NO. S227106

In the

Supreme Court

of the

State of California

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA AND ELECTRONIC FRONTIER FOUNDATION,

Petitioners,

v.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent.

COUNTY OF LOS ANGELES, AND THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT AND THE CITY OF LOS ANGELES AND THE LOS ANGELES POLICE DEPARTMENT,

Real Parties in Interest.

After a Decision by the Court of Appeal,
Second Appellate District, Division Three, Case No. B259392
Los Angeles County Superior Court, Case No. BS143004
(Hon. James C. Chalfant)

AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT

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and the California Peace Officers' Association

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT BRIEF OF AMICI CURIAE:

I. APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The California State Sheriffs' Association, California Police Chiefs Association and the California Peace Officers' Association respectively request leave to file the attached brief of Amici Curiae in support of Respondents, et al., in order to assist this Court in resolving the important issue of law presented in this matter.

Applicants endeavor to provide this Court with the perspective of similarly situated law enforcement agencies throughout the State regarding the important legal issues raised in this matter, specifically whether the law enforcement data base created by the use of ALPR (Automatic License Plate Readers) by law enforcement should be accessible as public records?

The issues in this case are of paramount importance to the parties, to Amici, to law enforcement generally, and to all of the People of the State of California.

Amici believe that they can provide additional perspective to this Court that will be helpful in its decision.

AMICI CURIAE INTEREST AND BENEFIT OF AMICI CURIAE BRIEF TO THE COURT:

Amici Curiae are the following associations: the California State Sheriffs' Association ("CSSA"), the California Police Chiefs Association ("CPCA"), and the California Peace Officers' Association ("CPOA"). Each of their memberships and interests are discussed below.

The California State Sheriffs' Association ("CSSA") is a non-profit professional organization that represents each of the 58 California Sheriffs. It was formed to allow the sharing of information and resources between

sheriffs and departmental personnel, in order to allow for the general improvement of law enforcement throughout the State of California.

The California Police Chiefs' Association ("CPCA") represents virtually all of the more than 332 municipal chiefs of police in California. CPCA seeks to promote and advance the science and art of police administration and crime prevention, by developing and disseminating professional administrative practices for use in the police profession. It also furthers police cooperation and the exchange of information and experience throughout California.

The California Peace Officers' Association ("CPOA") represents more than 2,000 peace officers, of all ranks, throughout the State of California. CPOA provides professional development and training for peace officers, and reviews and comments on legislation and other matters impacting law enforcement.

Amici have identified this matter as one of statewide significance in which their expertise may be of assistance to the Court. The attached brief offers a broad perspective of Amici as to the issues on appeal, namely the overarching impact of the Court's decision on local law enforcement agencies throughout the State by allowing public access to the electronic data obtained and stored through law enforcement use of Automatic License Plate Readers ("ALPRs").

The value of the ALPRs to law enforcement and to public safety in general is enormous, as ALPRs exponentially enhance the volume of information that is otherwise gathered manually by individual police officers occupying a police unit or patrolling any given area, where these devices collect information by digital recording. These devices also accelerate the identification of vehicles connected to crimes in progress or recent crimes and potentially can lead to identification of those persons/witnesses associated therewith.

The data derived from ALPRs has been a key component in detecting and solving crimes and protecting infrastructure by "almost immediately" identifying vehicles involved in crimes such as robbery and human trafficking.

In particular, if the Supreme Court finds in favor of Petitioners, the capacity of ALPRs for use in law enforcement investigations throughout the state will be so greatly impaired it could render this investigative tool and database virtually meaningless.

Opening up access to these databases to the public will not only compromise law enforcement investigations, it will also expose otherwise unavailable information associated with vehicle license plate numbers to the public that could pose safety or other risks to unknowing vehicle owners.

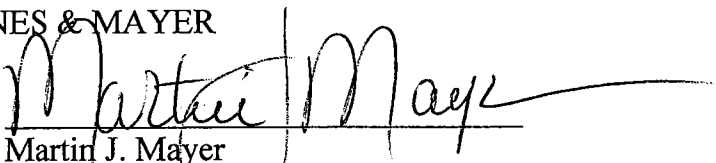
There is good cause for permitting the filing of the brief, as stated above, and this Court may grant the filing of the brief pursuant to California Rules of Court, Rule 8.520.

The undersigned have been given specific authority to make this Application on behalf of Amici.

Dated: April 28, 2016

Respectfully submitted,

JONES & MAYER

By: 

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I.

STATEMENT OF FACTS AND PROCEDURAL HISTORY.

Amici accept the procedural history and pertinent facts as set forth in the briefs of the parties.

II.

INTRODUCTION

This matter emanates from a series of California Public Records Act requests pursuant to California Government Code section 6253 ("CPRA") for law enforcement records from the database of the Los Angeles Police Department ("LAPD") and Los Angeles Sheriff Office ("LASO") ALPR , submitted by the American Civil Liberties Union ("ACLU") of Southern California and the Electronic Frontier Foundation ("EFF"). LAPD is a department of the City of Los Angeles, a local public agency existing under Government Code section 6252 (d). LASO is a department of the County of Los Angeles, a public agency existing under Government Code section 6252 (d).

LAPD and LASO produced records related to the regulation and use of the ALPR technology, however the ALPR records from the database that were withheld, based upon the exemptions afforded law enforcement investigative records under California Government Code sections 6254 (f), (k), and California Government Code section6255, were the subject of writ proceedings in which the courts below upheld the exemption(s).

The Petitioners would now have this Court redefine the term "investigation" in the wake of the technological enhancements to law enforcement investigative techniques through the use of ALPRs.

III.

THE ALPR DATA CONSTITUTES LAW ENFORCEMENT INVESTIGATION RECORDS AND THE COURT OF APPEAL CORRECTLY FOUND THEM TO BE EXEMPT UNDER GOV. CODE § 6254 (F).

ALPR plate scan data are intrinsically exempt as records of investigations obtained and stored through a secure law enforcement database. This falls squarely within the exemption expressly delineated within the California Public Records Act under section 6254 (f):

" . . . this chapter does not require the disclosure of any of the following records:

(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes . . ." (Cal. Gov. Code § 6254 (f).)

The courts below rested their decision in large part upon this exemption because each plate number is scanned and immediately compared through electronic transmittal to a list of plate numbers connected to specific crimes or individuals to ascertain whether further investigation is warranted. In their analysis, the lower courts analogized that ALPR data is similar to videotape obtained by an undercover officer watching a street corner for drug sales or other illegal activity. The fact the video may capture activity that is not criminal or that the video did not immediately lead to criminal prosecution does not mean it was not part of a law enforcement investigation of criminal activity.

As noted in the International Association of Chiefs of Police Privacy Impact Assessment cited by Petitioners, PET.BOM p. 38, the ALPR simply enhances what officers on the street or in their patrol unit have been doing manually:

"It has been law enforcement's position that the impact of LPR systems on the privacy of individuals is the same as the impact of any ordinary investigation. The premise of this position is that LPR systems simply automate the same exact process that has been available to police manually. Criminal justice agencies explain that LPR systems simply improve the accessibility of information that is already publicly visible and make it available for analysis and appropriate dissemination..." (http://www.theiacp.org/Portals/0/pdfs/LPR_Privacy_Impact_Assessment.pdf.)

According to Petitioners, the database should not be considered exempt under Section 6254(f) because the scanners are indiscriminate in how they collect data "on millions of innocent drivers." The Petitioners also pose a contorted rationale that the lower courts have "stretched" the definition of investigation to compel an "absurd" result that all vehicles in Los Angeles are "under investigation." (PET. Brief, p. 15.) The mere volume of data collected, however, does not transform its investigatory nature or purpose. The fact that a large number of vehicle plates are scanned and included in data that become part of an investigatory record does not mean that "all vehicles" in Los Angeles are "under investigation." The Petitioners, and communities served by law enforcement, must continue to adapt their perceptions as sophisticated and automated technological advancements are deployed in daily police work.

Regardless of the advanced technology or the amount of data collected, ALPRs are deployed for the express purpose of detecting whether criminal activity is afoot or has already occurred. This constitutes

an investigation according to the most basic definition, and does not require revision.

IV.

THERE IS NOTHING IN THE CPRA OR THE CASES INTERPRETING THE CPRA WHICH REQUIRE A NEW OR NARROWER DEFINITION OF "INVESTIGATION"

The Petitioners argue that a new definition of investigation must be devised to interpret the investigation records exemption under Section 6254(f) simply because the advanced techniques deployed by law enforcement enable them to gather more data more quickly. Petitioners hypothesize that interpretation of the CPRA exemption supports their "conclusion" that the term "investigation" applies only to inquiries that are "targeted"[1] (PET. Brief, p. 13.) They concede that the CPRA itself does not define the term, and they cite to the common English dictionary definitions: *Black's Law Dict.* (9th ed. 2009) (defining "investigate" as "1. To inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry... 2. To make an official inquiry."); *Webster's Third New International Dictionary of the English Language Unabridged* (1968)

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[1] The Petitioners also seem to blur the lines and analogize *United States v. Jones* (2012) 132 S.Ct. 945, 955 (Sotomayor, J., concurring); id. at 958 (Alito, J., concurring) (distinguishing GPS monitoring of a car's location 24 hours per day for 28 days from one officer following one vehicle on public streets); *Riley v. California* (2014) 134 S.Ct. 2473, 2490 (distinguishing the search incident to arrest of small physical items from the search of a cell phone); and *United States v. Graham* (4th Cir. 2015) 796 F.3d 332, 353. Each of these matters involved "targeted" searches, as the petitioner would define them, which were challenged as unlawful searches. These cases have no bearing on whether the ALPR data fall within the statutory definition of investigatory records under California Government Code section 6254(f). In fact, another very fundamental distinction is the Petitioner's objective here, which is to make otherwise confidential ALPR data public, as opposed to their objective of suppressing access to the electronic data in *Jones, Riley and Graham.*

(defining "investigate" as "to observe or study closely: inquire into systematically" and "investigation" as "1. the action or process of investigating: detailed examination..." and "2. a searching inquiry...."

Petitioners argue that the parties and the lower courts are stuck in the old fashioned "pen and paper era" of legal rules and definitions that shouldn't... "blindly be applied to new technology capable of collecting data on a mass scale." (PET. Brief, p. 29.) Presumably, the *Black's Law* and *Webster's* definitions were available to the courts in their "pen and paper" era interpretations of Section 6254(f), yet Petitioners offer negligible, if any, legal precedent to support their "pen and paper era" conclusion that the term investigation must be tethered to a specific suspect or "target".

Significantly, the fallacy of the petitioner's argument was long ago disposed of by this Court in *Haynie v. Superior Court* (2001) 26 Cal. 4th 1061, 1069, 31 P.3d 760, 764-765, 112 Cal. Rptr. 2d 80, 85-86, when it recognized the importance of protecting police records and explained the strategic reasons for the exemption of records of investigation and its impact on law enforcement:

"What is true for records of complaints (*Black Panther Party*) and intelligence information (*ACLU)* is true as well for records of investigations. The latter, no less than the former, are exempt on their face, whether or not they are ever included in an investigatory file. Indeed, we alluded to this in *Williams v. Superior Court* (1993) 5 Cal.4th 337, 349-353 [19 Cal. Rptr. 2d 882, 852 P.2d 377] when we noted that a document in the file may have extraordinary significance to the investigation even though it does not on its face purport to be an investigatory record and, thus, have an independent claim to exempt status. (*Williams*, supra, 5 Cal. 4th at p. 356, italics added.) **Limiting the section 6254(f) exemption only to records of investigations where the likelihood of enforcement has ripened into**

something concrete and definite would expose to the public the very sensitive investigative stages of determining whether a crime has been committed or who has committed it. . . ." (emphasis added.)

"Haynie's concession that records of a murder investigation would be exempt further illustrates the impossibility of making such a distinction. Law enforcement officers may not know whether a crime has been committed until an investigation of a complaint is undertaken. An investigation may be inconclusive either as to the cause of death or the circumstances in which the death occurred. A fire may be suspicious, but after investigation be found to have an accidental or natural origin. In this case we have no reason to believe that the deputies who stopped *Haynie* were not investigating a report of what they believed might be criminal conduct." (See, e.g., Pen. Code, § 12031.)

"The interpretation offered by *Haynie* would also impair 'routine'" investigations. Complainants and other witnesses whose identities were disclosed might disappear or refuse to cooperate. Suspects, who would be alerted to the investigation, might flee or threaten witnesses. Citizens would be reluctant to report suspicious activity. Evidence might be destroyed." *Haynie*, supra, at 26 Cal. 4th pp. 1070-1071 (bold emphasis added).

Petitioners also cite *Haynie*, supra, in support of their argument that ALPR data is not exempt because it is not the result of "targeted" information gathering. As noted in the lower courts, the plate scans performed by the ALPR system are precipitated by specific criminal investigations which produced the "hot list" of vehicle plate numbers associated with suspected crimes. The ALPR system's principal purpose is to compare the license plates against the hot list to determine if a vehicle is connected to a crime under investigation. As such, the ALPR system duplicates on a larger scale, a type of investigation that officers routinely perform manually by visually reading a license plate and entering the plate

number into a computer to determine whether a subject vehicle might be stolen or otherwise associated with a crime. The fact that the ALPR system automates this process does not make it any less an investigation to locate automobiles associated with specific suspected crimes. (Slip Opn. P.10).

Contrary to Petitioner's theory, ALPR records are expressly created as part of an investigation and therefore distinguishable from circumstances such as in *Uribe v. Howie* (1971) 19 Cal.App. 3d 194, 96 Cal Rptr 493, for example, where a public agency attempted to exempt ordinary, routine pesticide reports from public disclosure by simply placing them in an investigatory file.

"Mug shots," for example are also routinely obtained and retained in police databases long after the conclusion of criminal investigations. Courts have found such records are exempt from disclosure as records of investigations:

"We have no hesitation in finding that mug shots fall within the "records of investigations" exemption of Section 6254(f). (See *Loder v. Municipal Court*, supra, 17 Cal.3d at pp. 864-865; 65 *Ops.Cal.Atty.Gen.* 563, 567 (1982).) A mug shot is used by the police not only to identify the person arrested, but also to determine if he or she is wanted on any other charge. Mug shots from earlier arrests may be used during subsequent investigations to identify individuals suspected of committing criminal offenses." (See, e.g., *People v. James* (1977) 19 Cal.3d 99, 105; *People v. Cavanaugh* (1968) 69 Cal.2d 262, 264; *People v. Griffin* (1976) 59 Cal.App.3d 532, 535; 86 *Ops. Cal. Atty. Gen.* 132).

Although this Court noted that there is an occasional need to apply such a qualification to prevent an agency from attempting to "shield a record from public disclosure, regardless of its nature, simply by placing it in a file labeled 'investigatory" this Court also made it very clear in *Haynie* that a concrete, "targeted investigation" is not required to qualify

independently exempt records, such as the confidential database created by ALPR scanning:

"However, neither this court nor any court *Haynie* has identified has extended this qualification to § 6254 (f)'s exemption for '[r]ecords of . . . investigations . . . .' **The case law, in fact, is to the contrary.**

In *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal. 3d 440 [186 Cal. Rptr. 235, 651 P.2d 822] (ACLU), for example, we explained that the 'concrete and definite' qualification to the exemption in section 6254(f) 'relates only to information which is not itself exempt from compelled disclosure, but claims exemption only as part of an investigatory file. Information independently exempt, such as 'intelligence information' in the present case, is not subject to the requirement that it relate to a concrete and definite prospect of enforcement proceedings.'" (ACLU, supra, at p. 449, fn. 10.) In *Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645 [117 Cal. Rptr. 106] (*Black Panther Party*), the court of appeal explained that in *Uribe*, "the record in question was not a complaint but a routine report in a public file. It could gain exemption not because of its content but because of the use to which it was put, that is, when and if it became part of an investigatory file. Here, by their very content, the documents are independently entitled to exemption as 'records of complaints'; their exemption is not dependent upon the creation of an investigatory file." (*Black Panther Party*, supra, at p. 654.)

The hypothetical definition of "investigation" proposed by the Petitioners would foster an arbitrary and ambiguous result and an inconsistent application of law. ALPRs simply record what every driving member of the community displays in plain and public view: license plates. Regardless of the automated manner of detection and the volume of data collected, law enforcement's use of technological advancements does not negate the intent of the California Legislature to exempt the sensitive

data gathered by ALPRs from disclosure under the CPRA as records of investigations.

V.

THE SENSITIVE NATURE OF APLR DATA PREPONDERATES AGAINST DISLCOSURE.

Petitioners discuss at length their perceived, but exaggerated, mandate in Proposition 59 in favor of disclosure. They allege the legislative intent of Proposition 59 for transparency in government should override the holdings of *Haynie* and *Williams*, supra. They even argue that the voters intended to "strengthen the public right of access beyond existing law." (PET. Brief, p.19.) However, as the Real Parties City of Los Angeles have discussed at length in their Answer Brief, read as a whole, Proposition 59 makes it clear that its intent was to memorialize the CPRA as it was then understood and not to impose new requirements, (RPICLA Brief,p. 56), and there is no case law to support the radical "new interpretation" argued by Petitioners here.

Furthermore, Petitioners gave seemingly short shrift to the CPRA post-Proposition 59 cases, most pertinently, *Dixon v. Superior Court* (2009) 170 Cal. App.4th 1271, which held coroner and autopsy reports to be exempt as part of an investigatory file. The *Dixon* court explained that *Gov. Code* § 6254(f) has a strong government interest in preventing and prosecuting criminal activity [and] protects witnesses, victims and investigators... [and] recognizes rawness and sensitivity of information in criminal investigations..." *Id.* at p. 1276.

Petitioners speculate that the release of raw ALPR data "would not alert a suspect to an investigation, nor cause witnesses to disappear, citizens to be reluctant to report suspicious activity, nor evidence to be destroyed. Treating ALPR data as "records of... investigations" therefore does not fit the purpose of § 6254(f)" (PET. Brief, p. 19.) Petitioners' conjecture is a

bit myopic in their failure to recognize the clear potential for abuse if the public is given unfettered access to ALPR data under the CPRA. They also fail to reconcile their own apparent apathy for the privacy and security interests of the plate owners with their stated objective of opening up and exposing all of the plate owners' data to the public view to apparently fuel their speculations on potential police misuse of ALPR data to profile various groups or geographic areas.

Senate Bill 34, signed by Gov. Jerry Brown in October, 2015, which amends Civil Code section 1798.29, requires that agencies maintain reasonable security procedures and practices to protect ALPR data and that the ALPR only be used for authorized purposes. The Bill also requires agencies to publicly disclose the use of the readers and post a privacy policy on their websites. SB 34 thus reflects an intent and recognition by the legislature of the sensitivity of APLR data and a specific mandate that such data should not be publicly disclosed.

In *Westbrook v. County of Los Angeles* (1994) 27 Cal. App. 4th 157, 160-166, 32 Cal. Rptr. 2d 382, 383, the court recognized the privacy rights of citizens from third-party CPRA requests when Municipal Court Information (MCI) tapes consisting of a compilation of data from the court docket containing criminal history information were sought, noting the *U. S. Dept. of Justice v. Reporters Committee* (1989) 489 U.S. 749 [103 L. Ed. 2d 774 , 109 S. Ct. 1468 language that "...such disclosure can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted'". *Westbrook*, supra.

In *N. Cal. Police Practices Project v. Craig* (1979) 90 Cal. App. 3d 116, 121-122, 153 Cal. Rptr. 173, 176-177, the court recognized the importance of upholding the exemption under Section 6254 (f) where a

broad CPRA request for police records and sensitive information was also at issue: matters related to security procedures. The court sustained the CHP claim of exemption.

Similarly, in *American Civil Liberties Union Foundation ("ACLU") v. Deukmejian* (1982) 32 Cal. 3d 440, 450, 651 P.2d 822, 827-828, 186 Cal. Rptr. 235, 241, this Court recognized the harm posed by releasing sensitive data:

"Indeed, in view of the substantial harm that could be inflicted by a public revelation that an individual was listed in an index of persons involved in organized crime, or even listed as an 'associate' of someone involved in organized crime, we think the exclusion of personal identifiers must be viewed broadly. Not only names, aliases, addresses, and telephone numbers must be excluded, but also information which might lead the knowledgeable or inquisitive to infer the identity of the individual in question." *(ACLU v. Deukmejian*, supra.)

Petitioners' CPRA requests seek another government database of information that may include or lead to unsuspecting individual drivers' potentially private and sensitive information. As the court recognized in *Westbrook* and in *ACLU*, "the public's right to information of record is not absolute."

Given the asserted purpose of their CPRA requests to understand and demonstrate the extent of intrusion and location tracking involved in police use of ALPRs, this quest would conceivably include such location tracking information as the wireless access points and other information of a strategic nature that could compromise public safety and security. This sensitive information is precisely what the CPRA exemption for investigation and intelligence records was contemplated to protect from public access.

VI.

CONCLUSION

Petitioners insist that the Court should revise the definition of investigation to eliminate Section 6254(f)'s exemption for ALPR records because ALPRs don't have a predetermined target of their investigation. Petitioners, however, offer no meaningful support to change the definition of "investigation" and the application of the exemption provided by Section 6254(f) to ALPR data.

ALPR technology provides tremendous value to law enforcement, and thus value to the public at large.

The public's and law enforcement's interests in security, preserving infrastructure, and accelerated access to information in solving crimes are best served by nondisclosure of ALPR data.

Once these records are declared public, it opens them up to all persons who request them, including criminals, because Respondents /Real Parties cannot base their response to a CPRA on the purpose for the request or the identity of the requesting party. The lower court's decision focused on the greater harm that would occur from public disclosure because of the potential for criminals to interfere with policing and the public's "strong privacy interest in the location information contained in ALPR data."

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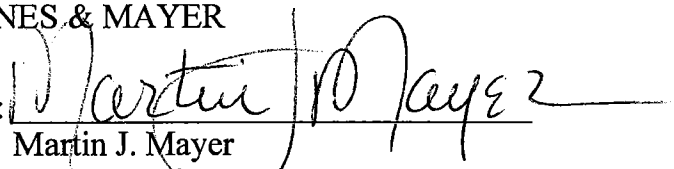
For all of the foregoing reasons, Amici respectfully request that this Court affirm the opinion of the Second District Court of Appeal.

Dated: April 28, 2016

Respectfully submitted,

JONES & MAYER

By: 

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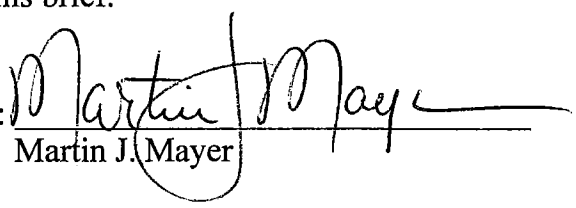
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(l) or 8.504(d)(l) of the California Rules of Court, the attached Amicus Curiae Brief is produced using 13-point or greater Roman type, including footnotes, and contains 4302 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 28, 2016

By: 
Martin J. Mayer

PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF ORANGE) ss.

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3777 North Harbor Blvd. Fullerton, Ca 92835.

On April 28, 2016, I served the foregoing document described as **AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT** on each interested party listed on the **attached service list.**

XX (VIA MAIL) I placed the envelope for collection and mailing, following the ordinary business practices.

I am readily familiar with Jones & Mayer's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at La Habra, California, in the ordinary course of business. I am aware that on motion of the parties served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

XX (VIA ELECTRONIC SERVICE): I further declare that a true and correct copy of the foregoing document has been filed via Electronic Document Submission (Supreme Court) on the Court's website, with the original and eight (8) copies delivered via Overnight Delivery to:

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SUPREME COURT OF CALIFORNIA
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

I placed the envelope or package for collection and overnight delivery in the overnight delivery carrier depository at Fullerton, California to ensure next day delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 28, 2016, at Fullerton, California.

Jenny P. Gonzalez

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