly all civil rights complainants will be disclosed in litigation even if they face substantial risk of harm and invasion of privacy.

## **II. STATUTORY BACKGROUND**

The California Legislature has vested DFEH with the authority to enforce state civil rights laws as “an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.” (Gov. Code, § 12920.) DFEH satisfies its statutory mandate by

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<sup>7</sup> The aggrieved individual only becomes a party to the action if he elects to intervene. (Gov. Code, § 12965, subd. (a).)

enforcing the California Fair Employment and Housing Act, Government Code section 12900 et seq., as well as other civil rights statutes. One way DFEH enforces the FEHA is by investigating complaints from aggrieved members of the public, resolving those complaints when possible, and pursuing enforcement actions in court when necessary.

FEHA “establishes a comprehensive scheme intended to protect and safeguard the right and opportunity of all persons” to be free from discrimination. (*Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774, 782, citing Gov. Code, § 12920; *State Pers. Bd. v. Fair Empl. & Housing Com.*, *supra*, 39 Cal.3d at p. 428.) The Unruh Civil Rights Act, Civil Code section 51, and the Ralph Civil Rights Act, Civil Code section 51.7, are expressly incorporated into FEHA. (Gov. Code, § 12948.)

As part of this comprehensive scheme, FEHA provides the procedures for investigation and prosecution of unlawful discrimination and civil rights violations. As applicable here, the FEHA states that “any person claiming to be aggrieved by an alleged unlawful practice” may file a complaint with DFEH. (Gov. Code, § 12960, subd. (b).) Once a complaint is filed, DFEH “shall make prompt investigation in connection therewith.” (Gov. Code, § 12963.) DFEH is authorized to “investigate, conciliate, mediate, and prosecute” the alleged discriminatory practices. (Gov. Code, § 12930, subd. (f)(2).)

If, at the conclusion of its investigation, DFEH determines that the complaint is valid, the Legislature has mandated that it “shall immediately endeavor to eliminate the [civil rights violation] complained of by conference, conciliation, and persuasion.” (Gov. Code, §§ 12963.7, subd. (a), 12965, subd. (a).) If the violations do not cease, and “if circumstances warrant, the director in the director’s discretion may bring a civil action in the name of the department on behalf of the person claiming to be aggrieved.” (Gov. Code, § 12965, subd. (a) [emphasis added].) As the trial court noted below, DFEH “seeks its own injunctive relief and specific relief to make the employee whole.” (PA 682 (February 16, 2021, Order).) In addition, “[p]rior to filing a civil action, the department shall require all parties to participate in mandatory dispute resolution in the department’s internal dispute resolution division....” (*Ibid.*)

Significantly, a civil action brought pursuant to section 12965, such as the underlying matter, may seek a wide range of relief, including any relief available to a private plaintiff or to a class. (See Gov. Code, § 12965, subds. (a) and (c) [emphasis added].) However, DFEH is not limited to seeking individual relief for the government’s victim-witness: “When a government agency brings an enforcement action, it may have multiple objectives” and seek multiple remedies. (*Dept. of Fair Empl. & Housing v. LSAC, supra*, 941 F.Supp.2d at p. 1172.) Thus, DFEH is entitled to, and

routinely does, seek remedies extending beyond the interests of the aggrieved party to “vindicate what it considers to be the public interest in preventing ... discrimination.” (*Ibid.* [citation omitted]; see also Gov. Code, § 12965, subd. (c) [authorizing any other relief that, in the judgment of the court, will effectuate the purposes of FEHA].)

### **III. STANDARD OF REVIEW**

When the propriety of an order turns on a question of law, “the Court determines the issue de novo.” (*City of Los Angeles v. Superior Court* (2017) 9 Cal.App.5th 272, 282 [internal quotations omitted].) A court abuses its discretion when it applies the wrong legal standard. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 (“*Costco*”).) Under either standard, DFEH should prevail.

### **IV. ARGUMENT**

DFEH requested the Superior Court’s permission to proceed with its litigation on behalf of its victim-witness using the fictitious name John Doe and to order defendants to redact personally identifying information from all public communications, filings, and statements. Although party names are usually required in any pleading (Code Civ. Proc., § 422.40), courts have allowed even parties to proceed under fictitious names where “exceptional circumstances” exist. (*Lincoln Unified, supra*, 188 Cal.App.4th at p. 767.) Here, where the aggrieved individual is *not* a party



to the case and DFEH elected to proceed with the litigation to vindicate the public's interest in eliminating harassment, discrimination, and retaliation in employment, the case presents those exceptional circumstances.

Courts in California have permitted plaintiffs to proceed anonymously: (1) when identification creates a risk of retaliatory physical or mental harm; (2) when anonymity is necessary to preserve privacy in a matter of a sensitive and highly personal nature; and (3) when the anonymous party is compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution.<sup>8</sup> (*Lincoln Unified, supra*, 188 Cal.App.4th at pp. 766–767, citing *Advanced Textile Corp., supra*, 214 F.3d at pp. 1067-1068.) A party requesting to remain anonymous must show that “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. 1057.)

In this case, the potential harm to the government’s victim-witness and his family is substantial, the opposing parties are not prejudiced because they already know his identity, and the general public has no

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<sup>8</sup> Contrary to defendants’ arguments below, anonymity is not restricted to a few statutory exceptions. (PA 562, 575; *Lincoln Unified, supra*, 188 Cal.App.4th at p. 766-767 [rejecting argument that anonymity is confined to limited situations defined by statute and discussing long line of cases in which it is allowed].)

legitimate interest in learning his name or his caste that outweighs the extreme risk of harm to the victim-witness and his family of disclosing his identity. Accordingly, on balance, the victim-witness in this government enforcement action should be permitted to proceed anonymously.

In denying DFEH's request to protect John Doe's identity, the Superior Court disregarded the substantial evidence submitted by DFEH in support of its motion. (PA 672-673.) While it took note of the supporting declarations, it did not assess the weight of those declarations when denying DFEH's Motion. (*Ibid.*) The declarants' statements stemmed from personal knowledge about their organizations, professional and educational backgrounds, and complaints they've heard and read. (Evid. Code, § 800.) The statements also reflect their research and experience as experts in the field of caste. (Evid. Code, §§ 800, 801.)

In addition, the trial court rejected DFEH's request that the Court take judicial notice of numerous articles. (PA 672.) Those articles, which are self-authenticating, provide important context for DFEH's Motion. (Evid. Code, § 645.1; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 900 n.3 [taking judicial notice of news articles for context]; *Unruh-Haxton v. Regents of Univ. of Cal.* (2008) 162 Cal.App.4th 343, 365 [noting trial court took judicial notice of news articles not for the truth of the matters asserted therein, but rather, to assess claims of ignorance].) The articles

show the level of press interest in the case, and demonstrate that if Doe's identity is revealed, it will become widely known, not just in the United States, but also in India.<sup>9</sup> (PA 184-193, 210-380.) As explained below, the Superior Court erred in at least three regards in its application of the three-factor test under *Lincoln Unified*.

**A. Identification of Doe's Name and Caste Creates Significant Risk of Retaliatory Physical and Mental Harm**

Disclosing Doe's name and Dalit status will create a tremendous risk of retaliatory physical and mental harm to him and his family, sufficient to establish the propriety of proceeding anonymously under the first prong of the *Lincoln Unified* standard. (Cf. *Advanced Textile*, *supra*, 214 F.3d at p. 1067 [reversing the district court, the Ninth Circuit held that the court was required to consider evidence of threatened retaliation by third parties].)

A 2018 survey of 1,500 South Asians in the United States found that 26 percent said they had experienced a physical assault because of their caste, while 59 percent reported caste-based derogatory jokes or remarks directed at them.<sup>10</sup> Anecdotal data also indicate that Dalit Indians *in the*

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<sup>9</sup> DFEH renews its request for judicial notice here for those articles, as well as several that followed the Superior Court's orders. (DFEH Request for Judicial Notice, filed concurrently.)

<sup>10</sup> PA 128-183 [Zwick-Maitreyi et al., *Caste in the United States: A Survey of Caste Among South Asian Americans* (2018) pp. 26-27, Equality (continued...)]

*United States*, once their caste is revealed, have been raped, attacked, and spat on because of their caste.<sup>11</sup> (See PA 203-204 (Declaration of Dr. Suraj Yengde (Yengde Decl.), ¶¶ 3, 5-7); PA 120-123 (Declaration of Thenmozhi Soundararajan (Soundararajan Decl.), ¶¶ 3-4, 6-9, 11).) The trial court dismissed this evidence as speculative. (PA 672.) But this was not a dispositive motion or trial, and thus the standards for admitting expert evidence do not apply, and in any event, the evidence establishes a material risk of harm to Doe and his family within the United States. (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 272, citing Evid. Code, § 801, subd. (a).)

Here, Doe will face actual and formidable risk of physical violence, or the threat of physical violence, and mental harm if his identity is disclosed. (*Advanced Textile, supra*, 214 F.3d at p. 1063; see PA 203-206 (Yengde Decl.).) One of Doe’s supervisors, defendant Iyer, talked about Doe to other engineers and those in their shared social circles. (PA 116 (Declaration of John Doe (Doe Decl.), ¶ 11.) The risk of retaliatory harm,

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Labs <<https://www.equalitylabs.org/caste-in-the-united-states>> (as of March 31, 2021)].

<sup>11</sup> DFEH Request for Judicial Notice, Exh. 3 [Ray, *Caste in America: The US Isn’t Safe From the Trauma of Caste Bias* (Mar. 8, 2019) WGBH News, The World <<https://www.pri.org/stories/2019-03-08/us-isn-t-safe-trauma-caste-bias>> (as of March 31, 2021)].

thus, is concrete because absent the protective order DFEH sought, Iyer can easily continue to leak Doe's name to their shared networks to encourage social and economic backlash against Doe. (*Ibid.*; *id.* at p. 117, ¶ 13.) Furthermore, Doe continues to work at Cisco. (*Id.*, at p. 116, ¶ 10.) He fears his name will be disclosed to his new workplace colleagues or he will be terminated pretextually in retaliation. Indeed, in support of its motion to compel arbitration, its demurrer, and its motion to strike, Cisco unnecessarily submitted documents to the Superior Court that, once unsealed, will reveal Doe's name. (PA 457-458.) Thus, defendants' own actions undermine their argument that arbitration would preserve Doe's privacy because they have taken steps to expose him. (*Ibid.*)

Doe's family in the United States faces a similar risk of retaliation and abuse, particularly if his identity (and theirs by extension) as a Dalit is exposed. (*Advanced Textile, supra*, 214 F.3d at p. 1063 [finding noteworthy that plaintiffs "reasonably fear that their families may face similar threats of physical and economic retaliation if their true identity is revealed"].) The risk will be compounded here because disclosure of his identity will be specifically in the context of being a Dalit who challenged the caste system. (PA 205-206 (Yengde Decl., ¶ 8).)

For Doe's family in India, the risk of retaliatory violence is worse. A 2019 U.S. State Department report on India contains a catalog of systemic

abuses against Dalits, including extrajudicial killings and sexual violence against Dalit women. (PA 116 (Doe Decl., ¶ 4); PA 204 (Yengde Decl., ¶ 5).) According to a Human Rights Watch report, Dalits are physically assaulted and threatened with economic and social retaliation for refusing to carry out various caste-based tasks. (DFEH Request for Judicial Notice, Exh. 2 [Narula, Caste Discrimination: A Global Concern, Background: “Untouchability” and Segregation (2001) Human Rights Watch <[https://www.hrw.org/reports/2001/globalcaste/caste0801-03.htm#P133\\_16342](https://www.hrw.org/reports/2001/globalcaste/caste0801-03.htm#P133_16342)> (as of Mar. 23, 2021)].) The report noted that any attempt to defy the social order led to “violence and economic retaliation on the part of those most threatened by changes in the status quo.” (*Ibid.*; see also PA 203, 205-206 (Yengde Decl., ¶ 3, ¶¶ 7-8; *id.* 116-117 (Doe Decl., ¶¶ 6, 7).)

Doe’s family have been the victims of caste slurs, isolation, and ostracization, and employment discrimination by neighbors, school mates, and employers in India because of their caste. (PA 116 (Doe Decl., ¶¶ 4-7).) As explained in the Yengde Declaration, name is linked to caste. (PA 204-205 (Yengde Decl., ¶ 6.)) Some of Doe’s family in India have been able to avoid hate violence because they changed their name and moved to the city. (PA 116 (Doe Decl., ¶ 7).) However, Doe still has family with his last name who live in rural areas of India, and they are especially at risk for being

physically attacked because of their caste, particularly if it comes to light that one of their relatives challenged the caste system.<sup>12</sup> (PA 116-117 (Doe Decl., ¶¶ 6, 14).) Additionally, news of this lawsuit has gained traction in India, increasing risk of disclosure of the caste of all his family members in India. (See, e.g., PA 292-297, 323-344.) Moreover, the international attention that this lawsuit has garnered in the United States and India, and the ensuing threats to pro-Dalit organizations, make the public disclosure of Doe's name particularly dangerous and create an imminent risk to Doe and his family. (PA 116-118 (Doe Decl., at ¶¶ 6-8, 13-19); see also PA 122-123 (Soundararajan Decl., ¶¶ 8-12).) DFEH should be able to vindicate his rights without fear of such retaliatory physical and mental harm to a government victim-witness.

Federal asylum cases provide a useful analogue for assessing the foreseeable risk of harm to Doe and his family, particularly his family in India. In cases like this one, where membership in a particular group results in being targeted for discrimination, harassment, and violence, the Ninth Circuit has found evidence similar to what is in the record here persuasive to establish a foreseeable risk of harm. (See, e.g., *Singh v. I.N.S.* (9th Cir.

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<sup>12</sup> PA 280-284 [Gettleman and Raj, *Tell Everyone We Scalped You! How Caste Still Rules in India*, New York Times (Nov. 17, 2018) <https://www.nytimes.com/2018/11/17/world/asia/tell-everyone-we-scalped-you-how-caste-still-rules-in-india.html> (as of March 29, 2021)].

1996) 94 F.3d 1353, 1358–1359.) In *Singh*, the asylum applicant, an ethnic Indian citizen of Fiji, was a member of an ethnic/racial group that, after the 1987 coups, was targeted with discrimination, harassment, and violence on account of their race. The Ninth Circuit found that the relevant Country Reports verified “that Indians [in Fiji] are subject to significant harassment and crime based on race” and that the documentation substantiated the claim for asylum. (*Id.* at p. 1360.) Additionally, the court found noteworthy that the discrimination, harassment, and violence were conducted by groups that the Fiji “government was unwilling or unable to control.” (*Id.* at pp. 1358–1359.) Here, the evidence similarly establishes a significant risk of harm to Doe’s family in India if his identity is disclosed, because they will be linked to a person challenging the caste system, conduct that is documented as a trigger for retaliatory violence that governmental authorities are unlikely to curtail. (PA 120-122 (Soundararajan Decl., ¶¶ 4-9), 205-206 (Yengde Decl., ¶ 8), .)

**B. A Fictitious Name Should Be Permitted Due to The Personal and Sensitive Nature of Caste Disclosure**

Under California law, even litigants are allowed to proceed under fictitious names “to preserve privacy in a matter of sensitive and highly personal nature,” such that public disclosure would inflict irreparable injury. (*Lincoln Unified, supra*, 188 Cal. App. 4th at p. 767 [quoting *Advanced Textile, supra*, 214 F.3d at p. 1068].) A non-litigant such as Doe



has an even stronger claim to anonymity.

For example, a United States district court in California considered social stigmatization among the “most compelling” reasons for permitting anonymity. (*Jane Roes 1-2 v. SFBSC Mgmt., LLC* (N.D.Cal. 2015) 77 F.Supp.3d 990, 994.) The district court applied the Ninth Circuit’s instruction that anonymity is permitted where the subject matter of a case is “sensitive and highly personal,” and where disclosing an individual’s identity threatens to subject the person to “harassment, . . . ridicule or personal embarrassment.” (*Jane Roes 1-2, supra*, 77 F.Supp.3d at 994, citing *Advanced Textile*, 214 F.3d at pp. 1067–1068; see also *Doe v. Penzato* (N.D.Cal. May 13, 2011, No. CV10–5154 MEJ) 2011 WL 1833007 at \*3 [granting anonymity to prevent public exposure and stigma of having been a victim of sexual assault].) Another district court in California permitted employee plaintiffs to intervene anonymously where “[t]hey [we]re concerned that they will be embarrassed by the public disclosure of the nature of their allegations against Defendants . . . in the small community where they live and work.” (*EEOC v. ABM Indus. Inc.* (E.D. Cal. 2008) 249 F.R.D. 588, 593.) This analysis is consistent with *Lincoln Unified*’s second prong, which focuses on the party’s interest in “privacy in a matter of sensitive and highly personal nature,” and provides an additional basis to support allowing DFEH to proceed while protecting

Doe's identity. (*Lincoln Unified, supra*, 188 Cal.App.4th at p. 767.)

To be sure, the cases cited above all involve sexual assault. But, as DFEH noted below, courts have allowed use of a fictitious name in cases not involving sexual assault. (PA 627, citing *Alexander v. Falk* (D.Nev. Aug. 30, 2017, 16cv2268) 2017 WL 3749573, \*5 [pseudonymous author plaintiffs allowed to proceed under pseudonyms in defamation case when they took care to maintain their anonymity]; PA 630, citing *Dept. of Fair Empl. & Hous. v. Law Sch. Admissions Council* (N.D.Cal. Aug. 20, 2012, 12cv1830) 2012 WL 3583023, at \*4-5 [allowing non-intervening aggrieved individuals with cognitive differences to proceed anonymously]; *Advanced Textile, supra*, 214 F.3d at pp. 1062-1063 [collective action under Fair Labor Standards Act]; see also *Publius v. Boyer-Vine* (E.D.Cal. 2017) 321 F.R.D. 358, 366-367 [allowing blogger who challenged enforcement of a state statute prohibiting “doxing” of elected or appointed official to proceed anonymously]; *Doe v. Franklin Bank, S.S.B.* (W.D.Tex. 2008, A-08-CA-293 LY) 2008 WL 11334179, at \*4 [concluding plaintiff who challenged infringement on his right to privacy concerning medical diagnoses and treatment should be allowed to proceed anonymously].) The Superior Court cited only cases involving sexual issues (PA 655-656.) The trial court erred as a matter of law when it declined to consider these additional authorities and narrowed the comparison of the risk to Doe's privacy of revealing his

Dalit status only to cases involved sexual assault or other sexual matters.  
(PA 673-674.)

As discussed in Section A, *supra*, if identified outside of this litigation, Doe and his family are likely to face social stigmatization, ostracization, harassment, ridicule, and personal embarrassment. In the Indian and Indian-American community, one's caste is a highly sensitive and personal matter, especially if one is from the lowest class, as is Doe. A 2018 study uncovered that over half of surveyed Dalits in the U.S. feared being outed. (PA 145-146.) Those surveyed expressed significant psychological turmoil around the secrecy of their caste. (PA 146.) In its Complaint, the DFEH alleged that Doe confronted defendant Iyer when he learned that Iyer had revealed Doe's Dalit status to his co-workers. (PA 12-13 (Compl., ¶¶ 31-37).) DFEH also alleged defendants Cisco, Iyer, and Kompella continued to discriminate against and harass him because he is Dalit Indian, and when he opposed the unlawful actions, Doe faced swift and sweeping retaliation. (PA 12-14 (Compl., ¶¶ 31-47).) As a result of defendants' actions, Doe suffered psychological injury, emotional pain, mental anguish, and humiliation. (PA 16-20 (Compl., ¶¶ 57, 68, 78, 89).) Revealing Doe's identity would not only reveal his caste, it would also reveal him as one who is openly challenging a two-millennia-old caste system that its beneficiaries feel passionately about retaining. (PA 159.)

Therefore, to protect John Doe from further harassment, injury, ridicule, and personal embarrassment due to the personal and highly sensitive nature of caste disclosure, the DFEH requests he be permitted to proceed anonymously.

**C. Doe Has A Legitimate Fear of Further Discrimination Should His Identity Be Revealed**

A fictitious name will also protect Doe from further discrimination as he continues to work at Cisco and seeks work in the future. In *Advanced Textile*, where the plaintiffs requested to use fictitious names out of a fear of future retaliation from their employer, the court identified three relevant factors in determining whether the use of pseudonyms was appropriate: “(1) the severity of the threatened harm, (2) the reasonableness of the anonymous party’s fears, and (3) the anonymous party’s vulnerability to such retaliation.” (*Advanced Textile, supra*, 214 F.3d at p. 1068.) In *Lincoln Unified*, the appellate court examined the line of cases allowing parties to proceed under a fictitious name, and quoted the Ninth Circuit’s test. (*Lincoln Unified, supra*, 188 Cal.App.4th at pp. 766-767; see also *The Rossdale Group, LLC v. Walton* (2017) 12 Cal.App.5th 936, 946 [“The *Lincoln Unified* court then examined a long line of cases allowing the plaintiff to proceed under a fictitious name.”].)

Here, DFEH seeks to maintain Doe’s anonymity to prevent further injury to him and his family and to avoid the possibility that any employers

will discriminate against him based on his caste. (PA 203 (Yengde Decl., ¶¶ 11-12).) Each of these concerns is concrete and legitimate. Especially in this age of internet-accessible information, Doe's concerns should be addressed by the use of a fictitious name. "The judicial use of 'Doe plaintiffs' to protect legitimate privacy rights has gained wide currency, particularly given the rapidity and ubiquity of disclosures over the World Wide Web." (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1452, fn.7.)

Below, defendants argued that other federal cases weigh against allowing Doe anonymity. (PA 577-578.) They cited, for example, a case in which non-native Hawaiian students sought admission to a school traditionally reserved for native Hawaiians. (*Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate* (9th Cir. 2010) 596 F.3d 1036, 1038.) The district court found the children did not reasonably fear severe harm and denied their motion to proceed anonymously. (*Id.* at p. 1045.) Upon abuse of discretion review, the Ninth Circuit affirmed the finding, noting that among other things, the plaintiffs did not fear harm from disclosure of their identities in the litigation because, if they were admitted to the school, it would be *obvious* they were not native Hawaiians, and other non-Hawaiians attended the school without incident. (*Id.* at p. 1045.) Here, Doe has not voluntarily revealed his caste at work. (PA 115-116 (Doe

Decl., ¶ 3).) Moreover, as stated above, Doe is not a party to this action.

(Gov. Code, § 12965, subd. (a).) Rather, in this instance, DFEH seeks to afford a non-intervening aggrieved individual protection when the very harm he suffered stemmed from involuntary exposure of his caste status.

**D. Disclosure of Doe’s Identity Cannot Be Undone and Will Cause Irreparable Damage to Doe and DFEH’s Interests**

Once Doe’s identity is disclosed, the damage will be irreparable, and he will have very few remedies to stem further public disclosure while working at Cisco or if he looks for another job. (*Advanced Textile, supra*, 214 F.3d at p. 1058 [“Anonymity in litigation can be used to shield plaintiffs from economic injury”].) Moreover, courts have found that employees are more effectively protected from retaliation by concealing their identities than by relying on the deterrent effect of *post hoc* remedies. (*Id.* at p. 1071.) Therefore, the severity of the harm once public disclosure is made, the reasonableness of Doe’s fears, and his particular vulnerability to retaliation warrant allowing him to proceed anonymously.

**E. Doe’s Need for Anonymity Outweighs Any Prejudice to The Opposing Parties or The Public**

The Superior Court expressed concern that granting Doe anonymity would impair the right of the public to know what occurs in its courts. (PA 672-673.) But as the Superior Court acknowledged, the right of privacy can outweigh that right in “an unusual case.” (PA 671, quoting *Lincoln Unified*,

*supra*, 188 Cal.App.4th at p. 767.) As set forth above, this is such a case based on the factors set forth in *Lincoln Unified*. The harm DFEH seeks to redress involves the involuntary exposure of Doe’s caste status, and the use of that status as a basis for harassment and discrimination. (PA 5-23.) Absent the use of a pseudonym and an appropriate protective order, it is probable that DFEH’s government enforcement action can be used to expose Doe to further harm. (PA 294-380; DFEH Request for Judicial Notice, Exhs. 5-6.) This, in turn, will likely deter other aggrieved individuals from seeking DFEH enforcement of their rights. The Court should protect Doe’s right to seek assistance from the DFEH without fear of further harm. (*Avongard, supra*, 1 Cal.App.5th at p. 1311; *Machine Zone, Inc., supra*, 9 Cal.App.5th at p. 628; see Gov. Code, § 12960, subd. (c).)

The use of the pseudonym in this case will neither prejudice defendants nor materially impair the public’s right to know. State and federal courts have adopted a balancing test between the need for anonymity and the public interest in open proceedings. (*Lincoln Unified, supra*, 188 Cal.App.4th at pp. 766–767, citing *Advanced Textile, supra*, 214 F.3d at pp. 1067-1068.) As the Ninth Circuit explained in *Advanced Textile*, “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.) The Superior Court concluded that *Lincoln Unified* did not adopt any federal standard. (PA 671.) However, it is as explicit an endorsement of the federal standard as exists in any published California case.

The factors set forth in *Lincoln Unified* support DFEH's position here, yet the Superior Court effectively cabined *Lincoln Unified* and the ability to proceed anonymously only to cases involving sexual assault. (PA 673-674.) Here, DFEH submitted substantial evidence to support its argument that caste *is* a highly sensitive and personal issue. (PA 41-380.) Notwithstanding the evidence and context offered by DFEH for its motion, the Superior Court focused on cases involving sexual issues. (PA 673-674.)

In contrast to Doe's legitimate need for anonymity, there is no prejudice to the defendants, who already know his identity. (*Advanced Textile, supra*, 214 F.3d at p. 1069, fn. 11 ["[W]hatever knowledge defendants have of plaintiffs' identities . . . lessens their claims to be prejudiced by the use of pseudonyms"].) In addition, the use of a fictitious name is *in* the public interest because it encourages victims of caste discrimination and harassment to bring their own claims against their alleged harassers. (*Id.* at p. 1073 ["Employee suits to enforce their statutory rights benefit the general public"].) Otherwise, victims of caste-based



discrimination, harassment, and retaliation will face a Hobson's choice between seeking justice and having their caste more widely publicized in the process, thereby subjecting them to further caste-based discrimination, harassment, and retaliation from strangers, or avoiding the risk of further damage by staying silent. As is the case here, "anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them." (*Id.* at p. 1068 [internal citations omitted].) Put differently, the public's interest in knowing *Doe's specific identity* as a victim of alleged caste-based discrimination is minimal in absolute terms, and immaterial relative to the interest in ensuring effective enforcement of civil rights laws preventing discrimination based on caste. Rather than engaging in this type of analysis, the Superior Court's analysis effectively adopted a bright-line rule foreclosing proceeding anonymously in cases involving caste-based discrimination or other protected categories that do not involve intimate sexual matters.

Moreover, as the United States Supreme Court has recognized, fear of employer reprisals will frequently chill employees' willingness to challenge employers' violations of their rights. (*Id.* at p. 1073, citing *Mitchell v. Robert De Mario Jewelry, Inc.* (1960) 361 U.S. 288, 292 and *NLRB v. Robbins Tire & Rubber Co.* (1978) 437 U.S. 214, 240.) Permitting Doe to use a pseudonym will serve the public's interest by enabling the

government enforcement action to go forward and also because it will encourage other victims to come forward, not only in this case, but also in the future. On balance, the Court should allow John Doe to proceed anonymously.

## **V. CONCLUSION**

The Superior Court erred because it did not apply the proper legal standard to DFEH's Motion. Rather than assessing the factors discussed in *Lincoln Unified, supra*, 188 Cal.App.4th 758, the Superior Court rejected the suggestion it should do so. Instead, the Superior Court cited the line of cases applying the use of a pseudonym to cases "involving human sexuality" and effectively limiting the ability to proceed anonymously to such cases, without acknowledging the other cases cited by DFEH that did not fall into that category. The Superior Court, moreover, concluded that Doe was effectively a party, despite well-settled authority (which the Superior Court recognized in denying defendants' motion to compel arbitration) that a complainant is *not* a party when DFEH enforces rights under FEHA. Additionally, the Superior Court only nominally considered the substantial evidence presented in support of DFEH's Motion and did not consider some of it at all (refusing to take judicial notice of news articles), while extensively discussing the public's interest in court proceedings. But granting anonymity to Doe would not prevent the public

from knowing what occurs in the case.

As irreparable damage will be done at the expiration of the Superior Court's sixty day stay of its order, this is a matter of great urgency.

For the reasons stated herein, DFEH respectfully requests that the Court grant the petition. If the Court denies the petition, DFEH respectfully requests the Court to grant an additional sixty day stay to allow DFEH time to seek further review.

Dated: April 1, 2021

Respectfully submitted,

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/s/

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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 PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [EXHIBITS FILED UNDER SEPARATE COVER] uses a 13-point Times New Roman font and contains approximately 8,836 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 1, 2021

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