

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSEPH MAYOR,

Petitioner,

vs.

**WORKERS' COMPENSATION
APPEALS BOARD and ROSS VALLEY
SANITATION DISTRICT,**

Respondents.

Case No. S287261

RESPONDENT'S REPLY BRIEF ON THE MERITS

First Appellate District, Division Four, Case No. A169465
Workers' Compensation Appeals Board, Case No. ADJ10036954

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TABLE OF CONTENTS

Contents

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES.....	3
REPLY BRIEF	5
I. Petitioner’s citations support a finding that Labor Code section 5909 is not jurisdictional and subject to equitable tolling.	5
A. Comparison with section 5900.....	5
B. Comparison with section 5950.....	8
II. Equitable tolling is warranted as the Appeals Board did not timely receive the petition.....	10
III. Equitable tolling is warranted as the DWC, by accepting the petition for reconsideration for filing, necessarily represented that it would follow the law	12
IV. The Appeals Board has applied <i>Shipley</i> rarely and appropriately.....	13
V. A writ of mandate is not proper as petitioner has a plain, speedy, and adequate remedy in the normal course of law and did not suffer irreparable harm in waiting for a decision after reconsideration.. ..	14
CONCLUSION	16
CERTIFICATE OF COMPLIANCE	18
PROOF OF SERVICE BY TRUEFILING	19

NOTE: Certificate of Interested Entities or Persons omitted pursuant to California Rules of Court, rule 8.720(c)(1).

TABLE OF AUTHORITIES

Cases

<i>Allied Compensation Ins. Co. v. Industrial Acc. Com.</i> (1961) 57 Cal.2d 115	9, 16
<i>Bab v. Superior Court</i> (1971) 3 Cal.3d 841	14
<i>Hall v. DHL Express</i> 2024 Cal. Wrk. Comp. P.D. LEXIS 336	13, 14
<i>James W. v. Superior Court</i> (1993) 17 Cal.App.4th 246	14
<i>J.M. v. Huntington Beach Union High School Dist.</i> (2017) 2 Cal.5th 648.....	7
<i>Law Finance Group, LLC v. Key</i> (2023) 14 Cal.5th 932.....	6
<i>Los Angeles Gay & Lesbian Center v. Superior Court</i> (2011) 194 Cal.App.4th 288.....	14
<i>Mayor v. Workers’ Compensation Appeals Bd.</i> (2024) 104 Cal.App.5th 1297.....	15
<i>Omaha Indemnity Co. v. Superior Court</i> (1989) 209 Cal.App.3d 1266	15
<i>Saint Francis Memorial Hospital v. State Dept. of Public Health</i> (2020) 9 Cal.5th 710.....	9
<i>Shipley v. Workers’ Comp. Appeals Bd.</i> (1992) 7 Cal.App.4th 1104.....	12, 13
<i>State Farm Fire & Casualty Co. v. Workers’ Comp. Appeals Bd. (Felts)</i> (1981) 119 Cal.App.3d 193	9

Statutes

Labor Code

Labor Code, § 110, et seq.....	10
Labor Code, § 5900	passim
Former Labor Code, § 5909, Stats 1992, ch. 1226, § 5.....	passim
Labor Code, § 5909, Stats 2024 § 27 (AB 171), effective July 2, 2024, repealed July 1, 2026	6

Labor Code, § 5950	passim
Civil Code	
Civ. Code, § 3548.....	12
Code of Civil Procedure	
Code Civ. Proc., § 1086.....	14
Regulations	
Cal. Code Regs., tit. 8, § 10205(a)	10
Cal. Code Regs., tit. 8, § 10305(m).....	11
Cal. Code Regs., tit. 8, § 10615(d).....	11
Cal. Code Regs., tit. 8, § 10617	11
Cal. Code Regs., tit. 8, § 10940.....	13
Cal. Code Regs., tit. 8, § 10961	11, 12
Cal. Code Regs., tit. 8, § 10962.....	11, 12
Constitutional Provisions	
Cal. Const., art. XIV, § 4.....	16
Rules of Court	
Cal. Rules of Court, rule 8.520(a)(4).....	5
Cal. Rules of Court, rule 8.100	11
Cal. Rules of Court, rule 8.121	11
Cal. Rules of Court, rule 8.150	11
Cal. Rules of Court, rule 8.821	11
Cal. Rules of Court, rule 8.831	11
Cal. Rules of Court, rule 8.840	11

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RESPONDENT'S REPLY BRIEF ON THE MERITS

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

The Workers' Compensation Appeals Board ("Appeals Board") has received and reviewed "Petitioner's Opening Brief on the Merits"¹ (hereinafter "Answer") and pursuant to Rule of Court 8.520(a)(4) files this Reply Brief on the Merits.

I. Petitioner's citations support a finding that Labor Code section 5909 is not jurisdictional and subject to equitable tolling.

A. Comparison with section 5900

Throughout the Answer, petitioner argues that Labor Code² section 5900, a jurisdictional statute governing how petitions for reconsideration must be *filed*, is analogous to section 5909, which governs how such petitions

¹ On March 11, 2025, the Supreme Court issued a Notice of Errata correcting the title of petitioner's brief to an answer brief on the merits.

² All future statutory references are to the Labor Code unless noted.

must be *decided*.³ Instead, a comparison of these sections reveals clear jurisdictional language in section 5900 and the absence of similar language in section 5909, indicating that the Legislature intended section 5909 to be non-jurisdictional.

As noted by this Court, when determining whether a statute is jurisdictional, we look for “clear markers of legislative intent that the respective deadlines are jurisdictional. (Citation.)” (*Law Finance Group, LLC v. Key* (2023) 14 Cal.5th 932, 951.) “Much as the high court has said of Congress, our Legislature ‘must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional’ in the fundamental sense.” (*Id.* at p. 950.)

Applying this analysis to section 5900, clear jurisdictional language exists:

(a) Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a workers’ compensation judge under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. **The petition shall be made *only* within the time and in the manner specified in this chapter.**

(§ 5900, subd. (a), emphasis added.)

³ As noted in Respondent’s Opening Brief, section 5909 was recently amended, effective July 2, 2024. (§ 5909, Stats 2024 § 27 (AB 171), effective July 2, 2024, repealed July 1, 2026.) This case concerns the language as it existed prior to that amendment. Further references to section 5909 refer to the former section, unless noted. (Former § 5909, Stats 1992, ch. 1226, § 5.)

The Legislature’s explicit command that petitions for reconsideration be filed “only within the time and in the manner specified” precludes a court from creating exceptions as the law expressly precludes such exceptions.

Comparing the language of section 5900 with section 5909 emphasizes the lack of jurisdictional restrictions in section 5909. “A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date of filing.” (Former § 5909, Stats. 1992, ch. 1226, § 5.) No jurisdictional language exists in section 5909, and thus, the section is not jurisdictional.

While petitioner focuses his argument on the language “deemed denied” (Answer at p. 20), this language does not preclude the Appeals Board from acting beyond 60 days. Other statutes such as the Government Claims Act with similar “deemed denied” language have been found to be not jurisdictional. (*J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648, 657.) Petitioner cites to *J.M.* and contends that the language in the statute in *J.M.* was similarly written to section 5900. (Answer at pp. 21-22.) However, Petitioner misreads *J.M.* as finding the Government Claims Act jurisdictional, when in fact this Court found that: “The doctrine of equitable tolling may also apply to the limitation periods imposed by the claims statutes.” (*J.M., supra*, 2 Cal.5th at p. 657.) This Court merely found that the facts of *J.M.* did not warrant equitable tolling. (*Id.* at p. 658.) “Deemed denied” language does not make a statute jurisdictional.

The Legislature used clear jurisdictional language to govern the *filing* of petitions for reconsideration under section 5900. In contrast, the Legislature omitted jurisdictional language to govern the *ruling* on petitions for reconsideration in section 5909. The omission of jurisdictional language in section 5909 shows the clear intent of the Legislature, and thus, section 5909 is not jurisdictional.

B. Comparison with section 5950

Petitioner further argues that section 5950, which is a jurisdictional statute controlling when a petition for review must be *filed*, is analogous to section 5909. However again, unlike section 5909, section 5950 contains clear jurisdictional language, highlighted as follows:

Any person affected by an order, decision, or award of the appeals board may, **within the time limit specified in this section**, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration. The application for writ of review **must be made within 45 days** after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration.

(§ 5950, emphasis added.)⁴

⁴ Notwithstanding that section 5950 is jurisdictional, notably even the Court of Appeal has reviewed a late petition where a party's right to due process was violated because the Appeals Board did not timely serve its decision:

Whether or not a procedure for review of decisions of the Board must be provided as a matter of constitutional law, once such a procedure is provided, as it is in California (see Lab. Code, § 5950 et seq.), it must comport with the guarantees of due process of law found in the Fourteenth Amendment to the United States Constitution and article I, section 7, of the Constitution of the State of California. (Citations.)

It is a fundamental principle of due process that a party may not be deprived of a substantial right without notice (Citations,) and a rule that the statutory right to judicial review of Board decisions is lost by passage of the 45-day statutory period even though the affected party was not afforded notice of the decision to be reviewed would offend elementary due process principles. We conclude, therefore, that where, as here, notice

The Legislature has created a system where the Appeals Board reviews the decisions of a workers' compensation administrative law judge ("WCJ"), and at a minimum, parties are entitled to due process of law. (*Ibid.*) A party who files a petition for reconsideration has a right to be heard, which requires the Appeals Board to review the petition before issuing its decision. (See *Allied Compensation Ins. Co. v. Industrial Acc. Com.* (1961) 57 Cal.2d 115, 120 [Wherein the Supreme Court held that when deciding reconsideration, the Appeals Board must achieve a substantial understanding of the record].) A trial judge cannot, in effect, deny an appeal of their own decision by failing to transmit the appeal to the reviewing court. Interpreting the statute in this manner would violate a party's right to due process.

Petitioner correctly states that section 5950 is jurisdictional, but the reason that section 5950 is jurisdictional is because the Legislature used specific language commanding that a petition for review "must be made within 45 days." (§ 5950.) The Legislature's inclusion of such language in section 5950, and its omission from section 5909, further supports the conclusion that section 5909 is not jurisdictional.

All statutes are presumed to be subject to equitable tolling. (*Saint Francis Memorial Hospital v. State Dept. of Public Health* (2020) 9 Cal.5th 710, 720.) The presumption that a statutory limitations period is subject to equitable tolling is rebuttable. (*Law Finance Group, LLC, supra*, 14 Cal.5th at pp. 952-953.) Here, the citations provided by petitioner show that the

of the order to be reviewed was not afforded until after expiration of the statutory period in which review could be sought, the running of the statutory period must be deemed to commence with the receipt of notice. Here, the petition for review was filed well within 45 days after State Farm first received notice on October 27, 1980, and the petition was therefore timely filed.

(*State Farm Fire & Casualty Co. v. Workers' Comp. Appeals Bd. (Felts)* (1981) 119 Cal. App. 3d 193, 196-197.)

Legislature has used compelling language in other parts of the Labor Code, while omitting such language in section 5909. The clear conclusion is that section 5909 is a non-jurisdictional statute, which is subject to equitable tolling.

II. Equitable tolling is warranted as the Appeals Board did not timely receive the petition.

Both petitioner and the Appeals Board acknowledge that Ross Valley Sanitation District electronically filed a timely petition for reconsideration in the Electronic Adjudication Management System (EAMS). That fact is not in dispute. Petitioner argues that equitable tolling should not apply because the petition for reconsideration in this matter was not lost or misplaced. Petitioner further argues that a petition filed in EAMS is directly filed with the Appeals Board. **This is not true.**⁵

Petitions for reconsideration are uploaded into an adjudication file⁶ in EAMS, but all adjudication files are maintained by the Division of Workers' Compensation (DWC) and not the Appeals Board. Consequently, while a document may be timely filed in EAMS for the purposes of meeting the statutory deadline, the regulations merely set forth an administrative procedure for filing, and are not a reflection of the statutory process for review contained in section 5900 et. seq.

⁵ The Appeals Board does not suggest that petitioner is intentionally misrepresenting the facts or law in this matter. Petitioner is confused and his confusion is understandable given the complexity of the statutes and the way the Legislature divided the adjudication and administration of the workers' compensation system amongst two independent divisions of government. (§ 110, et seq.)

⁶ “‘Adjudication file’ or ‘ADJ file’ means a case file in which the jurisdiction of the Workers’ Compensation Appeals Board has been invoked and which is maintained by the Division of Workers’ Compensation in paper format, or electronic format, or both, including a temporary paper case file.” (Cal. Code Regs., tit. 8, § 10205, subd. (a).)

“‘Filing’ a document means receipt and acceptance by the Workers’ Compensation Appeals Board of the document for the purpose of having it included in the adjudication file.” (Cal. Code Regs., tit. 8, § 10305, subd. (m).) Rule 10615, subdivision (d) states, in pertinent part: “When a document is filed electronically, it shall be deemed to have been received by the Workers’ Compensation Appeals Board when transmission of the document is complete. Receipt shall constitute confirmation of successful filing unless otherwise notified by the Workers’ Compensation Appeals Board or the Administrative Director.” (Cal. Code Regs., tit. 8, 10615, subd. (d).) In fact, Rule 10617 expressly permits acceptance of documents that are subject to a statute of limitations but have been improperly filed. (Cal. Code Regs., tit. 8, § 10617.)

In this context, the purpose of Rule 10615 is to establish the timely filing of a petition for reconsideration pursuant to section 5900, subdivision (a). For the purposes of the statute of limitations, the Appeals Board deems a petition for reconsideration received when it is filed in EAMS, but the Appeals Board does not directly receive the petition. The trial court (i.e., the DWC) must transfer the petition to the Appeals Board along with the report of the trial judge. (Cal. Code Regs., tit. 8, §§ 10961, 10962.) Only after the DWC electronically transfers the adjudication file to the Appeals Board does the Appeals Board have actual possession of the petition.

The Appeals Board utilizes a comparable procedure to that of the Superior Courts. In Superior Court, a party in a civil case first files a notice of appeal at the trial level. (Cal. Rules of Court, rules 8.100, subd. (a)(1), 8.821, subd. (a)(1).) Then the party notifies the trial court clerk of the designated record on appeal. (Cal. Rules of Court, rules 8.121, subd. (a), 8.831, subd. (a).) Finally, the trial court forwards the appeal along with the record to the appropriate reviewing court. (Cal. Rules of Court, rules 8.150, 8.840.) The procedure of filing an appeal directly with the trial court is

common practice and the idea that a trial court has a duty to the reviewing court to transmit its file is not new. The problem presented in this case is what to do when the trial court fails to perform their duty under the law to transmit the appeal to the reviewing court. Following the logic of *Shiple*, due process requires that the time for a reviewing court to act is tolled until the file is transferred to the Appeals Board. (*Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104.)

III. Equitable tolling is warranted as the DWC, by accepting the petition for reconsideration for filing, necessarily represented that it would follow the law.

Petitioner next argues that no equitable circumstances exist because no misleading representation was made in this case as existed in *Shiple*. (Answer at pp. 9, 38; *Shiple, supra*, 7 Cal.App.4th at p. 1108.) **This argument is incorrect.** The DWC accepted the petition for reconsideration for filing and in doing so it represented to the parties that it would follow the law. (Civ. Code, § 3548 [It is a maxim of jurisprudence that: “The law has been obeyed.”].) By operation of law, the DWC represented to Ross Valley Sanitation District that the workers’ compensation judge would review the petition for reconsideration, and either admit error and vacate his decision, or draft a report and transmit the petition to the Appeals Board for review. (Cal. Code Regs., tit. 8, §§ 10961, 10962.) Ross Valley Sanitation District relied upon the DWC to follow the law, but the DWC failed to perform its duties. When the DWC affirmatively accepts a petition for reconsideration for filing, the DWC necessarily represents that it will process the petition in accordance with the law.

IV. The Appeals Board has applied *Shipley* rarely and appropriately.

Petitioner next argues that the Appeals Board abused its power by using equitable tolling in a “sweeping manner” as a routine “procedural workaround.” (Answer at pp. 9, 28, 31, 34, 39-41.) However, petitioner provides no citation supporting this argument. Petitioner created no record suggesting that the Appeals Board uses tolling in a sweeping manner. The Appeals Board has applied *Shipley* responsibly to account for extraordinary circumstances to protect due process where a petition was not transmitted by the DWC district office or the Appeals Board has lost the petition.

Petitioner discusses the panel decision in *Hall v. DHL Express* as an example of the Appeals Board using equitable tolling improperly. (Answer at pp. 39-40; 2024 Cal. Wrk. Comp. P.D. LEXIS 336.) The issue in *Hall* arose when a party sought reconsideration of a decision of the Appeals Board, which by regulation must be filed directly with the Appeals Board and not with the DWC district office. (Cal. Code Regs., tit. 8, § 10940, subd. (a).) The problem presented in *Hall* is the same problem posed by petitioner’s Answer: parties confuse filing in EAMS with filing directly with the Appeals Board. As explained in *Hall*:

We note that the issue of equitable tolling in this case is close. The reason the file was lost is because defendant misfiled it at the DWC District Office in violation of our regulation. However, we recognize that there are significant misconceptions in the community as to what transpires after a petition is filed in EAMS. Traditionally, the DWC District Office has transmitted “lost” petitions to the Appeals Board, which unfortunately has further fueled the misapprehension that filing with the DWC District Office is acceptable.

(*Hall, supra*, 2024 Cal. Wrk. Comp. P.D. LEXIS 336 at p. *14.)

The Appeals Board recognized that, just like petitioner here, the party in *Hall* erroneously believed that filing a petition for reconsideration in EAMS was equivalent to filing it directly with the Appeals Board. Taking into account the understandable confusion, the Appeals Board found that tolling existed. No party challenged the decision. Petitioner attempts to refer to the decision in *Hall* to bolster his argument, but *Hall* is not an example of the Appeals Board using tolling in an unreasonable manner.

V. A writ of mandate is not proper as petitioner has a plain, speedy, and adequate remedy in the normal course of law and did not suffer irreparable harm in waiting for a decision after reconsideration by the Appeals Board.

To seek a writ of mandate, petitioner must still show that there is no “plain, speedy, and adequate remedy in the ordinary course of law.” (Code Civ. Proc., § 1086.) Here, petitioner had a clear remedy in the ordinary course of law, which is a writ of review. (§ 5950.) It has long been established that a petitioner seeking extraordinary writ relief must establish harm absent writ relief. (*Bab v. Superior Court* (1971) 3 Cal.3d 841, 851 [“We perform such a function of intermediate review with extreme reluctance”]; *James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 252 [“Appellate courts simply do not have the time or resources to police law and motion rulings on the pleadings through the mandamus power and, absent unusual circumstances, decline to do so”]; *Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 299-300 [“Conditions prerequisite to the issuance of a writ are a showing there is no adequate remedy at law ... and the petitioner will suffer an irreparable injury if the writ is not granted. [Citation]”].)

As explained by the Second District:

Error by the trial judge does not of itself ensure that a writ petition will be granted. A remedy will not be deemed inadequate merely because

additional time and effort would be consumed by its being pursued through the ordinary course of the law. (Citation.)

(*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1269.)

The *Mayor* court found that requiring a party to wait until a decision after reconsideration issued meant that no speedy resolution existed. (*Mayor v. Workers' Compensation Appeals Bd.* (2024) 104 Cal.App.5th 1297,1310.) This is not sufficient justification for exercising extraordinary writ relief.

The amount of time it takes to litigate extraordinary writs defeats *Mayor's* justification for granting relief. Petitioner continues to argue, and in fact admits, that his use of extraordinary writ proceedings in his case has caused substantial delays. (Answer, pp. 42-43.) Petitioner notes that a final resolution of his case has now been delayed by over two years and that he has been unable to seek adjudication of medical treatment disputes while this matter is pending. (*Ibid.*) If the *Mayor* decision stands as to its use of extraordinary relief, these types of delays may become more common.

Petitioner's own arguments demonstrate the perils of expanding the availability of extraordinary writ relief to non-final orders. Such petitions can cause significant delays in the cases where relief is sought. They can divert the limited resources of the Appeals Board to addressing preemptive writ proceedings and delaying the resolution of other cases before the Appeals Board. The use of extraordinary writs should be for extraordinary circumstances where the situation is genuinely unique and the petitioner has no appeal available, or when such an appeal would result in irreparable harm.

CONCLUSION

The Legislature has created a process whereby the Appeals Board is required to review timely filed petitions for reconsideration. Having created such a process, the Appeals Board is bound by both the State and Federal Constitutions to provide due process to all parties seeking reconsideration. At a minimum, the Appeals Board must review the petition for reconsideration and achieve a substantial understanding of the record prior to deciding it. (*Allied Compensation Ins. Co., supra*, 57 Cal.2d at p. 120.)

So long as humans are involved in processing petitions for reconsideration, human error will exist. On very rare occasions, petitions will be lost or misplaced, or computer files may get corrupted, or any other host of errors may occur. Dealing with error is part of the human condition. Such errors in workers' compensation are rare, but they do occur. The Appeals Board is compelled by the Constitution to accomplish substantial justice, which does not mean prizing form over substance, but means providing the parties a decision on the merits. (Cal. Const., art. XIV, § 4.)

In closing, section 5909 is not jurisdictional. The statute contains no language restricting the Appeals Board's continuing jurisdiction to act after 60 days. Comparing section 5909 with sections 5900 and 5950 clearly demonstrates that the Legislature used jurisdictional language in one part of the statutory scheme, but omitted it from section 5909. Section 5909 is not jurisdictional and is subject to tolling.

The facts of this case support tolling. The DWC accepted the petition for reconsideration for filing, but the WCJ failed to draft a report or transmit the petition for reconsideration to the reviewing court for determination. The Appeals Board was not aware of the petition until after its time to act expired. In effect, the WCJ denied an appeal of their own decision.

For these reasons, the Appeals Board continues to respectfully request that the Court reverse the decision below and find that section 5909 is a non-

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(Code Civ. Proc., § 1010.6; Lab. Code, § 5954; Cal. Rules of Court, Rules 8.70 - 8.79)

STATE OF CALIFORNIA)
)ss.
CITY AND COUNTY OF SAN FRANCISCO)

I am over 18 years of age and not a party to this action. I am employed in the county where the mailing took place. My business address is 455 Golden Gate Avenue, Suite 9328, San Francisco, CA 94102. My electronic name address is MDholakia@dir.ca.gov.

On April 1, 2025 at 6:30 P.M., I electronically served the attached RESPONDENT WORKERS’ COMPENSATION APPEALS BOARD’S OPENING BRIEF ON THE MERITS to Jorge E. Navarrete, Clerk/Executive Officer, in the matter Supreme Court Case No. S287261, Joseph Mayor v. Workers’ Compensation Appeals Board; Ross Valley Sanitation District [WCAB Case No. ADJ10036954], and on the parties registered for electronic service through TrueFiling.

<p><u>Supreme Court (TrueFiling):</u> Jorge E. Navarrete Clerk/Executive Officer Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797</p>	<p><u>Counsel for Petitioner (TrueFiling):</u> Elizabeth Common, Esq. beth@shoemakerlawoffices.com Shoemaker Law Offices 150 Glen Cove Marina Rd. E, Ste. 103 Vallejo, CA 94591</p>
<p><u>Counsel for Respondent (TrueFiling):</u> Christian Parker Kerry, Esq. ckerry@hannabrophy.com Hanna Brophy MacLean McAleer & Jensen LLP P.O. Box 12488 Oakland, CA 94604-2488</p>	<p><u>One Copy – Hand Delivered</u> Office of the Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004</p>

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on April 1, 2025.

/s/ Monali Dholakia

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S287261**
Lower Court Case Number: **A169465**

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