

January 5, 2021

Chief Justice Tani Cantil-Sakauye and
Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Amici Curiae* Letter in Support of Petition for Review
Wood v. Superior Court of California
Fourth Appellate District, Division One, Case No. D076317
San Diego Superior Court, Case No. 37-2018-00019066-CU-CR-CTL

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500, subdivision (g) of the California Rules of Court, *amici curiae* California Women’s Law Center (“CWLC”), Equal Rights Advocates (“ERA”), Family Violence Appellate Project (“FVAP”) and Family Violence Law Center (“FVLC”) (hereinafter, “*amici*”) respectfully submit this letter in support of Christynne Lili Wrene Wood’s Petition for Review in the above-referenced action (“Petition”).

I. Identity and Interest of Amici

CWLC’s mission is to create a more just and equitable society by breaking down barriers and advancing the potential of women and girls through transformative litigation, policy advocacy and education. For over thirty years, CWLC has placed a particular emphasis on eradicating all forms of discrimination and violence against women in housing, schools, and the workplace, including by advocating in appellate cases such as this one that will impact women and girls across the state.

ERA is a national civil rights advocacy organization dedicated to protecting and expanding educational and economic access and opportunities for women, girls, and people of all marginalized gender identities. Since 1974, ERA has fought sex discrimination and advanced gender justice through impact litigation, policy reform advocacy, community education and outreach, and by providing free legal assistance to individuals experiencing unfair treatment at work and in school through our Advice & Counseling program. ERA represents victims of gender-based harassment and sexual violence at all stages of litigation in state and federal court, and has participated as *amicus curiae* in dozens of cases relating to gender discrimination and employment- and education-related civil rights.

FVAP is a California non-profit legal organization whose mission is to ensure the safety and well-being of survivors of domestic violence and other forms of intimate partner, family, and gender-based abuse by helping them obtain effective appellate representation. FVAP provides legal assistance to survivors of abuse at the appellate level through direct representation, collaborating with pro bono attorneys, advocating for survivors on important legal issues, and offering training and legal support for legal services providers and domestic violence, sexual

assault, and human trafficking counselors. FVAP participates as *amicus curiae* in cases such as this one, which will have a broad impact on survivors of abuse. FVAP's work contributes to a growing body of case law that provides the safeguards necessary for survivors of abuse and their children to obtain relief from abuse through the courts.

FVLC is a 501(c)(3) nonprofit organization that works to end intimate partner and family violence in Alameda County by providing crisis support and legal services and representation for survivors of domestic violence, sexual assault and stalking, as well as violence prevention education.

As organizations that serve, represent, and advocate for women and people of all gender identities who experience sexual harassment and gender-based violence, *amici* know from experience how vitally important confidentiality of communications with government enforcement agencies is for individuals who experience sexual and gender-based harassment. We share an interest in ensuring that victims of such discrimination have access to the full panoply of protections and remedies available under our state's broad anti-discrimination and civil rights laws, including the California Fair Employment and Housing Act ("FEHA") and other core policies enforced by the Department of Fair Employment and Housing ("DFEH").

II. Introduction and Summary of Argument

Amici urge the Court to grant Christynne Lili Wrene Wood's Petition for Review to clarify that the attorney-client privilege enshrined in California's Evidence Code applies to communications between individuals who file complaints with the DFEH and the civil rights attorneys who investigate those complaints. The confidentiality of these communications is critical to the enforcement of the FEHA. The Court of Appeal's decision will make it more difficult for individuals to report discrimination and will impede the agency's ability to "protect the people of California from unlawful discrimination in employment, housing and public accommodations."¹ Because the FEHA has broader protections than federal law and one must file a complaint with the DFEH before they can file a lawsuit, the Court of Appeal's decision will compound the already pervasive problem of underreporting of these types of cases. Allowing discovery of otherwise confidential communications with DFEH attorneys will create another barrier that will further chill the reporting of sexual harassment and gender-based violence, and will exacerbate existing disparities in reporting for low-paid workers and women of color. If not addressed and reversed, the Court of Appeal's decision will harm those who have experienced harassment and frustrate the purpose of the FEHA.

III. Argument

A. Gender-based harassment is widely underreported and disproportionately harms low-paid workers and women of color.

Sex and gender-based harassment is a pervasive and widely underreported problem that disproportionately harms low-paid workers and women of color. In a statewide assessment of

¹ *About DFEH*, CAL. DEPT. FAIR EMP'T AND HOUS., <https://www.dfeh.ca.gov/aboutdfeh/> (last accessed 6/11/2020).

sexual harassment and assault in California, 86 percent of women “reported experiencing some form of sexual harassment and/or assault in their lifetime.”² More than four in five women experienced verbal sexual harassment, one in two women experienced unwelcome sexual touching, four in ten women experienced cyber sexual harassment, and one in three women experienced unwanted genital flashing.³ Due to high rates of underreporting and barriers to reporting, the actual numbers are likely even higher. A national analysis of sexual harassment charges filed by working women found that Black women filed sexual harassment charges with the EEOC at nearly three times the rate of white, non-Hispanic women and were over-represented among women who filed sexual harassment charges across every industry.⁴

Many studies show that women of color are more likely than their white counterparts to be targeted for and experience sexual harassment in the workplace.⁵ Women of color often experience racialized sexual harassment, or sexual harassment at the intersection of their race and gender. This often manifests as sex stereotypes based on a woman’s race: for example, “African American women are stereotyped as ‘Jezebels,’ Latinas as “hot-blooded,” Asian Pacific Islander and Asian Pacific American (API/APA) women as “submissive, and naturally erotic,” multiracial women as “tragic and vulnerable” and historically “product[s] of sexual and racial domination,” and American Indian/Native American women as “sexual punching bag(s)” who are “sexually violable” as a “tool of war” and colonization.”⁶ These racialized sex stereotypes in addition to the disproportionate representation of women of color in low wage jobs—resulting from systemic racism and gender-based occupational segregation—mean that “women of color have been more susceptible to sexual harassment and assault than White women have been.”⁷

Despite its prevalence, sexual harassment is widely underreported. In its 2016 report, the U.S. Equal Employment Opportunity Commission (EEOC)’s Select Task Force on the Study of Harassment in the Workplace found that approximately 70 percent of individuals who experienced harassment did not discuss their harassment with a supervisor, manager, or union representative about the harassing conduct.⁸ Rather than formally report it, the most common responses to workplace sexual harassment by those who experience it are to avoid the harasser

² *Measuring #MeToo in California: A Statewide Assessment of Sexual Harassment and Assault*, UC SAN DIEGO CTR. ON GENDER EQUITY & HEALTH, STOP STREET HARASSMENT, CAL. COALITION AGAINST SEXUAL ASSAULT, & PROMUNDO 8 (May 2019), <http://www.calcasa.org/wp-content/uploads/2019/05/CAMeTooReport-052219.pdf>.

³ *Id.*

⁴ Amanda Rossie, Jasmine Tucker, & Kayla Patrick, *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women*, NAT. WOMEN’S LAW CTR. 5 (2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>.

⁵ *Id.* at 5; Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (June 2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace>.

⁶ Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 26 (2019) (citations omitted). See Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, CRITICAL RACE FEMINISM: A READER 349 (Adrien Katherine Wing ed., 2d ed. 2003).

⁷ Katherine Giscombe, *Sexual Harassment and Women of Color*, CATALYST: BLOG (Feb. 13, 2018), <https://www.catalyst.org/2018/02/13/sexual-harassment-and-women-of-color/>.

⁸ Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (June 2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> [hereinafter *EEOC Report*].

(33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget or endure the behavior (44% to 70%).⁹ Barriers to reporting include, but are not limited to, fear of retaliation, psychological barriers, and misinformation on what constitutes sexual harassment.

These barriers and others disproportionately impact women of color, immigrant women, LGBTQ+ people, and women living with low incomes. People living at the intersection of multiple oppressed identities experience compounded effects of sex discrimination or harassment, especially considering existing wage gaps—wider for women of color when compared to their white counterparts—that further disincentivize reporting discrimination or harassment.¹⁰ For example, “Latina workers, especially immigrant and undocumented workers, [] face unique, oversexualized gender and ethnic stereotypes that make them even more likely to become targets of harassment” and “may be less likely to report sexual harassment or assault due to fears of losing their job or retaliation related to their legal status that could, in turn, lead to deportation.”¹¹ Undocumented workers or those on temporary work visas face additional barriers to reporting, including fear of being deported or losing their work visas.¹² Individuals living with low incomes experience increased fear in both the employment and housing context because of the of risk losing a job or housing altogether; “women—particularly women of color—are more likely to work lower-wage jobs, where power imbalances are often more pronounced and where fears of reprisals or losing their jobs can deter victims from coming forward.”¹³

While fear of retaliation is a real barrier to reporting for many employees who experience discrimination and harassment, this fear is heightened for workers in low-paid industries and jobs, where power imbalances between workers and supervisors often are more pronounced. Studies highlighted in the 2016 EEOC report show that this fear is warranted: For example, one study found that 75% of employees who spoke out against workplace mistreatment faced some form of retaliation.¹⁴ Other studies cited by the EEOC have found that sexual harassment reporting is often followed by organizational indifference or trivialization of the harassment complaint as well as hostility and reprisals against the victim.¹⁵ Additionally, “[a]lmost two-thirds of people who file a charge [of workplace sexual harassment] lose their jobs as a result of

⁹ *Id.*

¹⁰ *Sexual Harassment and the Gender Wage Gap*, NAT. P'SHIP FOR WOMEN & FAMILIES 1-2 (March 2020), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/sexual-harassment-and-the-gender-wage-gap.pdf>.

¹¹ Diana Boesch, Jocelyn Frye, and Kaitlin Holmes, *Driving Change in States to Combat Sexual Harassment*, CTR. FOR AM. PROGRESS (Jan. 15, 2019), <https://www.americanprogress.org/issues/women/reports/2019/01/15/465100/driving-change-states-combat-sexual-harassment/>.

¹² Sara Kominers, *Working in Fear: Sexual violence against women in the United States*, OXFAM AMERICA 27-28 (2015), <https://www.northeastern.edu/law/pdfs/academics/phrge/kominers-report.pdf>.

¹³ Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual harassment Across Industries Affects All Workers*, CTR. FOR AM. PROGRESS (November 20, 2017), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>.

¹⁴ EEOC Report, *supra* note 8.

¹⁵ *Id.*

their complaint.”¹⁶ And while more than two-thirds of formal charges are accompanied by allegations of employer retaliation, that rate is even higher for Black women.¹⁷

Lack of awareness or understanding of what constitutes sexual harassment also contributes to underreporting.¹⁸ When employees were asked if they had experienced sexual harassment, approximately one in four (25%) of women reported experiencing sexual harassment in the workplace.¹⁹ However, when asked “whether they have experienced one or more specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion, the rate of reported harassment rose to approximately 60% of women.”²⁰ The bystander effect contributes to the problem of underreporting: when others observe harassment but fail to intervene—whether due to the diffusion of personal responsibility or social influence—it leaves the impression that such behavior is condoned and further discourages complaints.²¹

The existing barriers preventing those who experience gender-based harassment and violence from coming forward are already onerous, and if the Court of Appeal’s decision is not reversed, the problem of underreporting will only be exacerbated.

B. Allowing discovery into complainants’ communications with the DFEH will impede enforcement and undermine effectuation of the civil rights laws that the agency enforces.

California has a long history of enacting and enforcing broad, robust policies against gender-based discrimination and violence in all forms and within virtually every aspect of the economy. The Court of Appeal’s published decision and reasoning will frustrate enforcement of these critical laws. Many of California’s policies against discrimination and hate-based violence are codified in the FEHA (Government Code section 12900, et seq.) and the Unruh Act (Civil Code section 51 et seq.), both of which the DFEH enforces.

The FEHA provides broader coverage and remedies, and more specific protections and prohibitions with respect to sexual harassment and other forms of gender discrimination than its federal counterpart, Title VII of the Civil Rights Act.²² The FEHA specifically prohibits sexual harassment by name and covers more bases for discrimination, such as gender, gender identity, and gender expression.²³ Among other areas not expressly prohibited by Title VII, it protects

¹⁶ Carly McCann, Donald T. Tomaskovic-Devey, *Nearly all sexual harassment at work goes unreported – and those who do report often see zero benefit*, THE CONVERSATION (Dec. 14, 2018), <https://theconversation.com/nearly-all-sexual-harassment-at-work-goes-unreported-and-those-who-do-report-often-see-zero-benefit-108378>.

¹⁷ Carly McCann, Donald Tomaskovic-Devey, & M.V. Lee Badgett, *Employer’s Responses to Sexual Harassment*, CTR. FOR EMP’T EQUITY UNIV. OF MASS. AMHERST, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment> (last visited May 27, 2020).

¹⁸ See EEOC Report, *supra* note 8 (citing research finding that “many individuals do not label certain forms of unwelcome sexually based behaviors - even if they view them as problematic or offensive - as ‘sexual harassment.’”).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Stefanie K. Johnson, Jessica F. Kirk, and Ksenia Keplinger, *Why We Fail to Report Sexual Harassment*, HARV. BUS. REV. (October 4, 2016), <https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment>.

²² Cal. Gov. Code § 12940.

²³ *Id.*

workers classified as independent contractors,²⁴ those working for smaller employers,²⁵ and those harassed by a supervisor who does not have the power to hire or fire them.²⁶ Thus, for many California workers facing sexual harassment, the DFEH may be their only viable avenue for obtaining accountability and relief.

In addition to the FEHA and the Unruh Act, the DFEH also enforces the Ralph Civil Rights Act (Civil Code section 51.7), the Trafficking Victim’s Protection Act (Civil Code section 52.5), and other specific protections against gender violence (Civil Code section 52.4) and sexual battery (Civil Code section 11708.5), in addition to many others.

As discussed above, the Court of Appeal’s decision will have a devastating impact on individuals who experience sexual harassment, who will be more reluctant to come forward with complaints if their communications with the DFEH are not protected. But the strong social stigma around sexual assault and harassment that keeps many from reporting sexual harassment and gender-based violence also makes maintaining the confidentiality of victims’ communications with enforcement agencies all the more vital.²⁷ This Court has recognized how important confidentiality is in this context. In explaining why compelled mental health examinations in sexual harassment lawsuits should be limited, this Court reasoned in *Vinson v. Superior Court*,²⁸ that “allowing unrestricted mental examinations potentially discourages sexual harassment victims from reporting and pursuing meritorious claims because of the fear of further intrusion as a result of the discovery.”²⁹ The same reasoning applies to communications survivors would otherwise understand to be confidential, including those they have with attorneys charged with evaluating and potentially prosecuting legal claims on their behalf.

C. Confidentiality is especially critical for FEHA complainants, who must exhaust administrative remedies or obtain a right to sue from the DFEH before filing in court.

An individual who believes they have been sexually harassed or otherwise subjected to unlawful discrimination in employment must timely file a complaint with the DFEH before they can pursue a civil action in court.³⁰ Thus, employees who experience sexual harassment *must* divulge personal information to the agency in order to file a claim in court.³¹ For this reason, the Court of Appeal’s published decision is particularly harmful to workers who have no choice but to file with the DFEH, especially where that employee could not assert a claim under federal law,

²⁴ Cal. Gov. Code 12940(j)(1).

²⁵ Cal. Gov. Code 12940(j)(4)(A).

²⁶ Cal. Gov. Code 12940(j)(1).

²⁷ It is also why the DFEH tells employers to “[c]reate a complaint process that ensures confidentiality to the extent possible” in its guidance on workplace sexual harassment prevention. See *Sexual Harassment Fact Sheet*, DEP’T OF FAIR EMP’T AND HOUS. (Apr. 2020), https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/SexualHarassmentFactSheet_ENG.pdf.

²⁸ See *Vinson v. Superior Court*, 740 P.2d 404, 413 (Cal. 1987).

²⁹ Katie M. Patton, *Unfolding Discovery Issues That Plague Sexual Harassment Suits*, 57 HASTINGS L.J. 991, 1002 (2006), https://repository.uchastings.edu/hastings_law_journal/vol57/iss5/3.

³⁰ Cal. Gov’t Code §§ 12960, 12965(b); *Romano v. Rockwell Int’l, Inc.*, 14 Cal. 4th 479, 492 (1996).

³¹ The statute requires that any person filing a complaint must state or provide: “the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, ... the particulars thereof and ... other information as may be required by the department.” Cal. Gov’t Code § 12960(c).

e.g. Title VII (which would allow and require them to exhaust administrative remedies through the EEOC, where confidentiality is still protected.)

The majority of complainants who file with the DFEH for sex discrimination and sexual harassment seek a right-to-sue letter, meaning they clearly intend to file a lawsuit.³² If complainants' communications with the DFEH are open to discovery, then any person who experiences workplace sexual harassment would have to assume that whatever information they disclose in the course of fulfilling the administrative exhaustion requirement under the FEHA, could be disclosed to the responding party or others who may eventually become involved in litigation arising from their complaint. Forcing complainants to take this risk of disclosure into account will likely inhibit their full and open communication with the DFEH attorneys. More fundamentally, it is also profoundly cruel to force a victim of sexual harassment to speak about what happened to them in a non-confidential environment. In contrast, ensuring that complainants' communications with the DFEH are shielded from discovery will help effectuate California's civil rights laws and protect the individuals who suffer violations of those laws.

IV. Conclusion

For all these reasons, this Court should reverse the Court of Appeal's decision and clarify that the attorney-client privilege protects the confidentiality of communications between complainants and the DFEH attorneys investigating their complaints.

Respectfully submitted,

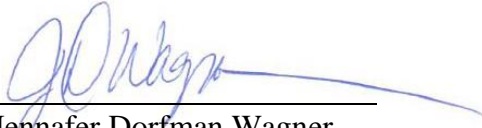


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³² DFEH complaints filed solely for a right-to-sue notice in employment cases based on sex/gender and sexual harassment were significantly higher than complaints filed for DFEH investigation. See DEP'T OF FAIR EMP'T AND HOUS., 2018 Annual Report 10 (2020), <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/01/DFEH-AnnualReport-2018.pdf> (last accessed 6/17/2020).



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