SUPREME COURT OF THE STATE OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent.	Case No. S243855 Second Appellate District, Division 8 No. B280676 Los Angeles County Superior Court No. BS166063
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, et al., Real Parties in Interest.	

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, BY AND THROUGH THE SAN FRANCISCO POLICE DEPARTMENT, IN SUPPORT OF REAL PARTIES IN INTEREST LOS ANGELES COUNTY SHERIFF'S DEPARTMENT et al.

The Honorable Judge James C. Chalfant

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APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

The City and County of San Francisco, by and through the San Francisco Police Department ("Police Department"), hereby applies to file the enclosed amicus curiae brief in support of Real Parties in Interest Los Angeles County Sheriff's Department et al.

In 2010, the Police Department adopted a formal *Brady* notification policy to ensure that criminal defendants are informed of the existence of potentially exculpatory information while respecting the statutory rights of peace officers to privacy in their personnel records. San Francisco's policy will be familiar to this Court, which addressed it three years ago in an opinion that lauded its role in the *Pitchess* process and appended it in full. (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 721 & appen.) In the instant case, both the majority and the dissent in the Court of Appeal discuss the same San Francisco policy lauded in *Johnson*. Notwithstanding this Court's praise for it, the majority finds it unlawful.

The policy was developed in consultation with the District Attorney's Office, the San Francisco Police Officers Association, and other stakeholders. In the litigation in this Court, it was supported by the Police Department, the District Attorney, and the defendant, represented by the San Francisco Public Defender. The Police Department seeks to file the enclosed brief because it continues to believe that its policy is an important and lawful measure to protect both the confidentiality of peace officer personnel records and the defendant's right to a fair trial.

Petitioner and Real Parties dispute whether the federal Constitution *requires* law enforcement agencies to provide *Brady* notifications to the prosecution. The proposed amicus brief argues that the *Pitchess* scheme

does not prohibit a *Brady* notification regardless of the answer to that question, which this Court therefore need not decide.

Pursuant to Rule 8.520(f)(4), applicant certifies that no party or counsel for a party has authored the proposed amicus brief in whole or in part, and that no person or entity has made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending appeal.

Dated: May 4, 2018

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ISSUE PRESENTED

When a law enforcement agency creates an internal *Brady* list (see Gov. Code, § 3305.5), and a peace officer on that list is a potential witness in a pending criminal prosecution, may the agency disclose to the prosecution (a) the name and identifying number of the officer and (b) that the officer may have relevant exonerating or impeaching material in his or her confidential personnel file, or can such disclosure be made only by court order on a properly filed *Pitchess* motion? (See *Brady v. Maryland* (1963) 373 U.S. 83; *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Pen. Code, §§ 832.7-832.8; Evid. Code, §§ 1043-1045.)

INTRODUCTION

In jurisdictions where peace officer personnel records do not receive statutory protection, the prosecution may examine the personnel file of a law enforcement witness to determine whether it contains any information that must be disclosed under *Brady*. *Johnson* established that California is different: The Legislature has protected the confidentiality of peace officer personnel files by shielding them from prosecutorial inspection, instead requiring the court to review them in camera and make the disclosure decision.

Under this system, the prosecution and/or the defense must decide whether to file a *Pitchess/Brady* motion requesting that the court conduct such a review, and the court must decide whether to grant it, requiring the officer's employing agency to submit the records in camera. Because often neither the litigants nor the court have a basis to know whether *Brady* material is likely to exist, *Brady* notifications play a narrow but vital role by streamlining their decision-making in a category of cases where in camera

review is unquestionably warranted—i.e., where the officer will testify as a prosecution witness and the employing law enforcement agency knows that the personnel file contains information that may be subject to disclosure. Without revealing the substance of the information, the notification ensures that the court will at least conduct a review to determine whether there is anything to which the defendant is entitled.

Such a notification is lawful under the *Pitchess* statutes regardless of whether the Constitution compels the law enforcement agency to provide it. While there are many ways in which the statutory scheme protects the confidentiality of personnel records, it is not intended to protect an interest in avoiding in camera review in cases where the appropriateness of such review is beyond doubt. To the contrary, the legislative history of the *Pitchess* statutes demonstrates that they were intended to ensure the disclosure of information that protects the defendant's right to a fair trial; it is necessary to the functioning of such a system that the court will actually review records to determine whether anything must be disclosed. Moreover, the rule Petitioner ("ALADS") advocates undermines the purposes of the statutory scheme *without* protecting the confidentiality interests that the Legislature determined were worthy of protection. Indeed, because the result of that rule may be more rather than fewer *Pitchess* motions, it risks subjecting a greater number of officers' personnel to judicial scrutiny without doing anything to protect the confidentiality of peace officers who do have *Brady* information in their files, and about whom the law enforcement agency therefore would have provided a notification.

As discussed below, ALADS's construction of the *Pitchess* statutes is not supported by the statutory language, the legislative history, or the

practical consequences of the proposed rule. The cases on which it relies—which arose in the context of public records requests, and which neither mentioned *Brady* nor had any cause to examine the scheme's intended purposes in protecting the right to a fair trial—do not support such a rule either. And because the Legislature has elsewhere recognized the role of *Brady* lists in ensuring that defendants receive exculpatory information (Gov. Code, § 3305.5, subd. (e)), it is not reasonable to conclude that the Legislature intended to prohibit law enforcement agencies from providing prosecutors with the notifications that would allow them to develop such a list in the first place.

DISCUSSION

I. THE COURT NEED NOT DECIDE WHETHER *BRADY* NOTIFICATIONS ARE CONSTITUTIONALLY COMPELLED IN ORDER TO DETERMINE WHETHER THEY ARE PERMITTED BY THE *PITCHESS* STATUTES

Real Parties begin by arguing that the Los Angeles County Sheriff's Department is constitutionally required to notify prosecutors of the existence of potential *Brady* material in peace officer personnel files; ALADS responds in turn that the Department has no such constitutional obligation. (OBM at 16-20; ABM at 27-32.) Adjudicating this issue in Real Parties' favor would essentially moot the question of whether the *Pitchess* statutes permit it, although this Court has previously held that the *Pitchess* process "operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information." (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14.)[1] Nonetheless, starting with the constitutional dispute arguably takes matters up in the wrong order. (See,

[1] "The statutory scheme is set forth in Evidence Code sections 1043 through 1047 and Penal Code sections 832.5, 832.7 and 832.8." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.)

e.g., *Wolston v. Reader's Digest Ass'n, Inc.* (1979) 443 U.S. 157, 160 [noting "general principle that dispositive issues of statutory and local law are to be treated before reaching constitutional issues"]; *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230 ["this Court will not decide constitutional questions where other grounds are available and dispositive"]); *Arden Carmichael, Inc. v. County of Sacramento* (2000) 79 Cal.App.4th 1070, 1077, fn.4 [citing *Wolston* and declining to reach constitutional issue where matter can be resolved by statutory interpretation].) By asking first whether a *Brady* notification is permissible under the *Pitchess* statutes, this Court would be required to resolve the constitutional dispute only if it answered that question in the negative.

This is not to say that it is unnecessary to consider federal constitutional law when answering the question of statutory interpretation presented here; the Court has explained that the defendant's right to a fair trial must inform the analysis of the *Pitchess* scheme's operation. (*Mooc*, *supra*, 26 Cal.4th at p. 1225 [the *Pitchess* procedure "must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial"].) But it is enough here to proceed from core principles already established by this Court: The *Pitchess* scheme provides the procedural mechanism for the disclosure of *Brady* information in peace officer personnel files; the threshold for obtaining in camera review is low (and is satisfied by the *Brady* alert along with an explanation of the relevance of the officer's credibility); and following such review, the court must order the disclosure of any information that satisfies *Brady*'s materiality standard. (*People v. Superior*

Court (Johnson) (2015) 61 Cal.4th 696, 721-22.)[2] As discussed below, one need not go farther than that to conclude the *Pitchess* statutes do not prohibit a law enforcement agency from alerting the prosecution to the potential existence of *Brady* information in the personnel file of a peace officer witness.

II. THE *PITCHESS* STATUTES DO NOT PROHIBIT A LAW ENFORCEMENT AGENCY FROM PROVIDING A *BRADY* NOTIFICATION TO THE PROSECUTION

A. The Statutory Language Does Not Prohibit a *Brady* Notification

The Court's "fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) The starting point for that analysis is the statutory language, considered in the context of the statutory framework as a whole; where it "permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid.*) Moreover, courts should not embrace a literal interpretation "that would result in absurd consequences the Legislature did not intend." (*Ibid.*; *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 125 [literal interpretation should "neither undermine[] clear legislative policy nor produce[] absurd results"].)

Subdivision (a) of Penal Code section 832.7 provides:

> Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be

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[2] *Johnson* also concluded that the *Brady* notification itself was information that the prosecution was required to disclose to the defense once it had received it, but did not hold that law enforcement agencies are constitutionally required to provide that notification in the first place. (61 Cal.4th at p. 715.)

> disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

When the Court examined this language in *Johnson*, it concluded that the exception for "investigations or proceedings" in the second sentence does not apply to a review for *Brady* material, and accordingly that the Legislature's intent was that prosecutors would not have "direct access to peace officer personnel records" for the purpose of complying with *Brady*. (61 Cal.4th at pp. 713-714.)

A *Brady* notification plainly does not disclose any personnel records to the prosecution. The majority opinion below concluded, however, that it does disclose "information obtained from these records." (*Assoc. of Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 435, review granted Oct. 11, 2017 [hereafter *ALADS*].) The dissent disagreed, noting that it reports only "the fact, known to the Department, that there may be *Brady* material in the officer's personnel records." (*Id.* at p. 453 (conc. & dis. opn. of Grimes, J.).) The notification is generic; it does not disclose the facts or circumstances of any incident, whether there was any citizen complaint against the officer, what discipline (if any) was imposed, or in what particular way the information may qualify as *Brady* material. There is a difference between disclosing the fact that certain kinds of information may exist, and disclosing substantively what the information is, and the phrase "information obtained from those records" does not clearly establish the Legislature's intent. Because the phrase could reasonably be interpreted to refer only to the information in the records, and not to the

mere fact that certain information may exist, it is necessary to consider the additional aids to interpretation discussed below.[3]

B. The *Pitchess* Statutes Were Not Intended to Protect an Interest in Avoiding In Camera Review of Personnel Files That Contain Potential *Brady* Material

The *Pitchess* statutes were enacted four years after the decision from which they take their name. The decision had two components. First, it held that the defendant had a due process right to "compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial," which in the instant case involved records from a sheriff's department unit that investigated citizen complaints of official misconduct. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536-537.) Second, it held that the sheriff's department could avoid disclosing the records only under the "official information" privilege in Evidence Code section 1040, which the department had expressly refrained from invoking because it would result in "a dismissal of charges against the defendant or a directed verdict against the prosecution on the issue to which the excluded material relates." (*Id.* at p. 539.)[4] The Court

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[3] The majority below also relied on *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1297, which cited subdivision (c) of Section 832.7—an exception for summary and statistical data that does not identify the individuals involved—to conclude that the statute prohibits dissemination of information that links a peace officer's name to the existence or disposition of complaints against him or her in response to a public records request. The disagreement between the majority and the dissent focused primarily on the extent to which that decision applies in the *Brady* context, rather than on the statutory language itself, and we address it separately below. (*Infra*, Section II.D.)

[4] The department instead asserted a common law privilege of confidentiality, but the Court concluded that no such privilege existed after the enactment of the Evidence Code, and found the department's strategy misconceived in any event, because a court is "equally compelled to dismiss a prosecution when material evidence is withheld from a defendant on a common law claim of governmental confidentiality." (*Id.* at p. 539 & fn. 5.)

thus protected the defendant's right to due process by allowing the sheriff's department to withhold the records (on a successful invocation of the official information privilege) only at the price of a directed verdict or dismissal of the charges.

To the Legislature, it was an intolerable bargain. It enacted the *Pitchess* statutes to prevent law enforcement agencies from jeopardizing criminal prosecutions by invoking a privilege to refuse to produce personnel records (as contemplated in the Court's decision), or—as reports presented to the Legislature alleged—by systematically destroying them in a misguided attempt to avoid the dilemma. (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 393-394 [discussing legislative history]; *Commission On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278, 293 [same].) The scheme is therefore *less* protective of confidentiality than what preceded it at least insofar as it requires a law enforcement agency to preserve the records for a minimum of five years (Pen. Code, § 832.5(b)), and insofar as it removes any privilege to withhold them altogether. (*Commission On Peace Officer Standards*, 42 Cal.4th at p. 293 ["The new legislation required that those records be maintained, but provided assurances to peace officers that such records would remain confidential *except as necessary in order to ensure a fair trial in civil or criminal proceedings*"], emphasis added.)

The statutory scheme protects peace officers' confidentiality in other ways. It begins with an express declaration that personnel records are confidential. (Pen. Code, § 832.7, subd. (a).) It prohibits their disclosure except by motion with notice to the officer, and—as this Court held in *Johnson*—it shields the files from routine inspection by prosecutors and instead requires the court to review any potentially responsive records in

camera before ordering production of relevant information, subject to protective orders. (See *ibid.*; Evid. Code, §§ 1043, 1045; *Johnson*, 61 Cal.4th at p. 714.)

It is necessary to the design and functioning of such a scheme that courts will actually review the records in appropriate cases. And appropriate cases include, at a minimum, those in which the prosecution will rely on the testimony of a law enforcement witness determined by the employing agency to have information in his or her personnel file that may be subject to disclosure under *Brady*. (*Johnson*, 61 Cal.4th at p. 721 [police department's *Brady* notification along with some explanation of the relevance of the officer's credibility satisfies necessary showing to obtain in camera review].) The *Brady* notification thus serves to "streamline" (*ibid.*) the process of obtaining in camera review in a particular category of cases in which such review is clearly warranted. That is why *Johnson* properly characterized the establishment of San Francisco's procedure as "laudabl[e]" (*ibid.*)—a characterization that ALADS is compelled to acknowledge, but cannot explain. (ABM at 57.)

By urging a construction of the *Pitchess* scheme that would prohibit law enforcement agencies from ever providing a *Brady* notification, ALADS seeks to protect a confidentiality interest that the Legislature has *not* found to be worthy of protection; i.e., an interest in avoiding in camera review of personnel records in cases where good cause plainly exists for it. The *Pitchess* scheme protects confidentiality in numerous ways, but that is not one of them; to the contrary, it is one area in which the Legislature determined that confidentiality must yield. ALADS's proposed construction therefore upsets the balance the Legislature struck. (See *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53 ["The statutory

scheme carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to the defense"].)

C. ALADS's Proposed Construction of Section 832.7 Is Undermined by Its Practical and Policy Consequences

Where there is uncertainty in the statutory language, "it is appropriate to consider 'the consequences that will flow from a particular interpretation'" and "'to favor the construction that leads to the more reasonable result.'" (*Copley Press*, *supra*, 39 Cal.4th at p. 1291, citations omitted.) That rule weighs heavily against a construction of Section 832.7 that would preclude any *Brady* notification: The consequences are bad for criminal defendants, peace officers, and courts.

As Justice Grimes observed in her dissent, if this Court were to decide that law enforcement agencies are prohibited from ever providing a *Brady* notification, both prosecutors and defense counsel are likely to conclude that the only way to safeguard the right to a fair trial is to seek the court's review of personnel files at least in every case in which the prosecution intends to rely on the testimony of a peace officer witness. (*ALADS*, *supra*, 13 Cal.App.5th at p. 454 (conc. & dis. opn. of Grimes, J.).) In such cases, the officer's credibility is potentially at issue, and lawyers on both sides will regard his or her personnel records as an important source of possible impeachment information.

ALADS dismisses this concern by asserting that "[f]or nearly 40 years *Brady* and *Pitchess* have coexisted without the need for the prosecutor to file a motion in every single case." (ABM at 62.) Yet on the next page, ALADS acknowledges Justice Grimes' observation that law enforcement agencies throughout the state have been providing *Brady* tips

to the prosecution "for years," not through a formalized procedure such as the one adopted by San Francisco in 2010, but "in response to informal requests from prosecutors." (ABM at 63 [quoting *ALADS*, 13 Cal.App.5th at p. 455 (conc. & dis. opn. of Grimes, J.)].)[5] ALADS does not dispute that the practice has occurred, and simply argues that it violates *Pitchess* as much as any formal procedure does. (ABM at 64.) But that is just the point: ALADS advocates a rule that would prohibit both formal *Brady* notification procedures and informal *Brady* tips in response to prosecutorial requests—practices that "for years" have allowed the system to function without the need for regular prosecution motions.[6]

When law enforcement agencies are able to provide *Brady* alerts, courts may approach the threshold showing of good cause differently depending on whether the agency has done so for the officer in question. As the Second District Court of Appeal recently held, when the employing agency has provided a *Brady* notification, there is no need for the moving party to allege specific officer misconduct—a requirement that, in the absence of a *Brady* notification, serves to limit fishing expeditions in *Pitchess* motions. (*Serrano v. Superior Court* (2017) 16 Cal.App.5th 759, 776.)

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[5] Justice Grimes also remarked that the trial court stated that it assumed that the practice has been occurring for as long as *Brady* itself has existed, although she added that she did not know whether the trial court's assumption was correct. (*Ibid.*) A formal notification protocol offers several advantages over a system of informal *Brady* tips: It helps ensure that the identification of officers with potential *Brady* material in their personnel files is done by appropriate personnel pursuant to regular procedures, and based on publicly articulated standards.

[6] It is also possible that prosecutors have chosen not to file motions, but that possibility does not establish that the system has worked well without them; it may simply mean that courts have not reviewed personnel records in camera notwithstanding the law enforcement agency's knowledge that *Brady* material exists, and in most cases the existence of that material has never come to light.

But if this Court were to prohibit law enforcement agencies from ever alerting the prosecution to the existence of potential *Brady* material, the percentage of motions that are effectively fishing expeditions would necessarily grow. And in most cases, there would be no way for the trial court to distinguish a motion that has some reasonable prospect of uncovering *Brady* material from one that does not.

While *Johnson* emphasized that the burden of showing good cause is "not high," a court might require prosecutors or defense counsel to allege specific officer misconduct even though they have no real reason to know what it could be, or the court might otherwise find that they failed to identify anything from which a "rational inference" that the agency has the requested information may be drawn. (*Johnson*, *supra*, 61 Cal.4th at p. 721.) As a consequence, in many cases the court would not review the records in camera even when the law enforcement agency knows that the personnel file contains information that is potentially subject to disclosure (and in which good cause would unquestionably be established under a *Brady* alert system). This approach unacceptably makes guesswork and chance the primary guardians of the defendant's right to a fair trial, and leads to outcomes that are contrary to the legislative intent embodied in the *Pitchess* scheme, including potentially placing convictions at risk.

Other courts might move in the opposite direction. At least in any case in which a peace officer's credibility may be relevant, courts may order law enforcement agencies to furnish personnel records for in camera review in response to nearly every *Pitchess* motion. But a regime in which a significantly greater number of officers have their personnel files scrutinized by the court—an increase consisting almost entirely of officers who have no information meeting the standards for disclosure and who

would not have been the subject of a *Brady* alert—is hardly an advance for the confidentiality of personnel records, and imposes its costs on officers who have done nothing wrong. Moreover, it unnecessarily increases the burden on trial courts, which will find themselves regularly engaging in reviews of personnel records that yield nothing. (Cf. *City of Los Angeles*, *supra*, 29 Cal.4th at p. 15, fn. 3 ["We do not suggest that trial courts must routinely review information that is contained in peace officer personnel files and is more than five years old to ascertain whether *Brady* ... requires its disclosure"].)

Thus, while the consequences of ALADS's interpretation of Section 832.7 could break in two different directions, the fact that they are both negative and would hinder the purposes of the statutory scheme is an additional reason to reject it. (*Copley Press*, *supra*, 39 Cal.4th at p. 1291 ["our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results"].)

D. This Court's CPRA Cases Do Not Establish That *Brady* Notifications Violate the *Pitchess* Statutes

ALADS, like the majority in the Court of Appeal, relies on three cases involving requests for documents under the California Public Records Act ("CPRA") in which this Court construed subdivision (a) of Section 832.7 to preclude the disclosure of information that links a peace officer's name to the existence or disposition of complaints against him or her. (See *Copley Press*, *supra*, 39 Cal.4th at p. 1297; *Commission on Peace Officer Standards*, *supra*, 42 Cal.4th at p. 295; *Long Beach Police Officers Assn. v.*

City of Long Beach (2014) 59 Cal.4th 59, 73.)[7] Arguing that "*Copley* was not dependent on the context in which the records were sought," ALADS contends that disclosure is prohibited whether a newspaper requests confidential information for public dissemination or a law enforcement agency seeks to notify the prosecution about the existence of potential *Brady* material in the personnel file of a testifying officer. (ABM at 51.) The argument does not withstand scrutiny.

Copley Press involved a newspaper publisher's request for documents in the possession of the County of San Diego Civil Service Commission, which hears peace officer disciplinary appeals. The Commission had already disclosed, without the sheriff deputy's name, all of the underlying facts and results of the proceeding; the publisher then filed a writ petition seeking both the name that was withheld and all documents, evidence, and audiotapes from the disciplinary appeal. (39 Cal.4th at p. 1280.)

The Court first rejected the argument that because subdivision (a) of Penal Code section 832.7 expressly places limits on the disclosure of personnel files "in any criminal or civil proceeding," it was not intended to prohibit their disclosure in other contexts (such as in response to a CPRA

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[7] Only *Copley Press* held that the information sought could not be disclosed; the other two cited the rule in concluding that the particular information the requester sought was not protected. *Commission on Peace Officer Standards* held that the information in the Commission's database—peace officers' names, employing departments, and hiring and termination dates—was not protected because it did not identify an officer as involved in an incident that was the subject of a complaint or disciplinary investigation. (42 Cal.4th at p. 299.) *Long Beach* held that the city could not refuse to disclose the identity of police officers involved in shootings, because the disclosure would communicate only factual information that the officer was involved in a shooting, and would not imply any judgment that the shooting was inappropriate or suspect. (59 Cal.4th at p. 72.)

request). The Court found, to the contrary, that because the statute declares the records confidential and then refers to disclosure only in criminal or civil proceedings, it contemplates disclosure *only* in that context, and not others. (39 Cal.4th at pp. 1284-1285.)[8] Thus, as to the CPRA, the Court concluded that the Legislature made a policy judgment that "the desirability of confidentiality in police personnel matters *does* outweigh the public interest in openness." (*Id.* at p. 1299 [quoting *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1428, fn. 18].)

By contrast, when it was the rights to due process and a fair trial on the other side of the scale, the Legislature struck the balance the other way. (*Supra*, Section II.B.) "The legislative preference for these rights over those representing collectively a generalized desire for information is by no means arbitrary." (*Hemet, supra*, 37 Cal.App.4th at p. 1427, fn. 17.) Because *Pitchess* held that the price of non-disclosure in a criminal case is an inability to proceed with the prosecution, or at least a directed verdict against the prosecution on the particular issue, the Legislature removed the privilege to withhold the records altogether and required the court to order the disclosure of relevant information after reviewing them in camera. But while due process requires disclosure in judicial proceedings, there is no constitutional right of access to records in the CPRA context: *Copley Press* held that neither the First Amendment nor the California Constitution requires it. (39 Cal.4th at pp. 1300-1305.)

With respect to the request for the deputy's name, the Court relied on subdivision (c) of Section 832.7, which provides: "Notwithstanding

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[8] It also concluded that it would defeat the Legislature's purpose in placing conditions on the disclosure of personnel records in civil and criminal proceedings if any member of the public could obtain them simply by submitting a request under the CPRA. (*Id.* at p. 1286.)

subdivision (a), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved." The Court concluded from this exception that subdivision (a) is intended to protect, in part, the identity of officers subject to complaints. (*Copley Press*, *supra*, 39 Cal.4th at p. 1297.)

The exception in subdivision (c) was not part of the original *Pitchess* scheme but was added by a 1989 amendment. (*Copley Press*, *supra*, 39 Cal.4th at p. 1297.) It was the Legislature's response to a California Attorney General opinion issued a year earlier, which concluded that subdivision (a) expressed a legislative policy judgment to prohibit the release of summary and statistical information to the public regarding complaints against peace officers. (71 Ops.Cal.Atty.Gen. 247 (1988); see *Commission on Peace Officer Standards*, *supra*, 42 Cal.4th at p. 311 (dis. opn. of Chin, J.) [noting that the 1989 amendment responded to the Attorney General's opinion].) In the amendment, the Legislature made clear that it considered summary and statistical information about such complaints to be of sufficient value to the public as to warrant its dissemination in a form that does not identify the individuals involved.

The purpose of this exception is not to protect the rights to due process and a fair trial in civil and criminal proceedings, and neither *Copley Press* nor the other two CPRA cases cited by ALADS had occasion to consider whether it illuminated the Legislature's intent with respect to that core function of the *Pitchess* scheme. The inference that *Copley Press* drew from it mirrored the intent and scope of the exception itself, i.e., that the Legislature did *not* believe that the public's interest in openness, as

recognized and embodied in the CPRA, was of sufficient importance to warrant the dissemination of information that *does* identify the individuals involved.

Drawing an inference from subdivision (c) about information designed to protect the right to a fair trial is a different matter. The majority below wrote that "[t]he confidentiality of the information protected by the *Pitchess* statutes does not depend upon who is seeking it or for what purpose it is sought." (*ALADS*, *supra*, 13 Cal.App.5th at p. 434.) But that assertion cannot be reconciled with the statutory language: Subdivision (a) of Section 832.7, and the provisions of the Evidence Code to which it refers, expressly contemplate disclosure to a litigant in a civil or criminal proceeding, who is required to explain the materiality of the information to the subject matter of the litigation; additional documentation is required in cases alleging excessive force in connection with an arrest or concerning conduct in a jail facility. (Evid. Code, §§ 1043, 1046.) Confidentiality *does* yield depending on who is seeking the material and for what purpose, and the Legislature clearly weighed the rights to due process and a fair trial differently than it weighed the general public interest in openness.

The argument that context does not matter is also defeated by the different consequences that flow from applying the *Copley Press* rule in the CPRA context and in the context of judicial proceedings. The consequence of *Copley Press*'s finding that subdivision (a) of Section 832.7 placed the records and the deputy's identity beyond the reach of a CPRA request was that the information would not be disclosed. The same cannot be said for a construction of subdivision (a) that prohibits a law enforcement agency from providing a *Brady* notification to the prosecution. The prosecution or

the defense (or both) may still file a *Pitchess* motion; indeed, they are likely to do so far more often if the law enforcement agency is prohibited from providing a notification. And if the officer is one who would otherwise have been the subject of a *Brady* alert, then there is a reasonable likeihood the court will order some material disclosed, at least assuming the court employs a standard of good cause that allows it to review the records in the first place.

In other words, the CPRA context differs fundamentally from the *Brady* context because in the latter, the rule that ALADS advocates has no true value. On the one hand, if it does not prevent the court from reviewing the records in camera, then the fact that the officer has material in his or her personnel file subject to disclosure under *Brady* will come out anyway when the court orders production of relevant records; and in addition to doing nothing to protect that officer's confidentiality, the rule will needlessly subject many other officers' personnel files to judicial perusal. On the other hand, if it operates to prevent in camera review in cases where there is *Brady* material in the officer's file, it undermines the very purpose of the *Pitchess* scheme by purchasing confidentiality at the expense of protecting the right to a fair trial.

There is thus no inconsistency between the CPRA cases ALADS cites and a conclusion that the *Pitchess* statutes are not intended to prohibit a law enforcement agency from notifying the prosecution that a peace officer witness may have information in his or personnel file that is subject to disclosure under *Brady*.

III. GOVERNMENT CODE SECTION 3305.5 SUPPORTS THE CONCLUSION THAT THE *PITCHESS* STATUTES DO NOT PROHIBIT A LAW ENFORCEMENT AGENCY FROM PROVIDING A *BRADY* NOTIFICATION TO THE PROSECUTION

In 2013, the Legislature enacted Government Code section 3305.5, which acknowledges the role of "*Brady* lists" in assisting the prosecution in complying with its *Brady* obligations (*id.*, subd. (e)), but imposes certain restrictions on their use in other contexts, i.e., as a basis for the imposition of discipline (*id.*, subd. (a)), or as evidence in administrative proceedings (*id.*, subd. (c)). It is not the restrictions that are important here; rather, because the statute expressly recognizes *Brady* lists as a mechanism to effectuate defendants' right to receive exculpatory information, it militates against a construction of the *Pitchess* statutes that would prevent prosecutors from receiving notifications that allow them to develop and maintain a *Brady* list. (See, e.g., *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089 ["we do not construe statutes in isolation; rather, we construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided"].)

ALADS tries to downplay the significance of Section 3305.5 by emphasizing that it defines a *Brady* list as something "maintained by a prosecutorial agency or office" and that the legislative history confirms was understood as "a tool for prosecutors." (ABM at 41-42.) On the basis of these observations, ALADS contends that the Legislature did not contemplate a *Brady* list maintained by a law enforcement agency. (ABM at 47.) But that conclusion does not follow, and in any event the argument does not help ALADS with the question presented here; namely, whether the *Pitchess* statutes prevent a law enforcement agency from notifying the

prosecution that peace officer witness may have information in his or her personnel file that is subject to disclosure under *Brady*.

The statute defines a *Brady* list as "any system, index, list, or other record containing the names of peace officers *whose personnel files are likely to contain* evidence of dishonesty or bias, which is maintained by a prosecutorial agency or office in accordance with the holding in Brady v. Maryland (1963) 373 U.S. 83." (Gov. Code, § 3305.5, subd. (e), emphasis added.) This definition recognizes that prosecutors create and maintain a *Brady* list based on information they receive *about the likely content of peace officer personnel files*—which are maintained by law enforcement agencies and not open for routine inspection by prosecutors. Indeed, it describes the kind of information that prosecutors receive when a law enforcement agency provides a *Brady* notification.

Consider the San Francisco Police Department's 2010 policy, which this Court appended to its decision in *Johnson*. (61 Cal.4th 696, appen., Bureau Order 2010-01, §§ III.B, III.C.) As the Court explained in its summary of the relevant provisions, "the district attorney is notified that the officer 'has material in his or her personnel file that may be subject to disclosure under' *Brady*," and "the Bureau Order contemplates that the district attorney 'will create a list of Department employees who have potential *Brady* material in their personnel files'...." (61 Cal.4th at p. 707.) The definition that appears in subdivision (e) of Section 3305.5 matches the process outlined in this policy.

ALADS points to an outdated policy of the Los Angeles County District Attorney's Office that provided for assembling a *Brady* list exclusively from sources "outside of police personnel files," such as news media, criminal charges, civil judgments, and reports of misconduct by

individual prosecutors. (ABM at 43-44.) But putting aside that the Office's current policy expressly contemplates receiving *Brady* notifications from law enforcement (see Real Parties' Motion for Judicial Notice, Exhibit A, at pp. A-21–A-22, § 14.06.01), there is no reason to believe that, when it enacted Section 3305.5, the Legislature had in mind a *Brady* list assembled exclusively from outside sources. The definition's reference to information that is likely to be contained in personnel files suggests otherwise, because information contained in outside sources may not be duplicated or reflected in the officer's personnel file. A list derived exclusively from outside sources is thus not a list based on what the personnel file is "likely to contain." Moreover, the officer's personnel file is less significant as a source of information if the *Brady* material is already available from an outside source.

In short, in Section 3305.5 the Legislature recognized that a prosecutorial agency's *Brady* list reflects notifications from law enforcement agencies about officers with potential *Brady* material in their personnel files; nothing in ALADS's argument establishes otherwise. Section 3305.5 therefore supports the conclusion that the *Pitchess* statutes do not prevent law enforcement agencies from providing prosecutors with a *Brady* notification.

CONCLUSION

For the foregoing reasons, the San Francisco Police Department requests that this Court overturn the decision of the lower court and hold that law enforcement may, consistently with the *Pitchess* statutes, notify the prosecution that a peace officer witness may have information in his or personnel file that is subject to disclosure under *Brady*.

Dated: May 4, 2018

DENNIS J. HERRERA
City Attorney
JEREMY M. GOLDMAN
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By: _____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 6,717 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on May 4, 2018.

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PROOF OF SERVICE

I, HOLLY CHIN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On May 4, 2018, I served the following document(s):

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, BY AND THROUGH THE SAN FRANCISCO POLICE DEPARTMENT, IN SUPPORT OF REAL PARTIES IN INTEREST LOS ANGELES COUNTY SHERIFF'S DEPARTMENT et al.

on the following persons at the locations specified:

Richard A. Shinee, Esq. Elizabeth J. Gibbons, Esq. GREENE & SHINEE, A.P.C. 16055 Ventura Blvd., Suite 1000 Encino, CA 91436 Attorneys for Petitioner Association for Los Angeles Deputy Sheriffs	Frederick Bennett, Esq. P. Nguyen, Esq. Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012 Attorneys for Respondent Superior Court of Los Angeles County
Geoffrey S. Sheldon, Esq. Alex Y. Wong, Esq. LIEBERT CASSIDY WHITMORE 6033 West Century Blvd., 5th Floor Los Angeles, CA 90045 Attorneys for Real Parties in Interest Los Angeles County Sheriff's Department, Sheriff Jim McDonnell and County of Los Angeles	California Court of Appeal Second Appellate District 300 S. Spring Street, 2nd Floor North Tower Los Angeles, CA 90013
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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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

Executed May 4, 2018, at San Francisco, California.

HOLLY CHIN

SUPREME COURT OF THE STATE OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent.	Case No. S243855 Second Appellate District, Division 8 No. B280676 Los Angeles County Superior Court No. BS166063
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, et al., Real Parties in Interest.	

AMENDED PROOF OF SERVICE

The Honorable Judge James C. Chalfant

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PROOF OF SERVICE

I, HOLLY CHIN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On May 22, 2018, I served the following document(s):

MAY 4, 2018 COURT STAMPED RECEIVED COPY OF

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, BY AND THROUGH THE SAN FRANCISCO POLICE DEPARTMENT, IN SUPPORT OF REAL PARTIES IN INTEREST LOS ANGELES COUNTY SHERIFF'S DEPARTMENT et al.

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The Honorable James C. Chalfant Superior Court of Los Angeles County 111 North Hill Street, Dept. 85 Los Angeles, CA 90012	

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service.

☒ **BY ELECTRONIC MAIL:** Pursuant to California Rules of Court 2.253(b)(2), I caused the documents to be served electronically through TrueFiling in portable document format ("PDF") Adobe Acrobat.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed May 22, 2018, at San Francisco, California.

HOLLY CHIN