IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

MICHAEL ARATA, Appellant, v. DEBORAH COOPER, et al. Respondents.	**Case No. A 159487**

On appeal from the
Contra Costa County Superior Court, Case No. MSN 19-2489
Hon. Charles Treat, Judge

RESPONDENTS' BRIEF

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INTRODUCTION

This is an appeal from an order of the Contra Costa County Superior Court denying appellant Michael Arata's pre-election petition for writ of mandate. The petition challenged the ballot measure question, letter designation, and impartial analysis of a local half-cent sales tax measure on the March 3, 2020, ballot. The petition was denied and the measure proceeded to the ballot without any changes. The March 3, 2020, election was held and the measure defeated. This appeal is therefore moot. It should be dismissed.

BACKGROUND

The half-cent sales tax measure was proposed by the Contra Costa Transportation Authority (CCTA). On October 30, 2019, CCTA's Board of Directors adopted an ordinance authorizing it to impose a half-cent sales tax to fund transportation improvements in Contra Costa County if two-thirds of the voters voting on the measure approve it. (Appellant's Appendix on Appeal (AA), 36-43.) On the same day, CCTA's Board of Directors also approved a resolution adopting the ballot measure question and requesting that the County Board of Supervisors submit the tax measure to the electorate. (AA, 47-51.)

On November 19, 2019, the Board of Supervisors adopted an ordinance calling a special election on the CCTA sales tax measure and

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consolidating the election with the statewide primary election on March 3, 2020. (AA, 53-55.)

The March 3, 2020, statewide primary was the most complex election in a four-year election cycle. There were 27 elective offices, with a total of 128 candidates for the various offices, that appeared on ballots. Voters also decided one state proposition and seven local measures in Contra Costa County. (AA, 111, 228.)

The Contra Costa County Elections Division assigned the letter J to the CCTA sales tax measure after a random letter draw on December 12, 2019. (AA, 112-113, 115-116.) The ballot measure question for Measure J appeared both on the official ballot and in the voter information guide. (AA, 115-116.) In accordance with Elections Code section 9160, the Contra Costa County Counsel prepared an impartial analysis of the tax measure and filed the impartial analysis with the County Elections Division on December 18, 2019. (AA, 113, 116.) The impartial analysis appeared in the voter information guide. (AA, 112, 116.)

The 10-calendar-day public examination period under Elections Code section 9190 for examining the impartial analysis (and arguments for and against local measures) was December 18 through December 28, 2019. (AA, 113-114.)

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On December 30, 2019, Arata filed a petition for writ of mandate. (AA, 4-27.) He named the County's acting Registrar of Voters and the County Counsel as respondents, and the County Board of Supervisors as a real party in interest (collectively, the County). He named CCTA as another real party in interest. The petition sought an order to assign a letter other than the letter J to the sales tax measure. (Petition, 3:16-17, at AA, 6; Petition, 22:27-23:3, at AA, 25-26.) The petition also sought an order to replace the cent symbol in the ballot question with a percent symbol. (Petition 23:12-13, at AA 26.) The petition further sought an order to add the word "additional" to the County Counsel's impartial analysis. (Petition, 9:28, at AA, 12; Petition, 23:12-13, at AA, 26.) The petition also sought declaratory and injunctive relief. (Petition, 3:20-21, at AA, 6; Petition, 15:25-28, at AA, 18.)

On January 6, 2020, after expedited briefing, the trial court denied the petition for writ of mandate. (AA, 263-265.) The trial court ruled that: (1) the petition was not timely filed; (2) granting the petition would unreasonably interfere with the election process; and (3) Arata's arguments on the merits were unconvincing. (Reporter's Transcript of Proceedings (RT), pp. 45-46.)

The Elections Division submitted the official ballots to the printer on December 31, 2019, in order to meet the statutory deadline for mailing

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ballots to military and overseas voters. (AA, 111.) The Elections Division had planned to begin printing the voter information guides on January 4, 2020, but waited until January 6, 2020, after the hearing, to begin printing the guides. (AA, 229.) Each voter information guide contained seven mandatory informational pages, eight sample ballot facsimile pages, four or five candidate statements pages, 56 pages of the CCTA's spending plan, impartial analyses, and between zero and seven pages of arguments for and against local measures. (AA, 229.) All pages were published in Spanish and Chinese, resulting in page counts of between 220 pages and 250 pages for each voter information guide. (AA, 229-230.)

On January 9, 2020, Arata went to court again, this time with an ex parte application for an order shortening time to hear a motion for reconsideration. (AA, 231-266.) The trial court denied it. (AA, 278-279.) The remaining causes of action for declaratory and injunctive relief were dismissed at Arata's request on January 29, 2020. (AA, 284-286.) Arata withdrew his motion for reconsideration on the same day. (AA, 281-282.)

Arata did not file a writ petition with the Court of Appeal immediately after the trial court's January 6, 2020, ruling. Instead, Arata waited until January 29, 2020, to file an appeal of the trial court decision. By then, ballots had been mailed to military and overseas voters. These ballots had to be mailed by January 17, 2020. (AA, 111.)

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After filing this appeal, Arata then took no action for another three weeks, waiting until February 18, 2020, to file a motion for expedited appeal, shortening time, and calendar preference. This Court denied the motion on March 9, 2020.

The election on the CCTA sales tax measure was held on March 3, 2020. The measure, which required a two-thirds vote to pass, was defeated. (See Motion for Judicial Notice, Exh. A, p. 11.)

The next day, March 4, 2020, the County and CCTA moved to dismiss this appeal as moot. On May 4, 2020, this Court deferred ruling on the motion to dismiss until consideration of the merits of this appeal.

ARGUMENT

A. Elections cases are moot after the election.

Litigation over election-related and ballot-related claims should be resolved before the election, since the outcome typically renders the contested issues moot. (See *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1006-1007.) In general, a case is moot when a ruling by a court can have no practical impact or provide the parties effectual relief. (*Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.) "[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a

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moot case or question which will not be considered by the court." (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.) An action is moot if an event occurs that makes it impossible for a court to grant any effectual relief. (*Consolidated Vultee Aircraft Corp. v. United Auto., Aircraft & Agricultural Implement Workers* (1946) 27 Cal.2d 859, 863.)

After an election, a pre-election petition or other pre-election challenge becomes moot. (See, e.g., *Mapstead v. Anchundo* (1998) 63 Cal.App.4th 246, 276-277 (appeal from judgment directing registrar to verify certain signatures and certify referendum petition dismissed as moot as a result of intervening election); *Mann v. Superior Court* (1986) 181 Cal.App.3d 372, 374-375 (appellate court denied writ petition because election had been held, and ordering trial court to vacate writ directing removal of withdrawing candidate's name would serve no purpose); *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 11 (dismissing as moot appeal from trial court's denial of injunction to stop election where election had subsequently taken place).)

B. Arata's procedural claims are moot.

Arata requests that this Court rule on several issues he labels "procedural issues," including whether the 10-day public examination

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period for ballot materials under Elections Code section 9190[1] can be longer than 10 days, whether the 10-day public examination period for ballot materials applies to the ballot question, whether Section 13314 applies to "neglect of duty," whether the letter assignment to the sales tax measure was proper, what standard of review applies to a finding of substantial interference with the printing of election materials, and whether his motion for reconsideration was properly denied. (Appellant's Opening Brief (AOB), pp. 69-70.) Arata did not timely pursue these claims in this Court before the election. They are now moot.

In *Costa*, the Supreme Court distinguished between actions challenging the substantive validity of a measure and procedural claims. (*Costa*, 37 Cal.4th at p. 1006.) Procedural claims should be resolved before the election. "[I]t cannot be said that there is no harm in postponing until after the election a determination of the validity of this type of procedural challenge …, because after the election the procedural claim may well be considered moot." (*Id.* at p. 1007 (remanding with directions to dismiss appeal as moot).)

Arata waived his opportunity to obtain rulings from this Court on the procedural issues he lists on pages 69 and 70 of his opening brief because

[1] All further statutory references are to the Elections Code unless otherwise indicated.

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he failed to petition this Court immediately after the trial court denied his petition for writ of mandate. (See, e.g., *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, 1171 ("[r]ecognizing the urgency of the matter").) The trial court ruled on Arata's petition on January 6, 2020. Arata then waited until January 29, 2020, to file an appeal of the trial court decision. Arata then took no action for another three weeks, waiting until February 18, 2020, to file a motion for expedited appeal, shortening time, and calendar preference. This Court denied the motion on March 9, 2020. By then, the election had been held. Arata's claims became moot because of his delays in pursuing his claims.

Not only are Arata's procedural claims moot, the trial court's rulings on these issues were correct. First, the trial court correctly ruled that Arata missed the statutory deadline for filing his petition, because he filed after the end of the 10-day public examination period. (RT, p. 45; see § 9190.) Section 9190 establishes a 10-day public examination period for challenging, among other things, an ordinance that is submitted to the voters (§ 9119) and an impartial analysis (§ 9160). A writ of mandate seeking to amend or delete these materials must be filed "no later than the end of the 10-calendar-day public examination period." (§ 9190(b)(1).)

Arata contends he should have been given two extra days to file his petition, since the 10-day examination period for challenging the impartial

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analysis fell on Saturday, December 28, 2019. However, in elections cases, when an act must be performed "not later than" a certain date, then that time period cannot be extended. (See *Steele v. Bartlett* (1941) 18 Cal.2d 573, 574; *Griffin v. Dingley* (1896) 114 Cal.481; see also *DeLeon v. Bay Area Rapid Transit Dist.* (1983) 33 Cal.3d 456, 459 (distinguishing between elections cases and government claims cases).) Here, subparagraph (b)(1) of Section 9190 provides that a writ of mandate to amend ballot materials "shall be filed *no later than* the end of the 10-calendar-day public examination period." (Emphasis added.) Arata did not have until Monday, December 30, 2019, to file his petition because the public examination period ended two days before that date.

Arata was late in challenging the impartial analysis because the challenge period ran from December 18 through December 28, 2019. He was similarly late in challenging the ballot question. (See *McDonough, supra,* 204 Cal.App.4th at p. 1173 (10-day examination period for county election materials); see also § 9190(a) (10-calendar-day challenge period runs "immediately following the deadline for submission of those materials").) The ballot question is contained in the County's ordinance submitting CCTA's sales tax ordinance to the voters, which was adopted by CCTA on October 30, 2019. The measure with the ballot question was officially placed on the ballot by County ordinance on November 19, 2019.

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(See AA, 36-45 (CCTA ordinance); 53-55 (County ordinance).) The absolute legal deadline for placing the measure on the ballot, including with the ballot question, was December 6, 2019, which is 88 days before the election. (See § 10403.) The County assigned the letter J to the measure on December 12, 2019. Arata's lawsuit, which was not filed until December 30, 2019, was weeks too late to challenge these ballot materials.

Moreover, mandamus is an action where equitable principles, such as laches, apply. (See, e.g., *El Dorado Palm Springs, Ltd. v. Rent Review Com.* (1991) 230 Cal.App.3d 335, 346.) Arata sat on his hands and took no action to challenge the ballot materials until after the 10-day public examination period had ended. Given Arata's failure to file his petition within the 10-day examination and challenge window, the Elections Division had no choice but to send the ballots to the printer on December 31, 2019, in order to meet federal and state statutory election deadlines for mailing ballots to military and overseas voters. (See 52 U.S.C. § 20302; Elec. Code, § 3114.)

Regardless of whether Arata's petition was timely filed, the trial court evaluated the merits of Arata's petition and ruled on the merits. The trial court correctly found that granting the petition would unreasonably interfere with the printing process. (RT, p. 45.) The trial court's ruling was based on a declaration filed by the County's Assistant Registrar of Voters,

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who stated under penalty of perjury that any changes to the measure would have affected all voters and all ballots, requiring them to be reformatted and reprinted at a cost of $650,000. (AA, 112.) This declaration was "clear and convincing proof" that granting the petition would unreasonably interfere with the printing process. (See § 9190.)

The trial court's denial of Arata's application for an order shortening time to hear his motion for reconsideration also was proper. The application was filed after the Elections Office began printing the voter information guide, and any changes required by the court after the motion for reconsideration would have cost approximately $2 million. (AA, 229.) Arata's application presented no new or different facts, circumstances, or law that would warrant reconsideration of the trial court's denial of Arata's petition. (See Code Civ. Proc., § 1008(b).) Arata then withdrew his motion for reconsideration. (AA, 281-282.) To the extent that Arata wants a ruling on whether the trial court's ruling was correct, he waived this by withdrawing his motion.

As to Arata's Section 13314 claim, he would like this Court to rule that this statute "may be applied to remedy neglect of duty and other Elections Code violations." (AOB, p. 69.) It already does this by its very terms. Subparagraph (a)(1) of Section 13314 provides in part that "An elector may seek a writ of mandate alleging … that any *neglect of duty* has

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occurred, or is about to occur." (Emphasis added.) An example of this might be the failure of the elections official to place a qualified measure on the ballot. But no neglect of duty occurred in this case, and in any event Arata's challenges are to the accuracy of the ballot materials, not whether the Elections Department failed to carry out a ministerial duty such as placing a qualified measure on the ballot.

Finally, as to Arata's request that this Court direct the trial court to issue a writ directing the Elections Office to "henceforth conform" the County's ballot measure letter designation procedures to Section 13116, Arata waived this as well. In his petition, Arata sought a declaratory judgment that the random draw method violated Section 13116. (Petition, p. 15, at AA, 18.) But Arata dismissed his declaratory relief and injunctive relief causes of action. (AA, 284-286.) In any event, Section 13116 is directory, not mandatory. "If [a statutory provision] goes to the substance or necessarily affects the merits or results of an election, the provision is mandatory. Provisions relating to the time and place of holding elections, the qualifications of voters and candidates and other matters of that character are mandatory." (*Daniels v. Tergeson* (1989) 211 Cal.App.3d 1204, 1208, citing *Atkinson v. Lorbeer* (1896) 111 Cal. 419, 422.) The assignment of a letter to a local measure does not go to the substance of the measure and will not affect the results of an election. There is no

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consequence for failing to assign measure letters in alphabetical order. (See, e.g., *Edwards v. Steele* (1975) 25 Cal.3d 406, 410 (statutory provision is directory if no consequences).) Arata is therefore not entitled to a writ or any other relief ordering future compliance with Section 13116.

C. The public interest exception to the mootness rule does not apply to Arata's substantive claims.

Arata also seeks rulings on issues he labels "substantive issues" – specifically, whether the Measure J ballot question and tax rate were untrue and whether the County Counsel's impartial analysis was partial, false, misleading, or inconsistent with the Elections Code. (AOB, pp. 70-71.)

One exception to the mootness rule is that an appellate court may consider an appeal that, while moot, raises an issue of broad public interest that is likely to recur, but might avoid review. (*Vargas v. Balz* (2014) 223 Cal.App.4th 1544, 1550.) In elections cases, courts may invoke this exception to resolve constitutional issues pertaining to election laws raised by candidates in elections that were held before a decision could be reached. (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 172.) By contrast, the exception is not invoked in elections cases where the appeal presents fact-specific issues that are unlikely to recur. (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 867.)

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The issues raised in this appeal are narrow, fact-specific issues that will not recur. Arata wants this Court to rule – even though the measure was defeated – that a different letter should have been assigned to the half-cent sales tax measure; the cent symbol in the ballot question should have been replaced with a percent symbol; and the word "additional" rather than "supplement" should have been included in the impartial analysis. These issues are specific to this ballot measure. They are not important issues – constitutional or otherwise – that are likely to recur. The public interest exception to the mootness rule should not be invoked here.

In any event, the trial court's rulings on these issues were correct. A writ to change an impartial analysis will issue only on clear and convincing proof that the impartial analysis is false, misleading, or inconsistent with the requirements of the Elections Code. (§ 9295; see *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1428.) All reasonable doubts must be resolved in favor of upholding the analysis. (*People ex rel. Kerr v. County of Orange* (2003) 106 Cal.App.4th 914, 936.) Under Section 9160, the impartial analysis must show "the effect of the measure on the existing law and the operation of the measure." (Elec. Code, § 9160(b).) The courts have interpreted this language to mean that an impartial analysis must describe the measure in "general terms" and provide the measure's "key components." (*Kerr, supra*, 106 Cal.App.4th at

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p. 936, citing *Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d 766, 779.) An impartial analysis is not required to inform voters of the arguments for or against a measure, and is not required to include background facts and circumstances related to the measure. (*Owens v. County of Los Angeles* (2013) 220 Cal. App. 4th 107, 125.) The analysis may not exceed 500 words. (Elec. Code, § 9160(b).) This word limit necessarily precludes an impartial analysis from discussing every issue related to a measure. (*Owens, supra,* 220 Cal. App. 4th at p. 126.)

Here, the impartial analysis (at AA, 116) explained the operation of the measure by stating the following: "The sales tax would be collected in the incorporated and unincorporated area of Contra Costa County from July 1, 2020, until June 30, 2055." The analysis further explained the operation of the measure by stating that two-thirds of those voting on the ballot measure must approve the measure for it to pass, and that a "yes" vote is a vote in favor of authorizing the 0.5% sales tax, while a "no" vote is a vote against authorizing the 0.5% sales tax. The impartial analysis showed the effect of the measure on the existing law by stating that the "proceeds from this sales tax would supplement CCTA's existing one-half of one percent (0.5%) sales tax, which will continue to be collected until March 31, 2034." The analysis also described the measure in general terms and provided the measure's key components by describing how the proceeds of the sales tax

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will be used for transportation purposes, as well as stating that the measure authorized CCTA to issue limited tax bonds to finance transportation projects. The analysis referred to the CCTA's Transportation Expenditure Plan (TEP), which the CCTA is required to prepare pursuant to Public Utilities Code section 180206. This statute requires a local transportation authority to prepare a TEP "for the expenditure of the revenues expected to be derived from the tax" imposed by the transportation authority. (Pub. Util. Code, § 180206(a).) The impartial analysis further explained that there will be public oversight of the sales tax proceeds and that tax expenditures will be subject to annual independent audits. (See impartial analysis at AA, 116.) The trial court correctly declined to change the impartial analysis, finding that the use of the word "supplement" as opposed to "additional" was not misleading. (RT, p. 46.)

The trial court further concluded that the Elections Office's assignment of the letter J to the measure after a random letter draw, and the use of the term "half-cent" rather than "half-percent" in the ballot measure question, did not merit the issuance of a petition. The trial court noted that no one would be confused by the assignment of the letter J to non-successive CCTA sales tax measures (RT, pp. 25-26), and further noted that no one would be confused by the use of "half-cent" rather than "half-percent" (RT, pp. 42, 46). In fact, ballot materials for local sales tax

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measures consistently describe the tax rate by using the word “cent,” and multiple courts have referred to sales tax increases in terms of cents rather than percentages. (See, e.g., *Jarvis v. Padilla* (2016) 62 Cal.4th 486, 534 n. 21 (half-cent sales tax increase); *Hoogasian Flowers, Inc. v. Bd. of Equalization* (1994) 23 Cal.App.4th 1264, 1268 (quarter-cent sales tax); *Silicon Valley Taxpayers’ Assn. v. Garner* (2013) 216 Cal.App.4th 402, 404 (one-eighth of a cent sales tax increase).)

D. This Court should not issue an advisory opinion.

Arata also generally “seeks clarification of the scope of Elections Code §§ 9190, 13116, 13119, 13314.” (AOB, 16; see also AOB, 69 (seeking “interpretations of relevant statutes”).) This request for “clarification” or “interpretations” of four sections of the Elections Code is merely a request for an advisory opinion. “It is settled that ‘the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.’” (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132; see also *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860 (“‘The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.’”).) As a

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request for an advisory opinion, Arata's request must be denied and the appeal dismissed.

E. No material issues remain to be determined.

Another exception to the mootness rule applies when a material question remains for the court's consideration. (*Vargas, supra,* 223 Cal.App.4th at p. 1550.) If an event occurs during the pendency of an appeal that would otherwise render the matter moot, a court may exercise its discretion to resolve the outstanding issue, such as a remaining declaratory relief cause of action. (*Ibid.*)

In this case, no material issues remain to be determined because the causes of action for declaratory and injunctive relief were voluntarily dismissed on January 29, 2020. There is no right to appeal from a voluntary dismissal. (*Cook v. Stewart McKee & Co.* (1945) 68 Cal.App.2d 758, 761.) Where a plaintiff has filed a voluntary dismissal of an action, the court is without jurisdiction to act further. (*Eddings v. White* (1964) 229 Cal.App.2d 579, 583.) No dispute remains for this Court to resolve.

CONCLUSION

Because the March 3, 2020, election was held and Measure J defeated, this appeal is moot. At every stage of this litigation, both in the trial court and in this Court, Arata was either dilatory or late. Arata failed to timely pursue his claims in this Court before the election, and no

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important issues need to be addressed by this Court. The County therefore requests that this Court dismiss this appeal.

Dated: July 6, 2020

Sharon L. Anderson, County Counsel

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CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c))

The text of this brief consists of 4,219 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: July 6, 2020

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PROOF OF SERVICE

Re: *MICHAEL ARATA v. DEBORAH COOPER, et al.*
First District Court of Appeal, Case No. A159487

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Office of the County Counsel, 651 Pine Street, Ninth Floor, Martinez, CA 94553-1229. On July 6, 2020, I served the following document(s) by the methods indicated below.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the California Court of Appeal for the First Appellate District by using the appellate True Filing system. The following participants in the case who are registered True Filing users were served by the appellant True Filing system.

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I mailed the foregoing document by First-Class Mail, postage prepaid, to the following:

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Clerk of the Court
725 Court Street
Martinez, CA 94553
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I declare under penalty of perjury, under the laws of the State of California and the United States of America, that the above is true and correct. Executed on July 6, 2020, at Martinez, California.

/s/ Tim Mitchell
Tim Mitchell

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