NO. S277510

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

CORY MICHAEL HOEHN,
*Petitioner and Defendant*,

v.

CALIFORNIA CAPITAL INSURANCE COMPANY, ET AL.,
*Respondent and Plaintiff.*

On Review of Decision of the Third District Court of Appeal
Following an Appeal from a Judgment of the
Placer County Superior Court
Hon. Michael Jones
Case No. SCV0026851

# APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to California Rules of Court, Rule 8.520(f), *Amici* respectfully request leave to file the attached Brief of *Amici Curiae* in support of Petitioner.[1]

*Amici* are law professors in California. They are proficient scholars and litigators with experience in various fields, including civil procedure, constitutional law, civil rights, racial justice, and poverty law.[2] While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law and the promotion of justice for all. *Amici* believe their submission will assist the Court in its deliberations.

CAL. CIV. PROC. CODE § 473(d) provides that "[t]he court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after

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[1] No counsel for either party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici Curiae*, or their counsel, made a monetary contribution to its preparation or submission.

[2] *Amici Curiae* are listed in the Appendix to this Brief.

notice to the other party, set aside any void judgment or order." Despite the absence of any time limit in § 473(d), the lower court grafted a two-year statute of limitation to the statute, thereby precluding defendants who never received proper notice of the underlying lawsuit from challenging a judgment after the two-year deadline. This was in error.

Grafting a temporal restriction to CAL. CIV. PROC. CODE § 473(d) is contrary to the text of the statute. It contains no statute of limitation or other temporal restriction. This is in stark contrast to other statutes that do impose time limits on litigants seeking relief. Because § 473(d) allows litigants to set aside a void judgment, it would be unreasonable to impose such a temporal restriction. Indeed, imposing a temporal restriction that prevents litigants from challenging a judgment acquired without proper service of process is contrary to basic principles of civil procedure—a system premised on the importance of providing valid notice to all parties throughout the litigation process.

Moreover, the lower court's interpretation would have a detrimental impact on low-income litigants and communities of color. These groups are disproportionately represented in debt collection actions and related lawsuits. These groups are also routinely victimized by faulty service practices. Adding a two-year time limit to claims for

relief under § 473(d) would perpetuate this inequality. It would incentivize plaintiffs to issue flawed service of process and then wait out the statute's limited temporal deadline before seeking to enforce their default judgments. The inequality that already exists within the civil justice system would be exacerbated by such an interpretation.

*Amici* respectfully submit this brief in support of Petitioner. As set forth below, *Amici* believe the significant and adverse impact of the lower court's decision warrants reversal.

July 7, 2023

Respectfully submitted,

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The rules of civil procedure should be fair and consistent in practice. They should not be interpreted to allow the powerful to profit and the poor to pay. Yet, this case reflects how purportedly neutral rules of civil procedure can be used—and have been used—to target vulnerable populations.

## I. NOTICE IS AN ESSENTIAL FEATURE OF DUE PROCESS, AND YET IT IS ROUTINELY DISCOUNTED IN CIVIL LITIGATION

Notice is an essential feature of due process. As the U.S. Supreme Court has repeatedly stated, an "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice . . . ." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950); *Harris v. Hardeman*, 55 U.S. 334, 339 (1853) ("[I]t would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was a party or privy; that no person can be in default with respect to that which it never was incumbent upon him to fulfil."). As a result, a lawsuit filed without proper notice to the defendant cannot lead to an enforceable judgment.

*Peralta v. Heights Med. Ctr., Inc*., 485 U.S. 80, 84 (1988) ("[A] judgment entered without notice or service is constitutionally infirm.").

Despite its significance, the right to notice is often discounted in civil litigation. *See* Robin J. Effron, *The Invisible Circumstances of Notice*, 99 N.C. L. REV. 1521, 1522 (2021) ("The due process right of notice is among the most neglected and understudied of constitutional rights."); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1234 (2022) ("Notice is regularly taken for granted in federal procedural scholarship . . ."). The willingness to disregard due process and the right to notice is evident in the lower court's decision.[3]

CAL. CIV. PROC. CODE § 473(d) provides that "[t]he court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after

[3] *See also* Ethan J. Lieb, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 900 (2013) ("The diversity and the lack of easily accessible decisions, however, cannot justify the lack of attention to how local judges should behave when faced with statutory questions, a task that comprises the day-to-day work of our local courts. These public officials are the face of law and justice to citizens in our democracy. What they do in their courtrooms when applying statutes is probably more relevant to citizens' sense of the legitimacy of our legal system and the rule of law than the vast majority . . . .").

notice to the other party, set aside any void judgment or order." The purpose of this statute is to ensure that civil judgments comply with the requirements of due process. A void judgment—one acquired without proper service of process—should not be accorded finality. Accordingly, there should be no time limit for a motion seeking relief under § 473(d). Because the statute is intended to remedy situations where notice was not provided to a litigant, it properly does not include a time restriction on its application. In fact, adding a time limit to the statute would be inconsistent with the constitutional significance attached to notice.[4] Thus, any time limits that may appear in other statutory provisions are irrelevant and do not apply to claims brought under § 473(d).[5]

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[4] Consider the Supreme Court's seminal decision on notice and personal jurisdiction. In *Pennoyer v. Neff*, the Court held that a judgment issued without proper notice and personal jurisdiction was constitutionally infirm and unenforceable despite the long passage of time. 95 U.S. 714 (1877).

[5] The lower court's opinion seems to suggest that someone in the defendant's position can always file an independent action in equity to challenge a judgment. This option is far beyond what most self-represented litigants can achieve.

It is unsurprising that this case arises in the context of a default judgment and a debt collection action.[6] Claims for debt collection are increasingly common in state courts.[7] *See generally* THE PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 16 (2020) ("PEW TRUSTS REPORT"); HUMAN RIGHTS WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 36 (2016). These claims often arise as a result of default judgments issued against individuals with limited financial resources. These defendants are generally unfamiliar with the intricacies of civil litigation. They are almost always

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[6] *See generally*, Jessica K. Steinberg, Colleen F. Shanahan, Anna E. Carpenter, & Alyx Mark, *The Democratic (Il)Legitimacy of Assembly-Line Litigation*, 135 HARV. L. REV. F. 359 (2022). The problems associated with debt collection and default judgments also extend to the criminal justice system. *See* AM. CIV. LIB. UNION, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT (2018).

[7] This is a national problem. *See, e.g.,* Aimee Constantineau, *Fair for Whom? Why Debt-Collection Lawsuits in St. Louis Violate the Procedural Due Process Rights of Low-Income Communities*, 66 AM. U. L. REV. 479 (2016); Conor P. Duffy, *A Sum Uncertain: Preserving Due Process and Preventing Default Judgments in Consumer Debt Buyer Lawsuits in New York*, 40 FORDHAM URB. L.J. 1147 (2013); Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans' Due Process Rights*, 35 WM. MITCHELL L. REV. 1115, 1118 (2009); Frank M. Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847 (1972).

unrepresented by counsel.[8] Steinberg et al., *supra*, at 359 ("In debt actions, asymmetrical representation is the norm, with the plaintiff almost always represented by counsel and the defendant very rarely so."). In addition, defendants in debt collection actions face other challenges. Their housing situation is likely unstable and uncertain, which makes personal service even more precarious.

All these factors make inadequate service and corresponding default judgments inevitable.[9] Researchers have long identified the issue of insufficient service as a major factor in debt collection cases. Hillard M. Sterling & Philip G. Schrag, *Default Judgements Against Consumers: Has the System Failed?* 67 DENV. U. L. REV. 357, 373 (1990); s*ee also* Bookman & Shanahan, *supra*, at 1221 ("Default rates

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[8] In California, the justice gap is well-documented. *See, e.g.*, STATE BAR OF CALIF., THE CALIFORNIA JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF CALIFORNIANS 25 (2019) (defining the justice gap as the number of civil legal problems for which individuals do not receive legal assistance); CAL. ACCESS TO JUSTICE COMM'N, STRATEGIC PLAN FOR 2023–2025, at 3 (2022) (explaining that economic, language, geographic, and immigration status barriers all contribute to the justice gap).

[9] These concerns will only increase because of technological developments. Keith Porcaro, *Robot Lawyers Are About to Flood the Courts*, WIRED (Apr. 13, 2023), https://www.wired.com/story/generative-ai-courts-law-justice/ (noting that debt collection actions and default judgments will grow commensurate with technological advances).

in eviction, debt collection, and other cases . . . are very high—with devastating consequences for litigants. One explanation for these high default rates is that litigants are not receiving notice, or sufficient notice, to spur participation in the litigation."); Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 HASTINGS CONST. L.Q. 261, 274 (2021) ("[T]here are strong incentives for plaintiff creditors, employers, and landlords to cut corners in giving notice because, in the absence of defense counsel, the likelihood that 'gutter service' will be challenged is low.").[10] The problem of inadequate service is so pervasive in these cases that it has its own name—"sewer service." *See, e.g.*, Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813 (2018); James Stoddard Hayes Jr., *Civil Procedure—A Possible Solution to the Problem of "Sewer Service" in Consumer Credit Actions*, 51 N.C. L. REV. 1517 (1973).

[10] But even in cases where individuals receive notice, the lack of representation means they often "lack a meaningful opportunity to be heard." Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1749 (2022). *See also* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999).

In the face of increasing efforts to improve equity and fairness in the service process through improved case notification, court processes, and residence verifications, the lower court's ruling takes California backward. THE PEW CHARITABLE TRUSTS, WHY CIVIL COURTS SHOULD IMPROVE DEFENDANT NOTIFICATION 3 (2023). If notice is an essential foundation to a valid judgment, there is simply no basis for interpreting § 473(d) to prevent someone from challenging a judgment that was issued through invalid notice.

## II. THE LOWER COURT'S DECISION WOULD HAVE A DISPROPORTIONATE IMPACT ON LOW-INCOME LITIGANTS AND COMMUNITIES OF COLOR

Grafting a temporal restriction to CAL. CIV. PROC. CODE § 473(d) would have a disproportionate and detrimental impact on low-income litigants and communities of color. These groups are disproportionately represented in debt collection actions and related lawsuits.[11] Pamela Foohey, Dalié Jiménez, & Christopher K. Odinet, *The Debt Collection Pandemic*, 11 CALIF. L. REV. ONLINE 222, 224 (2020) ("Black and Latinx Americans are sued by creditors and debt collectors more often

[11] *See also* Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods.

than others, and lawsuits against them are more likely to end with default judgments that lead to garnishments."); Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions,* 11 HARV. L. & POL'Y REV. 91, 110 (2017) ("[E]ven accounting for income, majority black neighborhoods experienced debt collection lawsuits and judgments at a rate two times that of mostly white neighborhoods."); PEW TRUSTS REPORT, *supra*, at 17 (describing racial disparities in debt claims).

These groups are also routinely victimized by faulty service practices. Gottshall, *supra*, at 816–18, 843 (describing the problem of "sewer service" and its impact on communities of color); Effron, *supra*, at 1544–45 (addressing how defendants in marginalized communities are often subject to notice problems and default judgments); Duffy, *supra*, at 1200 ("[D]ebt buyers . . . routinely exploit the adversarial process and deny due process to many, especially those who live in low- and moderate-income communities and communities of color."). This is unsurprising. Individuals from these communities seldom have counsel to assist them.[12] Russell Engler, *Connecting Self-*

[12] *See* Wilf-Townsend, *supra*, at 1707 ("The emerging dominance of unrepresented litigation raises serious concerns about the adequacy of our civil justice systems for reaching accurate results, their ability to

*Representation to Civil* Gideon*: What Existing Data Reveal about When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 79 (2010) (noting that most debtors appear in court without representation and are disproportionately people of color and individuals with low income); s*ee also* Dalié Jiménez, *Decreasing Supply to the Assembly Line of Debt Collection Litigation*, 135 HARV. L. REV. F. 374, 375 (2022) ("[S]tate courts have become co-opted by corporate plaintiffs and are inflicting illegitimate violence primarily on women and people of color . . . .")

Make no mistake—this case is infused with racial and gender dynamics. The evidence is simply overwhelming that "[r]ace, gender, and poverty are entrenched features of the civil justice landscape and pro se defendants in debt cases are disproportionately likely to be low-income people of color." Steinberg et al., *supra*, at 363; *id* at 366 ("On a platform of fraud, debt buyers are extracting wealth at the expense of poor people . . . ."); s*ee also* Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. 1130 (2023) (women disproportionately lack counsel in civil and criminal cases); Kathryn A.

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provide due process for litigants, and the distributive consequences of systems that place significant burdens on poor and otherwise marginalized communities.").

Sabbeth, *The Prioritization of Criminal Over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 931 (2015) ("The communities of persons unable to afford counsel in civil and criminal proceedings overlap substantially. Both are disproportionately poor people of color . . . . The key difference between the populations may be one of gender.").

The inequality generated by purportedly neutral rules of civil procedure is now well-documented.[13] Hannah Lieberman, *Uncivil Procedure: How State Court Proceedings Perpetuate Inequality*, 35 YALE L. & POL'Y REV. 257 (2016) ("[S]erious procedural reforms are necessary to ensure that our state civil courts do not perpetuate inequality under the guise of justice."). As explained by one scholar, "[t]he law of notice reinforces structural inequalities . . . at the expense of our most vulnerable populations." Robin J. Effron, *Notice and the Narratives of Court Access*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 202 (Brooke Coleman et

[13] *See, e.g.,* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES (Brooke Coleman et al. eds., 2022); Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143 (2021); Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV. 167 (2019); Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325 (2007).

al. eds., 2022). The extant legal regime also benefits "repeat players," with the time and financial resources to pursue judgments. Wilf-Townsend, *supra*, at 1708. The present case highlights this sobering reality.[14]

This inequality extends to all facets of life, including financial obligations. Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1410 (2020) ("Because debt affects marginalized groups disproportionately and more severely, its invocation as a source of equality and mobility may simply further entrench the very inequality it is offered to ameliorate."); s*ee also* Jiménez, *supra*, at 379 ("The available evidence points to a long history of rising debt collection cases, passive courts, default judgments, and unrepresented debtors.").

Adding a two-year time limit to claims for relief under CAL. CIV. PROC. CODE § 473(d) would perpetuate this inequality. The lower court's interpretation would incentivize plaintiffs to issue flawed service of process and then wait out the statute's limited temporal deadline before seeking to enforce their default judgments. Indeed, studies have documented how debt collection practices are built upon

[14] *See* NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL (2016); NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015).

the assumption that defendants will not show up and that state courts will decline to probe their absence. Wilf-Townsend, *supra*, at 1744. This interpretation would allow plaintiffs to prey on the most marginalized members of our community.[15] The inequality that already exists within the civil justice system would be exacerbated by such an interpretation.

[15] Ian Weinstein, *Access to Civil Justice in America: What Do We Know?, in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 3, 7-9 (Samuel Estreicher & Joy Radice eds., 2016) ("People in low-income households were less likely to perceive themselves as having a legal problem, less likely to address it themselves, less likely to seek legal assistance, and less likely to access the civil justice system than those in homes with greater financial resources.").

## CONCLUSION

For these reasons, *Amici* respectfully request that this Court reverse the lower court ruling.[16]

July 7, 2023

Respectfully submitted,

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[16] *See* Foohey, Jiménez, & Odinet, *supra*, at 230–31 (highlighting the important role of state high courts in remedying the problems associated with improper debt collection); Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg, & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509 (2022) (addressing the importance of judicial engagement in cases involving unrepresented parties).

## APPENDIX: LIST OF *AMICI CURIAE*

Affiliations are only provided for information purposes.

**Erwin Chemerinsky** is the Dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley School of Law. He previously served as the founding Dean at the University of California, Irvine School of Law. Professor Chemerinsky has authored many articles and authored or edited several books, including CONSTITUTIONAL LAW (6th ed. 2019). He is a Fellow for the American Academy of Arts and Sciences. In 2022, Professor Chemerinsky served as the President of the Association of American Law Schools.

**Pooja Dadhania** is a Professor of Law at California Western School of Law. She teaches Civil Procedure and Immigration Law. Professor Dadhania previously served as an Equal Justice Works Fellow at the Legal Aid Foundation of Los Angeles, where she provided direct legal services focusing on immigration and family law. She has published several articles that examine the impact of the immigration law regime on marginalized noncitizen communities, and how immigration status intersects with other forms of legal and experiential marginalization.

**David Freeman Engstrom** is the LSVF Professor of Law and Co-Director of the Deborah L. Rhode Center on the Legal Profession at Stanford Law School. Professor Engstrom teaches several courses, including Access to Justice and Administrative Law. He has published numerous articles on civil procedure, class actions, and employment discrimination. His forthcoming book on LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE (2023) will explore how technology can be used to assist those without lawyers. Professor Engstrom currently serves as the Reporter for the American Law Institute's Principles of the Law, High-Volume Civil Adjudication.

**Kenneth S. Klein** is the Louis and Hermione Brown Professor of Law at California Western School of Law. He teaches several courses, including Civil Procedure, Evidence, and The Law of Natural Disasters. Professor Klein has published numerous articles on matters of civil procedure, litigation, and insurance regulation. He has been recognized many times for his pro bono work, including as a two-time recipient of the Wiley E. Manuel Award for delivery of pro bono services and the State Bar of California's President's Pro Bono Services Award.

**Mark Rosenbaum** is an Adjunct Professor of Law at the University of California, Irvine, School of Law. He teaches Constitutional Analysis and Supreme Court Litigation. He also serves as the Director of Public Counsel Opportunity Under Law, which aims to eliminate economic injustice. Professor Rosenbaum previously worked for four decades with the American Civil Liberties Union of Southern California, serving as Chief Counsel and Legal Director.

**Gary C. Williams** is a Professor of Law and the Johnnie L. Cochran, Jr. Chair in Civil Rights at Loyola Law School. He teaches several courses, including Ethical Lawyering, Evidence, Privacy Law, and Civil Rights Litigation. Professor Williams has authored many articles and several books, including EVIDENCE: A STRUCTURED APPROACH (5th ed. 2021).

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of CRC 8.520(C) because it contains 3,181 words as counted by Microsoft Word, excluding those items listed in CRC 8.520(c)(3).

/s Paul Hoffman
Paul Hoffman
*Attorney for Amici Curiae*

## PROOF OF SERVICE

***California Capital Insurance Company, et al. v. Cory Michael Hoehn***
**SUPREME COURT CASE NO. S277510**
**Court of Appeal, Third Appellate District Case No. C092450**
**Placer County Superior Court Case No. SCV0026851**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 200 Pier Ave., Suite 226, Hermosa Beach, CA 90254.

On July 7, 2023 I served true copies of the following document(s) described as:

**APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF LEGAL SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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

Executed on July 7, 2023 at Hermosa Beach, California

William Hoffman
Paralegal

**STATE OF CALIFORNIA**
Supreme Court of California

## *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **CALIFORNIA CAPITAL INSURANCE COMPANY v. HOEHN**
Case Number: **S277510**
Lower Court Case Number: **C092450**

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

7/7/2023

Date

/s/Paul Hoffman

Signature

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