In the Supreme Court of the State of California

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, Petitioner, v. **SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,** Respondent.	Case No. S243855
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, et al., Real Parties in Interest.	

Second Appellate District, Division Eight, Case No. B258676
Los Angeles County Superior Court, Case No. BS166063
The Honorable James C. Chalfant, Judge

APPLICATION OF GEORGE GASCÓN, SAN FRANCISCO DISTRICT ATTORNEY, FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

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CERTIFICATE OF INTERESTED ENTITITES OR PERSONS

There are no interested entities or person to list in this Certificate under California Rules of Court, rule 8.208.

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

George Gascón, District Attorney, County of San Francisco ("Amicus") respectfully requests permission to file the attached brief in support of Real Parties in Interest. Amicus is the District Attorney for San Francisco County, which has a population of approximately 884,000. In 2017, our Office filed 6,543 criminal cases, which includes 3,318 felony cases. That same year, we issued 7,391 subpoenas for law enforcement officers and filed 91 *Brady/Pitchess* motions.

Almost eight years ago, the San Francisco District Attorney's Office (SFDA) and the San Francisco Police Department (SFPD) established procedures by which SFPD provides the name and identifying number of an officer (or civilian employee) who may have potential *Brady* information in his or her personnel file.[1] The prosecution, in turn, files a motion under Evidence Code section 1043 et seq. for an in camera review of the records by the trial court. This procedure seeks to ensure a defendant's right to due process while also honoring the legitimate privacy rights of law enforcement witnesses. The procedure challenged in this case, particularly the procedure by which the Los Angeles Sheriff's Department

[1] These procedures are set forth in SFPD Bureau Order 2010-01. At the same time, SFDA created an External *Brady* Policy, modeled after the same policy established in Ventura County more than fifteen years ago. The notification will be collectively referred to as a "*Brady* alert."

provides a *Brady* alert to the prosecuting agency, is identical to the procedure established in San Francisco.

In 2015, this Court reviewed and addressed San Francisco's *Brady* policy. (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696 (*Johnson*).) Ultimately, this Court held that the prosecution satisfies its *Brady* obligation by providing the defense with the *Brady* alert that it received from the police department. (*Johnson*, *supra*, 61 Cal.4th at pp. 705, 722.) This Court also held that a *Brady* alert would be sufficient to trigger an in camera review. (*Id.* at p. 721.) Going further, this Court praised San Francisco's streamlined *Pitchess/Brady* procedure and affixed a copy of SFPD's Bureau Order to its unanimous decision.

Amicus has an interest in the present matter because any holding consistent with that of the Court of Appeal would bring these established policies to a grinding halt. Not only would such a holding impact San Francisco, it would impact numerous other counties throughout the State. Indeed, that number has grown, no doubt as a result of the *Johnson* decision. At the time of the *Johnson* decision, there were approximately thirteen other counties in California that had developed similar agreements between police and prosecutorial agencies. Since *Johnson*, I am informed and believe that number has grown to approximately twenty counties, including Alameda, Amador, Calaveras, Contra Costa, Inyo, Marin, Monterey, Nevada, Placer, Sacramento, San Francisco, San Joaquin, San Luis Obispo, Santa Barbara, Santa Clara, Solano, Sonoma, Ventura, Yolo, and Yuba counties.

The attached amicus curiae brief will assist the Court by discussing the independent obligation of law enforcement agencies to provide *Brady* information, how the *Johnson* decision approved of the *Brady* notification procedure, and how the established *Brady* notification process harmonizes the obligation to provide *Brady* information to the defense within the

contours of the so-called *Pitchess* procedures. The brief also discusses the implications should such a system cease to exist – with a real example.

The undersigned helped write the briefings to this Court in the *Johnson* case and, at that time, administered the External *Brady* Policy for San Francisco County as a member of the Trial Integrity Unit.[2] While in the Trial Integrity Unit, I also maintained and regularly updated the list of law enforcement employees with potential *Brady* information in their personnel files. In addition, I appeared at the Evidence Code section 1043 hearings and provided office-wide trainings related to *Brady*, including the litigation in the *Johnson* case. In the present case, Amicus submitted a letter in support of this Court's grant of review.

The undersigned authored the brief and no person or entity other than amicus curiae, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of the brief.

Dated: May 4, 2018

Respectfully submitted,

GEORGE GASCÓN
District Attorney
County of San Francisco

By: /s/ ALLISON G. MACBETH
Assistant District Attorney

[2] Currently, the undersigned leads the Writs and Appeals Unit.

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AMICUS CURIAE BRIEF

INTRODUCTION

When a member of the prosecution team other than the prosecution itself possesses information that may be used to impeach a law enforcement witness in an on-going criminal case, what are its obligations under *Brady*? Undeniably, notice of such information should be provided to the defense as a matter of due process. But when a confidentiality provision prevents the prosecution from having direct, unfettered access to that information, should the law enforcement agency provide an alert to the prosecution so that either the prosecution or the defense may file a motion for an in camera review by a neutral, detached magistrate? The clear answer is yes. Not only did this Court approve of such a process in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, but the *Pitchess* statutes may be construed to permit these alerts. Otherwise, courts will be inundated with *Pitchess/Brady* motions. In the absence of such a system, due process violations could ensue and convictions could be subject to reversal—a scenario that this Court would not support.

ARGUMENT

I. WHERE PROSECUTORS DO NOT HAVE DIRECT, UNFETTERED ACCESS TO POTENTIAL *BRADY* INFORMATION CONTAINED WITHIN CONFIDENTIAL PEACE OFFICER PERSONNEL FILES, LAW ENFORCEMENT AGENCIES HAVE THEIR OWN INDEPENDENT OBLIGATION TO PROVIDE *BRADY* INFORMATION.

In *Johnson*, this Court addressed the interplay between *Pitchess* and *Brady* as it relates to potential *Brady* information contained within confidential personnel files of law enforcement witnesses. (*Johnson, supra,* 61 Cal.4th 696.) Consistent with well-established law, this Court

ultimately held that "the prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases." (*Id.* at pp. 705, 713.) This Court also rejected the Court of Appeal's position that the exception under Penal Code section 832.7 applies to law enforcement witnesses in a criminal case. (*Id.* at pp. 713-714.) So, "prosecutors, as well as defendants, must comply with the *Pitchess* procedures if they seek the information from confidential personnel records." (*Id.* at p. 714.)

While Petitioner recognizes that the prosecution has no direct access to confidential personnel files, Petitioner states outright that "the Department has no obligation under *Brady*." (Answer, p. 14; see also pp. 40, 46.) Well-settled law, left unaddressed by Petitioner, shows otherwise. Just like the prosecution, a law enforcement agency has an obligation to provide not only exculpatory information under *Brady*, but also impeachment information under *Giglio*.[3] (*Carrillo v. County of Los Angeles* (9th Cir. 2015) 798 F.3d 1210, 1220-1221, 1224-1225; *Tennison v. City and County of San Francisco* (9th Cir. 2009) 570 F.3d 1078, 1087; *United States v. Blanco* (9th Cir. 2004) 392 F.3d 382, 393-394 ["The obligation under *Brady* and *Giglio* is the obligation of the government, not merely the obligation of the prosecutor."].) Indeed, it has long been held that "the *Brady* rule encompasses evidence 'known only to police investigators and not to the prosecutor[.]'" (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 8 (*City of Los Angeles*) quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.)

A law enforcement agency, especially one that is part of the investigation team prosecuting a pending criminal case, therefore has its own independent duty to provide information related to the credibility of a

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[3] (*Giglio v. United States* (1972) 405 U.S. 150, 154.)

witness. Where the prosecution has no direct access, the obligation lies with the law enforcement agency. The *Brady* alert system, which provides just the name, identification number, and the fact that the officer's personnel contains potential *Brady* information, satisfies this obligation without unduly infringing on the officer's right to confidentiality. This procedure makes even more sense because the impeaching information is necessarily known to the testifying law enforcement witness. (*City of Los Angeles, supra*, 29 Cal.4th at p. 8.)

II. THIS COURT IN *JOHNSON* IMPLICITLY, IF NOT EXPLICITLY, APPROVED OF THE *BRADY* ALERT SYSTEM.

Petitioner argues that *Johnson* does not permit the release of information from law enforcement to prosecuting agencies. (Answer, pp. 55-61.) This argument, however, overlooks not only the role the *Brady* alert played in the Court's key holdings but also misconstrues the legislative enactment that preceded this Court's decision in *Johnson*.

In *Johnson*, the *Brady* alert system played a critical role in the Court's key holdings. For example, this Court held that the prosecution fulfills its *Brady* obligation when it passes along the *Brady* alert to the defense. (*Johnson*, supra, 61 Cal.4th at p. 716.) This Court also ruled that a *Brady* alert and an explanation of the officer's role in a case were sufficient to trigger an in camera review. (See *Johnson*, 61 Cal.4th at p. 721; see also *Serrano v. Superior Court* (2017) 16 Cal.App.5th 759, 778.) Absent a *Brady* alert, there would be no notification to the defense and insufficient information to trigger an in camera review. Thus, the *Brady* alert can be reasonably construed as being necessary to the holdings in *Johnson*. (See *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1168.)

Accordingly, this Court implicitly, if not explicitly, approved of the *Brady* alert system in *Johnson*.[4]

Petitioner, like the Court of Appeal, relies on this Court's decision in *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272 (*Copley*) to argue that the disclosure of an officer's name to a prosecuting agency in order to satisfy the government's *Brady* obligation violates *Pitchess*. (See Answer, pp. 34, 50-52.) *Copley*, however, addressed an entirely different statutory scheme, namely the California Public Records Act (CPRA), which provides for the public disclosure of information from records maintained by public agencies. In the end, *Copley* held that an officer's name is not subject to public disclosure under the CPRA. (39 Cal.4th at p. 1297.)

The *Brady* alert, as contemplated here, does not involve public disclosure. Rather, it involves the disclosure of a *Brady* alert to another member of the prosecution team in order to satisfy the government's obligation to disclose exonerating and impeaching evidence to the defense. Nor did *Copley* have occasion to address any of the seminal cases related to the interplay between *Pitchess* and *Brady*, including *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*) or *City of Los Angeles, supra,* 29 Cal.4th 1. Therefore, *Copley* is inapplicable to this case.[5]

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[4] Even if the Court's reference to and approval of San Francisco's *Brady* alert system could be characterized as dicta, statements of this Court are always deemed highly persuasive, particularly when the Court "has conducted a thorough analysis and such analysis reflects compelling logic." (*Hubbard, supra,* 66 Cal.App.4th at p. 1169 citing *United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 835.)

[5] It bears noting that the Petitioner SFDA, in its Opening Brief in the *Johnson* case, cited the *Copley* decision relative to the question of statutory interpretation [Pen. Code § 832.7, subd. (a)]. (Opening Brief, *Johnson*, S221296, pp. 34-35.) It also bears noting that Justice Ming Chin authored

(continued...)

Even if *Copley* applies here, the decision pre-dated the enactment of Government Code section 3305.5, which defines a *Brady* list as "any system, index, list or other recording 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) (ital. added).) When faced with a question of statutory interpretation, the court must first look to the language of the statute and "give effect and significance to every word and phrase." (*Copley*, *supra*, 39 Cal.4th at pp. 1284-1285.)

The language of section 3305.5 specifically recognizes that the name of an officer, whose personnel file may contain potential *Brady* information, will be provided to the prosecution to create a list. By using this clear language, the Legislature intended to create an exception to the confidentiality provision of section 832.7. That the Legislature created an exception also makes sense because, at the time, the Court of Appeal "consistently held that the prosecution does not have access to confidential personnel records absent compliance with the *Pitchess* procedures." (*Johnson*, *supra*, 61 Cal.4th at p. 713 citing *Rezek v. Superior Court* (2012) 206 Cal.App.4th 633, 642 (*Rezek*); *Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409, 415 (*Becerrada*); *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475; *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 56; *People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397, 404-407 (*Gremminger*).) The only way the prosecution could receive this

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both the *Copley* and *Johnson* decisions. Had the issue of a *Brady* alert been a concern to the Court, the Court presumably would have requested further briefing.

information from an officer's personnel file and create a *Brady* list is by receipt of *Brady* alerts.

Not only does the plain language of section 3305.5 indicate that the Legislature created a confidentiality exception to section 832.7 to allow disclosure of *Brady* alerts to the prosecution, but so does the legislative history. (*People v. Rodriguez* (2016) 1 Cal.5th 676, 686 [if statutory language subject to more than one interpretation, court may consider extrinsic aids, including legislative history, to determine the Legislature's intent] citing *Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198.) In enacting section 3305.5, the Legislature recognized the obligation of the government, not just the prosecution, to provide impeachment material for a testifying witness, quoting directly from *Blanco*, *supra*, 392 F.3d at pp. 387-388:

> Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned.' A prosecutor's duty under Brady necessarily requires the cooperation of other government agents who might possess Brady material. In *United States v. Zuno-Arce*, 44 F.3d 1420 (9th Cir. 1995) (as amended), we explained why 'it is the government's, not just the prosecutor's, conduct which may give rise to a Brady violation.' Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine Brady by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them.

(Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business SB 313 (2013-2014 Reg. Sess.) Sept. 11, 2013, p. 5.) By directly quoting *Blanco*, recognizing the duty of both the prosecution and government to provide both impeaching and exculpatory information, and using the language listed above, the Legislature therefore authorized law enforcement

agencies to provide *Brady* alerts to the prosecution. This narrow exception to the confidentiality provision of Penal Code section 832.7 satisfies disclosure obligations, all the while balancing the officer's interest in confidentiality.

III. THE *PITCHESS* STATUTES MAY BE HARMONIZED TO PERMIT LAW ENFORCEMENT AGENCIES TO PROVIDE *BRADY* ALERTS TO PROSECUTORS.

As this Court has long recognized, the *Pitchess* mechanism provides discovery in a criminal case to the defense and "'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[.]'" (*Johnson*, *supra*, 61 Cal.4th at p. 712, quoting *Mooc, supra,* 26 Cal.4th at pp. 1225-1226.)

In *City of Los Angeles*, the defense challenged Evidence Code section 1054's prohibition of discovery beyond five years. (29 Cal.4th at p. 13.) Recognizing that the "'"*Pitchess* process" operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information,'" this Court held that potential *Brady* information may be subject to disclosure, notwithstanding section 1054's five-year limitation. (*City of Los Angeles*, *supra*, 29 Cal.4th at p. 14; see also *Mooc*, *supra*, 26 Cal.4th at p. 1225.)

The same is true for the *Brady* alert, which provides only the name of the officer, the officer's identifying number, and the disclosure that the officer's personnel file may contain exonerating or impeaching information. Again, the law enforcement agency acting as part of the prosecution team has an independent obligation to provide impeachment material. Faced with these competing interests, a *Brady* alert—which provides just enough information to trigger an in camera review—cannot violate the *Pitchess* statutes under the reasoning of *City of Los Angeles*.

This interpretation is also consistent with Government Code section 3305.5. While section 3305.5 may be a tool for prosecuting agencies as Petitioner states, Petitioner overlooks *how* that information was provided to the prosecuting agency in the first place. (Answer, pp. 41-44.) Well-settled law, namely *Rezek*, *Becerrada*, *Gremminger*, and later *Johnson*, held that prosecutors do not have direct, unfettered access to these confidential personnel files. (*Johnson*, *supra*, 61 Cal.4th at pp. 705, 713.) So, the only way that prosecutors can receive that information in the first place is through a *Brady* alert from the law enforcement agency. Thus, the Legislature authorized the *Brady* alert procedure by enacting section 3305.5.

Two years later, this Court addressed San Francisco's *Brady* notification procedure, which provides the same information as listed in section 3305.5. When viewed against the larger background of constitutional obligations, *City of Los Angeles*, Government Code section 3305.5, and *Johnson*, the *Pitchess* statutes simply cannot prohibit law enforcement agencies from providing *Brady* alerts to prosecuting agencies.

IV. IN THE ABSENCE OF A *BRADY* ALERT SYSTEM, DUE PROCESS VIOLATIONS MAY ENSUE.

Petitioner contends that even in the absence of a *Brady* alert procedure, prosecutors would not be required to file *Pitchess/Brady* motions in every case. (Answer, p. 63.) This position turns *Johnson* on its head and fails to consider the due process implications.

Under *Johnson,* when the prosecutor provides a *Brady* alert to the defense, the defense instead of the prosecution could file the *Pitchess/Brady* motion. In that case, the prosecution would not be required to file *Pitchess/Brady* motions in every case.

But, when no alert system exists, a prosecutor is placed in an untenable position. Either, the prosecutor must: 1) blindly place an officer on the stand, hoping that no such *Brady* information exists; or 2) file a *Pitchess/Brady* motion in every case to ensure that no *Brady* information exists. Since the obligation to produce exonerating or impeaching information ultimately rests with the prosecutor, the prudent prosecutor will file *Pitchess/Brady* motions in every case for every law enforcement witness.

That said, the filing of a *Pitchess/Brady* motion by a prosecutor in the absence of a *Brady* alert system is no easy task. With no *Brady* alert, a prosecutor must make the showing necessary to trigger an in camera review for a pure *Pitchess* motion, that is, a showing of good cause which includes a "'specific factual scenario'" that establishes a 'plausible factual foundation.'" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021.) But "[i]t would be nonsensical to require the prosecution to allege that an officer, who is part of the prosecution team and an intended witness, engaged in specific acts of misconduct." (*Serrano, supra,* 16 Cal.App.5th at p. 776.)

The lack of a *Brady* alert system also has significant due process implications. Consider the following: a law enforcement agency and an officer *know* that the officer has sustained findings of misconduct, for example, that the officer planted evidence and falsified a report; the prosecution has not received a *Brady* alert regarding this officer and has no reason to doubt the officer's credibility; at trial, the defense asserts either that the officer planted the seized narcotics or falsified the report; and the officer testifies, denies doing so, but does not reveal the known sustained findings which are relevant to the defense. Sure, the defense could have filed a *Pitchess* motion, but the conviction would still be subject to reversal based on ineffective assistance of counsel. Moreover, it would be

disingenuous for the law enforcement agency to later claim that it had no obligation to at least alert the prosecution to the existence of this impeachment, if not exonerating, information, in light of the settled law related to the government's disclosure obligations. (*Carrillo, supra,* 798 F.3d at pp. 1220-1221, 1224-1225; *Tennison, supra,* 570 F.3d at p. 1087; *Blanco, supra,* 392 F.3d at pp. 393-394.)

Lest Petitioner claim that such a scenario is far-fetched, the Court of Appeal recently reversed a defendant's violent felony convictions for the failure to disclose impeaching information contained within an officer's confidential personnel file. In Fall, 2010, a jury found Francisco Valle guilty of attempting to murder two SFPD officers. At the time of trial, San Francisco's *Brady* policy was in its infancy. While the prosecution had disclosed some impeaching information to the defense, SFDA had not yet received a *Brady* alert as to one of the officers. Because the verdict hinged on the officers' credibility, the Court of Appeal reversed the defendant's conviction. (*People v. Francisco Valle* (Oct. 3, 2017, A140594) [nonpub. opn.], 2017 WL 4385742; 2017 Cal.App.Unpub. LEXIS 6896.)

CONCLUSION

Pitchess and *Brady* have long worked together to ensure the due process rights of defendants while also maintaining an officer's right to confidentiality. Against the constitutional landscape and in light of *Johnson* and Government Code section 3305.5, *Pitchess* does not prohibit law enforcement agencies from providing *Brady* alerts to the prosecution.

Due process requires nothing less.

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Dated: May 4, 2018

Respectfully submitted,

GEORGE GASCÓN
District Attorney
County of San Francisco

By: /s/ ALLISON G. MACBETH
Assistant District Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached APPLICATION OF GEORGE GASCÓN, SAN FRANCISCO COUNTY DISTRICT ATTORNEY, FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST; AMICUS CURIAE BRIEF uses a 13-point Times New Roman font and contains 3,641 words.

Dated: May 4, 2018

/S/ ALLISON G. MACBETH
Assistant District Attorney

DECLARATION OF SERVICE

I, Allison G. Macbeth, state:

That I am a citizen of the United States, over eighteen years of age, an employee of the City and County of San Francisco, and not a party to the within action; that my business address is 850 Bryant St., Rm. 322, San Francisco, California 94103. I am familiar with the business practice at the San Francisco District Attorney's Office (SFDA) for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the SFDA is deposited in the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic system or FileAndServeXpress electronic filing systems. Participants who are registered with either TrueFiling or FileAndServeXpress will be served electronically. Participants who are not registered with either TrueFiling or FileAndServeXpress will receive hard copies through the mail via the United States Postal Service.

That on May 4, 2018, I electronically served the attached APPLICATION OF GEORGE GASCÓN, SAN FRANCISCO COUNTY DISTRICT ATTORNEY, FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST; AMICUS CURIAE BRIEF by transmitting a true copy through this Court's TrueFiling or FileAndServeXpress system. Because one or more of the participants have not registered with the Court's system or are unable to receive electronic correspondence, on May 4, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the SFDA at 850 Bryant Street, Room 322, San Francisco, California 94103, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed May 4, 2018, at San Francisco, California.

/s/
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