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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

BRIAN HOWEY,

Petitioner/Plaintiff,

v.

CITY OF FRESNO and PACO BALDERRAMA, IN HIS OFFICIAL CAPACITY AS CITY OF FRESNO CHIEF OF POLICE,

Respondents/Defendants.

Case No. 23CECG01468

[Assigned for All Purposes to: Hon. Stephanie Negin, Dept. 404]

PETITIONER'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT

[Objections to Respondents' Request for Judicial Notice and Evidence, Petitioner's Request for Judicial Notice, and Loy Reply Declaration filed concurrently herewith]

Date: August 2, 2023
Time: 1:30 p.m.
Dept: 404
Judge: Stephanie Negin

Petition Filed: April 18, 2023

I. INTRODUCTION

The City cannot justify withholding the public records requested by Petitioner. It does not dispute that several officers used their Tasers on Michael Sanders at least ten times with fourteen electric cycles, inflicting at least eleven puncture wounds and literally burning the flesh of his groin to a crisp. The City no longer contends that withholding is justified because it conducted no internal investigation or because disclosure would impact any privacy rights. Instead, the City contends only that Mr. Sanders did not suffer "great bodily injury." That contention is meritless.

Disregarding the plain language of S.B. 1421, its express purpose to expand police transparency, and the California Constitution's command to construe statutes broadly in favor of disclosure, the City attempts to rewrite the statute. Under settled California law, "great bodily injury" means any "significant or substantial injury." It does not mean "serious bodily injury" or "life-threatening and potentially permanent, disabling injury," as the City contends. (Respondents' Opposition ["Opp."] at pp. 6, 9.) In choosing the term "great bodily injury," the Legislature meant what it said. The City might wish the statute were different, but no amount of verbal gymnastics can make it so.

The statutory language is clear, making legislative history irrelevant, but in fact, the legislative history refutes the City's position. It confirms that the Legislature rejected the term "serious bodily injury" in favor of "great bodily injury" and intended to incorporate the settled body of law construing that term. The City cannot justify the extreme step of ignoring the plain language of S.B. 1421. By using the term "great bodily injury," the Legislature struck a balance, requiring disclosure of records about any use of force resulting in significant or substantial injuries, not minor or trivial ones. The relevant standard for disclosing records, which turns on whether use of force resulted in "great bodily injury," has nothing to do with the standard for when officers can use deadly force, which requires a threat of "serious" bodily injury.

On the undisputed facts, Mr. Sanders suffered great bodily injury as that term is properly understood. The Court should therefore enter judgment in Petitioner's favor ordering the City to disclose the requested records.

II. UNDER THE PLAIN LANGUAGE OF S.B. 1421, GREAT BODILY INJURY MEANS ANY SIGNIFICANT OR SUBSTANTIAL PHYSICAL INJURY, AND THE CITY CANNOT REWRITE THE STATUTE TO ITS LIKING.

To interpret S.B. 1421, the Court must "determine the Legislature's intent so as to effectuate the law's purpose," based first and foremost on "the statutory language," and the Court must "follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law." (*Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 917.)

S.B. 1421 requires disclosure of records about any incident in which use of force resulted in "great bodily injury." (Pen. Code, § 832.7, subd. (b)(1)(A)(ii).) The plain language of the statute says "great" bodily injury, not "serious" bodily injury. The relevant standard is therefore "great"—not "serious"—bodily injury.

The City effectively concedes it cannot prevail under the statute as written. (Opp. at p. 8 [noting that the statutory definition of great bodily injury encompasses a broad array of injuries].) Instead, it attempts somehow to convert "great" bodily injury to "serious" bodily injury that allegedly requires a "life-threatening and potentially permanent, disabling injury." (Opp. at pp. 6, 9). However, a party may not "rewrite a statute to posit an unexpressed intent" or "speculate that the Legislature meant something other than what it said." (*California State University, Fresno Assn., Inc. v. County of Fresno* (2017) 9 Cal.App.5th 250, 266.)

"Great bodily injury" is a well-understood term. It means any "significant or substantial physical injury." (Pen. Code § 12022.7, subd. (f).) As authoritatively construed, it "contains no specific requirement that the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function," much less any life-threatening injuries. (*People v. Escobar* (1992) 3 Cal.4th 740, 750; see also, e.g., *People v. Saez* (2015) 237 Cal.App.4th 1177, 1188 [great bodily injury "need not be permanent or cause lasting bodily damage"].) The meaning of "great bodily injury" is therefore settled. It covers any significant or substantial physical injury and is not limited to a "life-threatening and potentially permanent, disabling injury."[1] (Opp. at p. 6.)

[1] While the CPRA may be "housed in the Government Code" (Opp. at p. 11 [emphasis omitted]), S.B. 1421 is housed in the Penal Code, and it is appropriate to look to the Penal Code's definition of "great bodily injury" to construe that term.

When the Legislature uses a legal term such as great bodily injury that it has already defined in another statute, it intends to incorporate the statutory definition of that term, especially when the term has been construed in the case law. (*People v. Wells* (1996) 12 Cal.4th 979, 986; *Garibotti v. Hinkle*, 243 Cal. App. 4th 470, 478.) By using "great bodily injury" in S.B. 1421, the Legislature meant what it said and incorporated the case law construing that term for purposes of determining what records must be disclosed under S.B. 1421.

California law is clear that "great" bodily injury is not identical to "serious" bodily injury. The California Supreme Court recently confirmed that "great" bodily injury and "serious" bodily injury have "separate and distinct statutory definitions," and therefore they are neither "equivalent as a matter of law" nor "interchangeable," clarifying previous dictum that they were "essentially equivalent." (*In re Cabrera* (2023) 14 Cal.5th 476, 484-485 [citing, e.g., *People v. Knoller* (2007) 41 Cal.4th 139, 143, fn. 2].)[2] As a result, "great bodily injury does not establish serious bodily injury." (*Id.* at pp. 485-86 [citing *People v. Santana* (2013) 56 Cal.4th 999, 1009].)

Great bodily injury means any "significant or substantial physical injury." (*Id.* at p. 484 [quoting Pen. Code, § 12022.7, subd. (f)].) In contrast, serious bodily injury means "a serious impairment of physical condition" including but not limited to "loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." (*Ibid.* [quoting Pen. Code, § 243, subd. (f)(4).) Because the Legislature used "great bodily injury" in S.B. 1421, it necessarily intended to adopt the settled meaning of that term, not the different meaning of a different term.[3]

As the California Supreme Court explained, "the original version of the section of the Penal Code describing great bodily injury defined it differently than the current law." (*Id.* at p.

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[2] Accordingly, the dictum in *Knoller, supra*, 41 Cal.4th at 143, fn. 2, does not support the City's position, nor does the similar statement in *People v. Arnett* (2006) 139 Cal.App.4th 1609, 1615 (cited in Opp. at p. 10).

[3] The City relies on another definition of "serious bodily injury." (Gov. Code, § 12525.2, subd. (d) ["substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ"].) The Court need not address any differences between the Penal Code and Government Code definitions of "serious bodily injury." Because the Legislature adopted "great bodily injury" in S.B. 1421, it is irrelevant what "serious bodily injury" means under any other law.

486.) Previously, "great bodily injury" meant "'a serious impairment of physical condition'—the same language the Penal Code uses to define serious bodily injury—and provided a list of specific injuries that generally paralleled the injuries listed in the serious bodily injury provision." (*Ibid.* [citing *Escobar, supra*, 3 Cal.4th at p. 747].) However, the Legislature amended the statute to its current version by deleting the "list of qualifying injuries" and changing "serious impairment of physical condition" to any "significant or substantial physical injury." (*Ibid.*) Accordingly, "the Legislature intended the amended great bodily injury statute to cover a broader range of injuries than the previous version of the law." (*Ibid.* [citing *Escobar, supra*, 3 Cal.4th at p. 750].)

As defined by the Legislature and construed by the California Supreme Court, "great bodily injury" and "serious bodily injury" are not the same thing. In S.B. 1421, the Legislature adopted the term "great bodily injury," not the different term "serious bodily injury." No amount of verbal gymnastics by the City can rewrite "great" into "serious." Under S.B. 1421's plain language, the City must disclose all records related to any use of force that resulted in "great bodily injury" as that term has long been understood.[4] (Pen. Code, § 832.7, subd. (b)(1)(A)(ii).)

In case of any doubt on that point, the California Constitution instructs that a statutory provision "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. 1, § 3, subd. (b)(2).) Accordingly, the "usual approach to statutory construction is supplemented by a rule of interpretation that is specific" to this public records case. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166.) Because S.B. 1421 was adopted to increase the people's right of access to information concerning use of force by police officers, it must be construed broadly in favor of disclosure. To construe

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[4] In criminal cases, an element like great bodily injury is "a factual issue for the jury" on which the prosecution bears the burden of proof beyond a reasonable doubt, and in some cases, perhaps a jury could "find that an injury was serious but not great," even if the evidence was sufficient to find great bodily injury. (*Cabrera, supra*, 14 Cal.5th at pp. 487-488.) That is immaterial to this civil action, in which the City bears the burden to justify withholding records. (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal. 4th 59, 70.) To prevail, the City must prove the requested records do *not* relate to use of force resulting in great bodily injury, and thus it must show "there is no evidence of sufficient substantiality" on which a factfinder could determine that great bodily injury occurred, regardless of what a jury might find in a criminal case. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629-30.) On the undisputed facts, the City cannot meet its burden.

great bodily injury as limited to "life-threatening and potentially permanent, disabling injuries" (Opp. at p. 10) would both rewrite the statute and violate the California Constitution by severely limiting access to public records.

III. BECAUSE THE STATUTE IS CLEAR, LEGISLATIVE HISTORY IS IRRELEVANT, BUT THE LEGISLATIVE HISTORY REFUTES THE CITY'S ATTEMPT TO REWRITE THE STATUTE.

The Court may and should decide the meaning of "great bodily injury" in S.B. 1421 without examining legislative history. "Construed in light of standard principles of interpretation, the meaning of [great bodily injury] is clear, and there is no need to resort to legislative history." (*In re Greg F.* (2012) 55 Cal.4th 393, 408; see also *Hamilton & High, LLC v. City of Palo Alto* (2023) 89 Cal.App.5th 528, 549 [where statute is clear, it is "unnecessary to resort to extrinsic interpretive aids such as the legislative history"].) The Court should therefore deny the City's requests for judicial notice of legislative history. (*Little v. Commission on Teacher Credentialing* (2022) 84 Cal.App.5th 322, 333, fn. 7; *Carachure v. Scott* (2021) 70 Cal.App.5th 16, 29, fn. 5.) That is especially true for legislative history of unadopted bills (McLaughlin Decl. Ex. A, H).[5] (*Kuciemba v. Victory Woodworks, Inc*. (July 6, 2023) No. S274191, 2023 Cal. LEXIS 3733, *55, fn. 11 [citing *Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1349].)

However, if the Court nonetheless wishes to consider it, the legislative history refutes the City's position. On August 23, 2018, shortly before S.B. 1421 was approved and sent to the Governor, it was amended to substitute "great bodily injury" for "serious bodily injury." (McLaughlin Decl. ¶ 9 & Ex. F. at p. 3.) By deleting "serious bodily injury" in favor of "great bodily injury," the Legislature clearly demonstrated its intent to make "great bodily injury" the relevant standard for disclosure of records about use of force.

That conclusion is reinforced by the Senate Floor Analysis of August 31, 2018, ignored by the City, which stated that the foregoing amendment was intended to "clarify the level of injury

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[5] The Court should also exclude as hearsay and irrelevant an article (McLaughlin Decl. Ex. I) allegedly showing what the California Police Chiefs Association believed about S.B. 1421 after it was passed. (Evid. Code, § 1200; *City of Hesperia v. Lake Arrowhead Community Services Dist*. (2019) 37 Cal.App.5th 734, 758; *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1389, fn. 13.) In any event, the article says only that the Association supported S.B. 1421; it says nothing about the definition of great bodily injury.

that requires release of records is 'great bodily injury' due to the larger body of law interpreting that term." (Loy Reply Decl. Ex. M at p. 2.) The history of S.B. 1421 demonstrates that for purposes of disclosing records about use of force, the Legislature expressly chose "great bodily injury" instead of "serious bodily injury" and intended that "great bodily injury" means what case law says it means. The legislative history thus confirms the "plain-meaning construction" of great bodily injury as used in S.B. 1421. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046.) Any "arguments as to what [the City] believes the Legislature should have enacted" cannot "change the plain language of the statute the Legislature did enact, or rewrite the legislative history evincing what the Legislature intended." (*State of California ex rel. Hindin v. Hewlett-Packard Co.* (2007) 153 Cal.App.4th 307, 320.)

The City finds no support in an amendment that removed a requirement to disclose records about use of any "electronic control weapon or conducted energy device" regardless of the resulting injuries. (Opp. at p. 15 [emphasis omitted].) Although police records might not be subject to disclosure solely because a Taser or other electronic weapon was used, S.B. 1421 does not prohibit disclosure of records about force resulting in great bodily injury merely because the injuries derived from Taser use. The plain language of S.B. 1421 requires disclosure of records about *any* "use of force … that resulted in … great bodily injury" (Pen. Code, § 832.7, subd. (b)(1)(A)(ii)), regardless of whether the force derived from a Taser or any other means. Therefore, the issue is whether the injuries in question amounted to "great bodily injury," not the type of force that caused the injuries. It would rewrite the statute to hold that records are exempt from disclosure merely because use of a Taser resulted in great bodily injury.

The City also finds no support in the assertion that S.B. 1421 requires disclosure of only "the most serious police complaints." (Opp. at p. 16 [quoting McLaughlin Decl. Ex. D at p. 7].) In context, that statement pertained only to records about certain kinds of *misconduct*, for which S.B. 1421 requires disclosure after a "sustained finding" of "sexual assault" or "dishonesty" in the

line of duty.[6] (Pen. Code, § 832.7, subd. (b)(1)(B)-(C)). It does not pertain to disclosure of records about force resulting in great bodily injury, because S.B. 1421 requires disclosure of such records *regardless of whether the force was legally justified or any complaint was made*. (Pet. Open. Br. at pp. 18-19.) Therefore, any assertion about the level of misconduct required to justify disclosure of other records has nothing to do with disclosure of records about use of force resulting in great bodily injury, for which no finding of misconduct is required.

IV. THERE IS NO BASIS TO TAKE THE EXTREME STEP OF DISREGARDING THE PLAIN LANGUAGE OF S.B. 1421.

The City has shown no "absurd consequences" that could justify the extreme step of ignoring the "plain meaning" of great bodily injury as used in S.B. 1421. (*Sierra Club, supra,* 57 Cal.4th at p. 165.) The correct understanding of great bodily injury demonstrates that it does not "devour" the investigatory records exemption. (Opp. at p. 8). First, many investigations do not involve any use of force, much less use of force resulting in injuries. Second, great bodily injury must be "significant or substantial," which is "greater than minor or moderate harm" or "trivial" injuries. (*Cabrera*, *supra*, 14 Cal.5th at p. 484.) Not all "police uses of force" of any kind (Opp. at p. 8), inevitably result in great bodily injury. For example, a simple control hold might cause little or no injury at all. The Legislature struck a balance by requiring disclosure of records relating to "great bodily injury," not any injury or pain of any kind, no matter how trivial. But when use of force results in great bodily injury as that term is used in S.B. 1421 and defined in settled law, the Legislature clearly intended that related records must be disclosed.

The correct definition of great bodily injury under S.B. 1421 has nothing to do with "the threshold for when officers could use deadly force." (Opp. at p. 9.) By statute that took effect January 1, 2020, the Legislature declared that officers may use deadly force only when they reasonably believe it is necessary to "defend against an imminent threat of death or *serious* bodily injury" or to "apprehend a fleeing person for any felony that threatened or resulted in death or

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[6] Senate Bill 16, which took effect January 1, 2022, amended Penal Code section 832.7 to add more categories of misconduct for which records are subject to disclosure after sustained findings, but it did not alter S.B. 1421's requirement to disclose records about use of force resulting in great bodily injury regardless of whether such force was appropriate.

serious bodily injury, if the officer reasonably believes that the person will cause death or *serious* bodily injury to another unless immediately apprehended." (Pen. Code, § 835a, subd. (c) [emphasis added].) The Legislature used different terms with different meanings for different circumstances. Records about use of force must be disclosed when the force results in "great" bodily injury. Officers may use deadly force when "serious" bodily injury is threatened. These terms are not equivalent, and decisions about one have nothing to do with the other.

The cases cited by the City on this point are irrelevant or outdated. In *People v. Morales* (2021) 69 Cal.App.5th 978, the issue was whether "a mere robbery, without more, will give rise to the right of self-defense with deadly force" by a civilian, and the court held that a robbery "cannot trigger the right to use deadly force in self-defense unless the circumstances of the robbery gave rise to a reasonable belief that the victim would suffer great bodily injury or death." (*Id.* at p. 992.) *Morales* has nothing to do with the standard for use of deadly force by an officer.

In *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, disapproved on other grounds, *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639, fn. 1, the court asserted that an officer's use of deadly force would be reasonable if the plaintiff threatened the officer's life "or at least put him in fear of great bodily injury." (*Id.* at p. 1106 [quoting *Reynolds v. County of San Diego* (9th Cir. 1996) 84 F.3d 1162, 1168, overruled on other grounds, *Acri v. Varian Associates, Inc.* (9th Cir. 1997) 114 F.3d 999.]) Assuming *Munoz* stated a correct understanding of California law at the time, it is obsolete now that the Legislature has authorized an officer to use deadly force only when *serious* bodily injury is threatened.[7] The same is true for *Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, which likewise predated the current standard for when an officer may use deadly force.[8]

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[7] Also, because those cases did not deal with access to public records, they were not subject to the constitutional mandate to construe great bodily injury broadly in furtherance of the people's right of access. (Cal. Const., art. 1, § 3, subd. (b)(2).)

[8] The term "great bodily injury" does not appear in *Graham v. Connor* (1989) 490 U.S. 386, which established the federal standard for when force is justified under the Fourth Amendment. In *Acosta v. City & County of San Francisco* (9th Cir. 1996) 83 F.3d 1143, 1145, the jury was instructed that the Fourth Amendment allowed an officer to use deadly force "as is necessary under the

V. ON THE UNDISPUTED FACTS, MR. SANDERS SUFFERED GREAT BODILY INJURY FROM TEN TASER STRIKES, FOURTEEN ELECTRIC CYCLES, ELEVEN PUNCTURE WOUNDS, AND A SIGNIFICANT BURN TO HIS GROIN.

On the undisputed facts, the use of force on Mr. Sanders resulted in great bodily injury as that term is properly understood. The City does not dispute several officers used their Tasers on him at least ten times, in dart or drive-stun mode, with fourteen electric cycles, inflicting excruciating pain, causing at least eleven puncture wounds, and burning the flesh of his groin literally to a crisp in one of the most sensitive areas of the body. That course of conduct inflicted more than enough pain, wounds, and burns to amount to great bodily injury. (See *People v. Odom* (2016) 244 Cal.App.4th 237, 247; *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047-1048; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755; *People v. Wallace* (1993) 14 Cal.App.4th 651, 665; *People v. Harvey* (1992) 7 Cal.App.4th 823, 827; cf. *United States v. Quiver* (10th Cir. 2015) 805 F.3d 1269, 1272 ["As the burn marks to Officer Friday's thigh show, a Taser in drive-stun mode is capable of causing serious bodily injury if applied to a sensitive spot …."].) Although it is abundantly clear that Mr. Sanders suffered great bodily injury, any doubts on that point must be "resolved in favor of disclosure" because the City bears the burden to justify nondisclosure of public records. (*Essick v. County of Sonoma* (2022) 81 Cal.App.5th 941, 950.)

It is irrelevant whether Taser use in other cases may have resulted in only "de minimis, insignificant, [or] temporary injuries." (Opp. at p. 12.) The issue is not what injuries were inflicted in other cases. The issue is whether the injuries in *this* case, involving at least ten Taser strikes, fourteen electric cycles, eleven puncture wounds, and a burn to the groin, amounted to great bodily injury. On the undisputed record, they clearly do. Regardless of whether Mr. Sanders's injuries were an "expected" result of "TASER dart and/or drive-stun deployment" (Opp. at p. 20), they

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circumstances to protect himself and others from what he reasonably believes to be a threat of great bodily injury or harm" (*id.* at p. 1145, fn. 3), but the validity of that instruction was not at issue in the appeal. In any event, federal decisions on when force is justified are irrelevant to the Legislature's adoption of "great bodily injury" as a defined term in California law for purposes of disclosing public records.

remain significant and substantial and therefore represent great bodily injury. Other facts might lead to different results, but they are not at issue here.

It is also irrelevant whether Taser use is "considered to be deadly force." (Opp. at p. 14). The issue is whether the injuries inflicted on Mr. Sanders amounted to great bodily injury, not the type of force used to inflict them. Force need not be "deadly" to inflict significant or substantial physical injury. Although the characterization of force as "deadly" or "non-lethal" (*ibid.*) might be relevant to the question whether an officer's use of force is justified (see, e.g., *Graham, supra*, 490 U.S. at p. 396; *Murchison v. County of Tehama* (2021) 69 Cal.App.5th 867, 887), it is irrelevant to this public records case. Here, the issue is not whether the force used on Mr. Sanders was justified, but whether public records about that use of force must be disclosed, regardless of its justification. Under S.B. 1421, the issue of disclosure turns on the injuries inflicted on Mr. Sanders, not the type of force used or the justification for that force. It is therefore absurd to contend that a correct understanding of great bodily injury under S.B. 1421 somehow converts "non-deadly force" into "deadly force." (Opp. at p. 15.)

VI. CONCLUSION

For the foregoing reasons, Mr. Howey respectfully requests that the Court grant his motion, issue a writ of mandate, and enter judgment in his favor.

Dated: July 19, 2023

FIRST AMENDMENT COALITION

By *_/s/ David Loy_*
DAVID LOY
Attorney for Petitioner BRIAN HOWEY

PROOF OF SERVICE

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 Marin, State of California. My business address is 534 4th Street, Suite B, San Rafael, CA 94901-3334.

On July 19, 2023, I served true copies of the following document(s) described as **PETITIONER'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT** on the interested parties in this action as follows:

Tony M. Sain
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BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address rregnier@firstamendmentcoalition.org to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 19, 2023, at East Palo Alto, California.

Robin P. Regnier