SUPREME COURT

OF THE STATE OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, a non-profit, public benefit corporation,

Petitioner/Appellant

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent/Appellee

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Real Party in Interest

Case No. S 243855

Second District Court of Appeal Case No. B 280676

Los Angeles County Superior Court Case No. BS166063, Hon. James C. Chalfant, Judge

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS; AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES

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APPLICATION TO FILE AMICUS CURIAE BRIEF

The League of California Cities ("League") requests leave to file an amicus curiae brief in support of the position of Real Party in Interest Los Angeles County Sheriff's Department.

The League is a voluntary, non-profit, nonpartisan association of 474 California cities located throughout the State. The League provides a key forum for California city officials to work together to provide for the public health, safety, and welfare of its members' residents, among other important purposes. To that end, the League identifies issues of concern to cities; develops reasonable goals and objectives for statewide policy; and advocates for sound legislation and regulations. In fulfilling this role, the League is guided by a series of principles, including the following: (1) the business of government should be conducted with transparency, openness, respect, and civility, (2) the spirit of honest public service is what builds communities, (3) open decision-making that is of the highest ethical standards honors the public trust, (4) cities are vital to the strength of the California economy, and the vitality of cities is dependent upon their fiscal stability and local autonomy.

The Court's decision in this matter will significantly impact the League's interests and the interests of cities generally because most cities maintain their own law enforcement agencies. If the Court of Appeals decision were to be affirmed by this Court, a *Pitchess* motion and court order would be required in every case for the prosecutor to be able to determine whether an officer's confidential personnel file contained *Brady* material. Thus, every arrest made by

an officer on a small police force would result in a *Pitchess* motion to which the law enforcement agency would be required to respond. The custodian of the confidential peace offer records would be required to retrieve and review the file, and to present it at the designated court hearing for *in camera* review, all while protecting its confidentiality. This will affect staffing and budgets for all cities that have their own law enforcement agencies.

The administrative burden and cost for cities to implement this system of discovery would be quite high. For smaller cities that have limited means and sparsely populated police departments, their Chief or another high-ranking officer is designated as the custodian of records – but those staff are also expected to be available to provide law enforcement services most of the time. A system that required the custodian of records to be available for several hours each week to review files, and another half day or more to attend court hearings, would cause law enforcement services in smaller cities to suffer, unless they could find additional budget to hire another officer. Even in cities with more sizable law enforcement agencies, the budgetary and time impacts of requiring a *Pitchess* motion as part of every criminal trial would be enormous. For cities that have large police forces with hundreds of confidential peace officer personnel files, responding to all the *Pitchess* motions could easily constitute a full-time job for the custodian of records. The effects of the decision the Court will render in this case will reverberate throughout law enforcement agencies statewide.

As the representative of hundreds of cities throughout the state, the League is uniquely situated to provide the Court with insight about the very practical implications of this case on cities and their law enforcement agencies.

Consequently, the League respectfully requests that the Court grant it leave to file this amicus curiae brief, so that the Court may consider the interests of cities and their law enforcement agencies in complying with their obligations under both *Brady* and *Pitchess*.

Dated: May 5, 2018

Respectfully submitted,

BARTKIEWICZ, KRONICK & SHANAHAN,
A Professional Corporation

By: Jennifer T. Buckman

Attorneys for *Amicus Curiae* League of California Cities

AMICUS CURIAE BRIEF

I. QUESTION PRESENTED ON REVIEW

When the personnel records of a peace officer contain evidence of misconduct that the prosecutor would be required to disclose to the defense under *Brady v. Maryland* (1963) 373 U.S. 83, the 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, do the *Pitchess* statutes preclude the law enforcement agency that maintains that file from disclosing to the prosecution: (a) the name and identifying number of the officer and (b) the existence of the *Brady* information, absent issuance of a court order on a properly filed *Pitchess* motion?

II. BRIEF ANSWER

No. As properly construed in *People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, and harmonized with law enforcement agencies' constitutional disclosure obligation under *Brady*, the *Pitchess* statutes do not prohibit a law enforcement agency from disclosing to the prosecutor in a pending criminal proceeding the existence of *Brady* material for an identified officer who may be called as a witness, even if the disclosure is not made in response to court order on a *Pitchess* motion.

III. INTERESTS OF THE AMICUS

The League of California Cities (League) is an association of 474 California cities located throughout the State. The League is dedicated to protecting and restoring local control to provide for the public health, safety, and

welfare of its members' residents, and to enhance the quality of life for all Californians.

The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Legal Advocacy Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or national significance and that merit participation by the League. The League's Legal Advocacy Committee has determined that this is such a case.

All of the League's members are cities that have broad police powers that flow directly from the Constitution. (*E.g.*, Cal. Const. art. XI, § 7 [power of cities to enact and enforce "local, police, sanitary, and other ordinances and regulations not in conflict with general laws"].) To provide essential police services to city residents, most League members maintain their own local police departments. As explained in more detail below, the *Pitchess* statutes require these law enforcement agencies to maintain the confidentiality of peace officers' personnel files except when the specific *Pitchess* motion procedures have been followed and a Court has reviewed and ordered the disclosure of identified materials.

However, under the interpretation advanced in *Brady*, the Due Process clause also requires law enforcement agencies to disclose to the prosecution, who must in turn disclose to the defense, any evidence of misconduct by a peace officer that could be used to impeach that officer's testimony. Although the League's members employ various means to discharge this constitutional duty,[1] many, if not

[1] Due to the vast differences amongst law enforcement agencies throughout the state, there is no "one-size-fits-all" approach to maintaining law enforcement records. These differences include, but are not limited to: (1) the number of

most, cities maintain a list of officers whose files contain *Brady* material and notify the prosecutor of the existence of this information when the need arises.

Regardless of the means a particular city uses to achieve compliance with *Brady*, the League's members are keenly interested in whether the Court of Appeal erred when it determined that the *Pitchess* statutes prohibit law enforcement agencies from disclosing even the existence of *Brady* materials for a specific officer without undertaking a *Pitchess* motion and *in camera* review of the confidential file. Many cities maintain what is called a *Brady* list for their law enforcement officers, and, when one of those officers is a potential witness in a pending criminal proceeding, the law enforcement agency notifies the prosecution of the officer's name and the fact that the officer's confidential personnel file may have *Brady* material in it; to acquire any further information about the *Brady* material, the prosecution must file a *Pitchess* motion and obtain a court order.

As a practical matter, if the *Pitchess* statutes are interpreted in the manner adopted by the Court of Appeal, the League's members likely will be encumbered with *Pitchess* motions in nearly every criminal case, since the prosecution will not be able to discover whether a file might contain *Brady* information without bringing such a motion. Such a result would severely increase the administrative burden on cities, as the employees who serve as the custodians of records for the confidential police officer personnel files would be required to attend frequent – perhaps daily – court hearings. In smaller cities, this increased administrative burden divert staff from their primary law enforcement tasks and would likely cause police services to suffer. For cities with larger law enforcement departments

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officers in the agency, (2) the rate of officer turnover, (3) the financial and other resources available to the agency, and (4) the agency's operational policies.

that maintain hundreds of confidential peace officer personnel files, this rule would so greatly expand the duties of the custodian of records that the cities would likely have to hire additional staff to review all the files and make all the court appearances. In either case, the administrative and fiscal burden on the League's members would be significant, and, for that reason, the League urges this Court to overturn the Court of Appeal's misinterpretation of the *Pitchess* statutes.

IV. ARGUMENT

As explicitly noted in the question certified for review, this case involves the interplay of the *Brady* doctrine, which imposes an obligation on the prosecution to disclose to the defense impeachment material that may be used to challenge the credibility or veracity of law enforcement witnesses, and California's *Pitchess* statutes, which establish strict procedures to maintain the confidentiality of peace officer personnel files and limit the disclosure of the contents of those files. By holding that the *Pitchess* statutes prohibit law enforcement agencies from disclosing to the prosecution even the existence of *Brady* materials in an officer's confidential personnel file, the Court of Appeal erred. The League urges this Court to reject this absurd result and to confirm its prior holdings that the *Pitchess* statutes allow law enforcement agencies that are aware of the existence of *Brady* materials in an officer's confidential personnel file to disclose that fact to the prosecution.

A. Properly Construed in the Context of the *Brady* Obligation, the *Pitchess* Statutes Do Not Prohibit Law Enforcement Agencies from Disclosing to the Prosecution the Existence of *Brady* Materials in an Officer's Confidential Personnel File

As this Court is well aware – and recently explained in *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 68 – the *Pitchess*

statutes require any public entity that employs peace officers to investigate and retain citizen complaints of any officer misconduct, such as the use of excessive force (Penal Code, § 832.5), but these complaints and investigations are confidential and access to these records is limited. (Evid. Code, §§ 1043, 1045.) The *Pitchess* statutes prohibit disclosure of these confidential peace officer records, and information obtained from these records, except upon a showing of good cause and in compliance with the statutorily specified procedures. (Penal Code, §§ 832.7, subd. (a), 832.8, subd. (e).) The *Pitchess* statutes also mandate confidentiality for peace officer's "personnel records," including an officer's personal and family information, medical history, and election of benefits (*id.*, § 832.8, subds. (a), (b) & (c)), records related to the officer's "advancement, appraisal, or discipline" (*id.*, subd. (d)), and any information that "would constitute an unwarranted invasion of [a peace officer's] personal privacy." (*Id.*, § 832.8, subd. (f).)

Before anyone, including the district attorney, can obtain the complaints or disciplinary information contained in an officer's personnel records, he or she must file a valid *Pitchess* motion. "[Penal Code section 832.7, subdivision (a)] requires the prosecution, as well as the defendant, to comply with the *Pitchess* procedures if it wishes to obtain information from confidential personnel records." (*Johnson, supra*, 61 Cal.4th at p. 712.) The prosecution "does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases." (*Id.* at p. 705.) To seek the information in those records, the prosecution must follow the same procedures that apply to criminal defendants, i.e., make a *Pitchess* motion. (*Ibid.*)

However, it does not necessarily follow that the obligations imposed on law enforcement agencies under the *Pitchess* statutes conflict with the disclosure requirements of *Brady*. To the contrary, California Courts have long interpreted *Brady* principles and *Pitchess* procedures together and in harmony. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225 [the *Pitchess* "procedural mechanism for criminal defense discovery . . . must be viewed against the larger background of the prosecution's constitutional obligation [under *Brady*] to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial"].) In other words, "[t]he *Pitchess* process operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information." (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 14.)

Less than three years ago, this Court took up the precise question of the interplay between the *Pitchess* statutes and *Brady*, and expressly approved a law enforcement agency's use of a *Brady* list and disclosure of the existence of potentially exculpatory evidence in the peace officer's personnel file. (*See, generally, Johnson, supra*, 61 Cal.4th 696.) The police department in *Johnson*, "acting pursuant to procedures it ha[d] established," would "advise[] the District Attorney's Office of the names of employees who have information in their personnel files that may require disclosure under *Brady*. The District Attorney's Office then makes a motion under Evidence Code 1043 and 1045 for *in camera* review of the records by the court." (*Id.* at pp. 707, 715.)

This Court commended this practice and found it appropriately reconciled the law enforcement agency's obligations under *Brady* and the *Pitchess* statutes: "In this case, the police department has laudably established procedures to

streamline the *Pitchess/Brady* process." (*Id.* at p. 721.) Once the existence of the *Brady* material had been disclosed by the law enforcement agency, it had satisfied its constitutional duty, and the burden was then on the parties to file a *Pitchess* motion to seek access to the information. (*Id.* at p. 716.) Upon a properly noticed motion with some explanation of how the officer's credibility might be relevant to the pending criminal case, the defendant would have made the showing necessary under the *Pitchess* procedures to trigger *in camera* review. (*Id.* at p. 721.)

Thus, *Johnson* confirms that the *Pitchess* statutes do not prohibit a law enforcement agency from maintaining a *Brady* list or from discharging its *Brady* obligations by giving the names of peace officers with *Brady* material in their files to prosecutors when charges are pending.

Disregarding *Johnson*, the Court of Appeal found that the law enforcement agency violates the *Pitchess* statutes merely by disclosing the name of an officer whose personnel file might contain *Brady* material. (*Ass'n for L.A. Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 457, review granted, depublished.)

The League urges the Court to overturn the Court of Appeal's holding and to confirm, once again, that nothing in the *Pitchess* statutes prohibits law enforcement agencies from establishing and maintaining *Brady* lists, or from disclosing the existence of *Brady* material to the prosecution when an officer is a potential witness in a criminal case.

B. *Copley* and Its Progeny Do Not Prohibit Law Enforcement Agencies from Disclosing the Existence of *Brady* Materials to the Prosecution in Pending Criminal Cases

In finding that the *Pitchess* statutes prohibit law enforcement agencies from disclosing the identity of peace officers whose files might contain *Brady* materials,

the Court of Appeal improperly extended the *Copley* line of cases outside of the context of disciplinary matters involving peace officers and erroneously applied it in the *Brady* context. (*See Ass'n for L.A. Deputy Sheriffs v. Superior Court*, *supra*, 13 Cal.App.5th at p. 457.) *Copley* construed the *Pitchess* statutes to protect the confidentiality of an officer's name, and it expressly *disapproved* a contrary Court of Appeal's decision authorizing the disclosure of an individual peace officer's identity. (*Long Beach Police Officers Ass'n v. City of Long Beach*, 59 Cal. 4th 59, 73 (2014), *discussing Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1298, and *New York Times Co. v. Superior Court* (1997) 52 Cal.App.4th 97, 101.)

However, as this Court subsequently explained in *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 298, the holding in *Copley* was limited to the specific context of disciplinary matters: the records sought in *Copley*, had they been disclosed, would have linked the officer's name, not just to an on-duty shooting, but also to a confidential disciplinary action imposed on the officer. Hence, these records were exempt from disclosure. (*See Commission*, *supra*, 42 Cal.4th at pp. 295, 298–299.) In 2014, the Court further clarified that *Copley* "did not alter the core holding [in *New York Times Co v. Superior Court, supra*, 52 Cal.App.4th 97], generally permitting disclosure of the names of peace officers involved in on-duty shootings." (*Long Beach Police Officers Ass'n v. City of Long Beach* (2014) 59 Cal.4th 59, 73.) Thus, even under *Copley* and its progeny, the *Pitchess* statutes do not prohibit the disclosure of the identity of an officer involved in an incident of potential misconduct. In extending the narrow holding of *Copley* to preclude disclosure of the names of officers

whose personnel files contain *Brady* material the law enforcement agency is constitutionally required to disclose, the Court of Appeals erred.

Copley's interpretation of the *Pitchess* statutes is limited to the specific context of a Public Records Act request by the media for disciplinary records on a specific officer. (*Copley*, *supra*, 39 Cal.4th at p. 1279.) Neither *Copley* nor the two cases clarifying it, *Long Beach* and *Commission*, construed the interplay of the *Pitchess* statutes with the law enforcement agency's constitutional obligations under *Brady*, and none of these cases holds that a law enforcement agency is barred from informing the prosecutor that the confidential personnel file of a potential witness in a pending criminal action might include *Brady* information.

The *Brady* doctrine charges the prosecutor with knowledge of exculpatory evidence known to members of the prosecution team, including law enforcement, and imposes a duty to disclose material exculpatory evidence, even if the accused has not requested it. (*Johnson*, *supra*, 61 Cal.4th at p. 709; *see also United States v. Blanco* (9th Cir. 2004) 392 F.3d 382, 394 ["*Brady* . . . impose[s] obligations not only on the prosecutor, but on the government as a whole"]; *see also United States v. Zuno-Arce* (9th Cir. 1995) 44 F.3d 1420, 1427 ["it is the government's, not just the prosecutor's, conduct which may give rise to a *Brady* violation"].) If the *Pitchess* statutes are interpreted, as the Court of Appeals did, to preclude a law enforcement agency that has identified the existence of *Brady* material in a peace officer's confidential records from disclosing the existence of this information, that constitutional obligation is thwarted.

As Justice Grimes noted in her dissenting opinion in the court below, the situation that the government faces in the context of its *Brady* obligations to

produce exculpatory evidence to the defense " . . . is entirely different from the disclosure prohibited in [the media cases]." (*Association for Los Angeles Deputy Sheriffs*, *supra*, 13 Cal.App.5th 413 at p. 453 (conc. & dis. opn. of Grimes, J.), review granted.) The *Copley* cases considered the balance between the peace officer's privacy interests as protected by the *Pitchess* statutes, on the one hand, and the news media's right to access information under the California Public Records Act, on the other. Obviously, in each of those cases, the media sought the officers' private information for the specific purpose of publishing and publicizing it.

Here, in contrast, the balance that must be struck is between the officer's privacy interests under the *Pitchess* statutes and the government's obligation under the Federal Constitution to provide criminal defendants with information that might be exculpatory. While the Public Records Act is a statute that can be limited or abridged by other statutes, no statute can abridge a defendant's Constitutional rights. Moreover, when a court orders disclosure of *Brady* information to the prosecution after a *Pitchess* motion, it will issue a protective order that should explicitly address the officer's confidentiality concerns: the court may make "any order which justice requires to protect the officer or agency from unnecessary annoyance embarrassment or oppression," and the order must state that the information disclosed may not be used for "any purpose other than a court proceeding pursuant to applicable law. (Evid. Code § 1045, subds. (d), (e).) Adherence to these statutory provisions allows the officers' privacy to be safeguarded without sacrificing the government's obligations under *Brady*.

Consequently, none of the *Copley* cases apply in the *Brady* context, and the Court of Appeal erred by holding otherwise. The League urges the Court to reject the lower court's absurd construction of the *Pitchess* statutes and to reconfirm the prior decisions of this Court reconciling law enforcement agencies' obligations under the *Pitchess* statutes and *Brady*.

C. The Court of Appeal's Misinterpretation of the *Pitchess* Statutes Would Needlessly Impose Undue Administrative Burden on the Courts and Law Enforcement Agencies

As Justice Grimes noted in his dissent, "The purport of the majority's decision is that it is illegal under *Pitchess* for any law enforcement agency to tell the prosecutor in a pending criminal proceeding that a potential witness may have *Brady* material in his or her records." (*Ass'n for L.A. Deputy Sheriffs*, *supra*, 13 Cal.App.5th at pp. 454-55 (Grimes, J., dissenting).) If the Court of Appeal's decision in this case were allowed to stand, a prosecutor would be required to file a *Pitchess* motion to determine whether there is *Brady* material in the personnel file of *every* peace officer who might be called as a witness. Thus, as a practical matter, prosecutors would have to make *Pitchess* motions for every officer who could be called as a witness in a pending criminal case, or they would jeopardize the case by risking a possible failure to disclose exculpatory *Brady* material to the defendant.

Such a rule would exponentially increase the amount of *Pitchess* motions the prosecutors would be required to bring, the law enforcement agencies would be required to respond to, and the Courts would be required to hear. If the Court of Appeal's interpretation of the *Pitchess* statutes were allowed to stand, it would bring about the very result that this Court cautioned against in *Johnson*:

"[r]epetitive requests by the District Attorney that the [Police] Department check employee personnel files of Department employees who may be witnesses create unnecessary paperwork and personnel costs . . . ." (*Johnson*, *supra*, 61 Cal.4th at pp. 707, 725.) As set forth in more detail above, the custodians of records for law enforcement agencies would have to spend several hours reviewing confidential personnel files, and additional half-days or more to attend court hearings, for *every* criminal case. For many smaller cities, this new administrative burden would interfere with their ability to provide police services; for larger law enforcement agencies, as the *Johnson* Court anticipated, the burden of producing the files of every officer who could be called as a witness in every criminal case would likely require hiring new staff just to process the voluminous increase in records requests. In either situation, cities would bear administrative and budgetary burdens if the Court of Appeal's decision were upheld.

This result can be avoided with a sensible construction of the *Pitchess* statutes that allows law enforcement agencies to disclose the existence of *Brady* materials but requires compliance with the *Pitchess* motion procedures, *in camera* review, and a properly issued Court order to obtain access to the contents of the officer's personnel file. In recent decisions such as *Johnson*, this Court has reconciled the law enforcement agencies' obligations under the *Pitchess* statutes and *Brady* in this manner. The League urges this Court to reaffirm that construction of the *Pitchess/Brady* scheme and to reject the Court of Appeal's contrary interpretation.

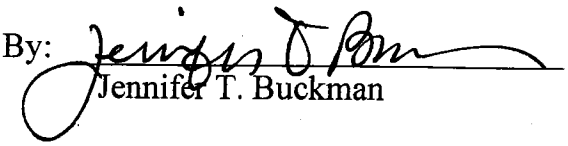
V. CONCLUSION

For all the reasons set forth above, amicus League of California Cities urges the Court to overturn the Court of Appeal's finding that the *Pitchess* statutes preclude law enforcement agencies from disclosing the existence of *Brady* material in an officer's confidential personnel file.

Dated: May 5, 2018

Respectfully submitted,

BARTKIEWICZ, KRONICK & SHANAHAN,
A Professional Corporation

By: 
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520 of the California Rules of Court, counsel for amicus curiae the League of California Cities hereby certifies that she caused the computer program used to produce the brief, Microsoft Word, to count the words in the proposed amicus brief, and the program calculated that the brief contains 3,414 words.

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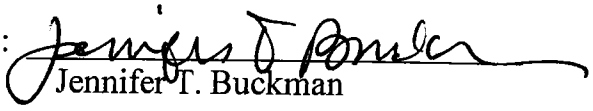
By: 
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PROOF OF SERVICE

I, Terry M. Olson, declare as follows:

I am a resident of the State of California, and employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 1011 22nd Street, Sacramento, California 95816. On May 4, 2018, I served a copy of the foregoing document(s) entitled:

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS; AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES

☑ BY TRUEFILING WITH ELECTRONIC MAIL DELIVERY: By uploading the document to the TrueFiling system, which I understand will cause the document(s) to be delivered as an electronic mail attachment in PDF format to the representatives of the parties listed below, consistent with Rule 9(a) of the Rules of the Supreme Court (eff. May 1, 2018)

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☑ BY OVERNIGHT DELIVERY: by placing for overnight delivery by Federal Express a copy of the document(s) listed above enclosed in a sealed mailer to the person(s) at the address(es) set forth below. I am readily familiar with the business' practice for processing of correspondence for delivery by Federal Express and, in the ordinary course of business, the correspondence would be entrusted to Federal Express for overnight delivery on the day on which it is deposited at a Federal Express office, consistent with Rule 5(a) of the Rules of the Supreme Court (eff. May 1, 2018)

Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797 [Case No. S243855]	Clerk of the Court Second District Court of Appeal Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013 [Case No. B 280676]

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 May 4, 2018 at Sacramento, California.

Terry M. Olson