Case No. S243855

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,
Respondent/Appellee

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,
Real Party in Interest.

After an Order by the Court of Appeal, Second Appellate District, Case No. B280676, Los Angeles County Superior Court Case No. BS166063, Hon. James C. Chalfant, Judge

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND [PROPOSED] BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER/APPELLANT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court 8.208

Pursuant to California Rule of Court 8.488, Amici Curiae, PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA and the PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA LEGAL DEFENSE FUND, by and through the undersigned counsel, certify that there are no interested entities or persons that must be listed in this Certificate under Rule 8.488.

Dated: February 22, 2019

MASTAGNI HOLSTEDT, APC

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APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER/APPELLANT

TO THE HONORABLE CHIEF JUSTICE TANI GORRE CANTIL-SAKAUYE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Cal. Rules of Court, Rule 8.520(f), the Amici Curiae respectfully ask for leave to file the attached brief in support of Petitioner/Appellant, Association for Los Angeles Deputy Sheriffs.

I.
THE AMICI CURIAE

This application is submitted on behalf of Amici Curiae Peace Officers Research Association of California ("PORAC") and the PORAC Legal Defense Fund ("LDF").

PORAC is a statewide, professional federation of local, state, and federal law enforcement agencies. Representing almost 70,000 public safety employees, it is the largest law enforcement organization in California, and the largest statewide association in the United States.

PORAC LDF is the nation's oldest and largest public safety legal plan, serving over 120,000 members nationwide. LDF provides representation to peace officers in administrative and criminal proceedings arising from the course and scope of employment.

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II.
INTEREST OF AMICI CURIAE

The Amici have a significant interest in the resolution of this issue, as they represent peace officers employed by state and local agencies throughout the State of California. As peace officers, Amici's members will be directly impacted by how the Court construes SB 1421, specifically the Court's determination on the law's impact on records created before 2019.

The Court's interpretation of SB 1421 will likely determine whether various peace officer personnel records, including records relating to use of force incidents, sustained findings of dishonesty, and sustained findings of sexual misconduct, are subject to disclosure as public records. Moreover, PORAC members made irreversible decisions, based on expectations of confidentiality, about whether to provide videotaped statements, whether to waive Fifth Amendment rights when giving statements, and whether to accept disciplinary actions instead of fighting them. They have an especially keen interest in preserving the confidentiality of these records.

Likewise, members' employing agencies made determinations about whether to include otherwise protected information in investigation records, which may now be subject to disclosure because the information is only protected from disclosure under state law. SB 1421 removed such state law protections from these records. As such, agencies' decisions to include such information in records for use of force investigations, could result in the

agencies publicly disclosing otherwise protected information if SB 1421 requires the disclosure of pre-2019 records. Disclosing pre-2019 records will thus greatly upset the reasonable expectation that records concerning Amici's members would not be subject to public scrutiny.

Finally, the Amici have an interest in obtaining this Court's interpretation of SB 1421, to provide the lower courts guidance on issues relating to the disclosure of peace officer records. PORAC members and their employee associations have commenced litigation in superior courts throughout the state, and are in the process of patchwork adjudication of issues relating to the application of SB 1421. Already, conflicting rulings have been issued in Contra Costa County, Ventura County, and Los Angeles County. Even the Office of the Attorney General has said it is waiting for guidance from a higher court regarding whether SB 1421 applies to documents created before January 1, 2019 before releasing such documents. (See Goldberg, Ted, "Free Speech Advocates Blast California A.G. for Refusing to Release Police Misconduct Files," KQED.org, February 5, 2019 (available at https://www.kqed.org/news/11723281/california-attorney-general-refuses-to-release-police-misconduct-files-despite-new-law.))

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III.
NEED FOR FURTHER BRIEFING

Amici are familiar with the issues before the Court and the scope of their presentation. They believe further briefing is necessary to address matters not fully considered by the parties' briefs, to ensure that the issues affecting PORAC, LDF, and their members are fully heard and considered by this Court.

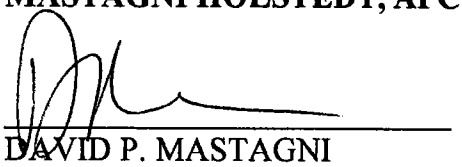
IV.
CONCLUSION

For the foregoing reasons, the Amici respectfully ask the Court to accept the accompanying brief for filing in this case.[1]

Respectfully submitted,

Dated: February 22, 2019

MASTAGNI HOLSTEDT, APC



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[1] Pursuant to California Rule of Court 8.520(f)(4), no party to this case authored the accompanying amicus brief in whole or in part, and no party other than the amici made a monetary contribution intended to fund the preparation or submission of the brief.

BRIEF OF AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER/APPELLANT

I.
INTRODUCTION

Senate Bill 1421 ("SB 1421") affects this case insofar as it relates to an agency's authority to provide a *Brady* tip relating to *Brady* material that is subject to disclosure under SB 1421, if it is contained in peace officer personnel records created after January 1, 2019 – the date SB 1421 went into effect. SB 1421 does not affect this appeal with respect to two issues: (1) whether *Brady* tips are permissible with respect to sustained misconduct in personnel files that is not publicly disclosable under SB 1421, but still potentially subject to disclosure under *Brady*; and (2) whether an agency may provide a *Brady* tip regarding pre-2019 records that would otherwise be disclosable under SB 1421. Amici decline to address the first issue, and instead urge this Court to hold that SB 1421 has no application to pre-2019 records. Accordingly, SB 1421 does not render moot the underlying dispute with respect to *Brady* tips involving any pre-2019 records.

SB 1421 did not retroactively destroy the confidentiality that previously attached to pre-January 1, 2019 records. Neither the plain language of the legislation, nor the legislative history supports a retroactive application of its amendments to the Penal Code. Accordingly, its enactment only affects this case insofar as it relates to post-2019 records.

II.
ARGUMENT

1. SB 1421 Partially Renders the *Brady* Tip Dispute Moot as to Certain Post January 1, 2019 *Brady* Material.

The Amici concede that, with respect to statements and records generated after January 1, 2019, SB 1421's changes to Penal Code section 832.7 allows a district attorney to bypass the *Pitchess* procedure for information relating to use of force investigations, as well as sustained findings of dishonesty and sexual misconduct. Before SB 1421's enactment, peace officer personnel records were confidential pursuant to Penal Code section 832.7, and therefore exempt from disclosure under the Public Records Act. SB 1421 amended Penal Code section 832.7 to subject several categories of records to public disclosure: (1) records relating to the discharge of a firearm by a peace officer or custodial officer; (2) records relating to use of force investigations; (3) records relating to sustained findings of dishonesty; and (4) records relating to sustained findings involving sexual assault. (Penal Code § 832.7(a).)

District attorneys, like every other citizen of the State, can now access post-2019 *Brady* material by making a Public Record Request. (Gov. Code § 6252.5.) In other words, to comply with its *Brady* obligations, a prosecuting entity can simply make a public records request for the information. (Gov. Code § 6252(c); *Connell v. Superior Court* (1997) 56 Cal.App.4th 601.) Because the California Public Records Act does not mandate what format

must be used for a public records request, a simple request for *Brady* tip information likely suffices. (*Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1392). Indeed, the prosecuting entity could submit a written public records request seeking the identity of officers subject to SB 1421 disclosures for sustained dishonesty and/or sexual misconduct, and provide that information to criminal defendants to fulfill its duty under *Brady*.

2. SB 1421 Does Not Affect the Brady Tip Dispute with Respect to Pre-2019 Records.

While Amici concede that SB 1421 may moot any dispute over the accessibility of *Brady* material in peace officers' post-2019 personnel records, there is still a live dispute over the application of these new procedures and the propriety of *Brady* tips for records generated <u>before</u> January 1, 2019. In deciding the propriety of *Brady* tips, Amici encourage this Court to find SB 1421 inapplicable to pre-2019 records because peace officers had reasonable expectations of privacy in those materials and SB 1421 did not retroactively rescind those privacy rights.

a. There is No Evidence SB 1421 Was Meant to Apply Retroactively.

Statutes are presumed to not operate retroactively. The Court must not construe SB 1421 as operating retroactively "unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828,

839; *see also Quarry v. Doe I* (2012) 53 Cal.4th 945, 955 ("In construing statutes, there is a presumption against retroactive application unless the Legislature plainly has directed otherwise by means of express language of retroactivity or. . . other sources provide a *clear and unavoidable* implication that the Legislature intended retroactive application." [emphasis added.]) "Ambiguous statutory language will not suffice to dispel the presumption against retroactivity; rather 'a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective.' " (*Quarry, supra* 53 Cal.4th at 981 (*citing Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841.)

Nothing in SB 1421 states its changes to Penal Code section 832.7 operate retroactively. The bill contains no legislative findings providing for a retroactive application, or saying the law is merely meant to clarify existing law. If the Legislature meant for SB 1421 to apply retroactively, and rescind existing privacy rights as well as modify the Evidence Code section 1043 *Pitchess* procedures to exempt select categories of records, it would and could have done so. It did not. This shows that the law was not meant to operate retroactively. (*See Aetna Casualty & Surety Co. v. Industrial Acc. Com.* (1974) 30 Cal. 2d 388, 396.)

Likewise, nothing in the legislative history describes a legislative intent to rescind peace officers' privacy rights for matters occurring before the legislation's effective date. In fact, the absence of any discussion of the

significant burden the law would impose on public agencies if it applied to pre-2019 records shows the Legislature did not intend for SB 1421 to apply retroactively.

b. Peace Officers Have a Reasonable Expectation of Privacy in Their Pre-2019 Records.

Before SB 1421 was enacted, officers had a reasonable expectation of privacy in their personnel records, as well as any compelled statements provided to their employing agency. For example, the officer's statements during an internal affairs investigation were confidential and not directly accessible by news media access. (*See, e.g., Copley Press, Inc. v. Superior Ct.* (2006) 39 Cal.4th 1272 (civil service commission's records regarding a deputy's administrative appeal of a termination were confidential personnel records, and therefore exempt from disclosure); *Berkeley Police Assn. v. City of Berkeley*(2008) 167 Cal.App.4th 385 (records obtained through peace officer investigation were confidential personnel records, even if generated pursuant to a citizen review panel.); *City of Richmond v. Superior Ct.* (1995) 32 Cal.App.4th 1430; *Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 688 (disclosure of information regarding every person arrested for certain offenses by two named deputies over a ten year period was not authorized by the Public Records Act.))

Further, pursuant to this Court's decisions in *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, and *Spielbauer v. County of Santa Clara*

(2009) 45 Cal. 4th 704, there were strict limitations on district attorney access to and use of compelled statements, which created an expectation of privacy. These statements remained confidential to the public, subject only to disclosure in the limited circumstances provided under Evidence Code section 1043 (the *Pitchess* procedure). Any materials secured were subject to a protective order prohibiting their use "for any purpose other than a court proceeding." (Evid. Code § 1045(e).) The information disclosed did not include verbatim reports, transcripts or recordings of statements secured during the internal misconduct investigation. (*See, e.g.*, *Ballard v. Superior Court* (1966) 64 Cal.2d 159, 167 [blanket requests for all available information improper]; *Arcelona v. Municipal Court* (1980) 113 Cal.App.3d 523, 530-531 ["The scope of disclosure of verbatim reports of internal investigations once generally permitted. . . is now circumscribed under the statutory scheme."]; *Azusa v. Superior Court* (1987) 191 Cal.App.3d 693, 696-697 [plaintiffs were "entitled, at most, to the names and addresses of other persons who complained."].) Indeed, in *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83, this Court, in balancing the officer's privacy interest and the criminal defendant's need for disclosure noted: "As a further safeguard...the courts have generally refused to disclose verbatim reports or records *of any kind* from peace officer personnel files," and instead have revealed "only the name, address, and phone number of any

prior complainants and witnesses." SB 1421 upended that carefully crafted balancing of privacy interests.

Records now subject to public release under SB 1421 also have confidentiality protections under the Public Safety Officers' Procedural Bill of Rights Act, Government Code section 3300, *et seq.* (hereafter "POBR.") Under that statutory scheme, public agencies are prohibited from subjecting an officer to the news media without consent. (Gov. Code § 3303(e).) SB 1421 changed that, as the news media now has direct access to such statements by the simple expedient of a Public Records Act request.

POBR further protects officers from having their photographic image disseminated to the news media without his or her consent. (Gov. Code § 3303(g).) Based on that protection, as well as the confidentiality protections of Penal Code section 832.7, officers regularly gave videotaped statements during investigations, in reliance on, the assurances of their employing agencies that the videos would only be used for law enforcement agency needs, as well as the limited dissemination under *Pitchess* procedures utilizing the protective order mandates of Evidence Code section 1045. Pre-January 1, 2019, officers agreeing to give statements on video had a reasonable expectation their video statements would not be disclosed to the public, published in the media, nor subject to widespread internet dissemination, posted on social media, or available on YouTube. These protections were especially important for officers in the context of life and

death encounters because they protected the officers' privacy interests in the video capture of their emotional retelling of those incidents.

Before SB 1421's enactment, the circumstances in which those videos would be accessible was strictly limited. SB 1421 thus created a *significant* change in the law. For example, in past use of force investigations, officers often consented to be photographed and gave video statements with the expectation, based on state law, that the photographs and videos would not be disseminated to the public. Officers may now opt to provide only an audio-recorded statement rather than a video-recorded statement in order to preserve the privacy of their emotional reactions and physical images. The irrevocable decision can now lead to ridicule and harassment of the officer, and his or her family, both in person, and online. (*See* the so-called "Stockton Police Department Corruption Reporting Page 3.0" Facebook group, which posts photos of officers (available at https://www.facebook.com/pages/category/Political-Organization/Stockton-Police-Department-Corruption-Reporting-Page-30-384375081724384/); Had the officers known these photographs and videos would be subject to disclosure, they would have provided only audio statements. Many officers are doing just that, now that SB 1421 is the law of the land.

The Penal Code, before January 1, 2019, defined confidential peace officer personnel records as "any file maintained under that individual's name by his or her employing agency and containing records relating to ...

employee advancement, appraisal, or discipline"... and "complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties." (Penal Code § 832.8(d),(e).) As a result, these records were largely exempt from public disclosure, unless obtained pursuant to *Pitchess* procedure, which is codified in Evidence Code sections 1043-45. Peace officers thus had a reasonable expectation that their personnel records would not be disclosed (absent compliance with *Pitchess*). Indeed, this Court previously recognized that a peace officer has a "legitimate expectation of privacy in his or her personnel records." (*People v. Mooc* (2001) 26 Cal.4th 1216.)

A peace officer's right to privacy in pre-2019 records arose when the records are generated–not when a public records request is submitted. SB 1421, if applied retroactively, would remove confidentiality for peace officer personnel records relating to: (1) officer involved shootings; (2) uses of force resulting in death or great bodily injury; (3) sustained findings of sexual assault involving a member of the public; and (4) sustained findings of dishonesty. This retroactively destroys officers' expectations of privacy in those records, including the videotaped recordings of statements provided during officer involved shootings and CSI photos, among other things.

The fact that some of these records were available through the *Pitchess* process does not contravene these privacy rights. SB 1421

categorically strips confidentiality from records relating to shootings, uses of force, sustained findings of dishonesty, and sustained findings of sexual assault on members of the public. Under SB 1421, any member of the public can examine these records. Before SB 1421's enactment, the *Pitchess* procedure was the exclusive means to obtain peace officer personnel records. It was limited to litigants who had a special need for the information, was limited in scope, and required an *in camera* review by a court to determine whether the records should be produced. Such records could not be obtained through a public records request. Many privacy laws allow for limited disclosure of information to parties with a special need to access it.[2] These records remain confidential, notwithstanding the limited disclosure. Indeed, with respect to the *Pitchess* process, Evidence Code section 1045(e) mandated that protective orders issue, which prevented the dissemination of these materials to the public or on the internet, or even their use in other proceedings. This Court described the *Pitchess* process as a veritable model of clarity and balance. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83.)

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[2]For example, information obtained in the course of providing services to a mentally disordered individual, who is detained and taken into a custody by a peace officer, are confidential and even though they may be disclosed to enumerated recipients and for purposes specified in state law. (Welf. & Inst. Code §§ 5150, 5328.) The same is true for records and information law enforcement agencies gather, relating to the detention of minors. (Welf. & Inst. Code § 827, 828.))

c. Subjecting Pre-2019 Records to Disclosure Pursuant to SB 1421 Constitutes a Retroactive Application of the Law.

"A law has a retroactive effect when it functions to change[] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct." (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 956.) In determining whether a particular application of the law is retroactive, the court must consider "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event . . . familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." (*Id.* citing *In re E.J.* (2010) 47 Cal.4th 1258, 1273.)

For example, prior to SB 1421 officers facing disciplinary action might enter into settlement agreements that sacrificed the right to appeal to avoid protracted litigation and foster stability in labor relations. Those settlements generally included limitations on the disclosure of the unchallenged disciplinary findings. Indeed, a routinely bargained-for provision of a disciplinary settlement agreement prohibits the agency from disclosing the records except under the limited circumstances codified in law prior to SB 1421. As recognized in *Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, confidentiality provisions in severance agreements were permissible under public policy to protect the privacy rights of the involved individuals. If SB 1421 applies retroactively, it disrupts those

agreements and deprives officers the benefit of the contractual bargain struck. Additionally, retroactive application of SB 1421 places public agencies in the untenable position of deciding whether to breach the settlement contracts entered into prior to 2018 and subject themselves to liability, or comply with SB 1421 and release information they contractually agreed to keep private. SB 1421 certainly was not intended to place public agencies in such a precarious position or to create such a "Hobson's Choice."

Courts look disfavorably on retroactive laws, because they upset the expectations of relied on prior law in conducting their affairs. As this Court said in *Quarry*, "ordinarily, considerations of basic fairness militate against such retroactive changes." (*Quarry*, *supra* 53 Cal.4th at 955.) Thus, for example, courts have routinely invalidated laws purporting to revive expired statutes of limitations. (*See, e.g. Douglas Aircraft v. Cranston* (1962) 58 Cal.2d 462, 465 (finding new limitations period inapplicable to defendant, opining that once a statute of limitations has run, defendants "may rely upon it in conducting their affairs."))

As this Court explained in *In re E.J.* (2010) 47 Cal.4th 1258, "application of a law is retroactive only if it attaches new legal consequence to, or increases a party's liability for, an event, transaction, or conduct that was completed before the law's effective date. (*Id.* at 1273.) In that case, the Court determined that a law prohibiting sex offenders from living within 2000 feet of a school was not being applied retroactively where the sex

offenders challenging the law had not taken up residence within the prohibited area before the law's enactment. According to the Court, the law was not retroactive because it did not change the legal consequences of the plaintiff sex offenders' decision to move too close to a school zone–it was unlawful when they made the decision, and remained unlawful.

The facts in the instant case can be analogized to the facts in *Aetna Casualty & Surety Co., supra,* 30 Cal.2d 388. In that case, the law at issue changed how disability benefits were calculated. The Court found that the law could not be applied to disabilities arising from pre-existing injuries, because the operative facts giving rise to the benefits was the pre-amendment injury, not the post-amendment disability. (*Id.* at p. 392.) Even though the benefits calculation occurred after the law went into effect, applying it to calculations for injuries occurring before the enactment was thus deemed a retroactive application.

In this case, the operative act was the creation of personnel files, which occurred through giving statements, writing reports, and conducting investigations, as well as entering into disciplinary settlement agreements. SB 1421 attaches new legal consequences to decisions officers and their employing agencies made with respect to the creation of personnel records before the law went into effect.

Before SB 1421's enactment, officers reasonably relied on the expectation that peace officer personnel records were confidential, as their

disclosure was governed exclusively by the *Pitchess* process, which tightly regulated the types of records that could be disclosed, who they could be disclosed to, when they could be disclosed, and how they could be used. Officers and agencies conducted their affairs in accordance with this expectation. Before SB 1421's enactment, as discussed *supra*, officers routinely agreed to videotaped statements during officer-involved shooting investigations, believing such videos would not be released to the general public, and therefore their faces would not be disclosed to the general public. Likewise, acting on the reasonable belief that personnel records would not be disclosed to the public, officers and their employing agencies undoubtedly included various forms of otherwise protected and confidential information in those records, such as victim identities and contact information, criminal history, settlement agreements, and other matters.

Because SB 1421 subjects records relating to use of force and officer-involved shooting investigations, and sustained findings of dishonesty and sexual assault to disclosure, it changes the legal consequence of including certain information in those records that would otherwise be protected from disclosure.

Take, for example, an officer's decision to provide information about where a crime victim works during his interview after an officer-involved shooting before SB 1421's enactment. Before January 1, 2019, the officer would have no reason to believe that this decision could violate the victim's

constitutional rights. SB 1421, if construed to require the production of pre-2019 records, would drastically change the legal consequences of the officer's decision retroactively–possibly even subjecting the officer to liability.

d. Subjecting Pre-2019 Records to Disclosure Pursuant to SB 1421 Potentially Violates Crime Victims' Constitutional Rights.

Marsy's Law gives crime victims a constitutionally protected right to prevent the disclosure of any confidential information or records to the defendant or the defendant's agents, which could be used to locate or harass the victim, or which disclose confidential communications made in the course of treatment, or which are otherwise protected from disclosure. (Cal Const. Art. I, § 28.)

An officer deciding whether to provide information that could be used to locate a victim before January 1, 2019 would have no reason to consider whether doing so could violate the victim's rights under Marys's Law. At the time, such information was protected from disclosure under Penal Code section 832.7, as well as Government Code section 6254(f) and (k), which incorporate the state statutes rendering this information confidential by exempting from the Public Records Act's disclosure requirements "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

SB 1421, if construed to require the disclosure of pre-2019 records, would dramatically change the legal consequences of the officer's decision to provide this information. Because SB 1421's exemptions from disclosure do not expressly authorize agencies to withhold information on the grounds that it is protected from disclosure under state law,[3] the agency in possession of the officer's statement could not rely on Marsy's Law to justify withholding. As such, the officer's decision to provide the victim's information during his statement before SB 1421's enactment could lead to the disclosure of the information, and infringe on the victim's constitutional rights.

As demonstrated by the example above, SB 1421, if construed to require agencies to produce pre-2019 records, would attach new legal consequences to all decisions officers and their agencies made about whether to include certain information in those records. As such, requiring agencies to produce such records would be a retroactive application of SB 1421. The Court should reject such a construction of the law.

The Court should reject any assertion that SB 1421 merely changed who can see peace officer personnel records. This significant change has

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[3] *See* Penal Code § 832.7(b)(1), which overrides the Public Records Act's exemptions, stating that–notwithstanding those exemptions "or any other law," personnel records shall be made available for public inspection. While the law exempts from disclosure records that are specifically protected from disclosure under federal law, it does not extend this exemption to state laws.

severe and adverse consequences if applied retroactively. Under SB 1421, any member of the public can request copies of records relating to officer-involved shootings, uses of force, sustained findings of dishonesty, and sustained findings involving sexual assault. Thus, a criminal defendant may request these records as a member of the public. (Gov. Code § 6252.) Further, Government Code section 6254.5 holds that if an otherwise exempt record is disclosed to anyone, its protection from disclosure is waived, and must be disclosed to anyone who asks. A defendant who was shot by an officer in the course of a robbery, for example, can now obtain all the records relating to the investigation of the shooting, and by extension, the defendant's underlying crime. As a result, any information officers and agencies put in these records, including information that would otherwise be protected from disclosure under Marsy's law, would be open for the defendant to review. By changing *who* can see the records, SB 1421 greatly changed the significance of prior decisions to put certain information in those records. Nothing in the bill refers to victims or redaction.

The impact of applying SB 1421 to pre-2019 peace officer personnel records has an especially significant impact on peace officers because they are often also victims of violent crime, within the meaning of Marsy's Law. Pursuant to Article I, section 28(e), a "victim" within the meaning of Marsy's Law is "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission of attempted commission of a

crime or delinquent act." The term also includes the victim's spouse, parents, children, siblings, or guardian. (*Id.*) Officers involved in shootings that required them to use deadly force are often victims themselves, because the use of force is required to stop a violent fleeing felon, or prevent the suspect from killing or severely injuring the officer. Involved officers are thus frequently "victims" within the meaning of Marsy's law, and constitutionally entitled to have information that could be used to locate or harass them, information they provided in the course of counseling, and information that is otherwise confidential withheld from criminal defendants.

3. The Magnitude of Complying with Requests for Pre-2019 Records is So Great, the Legislature's Failure to Even Discuss it Shows the Legislature Did Not Intend SB 1421 to Apply to Those Records.

The retroactive application of SB 1421 would cause an undue and massive burden to law enforcement agencies across the state. The mandates of SB 1421, even on a prospective basis, would require the acquisition of new and costly hardware and software related to the uploading, redacting, digitizing, and reformatting of files and evidence. Along with the costs of gathering the files and evidence, agencies would also have to contend with the unforeseen labor costs of additional staff needed to complete these requests. Meeting the staffing requirements to fulfill such an obligation would force departments to reallocate personnel from key positions. There

would also be additional costs for needed administrative staff to keep up with the overwhelming amount of requests.

If SB 1421 applies retroactively, law enforcement agencies will have the cumbersome task of going through all records no matter how old. While newer use of force or misconduct cases may have uniformly been scanned into law enforcement agency databases, older matters would likely require digitization or an entire manual review. This necessitates each sustained complaint to be individually reviewed, redacted, and uploaded into a releasable format. A typical investigation requiring disclosure under SB 1421 can generally include thousands of pages of written investigations and transcripts, hours of audio and video evidence from Body Worn Video and Digital In-Car Video, plus 911 dispatcher audio, and hundreds of photographs. For example, the Los Angeles Police Department recently audited one representative use of force investigation requiring disclosure under SB 1421. It estimated that this one case would require 267 hours to fully review before disclosure. This is a small sample of the exponential work that agencies will have to perform to comply with SB 1421 if it were retroactive.

The Sacramento Police Department has opined that "the additional mandate of SB 1421 requiring the release of written reports potentially could add an additional fifty staff hours per investigation. To further complicate the issue, much of the technology used to recode these investigations (i.e.,

cassette tapes) are no longer supported and would require modern conversions, prior review, redaction and release." (*See* November 28, 2018 Sacramento PD Deputy Chief Bernard email to David E. Mastagni, Exhibit A hereto, discussing the burden of reviewing and redacting records.) It would be unduly burdensome to redact information individuals provided with the expectation of confidentiality decades earlier. The amount of additional work hours needed to satisfy these requests would require the department to either hire new staff or reassign staff working on critical law enforcement activities. For some agencies, this means officers will be taken off the streets and forced behind desks to review case files to stay current with the onslaught of requests.

Retroactive application is so overly burdensome on a statewide basis that it weighs heavily in favor of construing the law prospectively. This Court has recognized that the public interest in disclosing records may be outweighed by the public interest in not disclosing it where disclosure would impose a massive burden on the affected agency. In *American Civil Liberties Union v. Superior Court* (2017) 3 Cal.5th 1032, the Court acknowledged that the burden of anonymizing license plate data could outweigh the public interest in disclosing that information pursuant to a records request. (*Id.* at p. 1044 (remanding the matter back to trial court to resolve factual dispute over how burdensome it would be to redact license plate information from records.)) As previously discussed, redacting pre-2019 records is

unquestionably laborious and time-consuming–there is no quick computer fix. Rather, public agencies would be compelled to hire staff, or reassign officers from law enforcement duties, to redact information from thousands of pages of records, and blur thousands of hours of videos, frame by frame. Thus, the public interest in disclosing pre-2019 records is outweighed by the public's interest in maintaining crucial law enforcement operations and avoiding millions of dollars in labor costs that would be necessary to disclose the records.

Given the magnitude of the work that would be involved if SB 1421 applied retroactively, the Legislature would have surely discussed the impact of such an application before enacting the law. But it did not. The only reasonable conclusion to draw from this absence of discussion about retroactivity is that the Legislature did not intend for SB 1421 to be applied retroactively.

III.
CONCLUSION

For the foregoing reasons, SB 1421's amendments to Penal Code section 832.7 should only affect the Court's analysis of whether an agency is permitted to disclose *Brady* material in records created after January 1, 2019. There is no basis for applying SB 1421 retroactively. Therefore, pre-2019 records must remain confidential, and *Brady* material contained in them should only be disclosed through the *Pitchess* process.

Respectfully submitted,

Dated: February 22, 2019

MASTAGNI HOLSTEDT, APC

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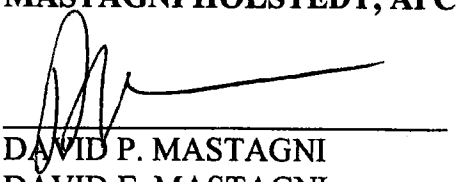
DAVID E. MASTAGNI
ISAAC S. STEVENS
Attorneys for the Amici Curiae

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that this brief consists of 7,345 words, as counted by the computer program used to generate the document.

Dated: February 22, 2019

MASTAGNI HOLSTEDT, APC



DAVID P. MASTAGNI
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PROOF OF SERVICE

SHORT TITLE OF CASE: *ALADS v. S.C. (LA COUNTY SHERIFF'S DEPARTMENT)*

SUPREME COURT CASE NO.: S243855

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is 1912 I Street, Sacramento, California 95811-3151. On the date below, I served the following document(s):

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER/APPELLANT

Addressed as follows:

Elizabeth J. Gibbons The Gibbons Firm, PC 811 Wilshire Boulevard, 17th Floor Los Angeles, CA 90017-2606 Douglas G. Benedon Judith E. Posner Benedon & Serlin, LLP 22708 Mariano Street Woodland Hills, CA 91367-6128 ***Attorneys for Association for Los Angeles Deputy Sheriffs, Petitioner***	Frederick Bennett Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012 ***Attorneys for Superior Court of Los Angeles County, Respondent***
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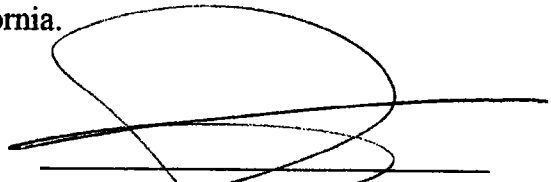
X **BY U.S. MAIL**. By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing today, following ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited this day with the United States Mail, with postage thereon fully prepaid at Sacramento, California in the ordinary course of business.

And,

X BY ELECTRONIC SERVICE: I further certify that I caused an electronic version of the above document to be served electronically on all participants registered in this case through TRUEFILING. Using the TRUEFILING system, electronic service will be provided on this date to all parties and attorneys of record registered on the electronic mailing list for this case maintained by TRUEFILING;

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct and executed on February 22, 2019, at Sacramento, California.



PATRICK ~~R. BARBIERI~~

Exhibit "A"

From: Ken Bernard <KBernard@pd.cityofsacramento.org>
Sent: Wednesday, November 28, 2018 12:39 PM
To: David E. Mastagni
Cc: Daniel Hahn; president@spoa.org
Subject: RE: SPOA Information Request

Dear Mr. Mastagni:
In response to your email, our department is also very concerned about SB 1421 if the law is interpreted to be retroactive. Every critical incident investigation is unique. Some are exceptionally complex, such as officer involved shootings and in custody deaths, which are the focus of this new law. With that in mind, my response below is based upon my experience managing officer Involved shooting investigations.

As you are aware, the police department, at the direction of Sacramento City Council, has been publicly releasing video surrounding these types of officer involved incidents since January of 2017. It is our belief that the release of these videos foster trust and increases transparency within our community. Our policy mandates the redaction of both audio and visual content that we determine to be legally protected, graphic, and/or harmful to involved victims, witnesses, and citizens.

Our primary concern is for the safety of citizens involved in these type of events, who have voluntarily given video recorded statements to detectives. The release of these tapes will unnecessarily place citizens, who are frequently family members or neighbors, at risk.

In addition, releasing all video and written reports will be an incredibly burdensome endeavor for our organization. The State of California recommends that officer involved shooting investigations be retained for twenty-five years. The Sacramento Police Department keeps these critical reports indefinitely. For example, our Records Division informed me that we have officer involved shooting reports dating back to the 1940's. Many of these reports contain legally protected information involving incidents such as sexual assault, child abuse, or domestic violence.

Historically, we average five or less officer Involved Shootings/in custody deaths per year. The investigations generally contain one thousand pages of written material. All critical interviews involving suspects, witness, and officers have been video and audio recorded for more than twenty years.

Should SB1421 be interpreted as retroactive, each of the above-mentioned reports and audio/visual recordings will need to be reviewed by a member of the Department prior to release. Many of the written documents and audio/visual recordings will then also require that protected information be redacted prior to release.

Based on current release practice, it is our best estimate that each incident required a minimum of 150 to 200 staff hours to prepare the video for release. The additional mandate of SB1421 requiring the release of written reports potentially could add an additional fifty staff hours per investigation. To further complicate this issue, much of the technology used to record these investigations (i.e., cassette tapes) are no longer supported and would require modern conversions prior review, redaction and release.

To reiterate, this is a conservative estimate and is based solely on our experience with video release over the last year.

Ken Bernard
Deputy Chief of Police, Investigations

From: David E. Mastagni <davidm@mastagni.com>
Sent: Tuesday, November 27, 2018 3:59 PM
To: Ken Bernard <KBernard@pd.cityofsacramento.org>
Cc: Tim Davis ([redacted]>
Subject: SPOA Information Request

Chief Bernard,

On behalf of the SPOA, I write to request information regarding the Department's compliance with SB 1421 and the impacts on SPOA members whose information, statements and video records may be disclosed, including but not limited to whether the Department intends to disclose critical incident investigations occurring prior to January 1, 2019, how long investigations are maintained, how many such investigations currently exist, what information/videos will be redacted and how, how many SPOA members (and other Departmental employees will be reassigned to respond to requests), how many work hours would you estimate would be needed to compliance with a request for all critical incident investigations maintained by the Department, and the impacts on officer deployment, shift assignments and overall public safety. This request is submitted pursuant to the MMBA.

Thank you for you anticipated attention to this information request.

David E. Mastagni | Partner

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