In the Supreme Court of the State of California

DON L. MATHEWS, et al.,

Plaintiffs and Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California, et. al.,

Defendants and Respondents.

Case No. S240156

Court of Appeal, Second Appellate District Division Two, Case No. B265990
Los Angeles County Superior Court, Case No. BC573135
Honorable Michael L. Stern, Judge

ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

The Legislature adopted AB 1775 to make clear that California's longstanding child abuse reporting laws apply to the digital realm. Like plaintiffs, amici—the California Medical Association, California Dental Association, California Hospital Association (collectively, CMA), and academics in various fields (Professors)—effectively acknowledge that, before AB 1775's enactment, the State's reporting requirements were constitutional. Amici advance two main arguments for why the changes effected by AB 1775 are unconstitutional. Both are unpersuasive.

First, amici suggest that harm suffered by victims of electronic child pornography is not sufficiently severe to justify AB 1775's reporting obligations. But the Legislature, charged with making this policy call, has determined that consumption of digital child pornography inflicts grave harm on the child victim by invading her privacy and providing an economic incentive to create more exploitative images. This determination has been repeatedly upheld by this and other courts.

Second, amici claim that AB 1775 will not substantively further the State's critical interest in protecting children, but their arguments are based on speculation and a misunderstanding of the harms the law addresses. Amici do not dispute the legislative and judicial recognition that the Child Abuse and Neglect Reporting Act (CANRA) advances the State's vital interest in protecting children, yet they offer no sound reason why the constitutional balance should be any different for mandated reporting of electronic child pornography consumption than for mandated reporting of the other forms of sexual exploitation covered by CANRA.

Amici may disagree that applying longstanding child pornography reporting requirements to electronic media best serves the public interest, but that is a policy judgment entrusted to the Legislature. The judgment below should be affirmed.

ARGUMENT

I. AB 1775 DOES NOT INFRINGE ON ANY LEGALLY PROTECTED PRIVACY INTEREST OR REASONABLE EXPECTATION OF PRIVACY

There is no legally protected privacy interest or reasonable expectation of privacy in information shared in therapy disclosing that an individual has downloaded, streamed, or accessed child pornography. (Attorney General's Answer Brief on the Merits (ABM) 27-37.) Child abuse has long been reportable. For at least three decades, mental health professionals have been required to make reports when they reasonably suspect that someone has engaged in duplicating, exchanging, or printing child pornography. Nearly forty years ago, the Legislature expressly provided that the psychotherapist-patient privilege does not apply to information included in a mandated report. (ABM 29-31, 34.) And when the Legislature established the psychotherapist-patient privilege in 1965, it set out numerous exceptions that limit the scope of the privilege, including in circumstances in which a patient may be a danger to himself or others. (ABM 32-33; see Evid. Code, §§ 1016-1027.) In light of these longstanding and established rules, there can be no reasonable expectation of privacy in information disclosing the consumption of digital child pornography, as any such expectation would not be based upon "an objective entitlement founded on broadly based and widely accepted community norms." (*Hill v. National Collegiate Athletic Assoc.* (1994) 7 Cal.4th 1, 37.)

Both sets of amici acknowledge that statutory exceptions to the psychotherapist-patient privilege inform the scope of any constitutional privacy right, but both misinterpret the scope of the psychotherapist-patient privilege. (CMA 19, 23-29; see Professors 24, 36-38.) CMA, for example, wrongly claims that, as a matter of statutory interpretation, CANRA does

not permit a mental health professional to make a mandated report unless the information giving rise to the report would independently satisfy one of the exceptions to the privilege enumerated in the Evidence Code. (CMA 27-32; see also Professors 36-38.) This contention is foreclosed by the plain language of CANRA, which states, without qualification, that the "psychotherapist-patient privilege" does not "appl[y] to information reported pursuant to [CANRA] in any court proceeding or administrative hearing." (Pen. Code, § 11171.2, subd. (b).) It also is of no significance that the Legislature opted to include this provision in the Penal Code (with the rest of CANRA's core provisions) rather than in the Evidence Code. (Compare CMA 30.) It is not uncommon to find statutes relating to the admissibility of evidence in the Penal Code. (See, e.g., Pen. Code, § 29.4 [evidence of voluntary intoxication]; *id.*, § 28 [evidence of mental disorder].)

Further, CMA's observation that Penal Code section 11171.2 speaks to the admissibility of evidence in a judicial forum does not support its conclusion that CANRA only permits disclosure of reportable information in an adjudicatory setting. (CMA 30-31.) Regardless of section 11171.2's scope, CANRA's basic reporting provision excepts reportable information from psychotherapists' general duty of confidentiality. (Pen. Code, § 11166; *People v. Garcia* (2017) 2 Cal.5th 792, 811 ["Even without any waiver of the psychotherapist-patient privilege, the psychotherapist has a statutory duty to report suspected child abuse or neglect"].)[1]

Professors also err in contending that AB 1775 represents a significant departure from the prior exceptions to the psychotherapist-patient privilege.

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[1] See also *People v. Stritzinger* (1983) 34 Cal.3d 505, 512 ("the Legislature intended the child abuse reporting obligation to take precedence over the physician-patient or psychotherapist-patient privilege"); ABM 31-33.

(Professors 37-38.) As previously explained, CANRA has long provided that information regarding certain acts of obtaining child pornography is not covered by the psychotherapist-patient privilege. (ABM 34-35.) Professors are also mistaken in suggesting that the dangerous-patient exception applies only for the limited purpose of warning a potential victim of impending harm. To the contrary, the exception applies after the threatened harm has passed, and even if no warning is issued to the potential victim. (*People v. Wharton* (1991) 53 Cal.3d 522, 556-557; *Menendez v. Superior Court* (1992) 3 Cal.4th 435, 451.)

Finally, amici urge that patients have a constitutionally protected privacy interest in divulging past criminal conduct to a mental health professional. (CMA 8-9, 19-20, 42; Professors 18-20.) Regardless of the validity of that general proposition, the specific question in this case is whether patients have a cognizable privacy interest in revelations to a mental health professional that they have downloaded or accessed sexually exploitative images of children.[2] They do not, given that the activity often occurs with the knowledge of others (ABM 29-30), established law and social custom do not recognize confidentiality over such communications (*id.* at 30-32), the crime may entail ongoing harm or risk to children (*id.* at 32-33), and patients are on notice of the reporting obligation (*id.* at 33-34). Plaintiffs have not stated a cognizable privacy claim.

II. THE STATE'S CRITICAL INTEREST IN PROTECTING CHILDREN OUTWEIGHS ANY ASSERTED PRIVACY INTEREST

Even if the Court determines that plaintiffs have adequately alleged a cognizable privacy interest, plaintiffs' claim nevertheless fails because the

[2] Contrary to amici's characterization, the Court of Appeal did not purport to categorically rule that there is no reasonable expectation of privacy in any statement relating to past criminal conduct. (ABM 36, fn. 6.)

State's critical interest in protecting children outweighs any privacy interest in maintaining the confidentiality of information that a patient has downloaded or accessed digital images of a child's sexual exploitation.

A. An Alleged Invasion of Privacy Does Not Violate the State Constitution If It Is Justified by Competing State Interests

Informational privacy claims are resolved under a general balancing test that asks whether an alleged invasion of privacy is "justified by a competing interest." (*Hill*, *supra*, 7 Cal.4th at p. 38; see also ABM 37-42.) No constitutional violation occurs if the claimed intrusion "substantively furthers one or more countervailing interests." (*Hill*, *supra*, 7 Cal.4th at p. 40.) Only an "obvious invasion[] of interests fundamental to personal autonomy must be supported by a compelling interest." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 556-557; see also *Hill*, *supra*, 7 Cal.4th at p. 34 [listing "freedom from involuntary sterilization" as example of fundamental autonomy interest].) Because AB 1775 does not intrude on any fundamental autonomy right, it is subject to a general balancing analysis. (See *Lewis v. Superior Court* (2017) 3 Cal.5th 561, 573; AB 38-40.)

Amici dispute this conclusion (Professors 21-22; CMA 32-33), relying primarily on *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, which applied the "compelling interest" standard to a law that required parental consent or a judicial bypass before certain minors could obtain an abortion. That case is inapposite as it involved the unique bodily autonomy interests implicated by the prospect of forcing a minor to carry a pregnancy to term, and imposing upon her the concomitant social, economic, and legal consequences of being thrust into parenthood against her will. (*Academy of Pediatrics*, *supra*, 16 Cal.4th at pp. 374-375 (plur. opn. of George, C.J.) [abortion is "exceptional and virtually unique" and

"unlike other medical procedures in constitutionally significant ways," brackets omitted]; see also *Lewis*, *supra*, 3 Cal.5th at p. 573 [*Academy of Pediatrics* only decision of this Court applying *Hill* to require compelling state interest].)[3] Further, unlike the law at issue in *Academy of Pediatrics*, CANRA does not require third-party consent to obtain a medical procedure or impose any remotely similar barrier to block patients from obtaining psychotherapy treatment of their choosing. (See ABM 51 [discussing Court's rejection of suggestions that information-disclosure requirements infringe on constitutionally protected rights to personal decision making, citing *Lewis*, *supra*, 3 Cal.5th at p. 573; *Wharton*, *supra*, 53 Cal.3d at p. 558].) Amici's reliance on *Planned Parenthood v. Casey* (1992) 505 U.S. 833 is misplaced for similar reasons. There, the Court invalidated a spousal notification provision, because it found that, in practice, it would act as a complete bar to obtaining an abortion for a significant number of women and would subject numerous women to domestic violence and other forms of physical abuse. (*Id.* at pp. 887-898 (plur. opn. of O'Connor J.).) AB 1775, in contrast, requires only a limited, non-public report of specified information (ABM 20, 45-46) and does not bar anyone from obtaining psychotherapy treatment.[4] *Hill*'s legitimate-interest balancing test applies. (ABM 37-42.)

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[3] Amici also cite no authority for the proposition that there is an unconditional autonomy right to obtain mental health services. (Cf. *Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1137-1140 [no fundamental autonomy right to physician-assisted suicide even if there is a right to take one's own life].)

[4] Professors also cite *Pettus v. Cole* (1996) 49 Cal.App.4th 402 in support of their contentions. (Professors 21.) *Pettus* applied a general balancing analysis to the disclosure of an employee's highly sensitive medical and psychiatric information to his employer. (*Pettus*, *supra*, 49 Cal.App.4th at pp. 445-448.) Only when the employer later sought to coerce the employee to undergo medically unnecessary in-patient treatment

(continued...)

B. Mandated Reporting of Downloading, Accessing, or Streaming Sexually Exploitative Images of Children Advances the State's Vital Interest in Protecting Children

AB 1775 furthers the State's critical interest in protecting children by reducing the proliferation of and demand for digital child pornography, preventing individuals from harming children, and bringing to justice those who exploit and abuse children. (ABM 42-45.) The law also helps to ensure that those who pose a threat to children will not gain access to employment that would place them in regular contact with children. (ABM 20.) AB 1775, like all of CANRA, reflects that children are uniquely vulnerable and frequently unable to report abuse themselves. (See, e.g., *United States v. Williams* (2008) 553 U.S. 285, 307 ["Child pornography harms and debases the most defenseless of our citizens"].) As this Court has recognized, CANRA's reporting obligations are often "the only way the proper authorities become aware of an incident of child abuse" (*B.H. v. County of San Bernadino* (2015) 62 Cal.4th 168, 190), and thus the only way that protective intervention can occur. The State's interests in AB 1775, moreover, outweigh any claimed privacy intrusion, given the circumscribed scope of CANRA reports and patients' knowledge of therapists' duty to report. (ABM 33-34, 45-46.)

Amici appear to acknowledge that the prior version of CANRA adequately furthered the State's interests, but they question the connection between AB 1775 and the State's paramount objective in protecting children. None of their arguments is persuasive.

(...continued)
against his will did the Court of Appeal hold that an autonomy right was implicated. (*Id.* at pp. 457-463.) Nothing of the sort is or could be alleged here.

Professors first question the severity of the harm caused by individuals who download, access, or stream child pornography. (Professors 38 & fn. 8.)[5] This argument is flatly inconsistent with decades of legislative judgments, upheld by this Court and others, that consumption of digital child pornography inflicts grave harm on the child victim by invading the child's privacy, and by providing an economic incentive to create more exploitative images. (*In re Grant* (2014) 58 Cal.4th 469, 477; ABM 14-15, 43-44, 47-49.)

Amici further claim that AB 1775's reporting requirement will not address this harm because of the sheer number of digital images of children's sexual exploitation in circulation. (Professors 33-34.) The Legislature disagreed. AB 1775 reflects the accepted position that "every viewing of child pornography is a repetition of the victim's abuse." (*Paroline v. United States* (2014) 134 S.Ct. 1710, 1727.) Mandated reporting of such behavior helps authorities locate and confiscate these images and stop instances of this harmful conduct. (ABM 43.)

Mandatory reporting also advances the State's interest in drying up the market for child pornography. (ABM 44-45.) Professors' argument to the contrary (at 35) cannot be reconciled with the longstanding judicial

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[5] Relatedly, Professors argue that AB 1775 changed CANRA's structure by "effectively replac[ing] the therapist's judgment with an irrebuttable presumption" that individuals who access, download, or stream child pornography "threaten[] harm to" children. (Professors 24.) But long before AB 1775's passage, CANRA established categorical definitions for various types of child abuse that must be reported, including "sexual exploitation," while permitting therapists to rely on their "training and experience" to determine whether the facts before them give rise to an objectively "reasonable suspicion" that abuse has occurred. (Pen. Code, § 11166, subd. (a)(1).) Contrary to Professors' suggestion, individual reporters have never been free to arrogate to themselves the legislative function of defining the categories of reportable conduct.

recognition that reducing demand for images of children's sexual abuse will decrease production of those images. (*Grant*, *supra*, 58 Cal.4th at pp. 477-478; ABM 14-15.) Professors appear to contend that basic principles of supply and demand do not operate in this context because Internet child pornography is obtainable at no charge to the consumer and there is thus no commercial market for it. (Professors 35.) But the study they cite in support of this position suggests the opposite. That study notes that consumers often pay for exploitative images through indirect means (such as by paying for access to websites where images are traded), and also found that some individuals were able to sell access to images and videos for hundreds of dollars. (Urban Institute Research Report, Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major U.S. Cities (March 2014) pp. 259-260 [individual charged $75 per person to watch a family member live on webcam, where viewers were invited to make requests].)

Professors' claim that AB 1775 will not reduce other forms of child abuse (what they refer to as "contact offenses") or lead to the rescue of exploited children likewise does not advance their cause. (See Professors 25-33.) Whatever the validity of that assertion, the State's interest in protecting against the harms visited upon children when sexual images of them are downloaded, accessed, or streamed is alone sufficient to outweigh any asserted privacy interest. (ABM 47-49.) AB 1775 need not solve all ills related to child pornography.

In any event, the studies amici cite do not support their position. Professors, for example, argue that recovering images of child pornography from an individual's computer will not lead to rescuing children. (Professors 31.) But they then go on to cite authorities showing that cataloguing and analyzing images of child pornography is an important—and successful—tool in identifying child victims. (Professors 32.)

Professors also cite a study that purportedly shows a low correlation between individuals who watch child pornography and those who commit "contact offenses." (Professors 27.) Yet this study reveals precisely the opposite.[6] Professors' characterization of a study as demonstrating that individuals who consume child pornography have a low recidivism rate is similarly mistaken. (Professors 26.)[7]

Professors further challenge the connection between AB 1775 and the State's interests by claiming that AB 1775 will undermine children's safety by deterring individuals from seeking treatment and by stigmatizing an already "despised" population, who "appreciate[] and acknowledge[] the wrongfulness of [their] conduct" and want only to "change their behavior for the better." (Professors 16, 30; see also CMA 22, 36-37.) This Court has rejected similar predictions in the past. (See *Wharton*, *supra*, 53 Cal.3d at p. 558, quoting *Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 440, fn. 12 [dismissing as "'entirely speculative'" predictions that allowing defined disclosures of therapeutic communications will lead patients to forgo necessary treatment].) This argument is also flawed because it rests on the erroneous assumption that the patient communicating

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[6] See Seto, Hanson & Babchishin, Contact Sexual Offending by Men with Online Sexual Offenses (2011) p. 133 (up to 60% of online offenders self-reported a prior contact offense); see also Professors 28, fn. 6 (citing a 2009 study that concludes viewing child pornography correlates with contact offenses).

[7] The study Professors cite in service of this claim only examined the behavior of individuals who had been *convicted* of possession of child pornography—i.e., those who came to the attention of authorities in the first place. (U.S. Sentencing Commission, Federal Child Pornography Offenses (2011).) The study says nothing about the correlation between contact abuse and viewing child pornography for those who were never apprehended and convicted in the first instance. (See also *B.H.*, *supra*, 62 Cal.4th at p. 190 [legislative record included testimony noting "the recidivist and escalatory nature of the crime of child abuse"].)

information giving rise to a mandated report will always be the suspected abuser. CANRA's reporting requirements apply without regard to the patient's relationship to the child or the suspected abuser. (Pen. Code, § 11166.) The reporting obligations apply, for example, to a patient who discloses to her therapist that she is traumatized after noticing a coworker streaming child pornography on his work computer. They also apply to individuals who seek psychotherapy treatment for an unrelated purpose, and disclose that they have downloaded child pornography—not just well-intentioned individuals attempting to reform their conduct, as Professors posit.

Moreover, plaintiffs' complaint alleges that AB 1775 is unconstitutional as to *all* psychotherapy patients. (ABM 26.) Professors' supposition that some unique subset of patients may be deterred from seeking treatment at some future time, even if correct, could not render AB 1775 unconstitutional on its face, the remedy that plaintiffs seek here. (See *Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084; ABM 26-27, 39; cf. *Whalen v. Roe* (1977) 429 U.S. 589, 595, 602 [declining to assign constitutional significance to potential for stigma and deterrence from seeking treatment].)

Lastly, Professors argue that the Legislature simply did not understand or appreciate the consequences of its actions when it passed AB 1775. Professors contend—despite the many committee reports analyzing the substance of the bill—that the Legislature was under the "mistaken belief" that it was merely updating CANRA, when in fact it effected a radical and unprecedented overhaul. (Professors 41-42.) In support of this claim, Professors argue that the remarks of individual *federal* lawmakers made over three decades ago concerning federal child abuse laws should be given controlling weight in interpreting CANRA.

(Professors 41-44.) Yet Professors fail to explain why reliance on secondary source material of such attenuated relevance is appropriate here.[8]

These materials also provide no support for Professors' belief that CANRA was historically aimed solely at "commercial distribution" of child pornography, while intending to leave "possess[ion] or view[ing] child pornography" outside of its ambit. (Professors 43.) California has long criminalized consumption of child pornography, not just the commercial aspects of its production and sale. (See *Grant*, *supra*, 58 Cal.4th at pp. 477-478; *Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402, 1418-1419.) In addition, under the prior version of CANRA, therapists were required to report to authorities when they had a reasonable suspicion that an individual had developed, duplicated, exchanged, or printed images of child pornography—activities that would in many cases be the necessary precursor, or likely successor, to viewing or possession (ABM 34-35.) The amendments effected by AB 1775 therefore largely served to confirm and clarify reporting obligations that predated its passage. (Assem. Com. on Appropriations, Analysis of Assem. Bill No. 1775 (2013-2014 Reg. Sess.) as amended May 13, 2014, p. 1 [AB 1775

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[8] Moreover, Professors' quotations of these floor speeches are taken out of context. For example, contrary to Professors' assertion (at 43), Rep. Kildee did not argue that federal law should only concern itself with *commercial* exploitation of children. He instead "envision[ed]" his "amendment as the beginning of a [multi-pronged] process" to "protect our children from sexual abuse and treat those who are the unfortunate victims." (Remarks of Rep. Kildee, 123 Cong. Rec. 29886 (daily ed., Sept. 19, 1977).) He further clarified that his amendment would focus on "one . . . aspect[] of this problem," and never suggested that commercial exploitation was the only issue to be resolved. (*Ibid.*; see also *Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402, 1418-1419 [explaining that California's criminal statute banning possession of child pornography is broader than its federal analogue].)

"update[d] a definition that would likely include [these] action[s] even absent the update"].)

This Court has recognized that CANRA advances the State's vital interest in protecting children (*B.H.*, *supra*, 62 Cal.4th at p. 190), and has concurred in the Legislature's determination that consumption of child pornography effects harrowing harm upon its victims (*Grant*, *supra*, 58 Cal.4th at pp. 477-478). AB 1775, which ensures that existing reporting requirements remain current in the digital age, provides no occasion to revisit these conclusions.

Professors would apparently prefer that the Legislature carve out an exception to CANRA's reporting requirements for abuse perpetrated over the Internet, but that is not a basis to hold the statute unconstitutional. (See *Hill*, *supra*, 7 Cal.4th at p. 38 [claimed privacy invasion is constitutional so long as it is "justified by a competing interest"].) While Professors highlight that there may be disagreement about how best to remedy the problem of Internet child abuse, this only underscores that this policy determination is best entrusted to the Legislature. (Cf. *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 372 [declining amici's invitations to "reweigh the 'legislative facts' underlying a legislative enactment"]; *Briggs v. Brown* (2017) 3 Cal.5th 808, 828.)[9] It is ultimately the Legislature's duty to balance the benefits of patient

[9] CMA's position that this Court must remand to the trial court for fact finding on a range of issues, including the circumstances surrounding the efficacy of treatments offered by individual therapists, is inappropriate for the same reason. (CMA 10, 21, 31-33.) It is also inapt because plaintiffs have brought a facial challenge to AB 1775, seeking to enjoin the law as to all therapists. (ABM 26.) The Court may therefore only consider "the text of the [law] itself, not its application to the particular circumstances of an individual." (*Tobe*, *supra*, 9 Cal.4th at p. 1084; ABM 26-27.) This perhaps explains why Professors have taken the position that remand is inappropriate here. (Professors 40-41.)

confidentiality with the need to protect children from abuse in the electronic context. (See *Tarasoff*, *supra*, 17 Cal.3d at p. 457 [the "Legislature obviously is more capable than is this court to investigate, debate and weigh potential patient harm through disclosure against the risk of public harm by nondisclosure"].) While strong policy disagreements of the type raised by Professors are commonplace, particularly on matters of great public interest, they are not a proper basis to hold AB 1775 unconstitutional.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: February 14, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO AMICUS CURIAE BRIEFS uses a 13 point Times New Roman font and contains 3,967 words.

Dated: February 14, 2018

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Mathews, Don L., et al. v. Xavier Becerra, et al. (SUPREME COURT)**
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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 14, 2018, I served the attached **ANSWER TO AMICUS CURIAE BRIEFS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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