**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| FACEBOOK, INC.,<br>Petitioner,<br>vs.<br>SAN DIEGO COUNTY SUPERIOR COURT,<br>Respondent,<br>LANCE TOUCHSTONE,<br>Real Party in Interest. | No. S245203<br>Court of Appeal<br>4th Dist., 1st Div.<br>No. D073171<br>Superior Court<br>Dept. SD-55<br>No. SCD268262<br>Hon. Kenneth K. So |

**APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE TO APPEAR AS *AMICUS CURIAE* ON BEHALF OF REAL PARTY IN INTEREST PURSUANT TO CALIFORNIA RULE OF COURT, RULE 8.520 (f), AND BRIEF IN SUPPORT OF REAL PARTY IN INTEREST.**

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**TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE PRESIDING, AND HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:**

California Attorneys for Criminal Justice (hereafter "CACJ") apply under California Rules of Court, Rule 8.520 (f) for permission to appear as *amicus curiae* on behalf of Real Party in Interest.

Under the California Rules of Court, Rule 8.520 (f), this brief may be filed by permission of the Presiding Justice of this Court, based on a showing of good cause. CACJ has filed this brief within 30 days of real party's Reply and respectfully tenders its showing of good cause below.

## I. APPLICATION OF CACJ TO APPEAR AS *AMICUS CURIAE* ON BEHALF OF REAL PARTY IN INTEREST.

### A. Identification of CACJ.

CACJ is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States

Constitution, the Constitution of the State of California and other applicable law." CACJ is administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 1,700 members, primarily criminal defense lawyers practicing before federal and state courts. These lawyers are employed throughout the State both in the public and private sectors.

CACJ has appeared before the United States Supreme Court, the California Supreme Court, and the California Courts of Appeal on issues of importance to its membership. CACJ's appearance as an amicus curiae before California's reviewing courts has long been recognized in a number of published decisions.

The undersigned, Donald E. Landis, Jr., who appears as counsel for CACJ at the request of Stephen K. Dunkle and John T. Philipsborn, Chair and Vice Chairs of the CACJ *Amicus* Committee, certifies to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief, and additionally certifies that no party to this litigation has contributed any monies, services, or other form of donation to assist in the production of this brief.

**B Statement of Interest of *Amicus Curiae.***

CACJ has both a general and specific interest in the subject matter of this litigation.

First, CACJ's membership consists largely of criminal defense lawyers who practice either with defender offices or in private practice. CACJ's membership is regularly involved in state and federal constitutional and statutory criminal discovery issues that effect the defense of those charged with crimes across this State. As a result, CACJ's membership has an interest in ensuring the vitality of the constitutionally protected right to

trial, counsel, and confrontation that is ensured by a full and vigorous investigation, discovery search, case preparation, and trial presentation.

Second, CACJ has a specific interest in the issues presented here, as CACJ members are regularly involved in proceedings in which the reach of the right to Due Process, and the reach of the compulsory process clauses of the United States and California Constitutions, are at issue. CACJ has previously appeared in this Court in a litigation involving related issues. In addition, Real Party is represented by lawyers who are CACJ members.

Third, CACJ was contacted by lead counsel for real party and requested to assert the interests of the defense bar generally, as it is represented by CACJ and its membership in the issues presented by this litigation in part because of CACJ's indicated interest, and history of involvement, in the issues presented.

### C. Application to File.

For the reasons explained immediately above, CACJ respectfully urges this Court to find that there is sufficient good cause for this Court to permit CACJ to file its brief on the merits.

## II. CACJ'S BRIEF ON THE MERITS.

### A. Introduction.

CACJ submits the following arguments in support of the positions taken by real party in his Petition for Review, Opening Brief, and Reply Brief filed in this Court in response to Facebook's Writ of Mandate/Prohibition granted by the Fourth District Court of Appeal, Division One, in Case number D072171.

Real party and fellow *amici* have already provided thorough and expert analysis of all the potential arguments supporting respondent court's decision granting production of Facebook content of identified persons from real party's lawfully served criminal subpoena duces tecum in

anticipation of his upcoming criminal trial. But like fellow *amici*, CACJ strives for focused advocacy, and as such, we provide the following additional arguments.

CACJ argues here that criminal defendants are entitled to compel the social media content of Facebook users, because they have previously consented to the potential production of their social media content consistent with the Stored Communications Act, 18 U.S.C. § 2702 (b)(3) by originally agreeing to Facebook's *Terms of Service* and *Data Policy*.

CACJ also argues that this State Supreme Court has the authority, duty, and responsibility to rule directly on the federal constitutionality of the federal Stored Communications Act as it arises in the context of a criminal defendant's request to compel pertinent social media content in state court criminal proceedings.

### B. Facebook Users Consent to Content Production under the Stored Communications Act, 18 U.S.C. § 2702 (b)(3) by Agreeing to Facebook's *Terms of Service* and *Data Policy*.

User consent is an exception to the Stored Communications Act's (SCA) ban on disseminating electronic records as set forth in 18 U.S.C. § 2702 (b)(3), which states:

> (b) Exceptions for disclosure of communications. A provider described in subsection (a) may divulge the contents of a communication–
> (3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

When the originator of a communication has made it available to the public, whether yelling it in the town square or posting it on their publically accessible Facebook page, they have necessarily and at least implicitly, if not explicitly, consented to its disclosure. While Facebook may continue to argue otherwise, generally everyone agrees that all posts on a public Facebook page must be produced in response to a criminal defendant's

subpoena, because the user impliedly consents to such disclosure by publicly posting content. Well known figures like Justin Bieber cannot later complain that his privacy has somehow been violated when someone subpoenas information from his public Facebook page shared only with 1.1 million of his most loyal Bieber fans.[1]

The more complicated question is when the Facebook user has set their profile to private or semi-private as their or Facebook's whim dictates given the privacy settings of the day. Do these Facebook users receive privacy protections under the SCA, and does the privacy protection continue even when the Facebook user's closed page or private profile has tens of thousands of followers? Luckily, this Court does not have to resolve this question, because Facebook's own *Data Policy*, in effect at the time of Touchstone's subpoenas,[2] states that when users agree to Facebook's *Terms of Service*, users provide consent that any and all content they put on Facebook can be shared with unidentified third parties, regardless of whether the user's settings are set to "public," "friends only," "friends of friends,", or through direct messages between two or more users on the Messenger application. By agreeing that Facebook can disseminate user content to unknown third parties regardless of privacy settings, users implicitly consent to disclosure under § 2702 (b)(3), and consequently waive all privacy protections under the SCA.

To start, Facebook's *Data Policy* expressly notifies users that anything the user says or does on Facebook – whether it be posts, messages,

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[1] See, https://www.facebook.com/JBHBOFFICIAL/.

[2] In the aftermath of the *Cambridge Analytica* scandal, Facebook has published proposed changes to its *Data Policy* which have not yet been implemented. (https://newsroom.fb.com/news/2018/04/terms-and-data-policy/)

activity, or comments – is collected and retained by Facebook.[3] Users are also notified that all public information is viewable to anyone on or off Facebook, and that any public content the user posts can be downloaded and re-shared by all other users.[4] Users are further notified that any posts or activity on Facebook, excluding personal identifiers such as names and email addresses, can be shared with an unlimited number of unidentified

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[3] The *Data Policy* states:

> Things you do and information you provide.
>
> We collect the content and other information that you provide when you use our Services, including when you sign up for an account, create or share, and message or communicate with others. This can include information in or about the content that you provide, such as the location of a photo or the date a file was created. We also collect information about how you use our Services, such as the types of content you view or engage with or the frequency and duration of your activities.
> (https://www.facebook.com/about/privacy/)

[4] The *Data Policy* states:

> How is this information shared?:
>
> Public information is any information you share with a public audience, as well as information in your Public Profile, or content you share on a Facebook Page or another public forum. Public information is available to anyone on or off our Services and can be seen or accessed through online search engines, APIs, and offline media, such as on TV.
>
> In some cases, people you share and communicate with may download or re-share this content with others on and off our Services. When you comment on another person's post or like their content on Facebook, that person decides the audience who can see your comment or like. If their audience is public, your comment will also be public. (https://www.facebook.com/full_data_use_policy)

advertising partners.[5] Under the Facebook's *Advertising Policies*, Facebook permits its advertising partners to share user data it collects from Facebook with "someone acting on your behalf such as your service providers," and places the burden on the advertising partner to ensure that those unidentified persons do not share user information it obtains from Facebook.[6] Thus, by agreeing to the *Terms of Service*, Facebook users are

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[5] The *Data Policy* states:

> Advertising, measurement and analytics services (non-personally identifiable information only).
>
> We want our advertising to be as relevant and interesting as the other information you find on our Services. With this in mind, we use all of the information that we have about you to show you relevant ads. We do not share information that personally identifies you (personally identifiable information is information such as a name or email address that can by itself be used to contact you or identify who you are) with advertising, measurement or analytics partners unless you give us permission. We may provide these partners with information about the reach and effectiveness of their advertising without providing information that personally identifies you, or if we have aggregated the information so that it does not personally identify you. For example, we may tell an advertiser how its ads performed, or how many people viewed their ads or installed an app after seeing an ad, or provide non-personally identifying demographic information (such as 25- year-old female, in Madrid, who likes software engineering) to these partners to help them understand their audience or customers, but only after the advertiser has agreed to abide by our advertiser guidelines.
> (https://www.facebook.com/full_data_use_policy)

[6] The *Advertising Policy* states:

notified that Facebook absolves itself of any responsibility to ensure the confidentiality of user data and places the burden on advertisers with whom Facebook's users are not in privity of contract. Even then, advertisers are authorized to share Facebook users' data with an unknown number of service providers and others acting on behalf of the advertising company.

Likewise, by agreeing to Facebook's *Terms of Service*, users are notified that Facebook shares all content information with an unlimited number of unidentified "vendors, service providers and other partners who globally support our business, such as providing technical infrastructure services, analyzing how our Services are used, measuring the effectiveness of ads and services, providing customer service, facilitating payments or conducting academic research and surveys."[7] Although the *Data Policy*

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Data use restrictions

1. Ensure that any advert data collected, received or derived from your Facebook or Instagram advert ("Facebook advertising data") is only shared with someone acting on your behalf, such as your service provider. You are responsible for ensuring that your service providers protect any Facebook advertising data or any other information obtained from us, limit their use of all of this information, and keep it confidential and secure. (https://business.facebook.com/policies/ads)

[7] The *Data Policy* states:

Vendors, service providers and other partners.

We transfer information to vendors, service providers and other partners who globally support our business, such as providing technical infrastructure services, analyzing how our Services are used, measuring the effectiveness of ads and services, providing customer service, facilitating payments or conducting academic research and surveys. These partners must adhere to strict

states that these entities must keep this information confidential consistent with the *Data Policy* and consistent with the agreements made between these entities and Facebook, this proviso is meaningless, because these third party entities are not identified, the agreements are not provided to the user, and there is no limit on the number or type of entities to which Facebook is authorized to disseminate user content. Thus, by accepting Facebook's *Terms of Service*, the user gives unilateral control to Facebook to disseminate information to "other partners who support our business" forever breaking the veil of privacy and allowing everyone – including criminal defendants – access to user content. (*Ibid.*)

Finally, Facebook's *Data Policy* informs users that Facebook shares unlimited user data with "the families of companies that are a part of *Facebook.*"[8] Facebook lists eight separate companies with whom it shares user content information taken from its users.[9] And the privacy policies of

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confidentiality obligations in a way that is consistent with this Data Policy and the agreements that we enter into with them.

[8] (https://www.facebook.com/full_data_use_policy)

[9] The Facebook Companies:

In addition to the services offered by Facebook Inc. and Facebook Ireland Ltd, Facebook owns and operates each of the companies listed below, in accordance with their respective terms of service and privacy policies. We may share information about you within our family of companies to facilitate, support and integrate their activities and improve our services. For more information on the Facebook Companies' privacy practices and how they treat individuals' information, please visit the following links:

Facebook Payments Inc.
(https://www.facebook.com/payments_terms/privacy)
Atlas (http://atlassolutions.com/privacy-policy)

those eight companies state that they, in turn, can share information about users with the other affiliates and disseminate user data to third party services providers and other that work with them.[10] Simply put, by agreeing to Facebook's *Terms of Service* and *Data Policy*, customers agree that Facebook has the unfettered discretion to disseminate anything a user says or does on Facebook, including its private Messenger, so long as the data goes to any "partner that globally supports our business." By placing this information in the hands of so many third parties as governed by its data polices and agreed to by its users, Facebook has pierced whatever fictional

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Onavo (http://www.onavo.com/privacy_policy)
Moves (http://moves-app.com/privacy)
Oculus and Oculus Ireland Limited
(http://www.oculus.com/privacy/)
WhatsApp Inc. and WhatsApp Ireland Limited
(http://www.whatsapp.com/legal/#Privacy)
Masquerade (https://www.facebook.com/msqrd/privacy)
CrowdTangle (https://www.crowdtangle.com/privacy)
(https://www.facebook.com/help/111814505650678

[10] For example, Onavo's privacy policy states as follows:

Service Providers

We may share your information, including personally identifying information, with third parties that perform services on our behalf to help us provide, understand, or improve the Services. For example, we may use Affiliates or other partners to help host our services and databases, perform analyses or research, send communications on our behalf, or measure the effectiveness of our advertising. Our service providers agree to only use your information in accordance with our agreements with them as well as this Privacy Policy.
(https://www.onavo.com/privacy_policy/#SharingPersonallyIdentifyingInformation)

privacy it currently advocates, and its users have undeniably waived any of their privacy rights by consenting to Facebook's *Data Policy* in the *Terms of Service.*

Accordingly, any and all Facebook user data should be produced in response to a criminal defendant's lawfully issued subpoena, subject to a trial court judge's *in camera* inspection for relevancy, consistent with the SCA's consent exception under 18 U.S.C. § 2702 (b)(3).

### C. This State Supreme Court Has the Authority, Duty, and Responsibility to Rule on the Federal Constitutionality of the Federal Stored Communications Act Arising in State Court Proceedings.

CACJ would like to once again reassert the rich legal history this State Supreme Court has in ruling on the federal constitutionality of the federal Stored Communications Act as it relates to criminal defendants seeking potentially exculpatory social media content for their defense.

"While decisions of the United States Supreme Court are binding on state courts on federal questions [U.S.Const. art. VI, cl. 2], 'the decisions of the lower federal courts, while persuasive, are not binding on [state courts]. [Citation.] Thus, in the absence of a controlling United States Supreme Court opinion, [state court judges] make an independent determination of federal law." (*Wagner v. Apex Marine Ship Mgmt. Corp.*, (2000) 83 Cal.App.4th 1444, 1451, as modified on denial of reh'g (Oct. 27, 2000); *Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 782-83 [same and "the presence or absence of a decision by the Ninth Circuit on this issue is not determinative"]; *People v. Bradley* (1969) 1 Cal.3d 80, 86 [same and state courts "are not bound by the decisions of the lower federal courts even on federal questions"]; *Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 520, fn. 8 [same and "[w]here the federal circuits are in conflict, the decisions of the Ninth Circuit are entitled to no greater weight than those of other

circuits"]; *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58 ["[w]here lower federal precedents are divided or lacking, state courts must necessarily make an independent determination of federal law [citation], but where the decisions of the lower federal courts on a federal question are 'both numerous and consistent,' [state courts] should hesitate to reject their authority"]; *Rohr Aircraft Corp. v. County of San Diego* (1959) 51 Cal.2d 759, 764 ["[a]ny rule which would require the state courts to follow in all cases the decisions of one or more lower federal courts would be undesirable, as it would have the effect of binding the state courts where neither the reasoning nor the number of federal cases is found persuasive. Such a rule would not significantly promote uniformity in federal law, for the interpretation of an Act of Congress by a lower federal court does not bind other federal courts except those directly subordinate to it. (citations)"]; *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 150 [same]; *Etcheverry v. Tri-Ag Serv., Inc.* (2000) 22 Cal.4th 316, 320-21 [same]; *Belshe v. Hope* (1995) 33 Cal.App.4th 161, 171["federal precedents are lacking on this question and this court is free to adopt its own interpretation"]; *California Assn. for Health Servs. at Home v. State Dep't of Health Care Servs.* (2012) 204 Cal.App.4th 676, 684 ["[i]In the absence of controlling authority from the United States Supreme Court, [state courts] make an independent determination of federal law"].)

Likewise, in enacting a statutes where state courts possess jurisdiction to enforce it, the United States Congress may not at the same time foreclose state courts from considering the federal constitutionality of the act, because state court judges may not enforce federal statutes whose terms are clearly unconstitutional. (*Miller v. Municipal Court of City of Los Angeles* (1943) 22 Cal. 2d 818, 827-829.)

In *Miller v. Mun. Court of City of Los Angeles; supra*, at p.p. 827-29,

the California Supreme Court considered whether "a state court upon which, if the contentions of the petitioner and the intervener are correct, has been conferred jurisdiction to pass upon consumer actions, be foreclosed by congressional mandate from considering the constitutionality of the act which it is to enforce." The Supreme Court concluded that "if Congress, in enacting the Emergency Price Control Act, so intended to restrict the jurisdiction of the courts to which it delegated the duty to entertain such actions, there would be considerable doubt as to the statute's validity, for the decisions indicate that, under the constitutional provision, the judge of a state court may not enforce a statute whose terms are clearly unconstitutional. See *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60; *People v. Western Union Tel. Co.*, 70 Colo. 90, 198 P. 146, 15 A.L.R. 326; cf. *State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 50 S.Ct. 228, 74 L.Ed. 710, 66 A.L.R. 1460." (*Ibid.*) The Supreme Court was concerned that, "the question of whether the act, as applied to the individual, conforms to constitutional due process in giving the one regulated adequate notice of the existence of the order for which enforcement is sought and sufficient opportunity to be heard or to exhaust his administrative remedy, under the facts of the particular case, is one which a court, particularly in a criminal proceeding, would be reluctant to ignore." (*Ibid.*)

Of course, at no point has social media offered any United States Supreme Court authority that directly addresses the federal constitutionality of the SCA as it relates to criminal defendants seeking social media content by way of subpoena, and any federal appellate and/or district court citations provided are all over the map on this novel and quickly growing phenomenon and legal conflict. The SCA itself was enacted over 29 years ago when no one even knew or could really contemplate how huge the

social media way of life would become in the twenty-first century or what Facebook was. Moreover, the United States Congress has done little to update a very dated and legally insufficient federal statute in light of how pervasive the digital world has become.

Faced with social media users who were of paramount importance to the prosecution and defense of real party's case, respondent court conducted a proper review of the corresponding federal and state case law, considered the federal statutory SCA privacy rights of these social media users, and weighed real parties' federal and state constitutional rights to due process, compulsory evidence, competent attorneys, and a speedy trial to ultimately conclude that real parties should receive this information for presentation at the upcoming jury trial. Respondent court possessed the legal authority and took the responsibility to make this very reasonable and measured determination that, as framed by the facts of this case, real party had a federal constitutional right to this social media content despite what petitioner argues the SCA prohibits. In no way did respondent court abuse its discretion in rendering this federal constitutional ruling of a federal statute, but instead invoked its constitutional authority as a member of the third branch to make such a ruling. The fact that it was a federal constitutional decision affecting a federal statute has no moment to its responsibility.

Social media continues to argue that cases like *Negro v. Superior Court* (2015) 230 Cal.App.4th 879 and *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, have already settled this issue in California, holding that the federal Stored Communications Act preempted civil discovery subpoenas served on e-mail service providers seeking e-mail documents identifying persons who supplied content. However, these lower court decisions involved only the civil subpoena process where other means of

discovery to the parties existed – interrogatories and depositions – that do not exist in criminal prosecutions. Finally, these cases did not address any federal constitutional issues raised by this case and which are germane to all state criminal prosecutions. As such, *Negro v. Superior Court, supra,* and *O'Grady v. Superior Court, supra*, should be disregarded.

## CONCLUSION

For all of the reasons advanced by real party, fellow *amici*, and CACJ as discussed above, this Court should reverse the Court of Appeal's decision and order Facebook to comply with the subpoena as ordered by the respondent court.

Dated: May 8, 2018

Respectfully submitted,

Stephen K Dunkle, Chair
John T. Philipsborn, Vice Chair
CACJ Amicus Committee
Donald E. Landis, Jr
Counsel of Record for CACJ

DONALD E. LANDIS, JR.
State Bar No. 149006
Attorney for *Amicus Curiae* CACJ

## RULE 8.204 (c)(1) CERTIFICATION

I, Donald E. Landis, Jr., declare as follows:

I represent petitioner on the matter pending in this court. This *Amicus Curiae* was prepared in Wordperfect X7, and according to that program's word count, it contains 4024 words.

I declare under penalty of perjury the above is true and correct. Executed on May 8, 2018, in Carmel, California.

DONALD E. LANDIS, JR.
State Bar No. 149006
Declarant

## PROOF OF SERVICE

I am employed in the City of Carmel, California, in the State of California. I am over the age of eighteen and not a party to the above-captioned action. My business address is P.O. Box 221278, Carmel, California 93922. On the date below, I served the following document(s) on all parties:

**APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE TO APPEAR AS *AMICUS CURIAE* ON BEHALF OF REAL PARTY IN INTEREST PURSUANT TO CALIFORNIA RULE OF COURT, RULE 8.520 (f), AND BRIEF IN SUPPORT OF REAL PARTY IN INTEREST.**

[x] (By Mail) - I am readily familiar with my office's practices for collection and processing of correspondence for mailing with the United States Postal Services. It is deposited with the U.S. Postal Service on the same day in the ordinary course of business. On the date shown below, I placed a true copy enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in Salinas, California, addressed as follows:

| | |
|---|---|
| Superior Court of San Diego County : Respondent<br>Central - Downtown Courthouse<br>P.O. Box 122724<br>San Diego, CA 92112 | Katherine Ilse Tesch<br>Office of the Alternate Public Defender<br>450 B Street, Suite 1200<br>San Diego, CA 92101 |
| Joshua Seth Lipshutz<br>Gibson, Dunn & Crutcher LLP<br>555 Mission Street<br>San Francisco, CA 94105 | Michael J. Holecek<br>Gibson Dunn & Crutcher LLP<br>333 South Grand Avenue<br>Los Angeles, CA 90071-1512 |
| Christian Lee<br>Perkins Coie LLP<br>3150 Porter Drive<br>Palo Alto, CA 94304-1212 | James G. Snell<br>Perkins Coie LLP<br>3150 Porter Drive<br>Palo Alto, CA 94304 |

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| Stephen K. Dunkel<br>Sanger Swysen & Dunkel<br>125 E De La Guerra Street, Suite 102<br>Santa Barbara, CA 93101 | John T. Philipsborn<br>Law Offices of J.T. Philipsborn<br>Civic Center Building<br>507 Polk Street, Ste. 350<br>San Francisco, CA 94102 |
| Michael C. McMahon,<br>800 S. Victoria Avenue<br>Ventura, California 93009 | Court of Appeal, Fourth Appellate District, Division One 750 B Street, Suite 300, San Diego, California 92101 |

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in the City of Carmel, California, on May 9, 2018.

DONALD E. LANDIS, JR.
Declarant