

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
NO. C093006**

GAVIN NEWSOM, in his official capacity as Governor of
the State of California, Petitioner,

v.

THE SUPERIOR COURT OF SUTTER COUNTY,
Respondent,

JAMES GALLAGHER and KEVIN KILEY,
Real Parties in Interest.

Petition for Writ of Extraordinary Mandate, Prohibition, or Certiorari from
Sutter County Superior Court,
Case No. CVCS20-0912, Hon. Sarah Heckman.

**APPLICATION OF SECRETARY OF STATE ALEX PADILLA
FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN
SUPPORT OF PETITIONER GOVERNOR GAVIN NEWSOM**

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208 and Rule 8.488 of the California Rules of Court, Secretary of State Alex Padilla certifies, through his undersigned counsel, that he knows of no entity or person that must be listed under Rule 8.208 or Rule 8.488 of the California Rules of Court.

Dated: December 18, 2020

Respectfully submitted,

/s/ Kevin Calia

Kevin Calia

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Secretary of State Alex Padilla

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.487, subdivision (e), of the California Rules of Court, Secretary of State Alex Padilla respectfully requests permission to file an amicus curiae brief in support of Petitioner Governor Gavin Newsom. This application is timely made within 14 days after the filing date of the real parties in interest's return.

Secretary of State Padilla is California's chief elections officer. (Gov. Code, § 12172.5.) He has responsibility to "administer the provisions of the Elections Code" and to "see that elections are efficiently conducted and that state election laws are enforced." (*Ibid.*) Throughout his tenure as Secretary of State, Secretary Padilla has worked to ensure that every Californian has the opportunity to participate in the electoral process. He has made it his priority to reduce or eliminate barriers that interfere with Californians' ability to vote. He has sought to increase access to voter registration, to expand access to language services, and to make it easier for California voters to cast their ballots.

When the COVID-19 pandemic reached California, Secretary Padilla and his staff immediately began working to determine what changes would be needed to ensure that every eligible California voter could vote in the November 3, 2020 election in a safe, secure, accessible, and healthy manner. After organizing a forum for discussion that included daily meetings among stakeholders from late March to mid-April, Secretary Padilla made recommendations to Governor Newsom and to the Legislature about procedures for the November 2020 election that would enable local election officials to send every registered California voter a vote-by-mail ballot, while also providing access to in-person voting opportunities and ballot dropoff locations. Secretary Padilla then continued to work with the Governor, the Legislature, and county elections officials as these

recommendations were incorporated first into executive orders, and subsequently into legislation (Assembly Bill 860 and Senate Bill 423), which was passed by two thirds of each House of the California Legislature and signed into law by Governor Newsom.

Secretary Padilla’s perspective, based on his experience administering the provisions of the Elections Code in past elections and in considering what election procedures could be changed to address the COVID-19 pandemic, will assist the Court in deciding the matter and in understanding the complexity of planning for and administering elections.

No party or counsel for a party in the pending case authored the proposed amicus curiae brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than the amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

Dated: December 18, 2020

Respectfully submitted,

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AMICUS CURIAE BRIEF

INTRODUCTION

Amid a global pandemic, a record 17,785,151 votes were cast by Californians in the November 3, 2020 election. (Secretary of State Certifies Record Setting General Election Results, available at <https://admin.cdn.sos.ca.gov/press-releases/2020/ap20-116.pdf>.) This represents more than 3 million more votes than the previous record set during the November 2016 General Election. (*Ibid.*) It would not have been possible to ensure that the November 3, 2020 election was accessible, secure, and safe without cooperative effort from the Governor, the Secretary of State, the Legislature, local elections officials, and voting rights stakeholders starting early in the pandemic. The Governor’s Executive Order No. N-67-20 was a key part of that cooperative effort that enabled elections officials to plan for and deliver an accessible, secure, and safe election despite the challenges caused by COVID-19.

Now that the election is over, the Secretary of State agrees with the Governor that any dispute over Executive Order N-67-20 is moot. By October 2, the Secretary of State had issued revised guidance that declared “Assembly Bill 860 and Senate Bill 423 superseded Executive Orders N-64-20 and N-67-20 upon their enactment.” (II Tab 38, p. 330, fn. 1.)

Real Parties argue that there were differences between Executive Order N-67-20 and Senate Bill 423, pointing to details about bar codes on ballot envelopes or whether planning meetings to determine the locations of voting centers or ballot dropoff locations could be conducted online instead of in-person. (Return at pp. 20-21.) Even if these details were determined by the executive order, however, there is nothing that can be done to change these details now. Ballot envelopes were printed months ago. They have been mailed to voters, returned, and counted. There is no need to resolve a dispute about what kinds of bar codes were printed on them. Likewise,

voting centers and ballot dropoff locations were selected months ago and voters already visited them and cast their votes. There is no point in fighting about whether the meeting to decide on those locations should have been in person or online. Executive Order N-67-20 concerned only the November 3, 2020 election, and now the ballots have been counted and the results of that election have been certified. Because the election is over, any dispute over Executive Order N-67-20 is moot.

If the Court finds it necessary to interpret the scope of the Governor's power under the Emergency Services Act, the Secretary of State urges the Court to consider the long-term planning that is required to administer any election. Even in normal times, a statewide election involves many months of planning to meet the complex statutory and logistical deadlines necessary to ensure that ballots are properly prepared and printed, voting equipment is procured and tested, voting locations are available and accessible, election workers and volunteer poll workers are hired and trained, and voters are educated about the available options for casting their ballots.

Given the months of planning required to administer an election, there may not always be sufficient time, when an emergency strikes, for the Legislature to respond with legislation quickly enough to protect Californians' right to vote. Accordingly, the Court should adopt an interpretation of the Emergency Services Act that permits the Governor to protect voters by issuing orders to fill any gaps that are created when provisions of the Elections Code must be suspended due to an emergency. Governor Newsom's Executive Order N-67-20 fits comfortably within this broad authority. It provided temporary authority to keep the planning process moving forward, while the Secretary of State's office continued to work cooperatively with the Governor and the Legislature to pass legislation to govern the November 3, 2020 election.

ARGUMENT

I. Any Challenge to Executive Order N-67-20 Is Moot.

Executive Order N-67-20, Assembly Bill 860, and Senate Bill 423 each concerned only the November 3, 2020 election. (Elec. Code, § 1600 [“This chapter applies only to the November 3, 2020, statewide general election.”]; see also Elec. Code, § 3000.5, subd. (a); Elec. Code, § 3016.7; Elec. Code, § 3019.7, subd. (d); Elec. Code, § 3020, subd. (d); I Tab 14, pp. 74-77.) On December 11, 2020, Secretary of State Padilla certified the results of that election. (Secretary of State Certifies Record Setting General Election Results, available at <https://admin.cdn.sos.ca.gov/press-releases/2020/ap20-116.pdf>.) Ballots have been mailed, returned, and counted. The election is over. Accordingly, the Secretary of State agrees with the Governor that any dispute about Executive Order N-67-20 is moot. (*Hillsboro Properties v. City of Rohnert Park* (2006) 138 Cal.App.4th 379, 389, fn.3 [citation omitted].)

Even before the election was over, however, events had already mooted the Real Parties’ challenge to Executive Order N-67-20. By October 2, the Secretary of State’s office had issued revised guidance that declared “Assembly Bill 860 and Senate Bill 423 superseded Executive Orders N-64-20 and N-67-20 upon their enactment.” (II Tab 38, p. 330, fn. 1.)

Real Parties argue that there were differences between Executive Order N-67-20 and Senate Bill 423, pointing to details about bar codes on ballot envelopes or whether planning meetings to determine the locations of voting centers or ballot dropoff locations could be conducted online instead of in-person. (Return at pp. 20-21.) These details, however, were finalized long before election day and the trial court could not possibly have ordered

changes to these procedures in its Statement of Decision issued on November 13, 2020, after the election had been conducted.

County elections officials were required to begin mailing ballots to voters 29 days before the election, on October 5, 2020. (Elec. Code, § 3000.5.) Any dispute over whether a particular type of bar code should have been printed on ballot envelopes was certainly moot by the time ballots had been printed and were being mailed throughout the state. In practical reality, the dispute was moot much earlier given the time required to design ballot envelopes and have them printed by vendors to be ready for mailing on October 5.

Likewise, voting locations and ballot dropoff locations were finalized long before the election. Ballot dropoff locations were required to be open “at least during regular business hours beginning not less than 28 days before the day of the election,” on October 6, 2020. (Elec. Code, § 1602, subd. (c)(2) and (c)(3).) Of course, the counties had to decide where the locations should be, conduct site inspections, and finalize arrangements before these voting locations could be opened. And counties had to include information about the locations of polling places and vote centers in mailings sent to voters at least 21 days in advance of the election, on October 13, 2020. (Elec. Code, § 13303.) Any dispute about whether the public meetings used to consider the locations of vote centers and ballot dropoff locations could permissibly be conducted online during a deadly pandemic was moot by the time voters began voting at these locations. Certainly, the trial court could not have granted effective relief on November 13, 2020 after all the voters had already voted at these locations.

The Secretary of State also agrees with the Governor that the possibility of a special election does not prevent a dispute over Executive Order N-67-20 from being moot. Executive Order N-67-20 does not cover any special elections. If an executive order is needed at all (and it appears

none will be needed), the planning and resources needed to administer a special election located in one part of the state will be very different from what was needed to conduct a statewide general election during a global pandemic. Any dispute about a special election should be decided with concrete facts about the local conditions and in litigation brought by parties with an interest in that actual controversy. (*Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 170 [“judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy”].)

It would make no sense for a trial court in Sutter County to decide what changes to election procedures are justified by the pandemic for a special election for State Senate District 30 in Los Angeles County, especially when Los Angeles County is subject to special rules that make it likely that an executive order will not be needed. (Elec. Code, § 4007.) Nor are legislators representing districts hundreds of miles away from Senate District 30 the appropriate parties to complain about any possible changes to the procedures for such a special election in one part of Los Angeles County.

II. Executive Order N-67-20 Was a Lawful Exercise of the Governor’s Powers Under the Emergency Services Act

To the extent this Court finds it necessary to interpret the scope of the Governor’s power under the Emergency Services Act, the Secretary of State urges the Court to adopt an interpretation that permits the Governor to fill gaps that are created when provisions of the Elections Code are suspended due to an emergency. (Pet. at pp. 51-54; Reply 16-23.)

Administering statewide elections requires months of planning even in normal times. Given the long-term planning required, there may not

always be sufficient time, when an emergency strikes, for the Legislature to respond with legislation quickly enough to protect Californians' right to vote. That is exactly what happened here. Executive Order N-67-20 was needed to provide authority to keep the planning process moving forward, while the Secretary of State's office continued to work cooperatively with the Governor and the Legislature to pass legislation to govern the November 3, 2020 election.

A. Elections Require Months of Planning

The planning process for any normal statewide election begins months in advance of "Election Day." During these months, the Secretary of State works closely with county elections officials and voting rights stakeholders to manage countless logistical details necessary to ensure that ballots are properly prepared and printed, voting equipment is procured and tested, voting locations are available and accessible, election workers and volunteer poll workers are hired and trained, and voters are educated about the available options for casting their ballots. In short, it takes many months of planning by elections officials to complete the work required to ensure that California's 22 million registered voters can cast their ballots in 58 diverse counties when the election begins.

For each election, the Secretary of State's office publishes an election calendar that lists pages of deadlines leading up to the election with cross-references to Elections Code provisions that establish the deadlines. (See November 3, 2020, General Election Calendar, available at <https://elections.cdn.sos.ca.gov//statewide-elections/2020-primary/section-8-general-calendar.pdf>.) County election officials also publish their own calendars, which contain additional details. (See Los Angeles County Registrar-Recorder/County Clerk, "CALENDAR OF EVENTS, GENERAL ELECTION – NOVEMBER 3, 2020," available at

https://www.lavote.net/docs/rcc/election-info/11032020_calendar.pdf?v=9.)

Even these detailed calendars do not reflect the full complexity of administering an election. For example, the Secretary of State must begin mailing the state voter information guide 40 days before an election. (Elec. Code, § 9094.) But, before the mailing can take place, the guide must be furnished to the Office of State Printing 40 days before the mailing begins. (Elec. Code, § 9082.) And, before the guide can be sent to the printer, it must be available for public examination for 20 days. (Elec. Code, § 9092.) And, of course, before the guide can be available for public examination, the various sections of the guide must be designed, drafted, and translated into multiple languages. (Official Voter Information Guide, available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>.) Each of these steps takes time and planning.

Moreover, much of the content in the voter information is tailored to the specific upcoming election and any recent changes in election procedures. Any such changes to election procedures must be known sufficiently in advance to draft, design, and translate the guide. For example, the 2020 voter information guide notified voters that “Every registered voter in California would receive a vote-by-mail ballot in the General Election:”



(*Id.*, at p. 1.) It also provided information about how voters could vote safely at early voting locations, including a graphic with a voting location safety checklist specific to COVID-19:

VOTING LOCATION SAFETY CHECKLIST

- Wear a face covering** while at the voting location.
- Keep 2 arms' length distance** from other people.
- Wash hands** before and after entering the voting location.
- Use hand sanitizer** after touching doors or voting equipment.
- Bring a ballpoint pen** to avoid touching high-contact surfaces.

Want more information about how to stay safe while voting?
Review Centers for Disease Control and Prevention guidelines at www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html

(*Id.*, at p. 2.) And it provided a checklist for voting by mail that was particularly important for explaining the procedures for signing, returning, and tracking their ballot envelopes to those voters who may have been new to voting by mail:

Voting by mail is SAFE and EASY.

After marking your choices on your ballot, simply:

- Seal it.**
Secure your ballot inside the envelope from your county elections office.
- Sign it.**
Make sure the signature on your ballot envelope matches the one on your CA driver license/state ID, or the one you provided when registering. Your county elections office will compare them to protect your vote.
- Return it.**
By mail—Make sure your ballot is postmarked by **November 3, 2020.** No stamp required!
OR
In person—Drop your ballot off at a secure drop box, polling place, vote center, or county elections office by **8:00 p.m. on November 3, 2020.**
- Track it.**
You can sign up at wheresmyballot.sos.ca.gov for alerts by text (SMS), email, or voice call on the status of your vote-by-mail ballot.

(*Id.*, at p. 3.)

Many of the deadlines on the election calendar involve a level of underlying complexity similar to the deadlines relating to the preparation of the voter information guide, including both statutory deadlines and logistical and planning deadlines that all must be met to get the necessary information to voters and administer the election. The Secretary of State and local elections officials spend months planning these details, designing clear communications, lining up vendors, securing contracts, preparing for massive mailings to voters, and planning for how to receive, process, and count the ballots that voters return.

B. Executive Order N-67-20 Was Critical to Planning for the November 2020 Election

Back in March and April, planning for the November 3, 2020 election was far from normal. Elections officials saw primary elections in other states that were disrupted by COVID-19. (I Tab 21, p. 149 [uncodified legislative findings in support of AB 860 detailing disruptions in other states]; I Tab 18, p. 133 [Declaration of Jana M. Lean].) At least 16 states either delayed their primary elections or converted them to vote by mail elections. (I Tab 21, p. 149.) Other states made changes to election procedures just days before their primary elections, which led to legal disputes and voter confusion. (*Ibid.*) Some jurisdictions were unable to open sufficient polling places because of a lack of safe space or available poll workers, which led to long lines at the polling places that were able to open and threatened the rights of citizens to vote. (*Ibid.*)

California elections officials faced great uncertainty about what the COVID-19 situation would look like months in the future. (I Tab 18, p. 133.) They were forced to plan for many possible contingencies, and they needed to begin planning right away and move quickly to secure supplies of

necessary space, materials, and workers in an environment where other jurisdictions were seeking the same sorts of supplies from the same sorts of vendors. There were legitimate concerns that there could be shortages of the specialized envelopes and ballot paper or that vendors might not be able to handle the increased volume of requests to print and mail envelopes and ballots since these requests were coming in at the same time from many states that were contemplating mailing more ballots to more voters. And all of this was happening at a time when America had run out of basic staples like toilet paper.

Against this backdrop, the Secretary of State's office hosted daily Zoom meetings or conference calls between March 25, 2020 and April 17, 2020 to discuss with stakeholders the changes to election procedures that would be needed to respond to COVID-19. These meetings included county elections officials, legislative and gubernatorial staff, voting rights advocates, election administration experts, and other stakeholders. As a result of the input provided during these meetings, Secretary Padilla made recommendations to Governor Newsom and to the Legislature about procedures for the November 2020 election that would enable local election officials to send every registered California voter a vote-by-mail ballot, while also providing access to in-person voting opportunities and ballot drop off locations. Secretary Padilla continued to work with the Governor, the Legislature, and county elections officials as these recommendations were incorporated first into executive orders, and subsequently into legislation (AB 860 and SB 423), which was passed by two thirds of each House of the California Legislature and signed into law by Governor Newsom.

During the early stages of the planning process, there was a pressing need for guidance so that elections officials could plan to overcome the looming challenges with recruiting and protecting poll workers, ensuring

the safety of polling places for workers and voters, and ensuring the availability and integrity of mail or other remote forms of voting. Such planning could not wait. (I Tab 18, p. 133.) COVID-19 threatened to require large-scale changes to how Californians would vote.

For example, many poll workers have historically been members of an age demographic that is particularly vulnerable to COVID-19. There was significant uncertainty about how difficult it would be to recruit poll workers and a need for significant planning to identify new sources and methods for recruiting poll workers. Elections officials needed to estimate how many people were likely to vote in person and how many voting locations would be used so that they could develop feasible plans to secure the needed poll workers. The types of planning that were needed to address a potential shortage of poll workers included working with employers and colleges to secure poll workers from less vulnerable age demographics. It also included efforts to establish protocols for the operations of voting locations that would assure the safety of workers and provide them with necessary personal protective equipment. All of this interrelated planning affected the ability of elections officials to recruit poll workers.

Similarly, in past elections, many counties have used small polling places for individual precincts at locations such as schools, firehouses, and similar small buildings spread throughout communities. Social distancing requirements and the unavailability of certain venues required planning for potential use of much different types of voting locations, including large facilities such as sports arenas that could handle many more voters while complying with distancing rules. It often took weeks or months of planning and negotiation to secure the use of locations such as the Staples Center, the Golden One Center, the Oakland Coliseum, or Dodgers Stadium as locations for voting centers.

Real Parties argue that Executive Order N-67-20 did not directly address poll worker recruitment. (Return at pp. 13-14, ¶¶ 77-78.) But the executive order provided a framework for an election with fewer, larger voting locations in many counties and parameters for what types of locations would be needed. Thus, the executive orders enabled county officials to move forward with interdependent plans about what locations would be used, how long those locations would be open, and how many poll workers those locations would need. Elections officials needed a framework that answered some of these questions before they could make the necessary plans for how to recruit the needed poll workers.

The executive orders also helped local elections officials to plan for a large increase in vote-by-mail ballots. Vote-by-mail ballot utilization had already been increasing in prior elections, with the percentage of vote-by-mail ballots having increased from approximately 25% in 2000 to 65% in the 2018 election. (Historical Vote-By-Mail (Absentee) Ballot Use in California, available at <https://www.sos.ca.gov/elections/historical-absentee>; I Tab 21, p. 148 [uncodified legislative findings in support of AB 860].) Back in the spring, however, it was uncertain how many voters would choose to vote by mail during the pandemic. (I Tab 21, p. 149.) Accordingly, elections officials were forced to plan for many different possibilities.

Executive Orders N-64-20 and N-67-20 directed officials to mail ballots to all active registered voters. This decision allowed elections officials to move forward with plans and contracts to purchase additional hardware to process increased amounts of vote-by-mail ballots (such as machines that extract ballots from their envelopes), to ensure a sufficient supply of watermarked and special ballot paper was available, and to arrange for print vendors to handle increased requirements. It also

permitted elections officials to begin planning for how to educate voters about the changes to election procedures.

Without this early planning, California would have risked being unprepared for the massive increase in the number of vote-by-mail ballots. The percentage of vote-by-mail ballots jumped from 65% of all ballots in 2018 to over 86% in 2020. (Secretary of State Certifies Record Setting General Election Results, available at <https://admin.cdn.sos.ca.gov/press-releases/2020/ap20-116.pdf>.) It was no easy task for elections officials to prepare to store, process, and count the record-setting 15.4 million vote-by-mail ballots that election officials received in 2020. Early guidance in Governor Newsom’s executive orders made it possible to successfully plan for the increase, including by enabling county elections officials and county boards of supervisors to authorize spending based on an actual plan with requirements that had the force and effect of law.

In summary, when the pandemic struck, elections officials needed to start planning right away so that new voting locations could be secured, additional supplies of ballots and envelopes could be obtained, new sources of poll workers could be identified, budgets could be adjusted, and new contracts could be approved. The Governor’s two executive orders provided authority to proceed with this planning that was needed to keep the process moving forward, while the Secretary of State’s office continued to work cooperatively with the Governor and the Legislature to pass legislation to govern the November 3, 2020 election. (I Tab 18, p. 133.)

CONCLUSION

For these reasons, Secretary of State Padilla supports the Governor’s request that the Court issue an appropriate writ. The trial court should either be directed to dismiss the complaint as moot or to issue a judgment in favor of Governor Newsom on the grounds that Executive Order N-67-20

was a lawful exercise of the Governor's powers under the Emergency Services Act.

Dated: December 18, 2020

Respectfully submitted,

/s/ Kevin Calia

Kevin Calia

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Attorneys for Amicus Curiae

Secretary of State Alex Padilla

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204 of the California Rules of Court, I certify that Secretary of State Alex Padilla’s proposed amicus brief uses a 13-point Times New Roman typeface and contains 3,547 words, not including the cover page, application, Certificate of Interested Entities or Persons, tables of contents and authorities, and this certificate.

Dated: December 18, 2020

Respectfully submitted,

/s/ Kevin Calia_____

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PROOF OF SERVICE

Gavin Newsom v. Superior Court of Sutter County
Third Appellate District Case No. C093006
Sutter County Superior Court No. CVCS20-0912

I, Roxanne Vorkoeper, declare:

I am employed in the County of Alameda, State of California. My business address is 1611 Telegraph Avenue, Suite 806, Oakland, CA 94612 and email address is roxanne@boersch-illovsky.com. I am over the age of 18 and not a party to the within action. On December 18, 2020, I served the following:

APPLICATION OF SECRETARY OF STATE ALEX PADILLA FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER GOVERNOR GAVIN NEWSOM AND PROPOSED AMICUS CURIAE BRIEF

on the interested parties in this action addressed as follows:

- BY ELECTRONIC TRANSMISSION (TrueFiling)** by causing a true copy thereof to be electronically delivered to the following person(s) or representative(s) at the email address(es) registered with TrueFiling. I did not receive any electronic message or other indication that the transmission was unsuccessful.
- BY FIRST CLASS MAIL** by causing a true copy thereof to be placed in a sealed envelope, with postage fully prepaid, addressed to the following person(s) or representative(s) as listed below, and depositing said envelope(s) with the United States Postal Service at Auburn, California.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 18th day of December, 2020, at Oakland, California.

/s/ Roxanne Vorkoeper

Roxanne Vorkoeper

Document received by the CA 3rd District Court of Appeal.