Case No. S206350

SUPREME COURT OF THE STATE OF CALIFORNIA

RIVERSIDE COUNTY SHERIFFS' DEPARTMENT,
Petitioner/Respondent,

v.

JAN STIGLITZ,
Respondent.

RIVERSIDE SHERIFFS' ASSOCIATION,
Intervenor/Appellant.

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

After a Published Decision by the Court of Appeal
of the State of California Fourth Appellate District,
Division Two, Case No. E052729

Riverside County Superior Court
The Honorable Mac R. Fisher, Judge
Case No. RIC10004998

ANSWER TO PETITION FOR REVIEW

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Real Party in Interest and Appellant KRISTY DRINKWATER ["Drinkwater" or "Appellant"] respectfully requests this Court to deny Respondent, RIVERSIDE COUNTY SHERIFF'S DEPARTMENT'S ["Department"] petition for review of the published decision and opinion filed by the Fourth District Court of Appeal, Division Two, on September 28, 2012, in *Riverside County Sheriff's Department v. Jan Stiglitz, et al.* (2012) 209 Cal.App.4th 883 (Court of Appeal No. E052729).

I.

ISSUE PRESENTED FOR REVIEW

The opinion of the Court of Appeal well states the law and the legislative intent of the State of California as expressed in statutes governing the discovery of peace officer personnel records and applies the law correctly in the case presented. The Department's Petition for Review should therefore be denied. If, however, Petition for Review is granted, which it should not be, Drinkwater requests review of the following additional issues: (1) whether at the time, there was a long-standing past practice under the Memorandum of Understanding ["MOU"] between the County of Riverside and the Riverside Sheriffs' Association ["RSA"], that featured litigation of so-called *Pitchess*

motions and opposition thereto before hearing officers in MOU Article XII administrative appeals, in which the Department never objected to the hearing officers' authority under the MOU to hear and decide these motions; (2) what is the effect of this established past practice on the case at bar, which neither the trial court nor the Court of Appeal addressed although invited by Drinkwater to do so; and (3) whether this Court should take judicial notice of Hearing Officer Jan Stigltiz' curriculum vitae and standing as an attorney and law professor as evidence of his training and qualifications to hear and decide *Pitchess* motions in the course of MOU Article XII administrative appeals.

II.

STATEMENT OF THE CASE

Drinkwater was employed by the Department as a correctional deputy. Following an administrative investigation, on March 11, 2009, the Department terminated Drinkwater alleging that she had knowingly falsified her payroll form in order to receive compensation to which she was not entitled. Drinkwater timely appealed the termination pursuant to the terms of the MOU between the County of Riverside and RSA. The MOU in effect at the time of Drinkwater's termination provided for a disciplinary appeal procedure whereby correctional deputies, on appeal, would be afforded a hearing as provided for by *Government Code* §3304, subsection (b) ["§3304(b)"]. The

MOU provided that the hearing would be presided over by a mutually agreed-upon hearing officer (Stiglitz). The names of the hearing officers appear in the MOU and are agreed upon by the RSA and the County of Riverside.

As provided by the MOU, the hearing officer has the authority to "sustain, modify, or rescind an appealed disciplinary action" and this decision is final, subject to the right of either party to seek judicial review pursuant to *Code of Civil Procedure* §1094.5. Thus, the hearing officer's finding and opinion routinely addresses the question, "Was the Discipline Appropriate?"

A central part of Drinkwater's defense was (and remains) that the penalty of termination was disproportionate to any alleged misconduct as other Department employees who have been found to have engaged in the same or similar misconduct were not discharged. Seeking evidence in support of this position, Drinkwater submitted a so-called *Pitchess* motion to Stiglitz[1]. In her motion, Drinkwater sought discovery of the disciplinary records of specifically-identified Department employees that she believed had either been investigated or disciplined for similar allegations and misconduct. Drinkwater's motion was narrowly tailored to the production of only certain records and, in an effort to maintain the employee's confidentiality,

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[1]Referencing the process by which a moving party may access confidential peace officer personnel files as promulgated in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and later codified in *Evidence Code* §1043, *et seq.*

Drinkwater proposed the employee's identity be redacted from any produced records. Finding good cause, Stiglitz granted Drinkwater's motion.

Thereafter, the Court of Appeal, First Appellate District, issued its opinion in *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, holding that hearing officers in DMV administrative per se hearings did not have statutory authority to hear *Pitchess* motions. The Department presented this opinion to the trial court at hearing on its petition for writ of mandamus and argued that it applied to all administrative hearing officers, including Stiglitz. The superior court granted the petition. Drinkwater (and RSA as Intervenor) appealed the ruling. Subsequently, the Court of Appeal ordered additional briefing as well as invited and received oral argument on the case. In a unanimous and published opinion authored by Presiding Justice McKinster, the Court of Appeal held that so-called *Pitchess* motions can be brought in administrative appeal hearings in police discipline cases, to discover evidence of excessive or disproportionate ("disparate") penalties, for the purpose of showing that others who committed substantially similar misconduct were not penalized to the same degree as the appellants in such cases.

III.

ARGUMENT

A. Grounds For Supreme Court Review Are Not Present

1. Supreme Court Review Is Not Necessary To Secure Uniformity Of Decisions

a. The Opinion Does Not Conflict with the Published Decision of the First Appellate District in *Brown v. Valverde* (2010) 183 Cal.App.4th 1531.

The Department erroneously asserts that the opinion of the Court of Appeal, Fourth Appellate District, conflicts with the opinion of the First Appellate District in *Brown v. Valverde*, (2010) 184 Cal.App.4th 1531. To the contrary, there is *harmony* between the two opinions, not conflict. Indeed, *Brown v. Valverde, supra*, only applies to administrative per se DMV hearings, *not Government Code* § 3304(b) appeals. The Court of Appeal correctly differentiated *Brown* from this case, noting that *Brown* only addressed "**a single issue of law**." *Brown v. Valderde*, at p. 1535 [Emphasis added]. (See also Slip Op., 20 citing *Brown* at p. 1546 ["The issue before us is whether a *Pitchess* motion is available in a DMV administrative per se hearing."]; and *id.* at pp. 1547-1559 [lengthy discussion by the court under the heading, "*Pitchess* Discovery Is Not Available in DMV Administrative Per Se Hearings"]). The case at bar concerns whether a so-called *Pitchess* motion

may be brought in a §3304(b) appeal. DMV administrative per se hearings are governed by *Vehicle Code* §13350 *et seq.*, an entirely separate statutory scheme with no applicability whatsoever to the current case.

The most telling evidence that there is no conflict between the two decisions is the concurrence by both courts that *Brown* does not hold that *Pitchess* motions may never be properly heard in an administrative proceeding. In *Brown*, the court expressly held that *Evidence Code* §1043's use of the term "administrative body" is not "surplusage" and that ". . . there may be administrative proceedings in which *Pitchess* discovery is permitted" but that a DMV administrative per se hearing is not one of those administrative proceedings. *Brown v. Valverde*, 183 Cal.App.4th at p. 1549.[2] The Fourth Appellate District agreed with the *Brown* court, holding that ". . . in the course of deciding the narrow issue presented . . . the court ultimately found itself forced to conclude that the scheme does not *foreclose* the use of *Pitchess* motions in all types of administrative proceedings. Rather, because *Evidence Code* section 1043 directs that a written *Pitchess* motion shall be filed 'with the appropriate court or administrative body,' the court held that the Legislature **intended** *Pitchess* discovery to be available in some types of

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[2]The court further stated that it was "clear" that the "Legislature did not intend *Evidence Code* sections 1043 and 1045 and *Penal Code* sections 832.7 and 832.8 to apply to DMV administrative per se hearings." *Brown, id.* at p. 155.

administrative proceedings." (Citations omitted) [Emphasis added] [Slip Op., at pp. 20-21]. Thus, the two decisions are in complete harmony and do not present a conflict. The Court of Appeal correctly determined that the *Brown* ruling applies only to DMV administrative per se hearings and its opinion does not conflict with *Brown*.

b. The Opinion Correctly Interprets *Brown's* Limited Applicability To Administrative Per Se DMV Hearings

Brown is also distinguishable because, quite clearly, the First Appellate District never intended for its ruling to be expanded beyond a DMV administrative per se hearing and certainly not stretched to the degree the Department advocates in its Petition for Review. Primarily, the court noted that the DMV administrative per se law (whereby the DMV immediately suspends the driver's licence of a person who is driving while intoxicated) was crafted and deemed necessary due to the "time lag" which "often occurs between the arrest and a conviction for driving while intoxicated." *Brown, supra,* at 1536. Thus, the administrative per se procedure serves as an expedited process to reduce court delays, serve as a deterrent and safeguard for persons using the roads and highways. The administrative per se hearing does not impose criminal penalties nor does it "restrict the ability of a prosecutor to

pursue related criminal actions." *Id.* Rather, the hearing, which may be presided over by an employee of the DMV with no legal training, simply determines whether the peace officer had reasonable cause to believe that the driver was operating a vehicle with a blood alcohol content of .08 or greater. *Id.* at 1537. This is the sole task of the hearing officer. *Id.*

Conversely, Drinkwater has sought the appeal of her termination pursuant to §3304(b). *Government Code* §§ 3300 through 3313 constitute the California Public Safety Officers' Procedural Bill of Rights Act ["POBRA"]. Although POBRA does not apply to correctional officers, the MOU provides the protections of POBRA to correctional deputies, like Drinkwater. The purpose of POBRA is protection and preservation of public safety officers' fundamental rights. An abundance of decisional law acknowledges this fact. "POBRA 'provides procedural guarantees to public safety officers under investigation.' " *Perez v. City of Los Angeles*, 167 Cal.App.4th 118, 122 (2008) (quoting *City of Los Angeles v. Superior Court* (*Labio*), 57 Cal.App.4th 1506, 1512 (1997)). "The 'Act "provides a catalogue of **basic rights and protections which must be afforded all peace officers** by the public entities which employ them.' " *Moore v. City of Los Angeles*, 156 Cal.App.4th 373, 380-381 (2007) (emphasis added) (quoting *Runyan v. Ellis*, 40 Cal.App.4th 961, 964 (1995)). Additionally, "'[T]he total effect of this legislation [i.e.,

POBRA] is not to deprive local governments of the right to manage and control their police departments but to secure basic rights and protections to a segment of public employees who were thought unable to secure them for themselves.' " *Upland Police Officer Ass'n v. City of Upland*, 111 Cal.App.4th 1294, 1302 (2003) (quoting *Baggett v. Gates*, 32 Cal. 3d 128, 135 (1982)).

The Department incorrectly and misleadingly asserts that the court has sought to rewrite §3304(b) under the "blanket guise" of due process. [Department's Petition for Review, page 4, lines 2-3]. In reality, the court has only aligned itself with the courts in the aforementioned cases. Similar to those cases, the court held that Drinkwater is entitled to certain rights and protections, to wit, a hearing pursuant to §3304(b). Further, that at this hearing, Drinkwater should be permitted to exercise her constitutional right to due process and present a meaningful defense (i.e., disparate penalty). The court did not state, imply or infer that §3304(b) contained language regarding *Pitchess* discovery. Rather, the court references §3304(b) to illustrate the inherent difference between such a hearing and a DMV administrative per se hearing. [Slip Op., p. 21]. In fact, the court exemplified the difference between a §3304(b) hearing and a DMV administrative per se hearing when it held that as "*Brown* points out . . . the statutes which govern the DMV administrative per se hearings contain no provision for discovery of law

enforcement personnel records (Citations omitted). These statutes do not apply to a section 3304(b) hearing." [Slip Op., p. 21]. "*Brown* also concluded that *Pitchess* motions may not be brought in an administrative per se hearing because the arresting officer's personnel records are not relevant to the *extremely limited issue to be decided* in those hearings. [Emphasis added.] However, personnel records of other officers may be relevant in a section 3304(b) hearing where . . . the defense is that the punishment imposed is excessive." [Slip Op., pp. 21-22].

Lastly, the court's decision does not suggest that Drinkwater's right to due process somehow overrides the discovery process for peace officer personnel records. In its opinion, the court provides yet another example of why *Brown* is completely distinguishable from Drinkwater. In *Brown*, the court questioned the relevance of the *Pitchess* discovery sought by the appellant. There, the appellant sought information regarding citizen complaints, effecting illegal arrests, fabricating evidence and offering false testimony, even records regarding the officer's inability to participate in the hearing, as contained within the arresting officer's confidential personnel record. The appellant argued this information was related to the officer's credibility. The court denied the motion, holding that "the role of the DMV officer is to determine three things, whether (1) the arresting officer had

reasonable cause to believe the driver was driving under the influence; (2) the driver was lawfully placed under arrest; and (3) the driver was driving with a BAC of 0.08 percent or greater. (Internal citations omitted). That records in the arresting officer's personnel file could have any bearing on these questions is dubious." *Brown v. Valverde*, 183 Cal.App.4th at p. 1557.

Contrariwise, and as noted by the court in the instant matter, in a disciplinary appeal, "disparate treatment is . . . a recognized defense" and "a penalty which is greatly in excess of the penalty imposed in similar circumstances may constitute an abuse of the disciplinary body's discretion." [Slip Op., at p. 22, citing *Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230 at pp. 229-231; *Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 104 at pp. 104-106). In such a scenario, the personnel records of other officers may be relevant. "For all these reasons, *Brown* is completely distinguishable from the present case." [Slip Op., at p. 23]. The opinion should therefore stand and the Petition for Review should be denied.

2. Review Is Not Necessary To Settle An Important Question Of Law

a. The Opinion Correctly Interprets The Statutory Schemes Applicable To The Discovery Of Peace Officer Personnel Records

In the opinion, the court noted that the "phrasing of the trial court's ruling is somewhat unclear." [Slip Op., at pg. 13]. However, the court determined that the question presented was one of statutory interpretation and it therefore properly reviewed the statutory scheme independently. *Id.*, citing *McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, 1331.

The court determined that "because *Evidence Code* §1043 provides that a *Pitchess* motion is to be made in 'the appropriate court or administrative body,' *Pitchess* discovery is available in at least some administrative proceedings." [Slip Op., at p. 24]. In its Petition for Review, the Department has once again re-asserted the same unsuccessful argument that *Evidence Code* §1043's reference to an "administrative body" should be disregarded in light of *Evidence Code* §1045's reference to "the court." Yet, in its opinion, the court acknowledged the ambiguity [Slip Op., at p. 25] and provided a lengthy, 8-page discussion that effectively resolves the ambiguity. [Slip Op., at pp. 24-32]. The Department's Petition for Review asks that this Court disregard the Court of Appeal's well-reasoned and sound analysis to consider an argument that has already failed to pass muster. In support of its position, the Department suggests that Justices King and Richli asked passing questions at oral argument in regard to fashioning an alternative practice for *Pitchess* motions. However, the Justices quite obviously abandoned this idea, assuming

arguendo, that the notion was even seriously considered at some point, when they concurred with the published opinion.

"In determining the meaning or application of statute, a court's task is to determine the intent of the Legislature." [Slip Op., p. 24]. Thus, the Court of Appeal first looked to statutory language "as it is normally the clearest indication of the Legislature's intent" (Slip Op., p. 24, citing *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1-94, 1103)]. Upon determining that ambiguity exists between *Evidence Code* §§1043 and 1045 (which references *Evid. Code* §915), the court next relied on extrinsic aids to attempt to ascertain the Legislature's intent. *Ibid.* The court thoroughly analyzed the language in *Evidence Code* §§1043, 1045 and 915 and concluded that "strong evidence" existed that the Legislature **did not** intend for *Pitchess* motions to only be decided by the courts. [Emphasis added.] [Slip Op., at p. 26]. The court reasoned that such an interpretation clearly conflicts with the due process rights afforded to peace officers in disciplinary hearings by §3304(b). *Id.* Due process in a §3304(b) hearing necessarily requires that the appellant be provided the "opportunity for a full evidentiary hearing" [Slip Op., at p. 27 citing *Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1329-1331] as well as the "opportunity to present a meaningful defense" [*Id.* citing *Petrus*

v. Department of Motor Vehicles (2011) 194 Cal.App.4th 1240, 1244; and *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 792-794]. "Accordingly, where that defense (disparate treatment) is raised in a section 3304(b) hearing, due process mandates that the officer who is subject to discipline must have the opportunity to demonstrate the relevance of the personnel records of other officers." [Slip Op., at p. 28].

Moreover, the court held that it "cannot simply read the phrase 'administrative body' out of Evidence Code § 1043" as the Department would have the courts do. [Slip Op., at p. 26]. To do so would be to flagrantly ignore the Legislature's express intent. "It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided." [Slip Op., at p. 26 citing *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010)]. Thus, the court held that there is "no justification for interpreting *Evidence Code* section 1043 in such a way to render the phrase 'or administrative body' meaningless." [Slip Op., at p. 27].

Lastly, the court concluded that *Brown* failed to address how a party seeking *Pitchess* discovery in an administrative proceeding would invoke the jurisdiction of a court to rule on the motion. The Department's suggestion that "only a court be permitted to review the actual records *in camera* and issue

orders regarding their disclosure" [Department's Pet. for Review, pg. 7] would flood the courts with *Pitchess* motions unrelated to any underlying judicial proceeding and reduce the already overwhelmed judicial officers to intermittent discovery referees. This is hardly a solution and, more importantly, it was rejected by the Court of Appeal.

Contrary to the Department's hyperbole that the court's decision will permit administrative hearing officers who are "not even lawyers," and who are "powerless to determine the sensitive privilege issues" [Department's Pet. for Review, at p. 8], Stiglitz, like the other hearing officers approved by MOU, is a lawyer. In fact, not only is Stiglitz a lawyer in good standing with the State Bar of California, he is also a law professor, a highly-regarded appellate lawyer and the Director of the California Innocence Project. This is yet another distinction between the present case and *Brown, supra*, where the hearing officers were DMV employees with no legal training. The opinion should therefore stand and the Petition for Review should be denied.

B. <u>The Petition For Review Should Not Be Granted Simply Because The Opinion Has Widespread State Application</u>

This issue does have widespread statewide application and rightly so. Respectfully however, this is not grounds for granting review. Indeed, this argument could be made for almost any case or issue seeking this Court's

review. Furthermore, the Department offers no evidence in support of its position that administrative hearings have proceeded for years without non-judicial officers considering *Pitchess* motions. In fact, in this case, Drinkwater has demonstrated that the Department has participated in *Pitchess* motions with administrative hearing officers sufficient to establish a past practice. The Court of Appeal declined to rule on this issue as it was a moot issue in light of the court's ruling that administrative hearing officers can hear and rule on *Pitchess* motions in §3304(b) appeals.

1. The Opinion Does Not Remove Any Procedural Safeguards From The Statutory Scheme Nor Does The Opinion Expand The *Pitchess* Discovery Process Beyond The Intention Of The Legislature.

Drinkwater has never argued, nor does the opinion suggest, that confidential peace officer personnel records under *Penal Code* §§ 832.5 and 832.7 should be disclosed without compliance with the appropriate procedures under *Evidence Code* §§ 1043 and 1045. This includes notice, an affidavit showing good cause and materiality of the records to the pending litigation, and a determination of good cause and *in camera* review by the presiding hearing officer. The issue in the present case was whether a hearing officer may rule on a motion for peace officer personnel records pursuant to *Evidence*

Code §§ 1043 and 1045, not whether a hearing officer may order disclosure of confidential personnel records in response to a simple "request" or "motion for discovery." If a motion is brought in compliance with the requirements of *Evidence Code* § 1043, and the hearing officer finds good cause and reviews the records for relevance before ordering disclosure, pursuant to § 1045, it cannot be said that there has been disclosure without compliance with *Pitchess* procedures.

Thus, the Department's argument on this point lacks merit. In fact, the Department's argument seems to consistently ignore the fact that disclosure of peace officer personnel records pursuant to a *Evidence Code* § 1043 motion, whether in court or in an administrative hearing, requires a finding of good cause before the records are even ordered to be produced, **and then** a finding of relevance after an *in camera* review before the records are ordered to be turned over to the moving party; not simply a determination made in response to a mere "request." Therefore, an officer whose records are sought does not have to fear any loss of confidentiality. This is particularly true in the present case where Drinkwater requested the identities of the officers be redacted. It is not the officer's identity which is sought by Drinkwater, it is the Department's imposition of discipline. Additionally, officers will not "forever" be concerned that prior discipline will be raised in an administrative

appeal.[3] The Department has attempted to create a picture of a world gone wild and run amuck with *Pitchess* motions. Not only is this grandstanding unfounded, it also ignores the requirements promulgated by the statutory scheme and reaffirmed by the Court of Appeal. In the opinion, the court held that "[t]he Legislature devised the *Pitchess* procedure specifically to balance privacy concerns with legitimate discovery needs, and provided that where *Pitchess* materials are relevant, privacy interests must give way to the legitimate interests of parties to litigation." [Slip Op., at p. 30 citing *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74 at pp. 83-83]. Further, the court held that the officer's privacy concerns have an "additional layer of protection" in that it is "precisely *because* of the privacy interests involved" that "administrative mandamus is available to provide judicial review of a hearing officer's order for production of officer personnel records before the records are actually produced." [Slip Op., at p. 31]. The Department's assertion that the hearing officer lacks the power to protect the file is absurd and superfluous. The hearing officer is required to follow the *Pitchess* procedure and review the personnel records *in camera* prior to rendering any decision. The procedure has not been altered by the opinion. In fact, the opinion emphasizes that this procedure will continued to be

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[3] *Pitchess* discovery only encompasses the previous five years.

followed. [Slip Op., at pp. 30-32].

Finally, the Department claims that *Brown* "got it right" because the *Pitchess* discovery process has "never been expanded to non-judicial administrative hearings in over 30 years." However, the *Brown* court acknowledged that it was a case of first impression (the decision is only two years old) and that the ruling only applied to DMV administrative per se hearings. This is hardly "strong evidence" that review should be granted. There simply is no conflict. *Brown* only applies to DMV administrative per se hearings and the instant case applies to §3304(b) hearings. The Court of Appeal made this overwhelmingly clear in its opinion.

IV.

CONCLUSION

For the foregoing reasons, Real Party in Interest and Appellant Kristy Drinkwater respectfully requests that this Court deny the Petition for Review.

Dated: November 16, 2012

STONE BUSAILAH, LLP

Michael P. Stone

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Appellant Kristy Drinkwater

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.504(d)(1), I certify that this brief contains 4196 words, as determined by the word-count function of WordPerfect, the word processing program used to create the answer.

Dated: November 16, 2012

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J.C. ALLEN
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 200 E. Del Mar Blvd., Suite 350, Pasadena, CA 91105

On November 16 2012, I served the foregoing document described as ANSWER TO PETITION FOR REVIEW on the following interested parties in this action

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/x/ VIA MAIL

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/X/ (State) I declare under penalty of perjury under that laws of the State of California that the foregoing is true and correct.

Executed on November 16 2012, at Pasadena, California.

Patricia Brady

Patricia Brady