No. S259364

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SUNDAR NATARAJAN, M.D.,

Petitioner and Appellant,

vs.

DIGNITY HEALTH,

Respondent.

After a Decision of the Court of Appeal
Third Appellate District, No. C085906
San Joaquin County Superior Court
No. STK-CV-UWM-2-16-4821

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Sundar Natarajan, M.D. seeks review of a decision rejecting Natarajan's novel theory that the hearing officer presiding over his medical staff hearing had an impermissible financial bias. However, the Court of Appeal's Opinion is fully consistent with the statute setting forth the governing standard for medical staff hearing officer financial bias, as well as with a consistent line of authority holding that fair procedure, not constitutional due process, applies to medical staff hearings at private hospitals in California. Nothing about the Opinion warrants this Court's review.

II. REVIEW IS NOT WARRANTED

A. There is no need to resolve any purported conflict with *Yaqub*.

Natarajan asserts review is needed to resolve a supposed conflict between the Opinion and *Yaqub v. Salinas Valley Memorial Healthcare System* (2005) 122 Cal.App.4th 474. In fact, any conflict between the two decisions is of no real significance, and does not require this Court's involvement.

The subject matter of the Opinion and *Yaqub*—whether a medical staff hearing officer has a disqualifying financial bias—is governed by statute. Business & Professions Code section 809.2, subdivision (b) unequivocally provides the sole applicable standard. It states: "If a hearing officer is selected to preside at a hearing held before a panel, the hearing officer shall gain no direct financial benefit from the outcome, shall not act as a prosecuting officer or advocate, and shall not be entitled to vote." *Yaqub* does not mention this statute and Natarajan does not

acknowledge this statutory standard until 12 pages into his Petition in his fourth argument, and then only to argue generally that its terms are undefined. (Pet. 17.)

The Opinion here is the *only* appellate decision to discuss and apply this governing statute. Having not mentioned the statute, *Yaqub* did not offer any conflicting interpretation. The *Yaqub* court concluded that a hearing officer had a disqualifying financial bias even though, as the court conceded, he *lacked* any "direct" interest. (*Yaqub*, 122 Cal.App.4th at 485 [explaining "there was *no evidence* of actual prejudice or of a *direct financial interest in the outcome of the case*"] [emphasis added].) Under section 809.2, subdivision (b), the governing statute, a hearing officer without a "direct financial benefit from the outcome" does not have a disqualifying financial bias. *Yaqub* simply erred. This mistake does not require review or resolution by this Court, when, at bottom, the Opinion here amounts to a first-impression ruling as the only decision to apply the controlling statute.

Natarajan speculates about the reasons why *Yaqub* did not address section 809.2, subdivision (b) (Pet. 26), but the reasons do not matter. The fact is that *Yaqub* did not address the binding statute applicable to this precise setting, and instead applied a different common-law standard. *Yaqub* thus is irrelevant.

Yaqub has had no discernible practical impact in the evolution of the case law. In the 15 years that *Yaqub* stood as the sole citable precedent on the subject of medical staff hearing officer financial bias, its holding was never applied or followed in any published opinion. *Yaqub* was *cited* in two published

California opinions, neither of which applied or discussed it. Both cases merely referenced *Yaqub* in passing for the general proposition that a hearing officer may be disqualified for financial bias. (See *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 996; *Thornbrough v. Western Placer Unified School District* (2013) 223 Cal.App.4th 169, 188.) Natarajan seeks to find significance for *Yaqub*'s continuing viability in the fact that this Court cited it in *El-Attar*, but *El-Attar* was not a hearing officer financial bias case and it had no occasion to consider *Yaqub*'s neglect of the governing statute or its statement that there was no evidence of a "direct" benefit. Courts have mostly ignored *Yaqub*; they are even less likely to start applying it now.

And during the same 15 years since the decision in *Yaqub*, the relevant legal landscape has been clarified by this Court in ways that render *Yaqub* even further out of step and resigned to legal obscurity. In *Mileikowsky v. West Hills Hosp. & Med. Ctr.* (2009) 45 Cal.4th 1259, 1271, the Court affirmed the limited, non-adjudicatory role of a medical staff hearing officer, including explaining that the hearing officer is not the decision-maker. It did so by construing different language of the same statute (section 809.2, subd. (b)) examined in the *Natarajan* Opinion. (*Ibid.*) The hearing officer's limited role makes any "bias" on the part of the hearing officer less likely to have any impact on the outcome. In *El-Attar*, the Court made clear that a peer review action will not be reversed for an unfair procedure if a claimed error was harmless. (*El-Attar*, 56 Cal.4th at 990-991.) This

typically would be the case if a non-adjudicator hearing officer had some sort of undetected bias.

There is no need for this Court to address *Yaqub*.[1]

B. There is no need to resolve any purported conflict with *Applebaum*.

Natarajan also urges review to resolve what he characterizes as a conflict between the Opinion and *Applebaum v. Board of Directors of Barton Memorial Hospital* (1980) 104 Cal.App.3d 648, regarding the difference between "due process" and "fair procedure" rights of physicians in peer review proceedings at private hospitals. Again, there is no reviewable conflict of decision.

In the Opinion, the court reaffirmed the principle, as articulated in numerous prior cases (including from this Court), that a physician in a private hospital is entitled to fair procedure, *not* constitutional due process. (See, e.g., *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278; *Kaiser Found. Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 102[2]; *Powell v. Bear Valley Community Hospital* (2018) 22 Cal.App.5th 263, 274.) In *Applebaum*, the court acknowledged that same principle, stating "[s]ince the actions of a private institution are not necessarily those of the state, the controlling concept in such cases is fair procedure and not due process." (*Applebaum*, 104 Cal.App.3d at 657.) *Applebaum* went on to say that "[t]he distinction between

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[1] The Court denied review in *Yaqub* as well.

[2] In petitioning for review in *Kaiser*, Natarajan's counsel similarly argued that the decision was at odds with *Applebaum*. (2005 WL 2396394, at *26-*27.)

fair procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual; the essence of both rights is fairness." (*Ibid.*) This commentary about procedural fairness, without regard to how it is labeled, does not create a conflict of decision.

First, *Applebaum* had nothing to do with the financial bias of a hearing officer, and so it is not authority for any principles or rules about how to determine financial bias of a hearing officer. The procedural unfairness in *Applebaum* arose because (1) the doctor who instigated the investigation of the plaintiff physician and gave evidence against him was a member of the ad hoc committee that recommended the suspension of his privileges; and (2) several members of the appeal committee that made the final decision had attended a meeting of the executive committee at which disparaging comments about the plaintiff had been made. (*Applebaum*, 104 Cal.App.3d at 658-660.) The combination/overlap of investigative and adjudicative functions is what led the court to hold that the particular facts of that situation created an intolerable potential for bias—"a practical probability of unfairness"—which is and was the accepted standard for fair procedure under California common law. (*Applebaum*, 104 Cal.App.3d at 659; *Rhee v. El Camino Hosp. Dist.* (1988) 201 Cal.App.3d 477, 492.). The *Natarajan* Opinion says the same thing. (Slip Op. 8-9, fn. 11.) *Applebaum* had no occasion to apply "due process" principles in any way that deviated from fair procedure.

Second, *Applebaum* does not create a conflict in the law

because its holding was codified with the subsequent enactment, nine years later, of section 809.2, subdivision (a). In that statute, which addresses bias of members of a medical staff hearing adjudicatory panel, the Legislature prohibited the sort of combined or overlapping functions that led to the unfairness problem in *Applebaum*. Section 809.2, subdivision (a) states, as relevant here: "The hearing shall be held . . . before *a panel of unbiased individuals* who shall gain no direct financial benefit from the outcome, *who have not acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter . . . .*" (emphasis added). *Applebaum* and the statute impose the same rule, and so *Applebaum* has no continuing independent significance. And section 809.2, subdivision (a) is not at issue here.

Third, if Natarajan were correct that there is no meaningful difference between constitutional due process and fair procedure requirements with respect to hearing officer financial bias, then section 809.2, subdivision (b) would be superfluous. Its standard of "direct financial benefit" is already encompassed within the broader constitutional and common-law standards, so there would have been no need for the Legislature to enact a statute that articulates only one of a larger set of applicable standards for financial bias. "[T]he Legislature does not engage in idle acts." (*Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087.)

Similarly, equating due process with fair procedure renders superfluous the Legislature's express directive that "due process

of law" governs peer review of physicians at California's *public* hospitals. (Bus. & Prof. Code, § 809.7 [stating that sections 809.1 to 809.4 do not apply to public hospitals and that "[t]his section shall not affect the obligation to afford due process of law to licentiates involved in peer review proceedings in *these* hospitals" [emphasis added]]; see also *Kaiser*, 128 Cal.App.4th at 102, fn. 15 [citing specifically to section 809.7 when rejecting the argument that due process governs peer review proceedings at private hospitals].)

C. The Opinion presents no "important" unresolved question because the standard for medical staff hearing officer financial bias is resolved.

Natarajan also urges review on the ground that the issue of hearing officer financial bias is "very important" and is unresolved. (Pet. 10.) But the standard for hearing officer financial bias, while important, is not unresolved. As discussed, the standard is imposed and resolved by an on-point statute.

Natarajan's "unresolved" characterization is based on *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, which articulated a common-law standard applicable to an administrative hearing officer who was an adjudicator, unlike hearing officers in physician peer review cases. (See *Mileikowsky*, 45 Cal.4th at 1271 [noting that peer review hearing officers "ha[ve] no part in the decisionmaking process"].) But as *Haas* explained, the Court needed to impose a common-law standard because there were *no applicable statutory standards*. Rather, this Court explained that "[t]he problem" of impermissible financial bias in *Haas* "arises from the *lack of specific statutory*

standards governing temporary hearing officers appointed by counties under Government Code section 27724." (*Haas*, 27 Cal.4th at 1036 [emphasis added].) In contrast, here, the Legislature examined financial bias in this precise context, and it enacted a specific statute imposing a specific standard. *Haas* does not make the standard "unresolved."

Natarajan tries to bolster the "importance" of the issue by pointing out that numerous amici appeared before the Court of Appeal and that Dignity Health and others sought publication of the Opinion. In fact, no amicus appeared in support of Natarajan's position, and the only amicus that did not overtly support Dignity Health—the California Medical Association (CMA)—expressly declined to support Natarajan as well. (See Application for Leave to File *Amicus Curiae* Brief and *Amicus Curiae* Brief of the California Medical Association in Support of Neither Party, p. 7 ["[w]ithout taking a position on the ultimate outcome of this case . . ."]; *id.*, p. 10 ["CMA is neutral in this case and takes no position on the ultimate outcome of Dr. Natarajan's appeal"].)

Further, the landscape has changed since the Opinion was published. Prior to the Opinion's publication, *Yaqub*, although mostly ignored, still was at least potentially concerning in that it was the only case addressing medical staff hearing officer financial bias. In that context, it was important to obtain a decision stating and applying the correct, applicable statutory law to eliminate possible confusion. Now, with the published Opinion in this case, trial courts are free to follow the correctly

decided Opinion, the only one that applies the governing statute. There is no reason to speculate or assume they will not do so, and the Opinion lays out some of the many reasons not to follow *Yaqub*. There is no danger—only Natarajan's speculation—that the co-existence of the Opinion and *Yaqub* will create uncertainty.

D. The asserted "serious practical problems" are merely speculative.

Natarajan suggests a parade of horribles that will ensue if the Opinion stands. For instance, he contends that hospitals will cite the Opinion as authorizing them to repeatedly hire their favorite hearing officers without restrictions. (Pet. 19 ["there is little or no doubt that if this Court does not grant review, hospitals will decide it is perfectly safe for them to repeatedly appoint their preferred hospital attorneys as hearing officers"]; *ibid.* ["hospitals will have a virtually unlimited ability to appoint whomever they like as hearing officers"].) There are several reasons why such a result cannot reasonably be expected, all of which were briefed below and none of which is mentioned in the Petition.

Natarajan's case has always been unique in that the bias he alleged was not based on the hearing officer's potential for additional work *at the same hospital*. Rather, Natarajan contended that an impermissible financial bias existed based on his unprecedented assertion (one not even considered in *Yaqub*, which involved a hearing officer's repeated service at and multiple connections to a single hospital) that the hearing officer might in the future be hired as a hearing officer at *any of the*

other 33 hospitals owned by Dignity Health across the state. There is no support for this theory of bias, and in any event the Opinion found it unnecessary to reach this issue. (Slip Op. 11 ["we do not need to address . . . plaintiff's immaterial assertion that we should consider potential employment with defendant's hospitals as a whole as opposed to only St. Joseph's"].)

Natarajan assumes a hospital would repeatedly hire a hearing officer who had ruled in its favor in past hearings. But if a hearing officer makes erroneous and unsupported rulings just to try to please the hospital, those rulings may well be reversed, requiring an expensive and time-consuming do-over of the hearing process while the physician in many cases must be allowed to continue to practice at the hospital, threatening patient safety, until the hearing process is complete. A hospital would not want to use a hearing officer again if his or her rulings led to reversal.

Natarajan argues that an "actual bias" standard is unworkable because it will be impossible for a physician to prove actual bias, as hearing officers will never admit to it. (Pet. 19.) He does not explain why the statutory voir dire process that the Legislature implemented for this very purpose (Bus. & Prof. Code, § 809.2, subd. (c)) will not be sufficient to identify actual bias in most cases. Further, "actual bias" is the accepted standard for other types of claimed prejudice, including in medical staff cases. (See *Weinberg v. Cedars-Sinai Med. Ctr.* (2004) 119 Cal.App.4th 1098, 1115 ["In administrative proceedings, 'a party claiming that the decision maker was biased

must show actual bias, rather than the appearance of bias, to establish a fair hearing violation."] [citation omitted]; *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 911 ["[T]he mere appearance of bias is not sufficient."] [citations omitted]; *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1142 ["bias in an administrative hearing context can never be implied, and the mere suggestion or appearance of bias is not sufficient"].) The decision here is in accord. (Slip Op. 6-7.) This is consistent with the general principle that procedural irregularity in a peer review hearing resulting in no harm is not ground for reversal of the proceeding. (*El-Attar*, 56 Cal.4th at 990.) Natarajan does not argue that an actual bias standard has not proven perfectly workable in these other contexts.

Natarajan also argues that the Opinion will encourage hospitals to disregard the procedural safeguards required by section 809.1 et seq. and to claim that the lack of safeguards does not render a hearing unfair because private hospitals are not subject to due process. (Pet. 15.) This makes no sense. While private hospitals are not subject to constitutional due process, they unquestionably are subject to the section 809 statutory requirements and must follow those procedures as well as provide a fair trial under the administrative mandamus statute, Code Civ. Proc., § 1094.5, subd. (b). The law presumes that "[t]he law has been obeyed" (Civ. Code, § 3548) and that "official duty has been regularly performed." (Evid. Code, § 664.) If private hospitals fail to provide the required statutory protections, they

would be violating the law.

E. None of Natarajan's other considerations warrants review.

Natarajan offers a handful of miscellaneous "additional considerations supporting review," relegated to the last few pages of his Petition. (Pet. 24.) None supports review.

In particular, Natarajan's focus on the well-developed and unique factual record in his case (including the highly unusual circumstance that the hearing officer was deposed and compelled to produce documents) actually highlights the individual factual nature of the bias inquiry in this and every other case, making it unsuitable to any sweeping legal rule other than the statutory requirements. It also highlights the fact that Natarajan is at bottom claiming error, and asking the Court to review the facts and make different factual findings. (Pet. 24-26.) While the Opinion here committed no such errors, mere assignment of error is not reviewable. (Cal. Rules of Court, rule 8.500(b); Judge Eileen C. Moore & Michael Paul Thomas, Cal. Civ. Prac. Proc. (Nov. 2019 update) § 43:7 ["the supreme court's focus is not on correction of error by the court of appeal in a specific case" [citing *People v. Davis* (1905) 147 Cal. 346, 348]].)

Natarajan also argues that review is warranted because section 809 did not replace the common law, so that the rule of adjudicator financial bias articulated in *Haas* remains relevant to non-adjudicator hearing officers who preside over medical staff hearings and was properly applied in *Yaqub* instead of the governing statute. The Opinion, however, found it unnecessary to decide whether common law survives section 809, stating "[i]n

the present case, whether or not the common law is fully superseded is ultimately only of academic interest, as neither party has identified any pre-1989 [when section 809.2 was enacted] decisions addressing the central issue on appeal." (Slip Op. 7.) An issue "only of academic interest" means that any opinion would be advisory only. (See *People v. Slayton* (2001) 26 Cal.4th 1076, 1084 ["As a general rule, we do not issue advisory opinions indicating 'what the law would be upon a hypothetical state of facts.'"] [citation omitted].)

The Opinion also noted that no party had identified a case decided under common-law, pre-section 809.2, fair procedure principles that supported Natarajan's theory that the possibility of future work disqualified a hearing officer for financial bias. It explained that "[i]n the face of the common law in 1989, we do not believe that the Legislature intended 'direct financial benefit' to include an even more ephemeral potential for bias than *Haas* . . . . *Had* that been the intent, the Legislature would have described the disqualifying financial benefit as 'potential,' or 'possible,' rather than 'direct.'" (Slip Op. 10-11 [emphasis in original].) The principle that a statute does not abrogate common law, without evidence of a clear legislative intent to do so, does not justify a court ignoring an on-point statute.

F. Natarajan's Petition is factually misleading.

Finally, Natarajan makes various factual assertions that are unsupported and irrelevant. He never informs the Court that he effectively conceded that substantial evidence supported the decision to terminate his privileges on the merits, by never challenging the supporting evidence. (Slip Op. 2, 5; Code Civ.

Proc., § 1094.5, subd. (c).) In his opening brief to the Court of Appeal, he barely mentioned the evidence against him that supported the decision. As the Opinion stated, "Plaintiff does not contest the sufficiency of the evidence in support of the internal decision . . . ." (Slip Op. 2.) Natarajan's challenge was purely procedural. (*Ibid.*)

In his Petition, however, he argues facts in his favor that are contrary to the final and binding findings of both the Judicial Review Committee (JRC) administrative hearing panel and the trial court. For instance, Natarajan repeatedly asserts that the hospital was in competition with him and had an economic incentive to get rid of him, suggesting that this somehow remains a live issue and undermines the Court of Appeal's decision. (Pet. 22, 30.) But he omits mention of the JRC decision, which debunked that theory after allowing Natarajan leeway to present it. The JRC heard evidence that the medical staff acted "with no goal of advancing any economic interests of the hospital" and that the hospital did not have "a financial agenda regarding these concerns" about Natarajan. (PAR09430-9431, fn. 8.) The JRC specifically rejected Natarajan's claim of economic motive: "the [hearing committee] finds no persuasive evidence in support of Dr. Natarajan's suggestion that Medical Staff leaders were pressured to initiate the investigation or reach adverse conclusions in the investigative process for reasons other than concern for efficient and high quality patient care at the Medical Center." (*Ibid.*) Natarajan never challenged these findings, and they are binding. (See *Johnson v. City of Loma Linda* (2000) 24

Cal.4th 61, 69-70 [administrative findings that are not challenged and set aside in a judicial mandamus proceeding are final and binding].)

Natarajan also continues to assert that "Dignity Health," rather than the independent self-governing Medical Staff of the particular hospital, St. Joseph's Medical Center, was the hiring entity, in order to press his argument that the hearing officer's work on Natarajan's case at St. Joseph's might have been influenced by the possibility of future work at any other "Dignity Health" hospital. (Pet. 23-24.)[3] However, the trial court's Statement of Decision, also unchallenged on appeal, *repeatedly* found otherwise:

> Pursuant to the Medical Staff Bylaws ("Bylaws"), which delegate to St. Joseph's CEO the Medical Staff's responsibility for appointing the Hearing Officer for peer review hearings, Robert Singer was appointed as the Hearing Officer for Dr. Natarajan's peer review hearing. (9-CT-2515:11-14; 2516:7-10.)
>
> Mr. Singer has been appointed by the medical staff every time he has served as a hearing officer for peer

[3] The St. Joseph's Medical Staff is a separate and legally distinct entity from St. Joseph's Medical Center, with its own rights and responsibilities. (See *Hongsathavij*, 62 Cal.App.4th at 1130, fn. 2 ["A hospital's medical staff is a separate legal entity, an unincorporated association, which is required to be self-governing and independently responsible from the hospital for its own duties and for policing its member physicians."]; Bus. & Prof. Code, § 2282.5.) "Hospitals in this state have a dual structure, consisting of an administrative governing body, which oversees the operations of the hospital, and a medical staff, which provides medical services and is generally responsible for ensuring that its members provide adequate medical care to patients at the hospital." (*El-Attar*, 56 Cal.4th at 983; see also Cal. Code Regs., tit. 22, § 70701, subds. (a)(1)(D), (a)(1)(F).)

> review hearings such as Dr. Natarajan's. (9-CT-2515:20-21.)
>
> Mr. Singer is always hired by a hospital's medical staff directly, regardless of the accounting practices of the hospital's parent company. (9-CT-2515:22-23.)
>
> There is no evidence that Dignity Health is the entity that chooses hearing officers for the other medical staffs of the hospitals it owns, or even that Dignity Health would be the entity "signing the paychecks" if Mr. Singer were selected again by another medical staff of another hospital Dignity Health owns. (9-CT-2517:18-22.)[4]

Natarajan never challenged any of these findings, and they are final and binding. (*Johnson*, 24 Cal.4th at 69-70.) He cannot now use unsupported and rejected factual assertions to try to bolster his case for Supreme Court review.[5]

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[4] Medical staffs commonly delegate certain peer review procedural functions, including selection of hearing officers, to hospital administration. (See *El-Attar*, 56 Cal.4th at 989-990; Bus & Prof. Code, § 809, subd. (b) [authorizing the involvement in peer review proceedings of "any designee" of a peer review body].)

[5] Natarajan asserts that he "reserves any claim that the decision in *Natarajan* violates his federal due process rights for determination by federal courts." (Pet. 16, fn. 4.) But there was no state action taken in this case against a private hospital, and thus no basis for a federal claim, as his counsel well knows. (See *Safari v. Kaiser Found. Health Plan* (N.D. Cal. May 11, 2012) 2012 WL 1669351, at *9 [dismissing without leave to amend physician's complaint alleging that private hospital acted under color of state law and violated his due process rights in conducting peer review under section 809 et seq.].)

III. CONCLUSION

Natarajan has presented no issue warranting review. The Petition should be denied.

Dated: January 2, 2020 MANATT, PHELPS & PHILLIPS, LLP

By: s/ Barry S. Landsberg
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DIGNITY HEALTH

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d), I certify that this Answer to Petition for Review contains 4,171 words, not including table of contents, table of authorities, the caption page, or this Certification page.

Dated: January 2, 2020 MANATT, PHELPS & PHILLIPS, LLP

By: s/ Barry S. Landsberg
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DIGNITY HEALTH

PROOF OF SERVICE

I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On **January 2, 2020**, I served the within: **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action addressed as follows:

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Clerk, Superior Court of California San Joaquin County Superior Court 180 E. Weber Avenue Stockton, CA 95202-2777	*(Via U.S. Mail)* *For Delivery to the Hon. Barbara Kronlund, Dept. 10D*

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **January 2, 2020**, at Los Angeles, California.

Brigette Scoggins

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S259364**
Lower Court Case Number: **C085906**

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