Supreme Court Case No. _____

**IN THE SUPREME COURT OF CALIFORNIA**

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TIBURON/BELVEDERE RESIDENTS UNITED to SUPPORT the TRAILS ("TRUST"), *Plaintiff/Appellant,*

v.

MARTHA CO., a California corporation; and DOES ONE through FIFTY, *Defendant/Respondent.*

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Petition after Decision by the Court of Appeal,
First Appellate District, Division 5
Court of Appeal Case No. A157073

Marin County Superior Court, The Honorable Roy O. Chernus
Case No. CIV 1703276

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# PETITION FOR REVIEW

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## I. QUESTIONS PRESENTED

1. Is use by the neighboring community sufficiently diverse to support an implied in law dedication of a wilderness trail?

2. Do ineffectual efforts of a landowner to police wilderness trails defeat an implied in law dedication?

## II. REVIEW SHOULD BE GRANTED TO CORRECT LEGAL ERROR AND AVOID INCONSISTENT INTERPRETATIONS OF IMPLIED IN LAW DEDICATIONS OF WILDERNESS TRAILS

Preservation of trails and other recreational facilities grow ever more important as California becomes overcrowded and is unable to provide sufficient public amenities. Recreational outlets are essential to the well-being of our communities. The question raised by this petition is whether neighborhood use of trails prevents an implied in law dedication when an owner of the servient property lives in the neighborhood adjoining the trails system. The First Appellate District held that permission is deemed granted through neighborly accommodation, thereby precluding a public dedication, because the owner lived near the property and the public users were largely from the surrounding area, making them non-diverse. The meaning of diverse public use as it relates to neighbors accessing wilderness trails has not been explicitly determined in previous California Supreme Court decisions.

The trails that will be lost because of the owner's actions and the errors below are vital to the community and the people of this state. They overlook Angel Island State Park and are bordered by Uplands Nature Preserve and Old St. Hilary's Open Space as well as adjoining the campus of Francisco State University's Romberg/EOS Center for Oceanographic Studies. The trails date back to native populations and the Spanish occupation. Their loss as a recreational resource is immeasurable.

As a result of the decision below, the appellate courts have issued conflicting published opinions on an issue of vital importance to the interpretation of three California Supreme Court decisions: *Gion v City of Santa Cruz* (1970) 2 Cal.3d 29*, County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, and *Scher v. Burke* (2017) 3 Cal.5th 136. The conclusion that the trails at issue are not public because they were used mostly by neighbors, because the owner was a neighbor, and because of good faith but wholly ineffectual efforts to restrict access, was error.

The Court of Appeal's decision should be reviewed and reversed.

## A. The Decision Below Conflicts with *Blasius* by Failing to Recognize the Wilderness Setting of the Tiburon Trails

### 1. Review is Needed to Preserve Uniformity of Implied in Law Dedications

Review of the decision, *Tiburon/Belvedere Residents United to Support the Trails v. Martha Company* (2020) 56 Cal.App.5th 461, 270 Cal.Rptr.3d 489 ("*TRUST*"), is necessary to secure uniformity of decisions involving implied in law dedications of trails. The decision conflicts with the decision of *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810 ("*Blasius*").

The decision below holds that use of trails by "neighbors" implies consensual use. But *Blasius* held the opposite, that neighborhood use of trails supported an implied dedication. It is necessary for this Court to review *TRUST* to eliminate confusion about implied in law dedications and ensure consistency in interpreting and reviewing these cases. This outcome is of great importance in knowing whether trails in California are to be deemed public or private, an important and timely issue of genuine concern to the public.

The *TRUST* decision creates an inter district conflict between California's Courts of Appeal. The ruling that the trails at issue were not

dedicated to the public because they were used by wilderness hikers from the surrounding area conflicts with the holding in *Blasius*, 78 Cal.App.4th at p. 825, fn.7, where the court recognized that a wilderness trail may qualify as a public trail subject to an implied dedication. The fact the trails were used as wilderness experiences should not disqualify them from being public.

The trails in *Blasius* and below were similarly situated near neighborhoods that provided the primary use of the trails. The magnitude of use was also similar, yet the two courts came to different conclusions because of the how neighborhood hiking is to be viewed. *Blasius* holds neighborhood hiking to be supportive of a public trail, whereas the court below held neighborhood use should not create a public trail.

**2. The Trial and Appellate Courts Erred in Failing to Recognize Trails Use in A Wilderness Setting**

The Court of Appeal also erred by measuring the essentially wilderness trails by urban standards. The Tiburon Trails, a wilderness system in an urban setting, had a supposed paucity of hiking. But, as *Blasius* demonstrates, wilderness trails are not supposed to be busy pedestrian thoroughfares, even when located in or near an urban area. The court misapplied *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 39, *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, and *Scher v. Burke* (2017) 3 Cal.5th 136 by holding the Tiburon Trails to standards of urban use, requiring broad diversity and overwhelming use, and thus making it impossible to find an implied in law dedication over a wilderness trail in an urban setting. This was error.

The court erred by evaluating the Tiburon Trails by urban standards when in fact the trails are wilderness trails. That is the uniqueness of the system. It is a wilderness experience in and urban setting. The value is their ability to provide respite from the bustle of city life in a wilderness setting

without the need to travel great distances at substantial expense and time. The Tiburon Trials are an emersion in history. The Spanish Trail connected ancient Miwok villages on the Tiburon Peninsula.[1]

Use of the Tiburon Trails continued through the years, and eventually what was known as the Ridge trail evolved into a wide and popular path in the 1950's. A veteran aerial photographer, David Ruiz, verified the evolution of the trails into identifiable paths of the system in use today. The overwhelming evidence was countered only by alleged and admittedly wholly unsuccessful attempts of the owner to interdict hikers with the posting of signs. Yet not a single of the two dozen witnesses who testified about their use of the trails during the relevant period ever encountered any signage or restrictions on use at that time. The overwhelming evidence was that use of the Tiburon Ridge trails has been long and historic.

Yet the courts below sided with the ownership in finding a paucity of use, mostly by neighbors, combined with good faith yet ineffectual attempts (purchasing signs and mending fences gates) which none of the 24 hikers ever encountered. Not one of the hiking witnesses ever encountered a member of the ownership or their agents, they were never evicted or removed from the property, and all of them testified that the trails were always open and readily accessible. Nonetheless, the trial judge and appellate court ruled for the landowner because most of the hikers resided in the vicinity of the owner and the trails and thus were *assumed* to be hiking by invitation.

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[1] Since the 1880's, ferries of the Northwest Pacific transported thousands of San Franciscan's on weekends to this locations where the trails were easily accessed and enjoyed, a short walk to the top of the hill above the Northwest Pacific Railroad's main rail yard located on the tip of the Tiburon Peninsula. Use continued for the next one-hundred forty years. A history of the rail and ferries is available at https://www.mendorailhistory.org/1_railroads/nwp/ferries.htm.

Not only did this contradict the evidence, but it directly contradicts the law provided as explained in *Gion*:

> *We will not presume that owners of property today knowingly permit the general public to use their lands and grant a license to the public to do so.* For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, therefore, he must either affirmatively prove that he has granted the public a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use.

(*Gion, supra,* 2 Cal.3d at p.41 [emphasis added].)

There was no evidence the owner ever granted permission to the public—inferentially or otherwise. An inference of permissive use is in polar opposition to the record and the law. By rejecting the application of *Gion* and *Berk*, the trial and the appellate courts have ruled contrary to the decisions of the this Court. The court below ignored the objective evidence of substantial and continuous use of the trails and instead concentrated on the assumed state of mind of the landowner. This framework reverts to pre-*Gion* case law that assumed neighborly acquiescence. But what the owner believed or thought is not a factor in an implied in law dedication. (*Gion, supra,* 2 Cal.3d at p. 40.)

The reversion to previously rejected case law, in which dedication is defeated if an owner or one of its representative lives near a trailhead is a difficult and controversial standard to apply. Who is an owner? And what if the owner is a corporation, as here, and how much stock must the owner own? Are shareholders, even minority shareholders impliedly to be identified with the owner? How long must an owner reside in the neighborhood to have the requisite chilling effect? How close and friendly must the hikers be to an owner to presume invitation? What must the owner know about who is using the property, where those members of the public

reside, and whether they are in fact neighbors? Rather than allow the vague and confusing standard to govern future implied in law dedications, this Court should review and reverse, to ensure compliance with *Gion* and consistency in implied in law dedication cases.

### B. The Tiburon Trails Have Historically Been Used by The Public, Including the Local Community

The Tiburon Trails that are the subject of this action consist of approximately two miles of historic footpaths located on a 110-acre property situated on a remote portion of the undeveloped Southeastern end of the Tiburon Peninsula overlooking the San Francisco Bay. They consist of two main trails, the Ridge Trail, which transverses the main ridge of the Tiburon Peninsula, and the Spanish Trail, which is located a short distance directly above Paradise Drive on the forested backside of the Peninsula. The two major trails are connected by vertical trails to the South and North, called the "Connector Trails." In total the trails are approximately two miles long. The vertical rise between the two major trails is approximately 200 feet. The trails system provides spectacular views of the Bay, Angel Island, and the Golden Gate Bridge. Included on the trails is an ancient rock, known as Founder's Rock, which is the overlook destination of the Ridge Trail.

The trails are located directly above the suburban towns of Tiburon and Belvedere. They have long been popular with residents for hiking, jogging, and strolling. During the pertinent period, April 1967 to April 1972, a major owner of Martha Co., Edgar Reed, resided near one of the more popular trailheads.

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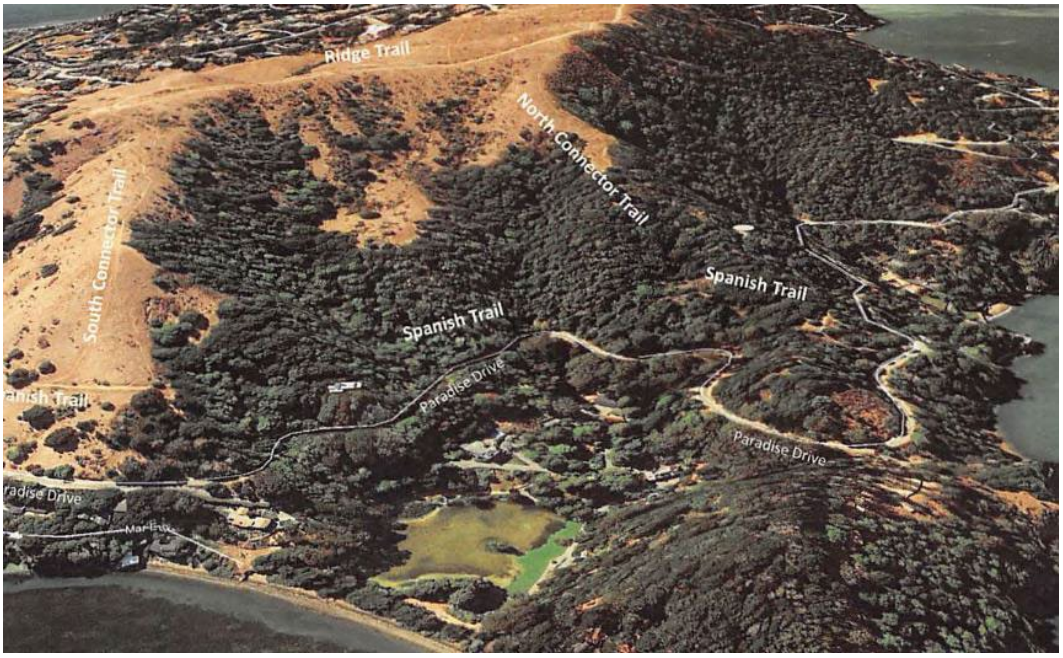


In late 2016, the owner closed access to the trails. This lawsuit was filed by TRUST in September of 2017 to restore the public's ability and right to use the trails, as had existed for decades. Despite the testimony of two dozen hiking witnesses and an aerial expert that established extensive use of the trails, the trial court ruled there was not enough use to support an implied in law dedication to the public.

The appellate court affirmed, holding the owner had impliedly consented to the use because many of the witnesses who testified at trial lived in the area around the trails. The appellate court held the proximity of both the owner and the hikers implied consensual use of the paths and a lack of diversity of public use. As a result, the trial and appellate courts refused to validate the paths as public, despite the consistent use by the public, without permission, for decades preceding the owner's closure of the trails in 2016.

Despite the substantial hiking by members of the communities of Belvedere and Tiburon, the courts below held that permission was implied by the fact that the owner resided in the neighborhood of the trails and thus

neighborly accommodation was implied. This conclusion was error and should be reviewed and reversed.

### C. The Hikers Were Sufficiently Diverse

The court erred by concluding that "the users were not diverse because they were neighbors." (*TRUST*, 56 Cal.App.5th 461 [270 Cal.Rptr.3d 489, 497].) His reason again was that they were neighbors and, frequently, "neighborhood children" as well as the fact that there was no evidence, as in *Gion,* that the trails were occasionally maintained by a public entity. But nowhere in *Gion* does it state that there must be public maintenance to find a public trail. Indeed, the Supreme Court held that *all that was necessary* was that *the hiking* be such as to bring it to the attention of the owner and that it must continue for five years without disruption. Nowhere does *Gion* state that neighbors must be excluded as hikers.[2] Nowhere does *Gion* or *Berk* state that public construction or maintenance is necessary or that hikers from the immediate neighborhood are somehow to be excluded from the analysis. Again, these are new requirements employed to defeat the public trails.

Finally, there is no evidence that plaintiff's twenty-four trails witnesses were friends and acquaintances of the owner Reeds. The Court has confused the plaintiff's case with the defendant Martha's defense which was that many of the *Reed Family's friends and relatives* used the trails for motor biking and camped out on the property – which has nothing to do with the public hikers testifying for the plaintiff. Even the trial court dismissed the use of the Martha friends as having any bearing on the case.

The Court erred by the following, 1) the rejection of overwhelming evidence of hiking for the requisite five years by the general public, which

[2] In fact, trails such as these are mostly hiked by neighbors living near the trailhead.

included persons who lived in the neighborhoods of Tiburon and Belvedere, and 2) the reliance on completely ineffectual supposed policing.

The court below stated the trails had been used enough to be substantial use. But as wilderness trails, they were only to be used by occasional hikers rather than a steady stream of pedestrians. This conflicts with *Blasius*:

> The use must be substantial, diverse, and sufficient, considering all the circumstances, to convey to the owner notice that the public is using the passage as if it had a right so to do. Thus, e.g., a long history of continued passage by a diverse group of occasional hikers across a well defined privately owned trail segment leading to a network of trails, say on a public wilderness area, might suffice.

*Blasius, supra,* 78 Cal.App.4th at 825, fn. 7.

The attraction of the Tiburon Trails is that they are in a wilderness setting, but in close proximity with the towns of Belvedere and Tiburon. They were used by an occasional but stream of hikers, who testified to that use as members of the public. There is nothing in *Gion* or *Berk* or *Burke* that states that wilderness trails must be crowded—certainly substantial and regular use qualifies.

The Court concluded the hikers were not diverse because they were local, which implied neighborly accommodation, not adverse and diverse use. But implying permission as a matter of law just because hikers lived near the owner or the trails is inconsistent with the requirements of *Gion* and *Berk*, and prevents ever acquiring public rights if an owner lives near the subject property and can assert the users are "locals" or "neighbors."

### D. The Focus on the Owner's Subjective Belief About Neighbors Is Inconsistent with *Gion*, *Berk*, and *Blasius*

The trails were sufficiently used to be public, as attested by the twenty-four hiking witnesses. Nonetheless, the Court of Appeal ruled that hikers from the neighborhood do not count, assuming instead that because they were neighbors, they were using the trails with permission. By so doing, the Court discarded the rule of *Gion* and *Berk* and reverted to the pre-*Gion* standard of the subjective state of mind of the owner, rather than the objective use of the trails. Indeed, neighborly accommodation can only occur based upon the owner's actual knowledge of who they are "accommodating." There is no basis in post-*Gion* implied in law dedications that the owner's subjective knowledge or belief about what they are allowing is relevant.

Instead, *Gion* held that it was the objective activities of the public that were to be measured, and not the subjective intent of the landowner:

> When, on the other hand, a litigant seeks to prove dedication by adverse use, *the inquiry shifts from the intent and activities of the owner to those of the public*. The question then is whether the public has used the land "for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone." (42 Cal.2d at p. 240, quoting from *Hare v. Craig* (1929) 206 Cal. 753, 757 [276 P. 336].) As other cases have stated, the question is whether the public has engaged in "long-continued adverse use" of the land sufficient to raise the "conclusive and undisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license." (42 Cal.2d at p. 241, quoting from *Schwerdtle v. County of Placer*, supra, 108 Cal. 589, 593.)

(*Gion, supra,* 2 Cal.3d at p. 38 [emphasis added].)

Despite overwhelming uncontradicted objective evidence of trails use by the twenty-four witnesses, the courts relied on the subjective beliefs of the owners (without evidence about those beliefs) rather than the objective standard of the public's use. The fact of the owner's presence in the neighborhood combined with the fact that many of the hikers were indeed members of the local community is insufficient as a matter of law to overcome the objective use proven at trial. It is the uninterrupted hiking that creates the dedication and easement, not where the owner lives, where the hikers are from, or assumptions about what the owner may have known about those hikers. By rejecting public use as the standard, the decision below turns the rationale of *Gion* and *Berk* on its head.

According to the court below, the owner's residential presence in the neighborhood of the trails implies consensual use, thus vitiating the adversity of the use by the public. But most of the hiking witnesses testified they did not know the owners at all, or that the family owned the property. One exception, Anne Lamott, the well-known author whose family lived a short distance from the owner's residence, confirmed that the use was not "neighborly" or "permissive. Indeed, she testified unequivocally that her family's acquaintance with the owner had no impact on her decision to use the trails, and that seeking permission from the owner would have been unheard of. Her testimony was as follows:

> Q. And [I] ask you, do you have any knowledge that your mother ever asked permission for you to go on the Spanish Trail?
>
> A. No. There's no reason why she would have. It was just public. I didn't actually know anyone owned it.
>
> Q. You're not aware that she ever did that?

> A. No. I'm positive. It would have been unheard of for a parent to ask for permission.

Ms. Lamott was the only witness who lived even close to the owner. The Court has ruled that neighbors received implied consent to use the trails from the same owner, without evidence in the record that demonstrates the owner in fact knew who was using the trails. This leaves us with an appellate court decision in the First Appellate District directly in conflict with the decision from the Fifth over what sort of public use counts for the purposes of finding an *implied in law* dedication.

### E. <u>There Is No Rule That People Who Know the Owner of The Property Be Excluded from The Public in Proving an Implied in Law Dedication</u>

No benchmark of use has been provided by the Supreme Court other than it is enough to put the landowner on notice and that the use be continuous for a period of five years without effective interruption by the owner. As wilderness trails, the use given by the hikers was more than sufficient to place the owner on notice and the record is clear that the owner well knew the hiking was occurring.

The Court below explained that the trails were "no doubt used by local individuals, families, and groups of children, along with their occasional guests, for hiking, bike riding, picnicking, and other recreational pursuits. But substantial evidence suggests there were never more than a few people on the trails at any given time." (*TRUST, supra,* 56 Cal.App.5th 461, 270 Cal.Rptr.3d at p. 497.) Yet despite this acknowledgment of use, because it was by locals who lived in the same community as the owner, the use magically transformed into something insubstantial. This is error and in conflict with *Blasius*.

### F. The Court's Holding That Obviously Ineffectual Efforts to Police Property Defeat A Dedication Was Legal Error

Finally, the court below also erred in finding that the owner's efforts to police their property were sufficient to defeat an implied in law dedication. (*TRUST*, 56 Cal.App.5th 461, 270 Cal.Rptr.3d 489, 498-499.) This too was legal error.

Under *Gion*, in order for an owner to defeat the presumption of dedication that comes with substantial adverse public use, the owner must "prove[] that he has made more than minimal and ineffectual efforts to exclude the public." (*Gion, supra,* 2 Cal.3d at 41.) Only then does the court decide "whether the owner's activities have been adequate." (*Ibid.*) While this is generally a factual determination, and while the court below deferred to the trial court's factual findings on this question, that deference was legal error in the face of the admissions and overwhelming evidence that the efforts taken by the owner were wholly ineffectual. As *Gion* held, efforts at restrictions must be "more than . . . ineffectual," to be sufficient. (*Ibid.*)

Here, the efforts were wholly ineffectual, so it matters not what the owner did, or whether it was a bona fide attempt to restrict access, or whether the public should have understood the owner was attempting to enforce its property rights over the trails. In reality, none of the hiker witnesses ever was asked to leave the property, ever encountered or saw attempts to evict "trespassers," or ever believed anyone had any right to restrict their ability to use the trails in any manner. And the testimony from the owner was that no matter the efforts they took, the property was too big, too remote, and the use was too common for any of those efforts to have had any effect or impact on the public's use of the trails.

Thus, the court's decision below that the owner's efforts to restrict access were bona fide attempts skipped over the first step of the analysis. Because all those efforts were wholly ineffectual, it matters not how hard

they tried or whether those efforts were bona fide. It is only when the efforts by the property owner are "more than . . . ineffectual" that they can, as a matter of law, give rise to a defense against public use of the trails. (*Gion, supra,* 2 Cal.3d at p. 41.) The court's conclusion to the contrary, that ineffectual, yet good faith efforts, were sufficient to defeat a dedication was error and should be reversed.

## III. CONCLUSION

Petitioner Tiburon/Belvedere Residents United to Support the Trails respectfully requests that the Court grant review to correct the legal errors below, ensure consistency in the law of implied dedication, and ensure that the historic Tiburon Trails be preserved for use by the public for future generations as they had been for over fifty years until they were abruptly terminated in 2016.

Respectfully submitted,

Dated: December 2, 2020 **COTCHETT, PITRE & McCARTHY, LLP**

By: */s/ Eric J. Buescher*

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this brief contains 4,003 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dates: December 2, 2020 **COTCHETT, PITRE & McCARTHY, LLP**

By: */s/ Eric J. Buescher*

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## CERTIFICATE OF SERVICE

I, Jennifer Tung, declare:

I am employed in the County of San Mateo, State of California. I am a citizen of the United States, over the age of 18 years and not a party to the within cause. My business address is the Law Offices of Cotchett, Pitre & McCarthy, LLP, San Francisco Airport Office Center, 840 Malcolm Road, Suite 200, Burlingame, California, 94010. On this day, I served the following document(s) in the manner described below:

**PETITION FOR REVIEW**

✓ **BY E-SERVICE:** I am readily familiar with this firm's practice for causing documents to be served by electronic transmission. Following that practice, I caused the aforementioned document(s) to be electronically submitted to the email addressee(s) specified below using the electronic service provider TrueFiling.

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| Andrew B. Sabey<br>**COX, CASTLE & NICHOLSON, LLP**<br>50 California Street, Suite 3200<br>San Francisco, CA 94111 | **ATTORNEYS FOR DEFENDANTS AND RESPONDENTS** |
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✓ **BY MAIL:** I am readily familiar with this firm's practice for collection and processing of correspondence for mailing. Following that practice, I placed a true copy of the aforementioned document(s) in a sealed envelope, addressed to each addressee, respectively, as specified below. The envelope was placed in the mail at my business address, with postage

thereon fully prepaid, for deposit with the United States Postal Service on that same day in the ordinary course of business.

| | |
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| Judge Roy O. Chernus, Dept. 6<br>Marin County Superior Court<br>P.O. Box 4988<br>San Rafael, CA 94913 | **SUPERIOR COURT** |
| Associate Justice Mark B. Simons<br>Associate Justice Henry E. Needham, Jr.<br>Associate Justice Gordon B. Burns<br>Court of Appeal<br>First Appellate District<br>350 McAllister Street<br>San Francisco, CA 94102 | **COURT OF APPEAL** |

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed at Burlingame, California, on December 2, 2020.

JENNIFER TUNG