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August 31, 2018

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Michele Coyle v. Historic Mission Inn Corp.*, S250147
Letter in Support of Respondent's Petition for Review

Honorable Justices:

The Association of Southern California Defense Counsel (ASCDC or Association) submits this letter pursuant to Rule 8.500(g) in support of the petition for review filed on July 24, 2018 by Respondent Historic Mission Inn Corporation (hereafter Mission Inn or Respondent). ASCDC urges this court to grant review of the Court of Appeal's decision entitled, *Coyle v. Historic Mission Inn Corp.* (June 15, 2018, E066265) 9 Cal.App.5th 807 (*Coyle*).

IDENTITY AND INTEREST OF ASCDC

ASCDC is the nation's largest and preeminent regional organization of trial and appellate lawyers devoted to defending civil actions, comprised of approximately 1,000 attorneys in Southern and Central California. ASCDC is actively involved in assisting the courts and organized bar in addressing legal issues of interest to its members and the public.

In addition to involvement in appellate matters of public interest, the Association provides members with specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas focusing on the improvement of the administration of justice and civil litigation practice in this State.

ASCDC members routinely represent landowners and businesses in the of defense of lawsuits alleging premises liability, including the scope of a landowner's legal duties to patrons and visitors such as those raised by the Issues Presented for Review in this case. The Association and its members have appeared on behalf of parties and as amicus curiae on numerous occasions in cases before this court involving similar questions of legal duty, including *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456 (*Parsons*), and more recently, *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077 (*Vasilenko*), among others.

ASCDC is substantially interested in the proper development of California law concerning the legal duties of landowners.

REASONS WHY REVIEW SHOULD BE GRANTED

Mission Inn's petition for review presents related issues that, in light of the record, that may be summarized concisely as follows:

1. Does a restaurant have a duty to take particular steps to keep venomous spiders away from patrons eating in outdoor dining areas beyond those reasonably required to keep the premises free from pests by the customs and practices of the restaurant industry?

2. Does a restaurant have a duty to post signs warning patrons eating in outdoor dining areas that spiders may be present?

Before the published decision in *Coyle*, in addressing a landowner's ostensible legal duty to protect patrons and visitors—and the corollary duty to "warn"—against harm from attacks by insects, spiders or other "wild animals," the approach taken by the California courts appeared to be entirely consistent with majority rule stated by the Restatement Second of Torts.

Under the Restatement view, "an owner or occupier of land is not normally liable for injury to others as a result of an attack by a wild animal indigenous to the area …." (*Brunelle v. Signore* (1989) 215 Cal.App.3d 122, 129, fn. 5 (*Brunelle*) [homeowner not liable to guest for venomous spider bite], citing *Williams v. Gibbs* (1971) 123 Ga.App. 677, 678, 182 S.E.2d 164 [landowner not liable to patron injured while running away from rattlesnake in the grass next to its restaurant]; Rest.2d Torts, § 508 [even the "keeper" of a wild animal that escapes is not liable if the animal is indigenous to the

area]; see also *id*., com. a [the possession of land "does not carry with it the possession of indigenous wild animals that are upon it."].)

Coyle parts company with the rationale of prior California cases like *Brunelle*, and instead, expands the scope of the legal duty (and potential liability) of the operator of a business who undertakes to exterminate insects or pests consistent with the customs and practices of that industry. (Compare *Brunelle*, *supra*, 215 Cal.3d at pp. 129-130 [no duty imposed upon the homeowner to inspect and exterminate venomous spiders coming into a residence] with opn. at pp. 21-22 [Mission Inn's pest control measures—inspecting for spiders, hiring a pest control company, etc.—were deemed insufficient; declining to follow *Brunelle*]; see petition at p. 38.)

In addition, the opinion would impose on the operator of a restaurant a "duty to warn" patrons of the risk of spider bites while dining on the outdoor patio. (Opn. at p. 17 [duty to place "warning signs" about black widows on the premises]; *Brunelle*, *supra*, 215 Cal.3d at p. 130 [no duty to warn].) The connected doctrines of legal duty to take "remedial action" and duty to warn both involve questions of law requiring close evaluation of policy considerations regarding the risks and benefits to the parties and society at large. (*Parsons*, *supra*, 15 Cal.4th at pp. 474-475 [factors in evaluating duty to warn of a known or foreseeable hazard].) Whether any "warning" about attacks by spiders, insects or other wild animals while eating outdoors would actually *reduce* any known and foreseeable risk of harm to diners is rife with speculation about the practical effectiveness of such an undertaking. (*Id*. at p. 475; see also *Brunelle*, *op. cit*.)

Review is warranted to settle these important questions of California law and public policy, and to resolve existing conflicts in the cases.

A. Background

May 8, 2013, Michelle Coyle (Coyle) was a patron at the Mission Inn restaurant where she ate lunch with a friend on the restaurant's patio. Coyle took off an over-blouse she was wearing and placed it on an empty chair or low concrete wall. Later, she put the over-blouse back on and felt a sharp pain in her shoulder blade. She told her friend it felt like she had just been bitten by something. He experienced numbness and put ice on her shoulder. The next morning, she was unable to move her arms or legs, and used her nose to dial for help. After Coyle was admitted to the hospital, doctors

determined that toxic spider venom, likely from a black widow bite, had reached Coyle's spinal fluid which caused permanent damage. She ultimately lost function in her left hand and leg. (Opn at pp. 2-3.)

Coyle brought this premises liability action against Mission Inn alleging that the owners owed a duty of reasonable care to its patrons in maintaining the property. This included warning patrons of the presence of black widow spiders, and taking remedial action in the form of specific pest control to address the risk of black widow spiders. (Opn. at pp. 3-4.)

Mission Inn successfully moved for summary judgment, arguing that it did not owe Coyle a duty because it was not reasonably foreseeable that diners would be bitten by black widow spiders on the restaurant patio, and reasonable precautions were taken to address the foreseeable risks of harm posed by spiders. Although Coyle presented evidence of previous sightings of spiders by Mission Inn staff on the property that were reported to the hotel's pest control company during the previous year (2012), including two black widows, no patrons had ever been bitten by a black widow on the patio where Coyle ate lunch. The trial court concluded that Mission Inn did not have a duty to protect Coyle from potential insect or spider bites. (Opn. at pp. 4-6.)

The trial court ruled: "I don't believe there's sufficient evidence that [Coyle] has met [her] burden that the duty itself as a matter of law would extend to the Mission Inn to protect potential customers from this type of [insect or spider] bite based upon the evidence that's been presented." (Opn. at p. 5, last brackets added, other brackets in original text.)

The Court of Appeal, in a published opinion, reversed.

B. Does a Restaurant Owner Owe a Legal Duty to Prevent Black Widow Spiders From Biting Patrons?

The existence of a duty is a question of law. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770 (*Cabral*); see also *Parsons*, *supra*, 15 Cal.4th at p. 465.) Civil Code section 1714, subdivision (a) "establishes the *general duty* of each person to exercise, in his or her activities, reasonable care for the safety of others." (*Cabral, supra,* 51 Cal.4th at p. 768, emphasis added.) In other words, no special duty of care is created at common law to protect others against foreseeable risks of harm in the absence of additional factors. (*Vasilenko*, *supra*, 3 Cal.5th at p. 1083.) "Courts ... invoke[] the concept of

duty to limit generally 'the otherwise potentially infinite liability which would follow from every negligent act ….'" (*Id*., citing *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.)

This court's negligence jurisprudence instructs that "in the absence of a statutory provision establishing an exception to the general rule of ordinary care under Civil Code section 1714, courts should create one only where 'clearly supported by public policy.'" (*Cabral, supra,* 51 Cal.4th at p. 771, quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland*).)

In determining whether policy considerations weigh in favor of such an exception, this court has identified the so-called *Rowland* factors as among those that may define the scope of a landowner's duty in a given case; including: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Vasilenko*, *supra*, 3 Cal.5th at p. 1083, citing *Rowland, supra,* 69 Cal.2d at p. 113.)

"'[D]uty' is not an immutable fact of nature 'but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" (*Parsons*, *supra*, 15 Cal.4th at p. 473, internal citations omitted.)

Thus, the inquiry into whether a duty exists in a particular context is determined on a case-by-case basis. The question is not whether these factors (the *Rowland* factors) "support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." (*Cabral, supra,* 51 Cal.4th at p. 772; see Rest.3d Torts, Liability for Physical and Emotional Harm, § 7, com. a, p. 78 ["No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases."].)

Assessing whether conditions that existed adjacent to the property of a possessor or owner of land—heavy traffic on a busy street—created a special duty of care to invitees, this court held in *Vasilenko*, *supra*, 3 Cal.5th at pp.

1083-1087 that no such additional duty of care should be imposed: "'[N]o one would think that a land possessor [had] a duty of care to others for conditions not caused by the possessor on public highways and streets adjacent to the possessor's land.' … The reason for this rule is that a landowner generally has no right to control another's property, including streets owned and maintained by the government." (*Id.* at pp. 1083-1084.)

In that particular context, the court noted that "[t]he *Rowland* factors fall into two categories. Three factors — foreseeability, certainty, and the connection between the plaintiff and the defendant — address the foreseeability of the relevan[t] injury, while the other four — moral blame, preventing future harm, burden, and availability of insurance — take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." (*Vasilenko*, *supra*, 3 Cal.5th at p. 1085, quoting *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1145.)

Ultimately, *Vasilenko* concluded that "the occurrence of injury results from the confluence of an invitee choosing to cross the street at a certain time and place and in a certain manner, and a driver approaching at that moment and failing to avoid a collision. … But unless the landowner impaired the driver's ability to see and react to crossing pedestrians, the driver's conduct is independent of the landowner's. Similarly, unless the landowner impaired the invitee's ability to see and react to passing motorists, the invitee's decision as to when, where, and how to cross is also independent of the landowner's. Because the landowner's conduct bears only an attenuated relationship to the invitee's injury, we conclude that the closeness factor tips against finding a duty." (*Vasilenko*, *supra*, 3 Cal.5th at p. 1085.)

"[F]oreseeability alone is not sufficient to create an independent tort duty.' ... [The] existence [of a duty] depends upon the foreseeability of the risk and a weighing of [other] policy considerations for and against imposition of liability.'" (*Vasilenko*, *supra*, 3 Cal.5th at p. 1086; see also *Parsons*, *supra*, 3 Cal.4th at pp. 475-477 ["social utility" of defendant's conduct and "societal cost" of taking additional precautions, weighed against imposing duties on garbage collector to refrain from making noises on public streets that might spook horses riding nearby].) As this court held, "the ability of landowners to reduce the risk of injury from crossing a public street is limited." (*Vasilenko*, *supra*, 3 Cal.5th at p. 1087.)

Likewise, even under circumstances in which attacks by wild animals (including insects and spiders) on a landowner's patrons or invitees is arguably "foreseeable," the majority of courts in California and elsewhere have declined to impose a special duty of care to prevent that risk of injury.

Brunelle, *supra*, 215 Cal.App.3d 122, framed "the issue [as] whether an owner or occupier of a residence, a business or a hotel/motel may be held liable for plaintiff's injury as a result of an insect or spider bite sustained on the premises." (*Id.* at p. 128.) There, a visitor at the defendant's home in Cathedral City was seriously injured when bitten by a brown recluse spider, a venomous spider indigenous in the area, while sleeping in a den where patio furniture (presumably the spider's nesting ground) was stored. (*Id.* at pp. 132-133, Appendix A.)

Analyzing the *Rowland* factors, and rejecting, in turn, the nearly identical arguments asserted by plaintiff Coyle here, the Court of Appeal held that the homeowner had no duty to "prevent" the spider bite:

> Here plaintiff urges imposition of a duty because defendant had general knowledge of the prevalence of other harmful insects around his home and also urges that defendant had a duty to use a professional exterminator and/or exterminate his house himself 'more frequently' and also to hire a professional cleaning person or persons to clean defendant's home when he (defendant) was not in residence. However, that foreseeability which an owner or occupier of a residence shares with the public at large does not, per se, impose a duty on such owner or occupier to procure professional exterminators and/or cleaning crews to "de-bug" his residence, inside and out, on a periodic basis. *An owner or occupier of property is not an insurer of the safety of persons on the premises*. [Citation omitted.] *His responsibility is not absolute*, or based on a duty to keep the premises absolutely safe.

(*Brunelle*, *supra*, 215 Cal.App.3d at pp. 130-131, emphasis added.)

Following the Restatement approach, the *Brunelle* court "concluded that in the absence of knowledge of such a danger, i.e., the presence of or imminent attack by a flying, stinging insect, there was no duty on the part of the proprietor to take specific steps to prevent the injury by a bee or yellow jacket ..."; or, as in *Brunelle*, the bite of a venomous spider. (*Brunelle*, *supra*, 215 Cal.App.3d at pp. 129-130, emphasis added.)

In 1989, when *Brunelle* was decided, the court had little guidance from decisions of other jurisdictions in the area of spider bites or insect attacks. But in the intervening three decades since *Brunelle*, the majority of jurisdictions analyzing the "duty" question in similar contexts have reached the same conclusion. (See generally *Nicholson v. Smith* (Tex. App. 1999) 986 S.W.2d 54, 60 [Texas appeals court held that a recreational vehicle park owner was not liable for injuries to camping guests caused by fire ants, even though he knew of the existence of fire ants in the area and his prior efforts to exterminate fire ants on his property were unsuccessful]; and *Palumbo v. State Game & Fresh Water Fish Comm'n* (Fla. App. 1986) 487 So.2d 352, 353 (*Palumbo*) [Florida appeals court held that owner of RV park operated next to a state park and wildlife area was not liable for injuries to a swimmer resulting from an alligator attack—the animal was in its natural habitat, and indigenous to the area—factors that also barred State's liability].)

"The Restatement [Second] of Torts advises that a landowner is not generally liable for harm caused by wildlife on his or her property unless the landowner exerts some containment or control of the wild animal," or otherwise acts in a manner that increases the risk of harm to invitees or the public beyond the already-dangerous propensity of the animal or insect. (See J. Florence Reagan, *When Ferae Naturae Attack: Public Policy Implications and Concerns for the Public and State Regarding the Classification of Indigenous Wildlife as Interpreted Under State Immunity Statutes* (2007) 35 Hamline J. Pub. Law & Policy 156, 176 & fns. 114-115 (Reagan, *When Ferae Naturae Attack*); see also *id* at p. 175 & fns. 111-113.)[1]

Generally, wild animals are considered a "condition on the land" or a "natural condition" under recreational use statutes (similar to government immunity statutes—which preclude liability for such attacks). (See Reagan, *When Ferae Naturae Attack*, 35 Hamline J. Pub. Law & Policy at pp. 175-179 [digesting cases, including attacks by fire ants and bees]; *Arroyo v. State of*

[1] "[T]he Draft Restatement Third … for animals (intruding, wild, and dangerous domestic) … makes only minimal changes [from the Restatement Second's rule stated above], including a more sensible and less awkward definition of 'wild animal' …." (Kenneth W. Simons, *The Restatement Third of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines* (March 23, 2009) BOSTON UNIVERSITY SCHOOL OF LAW WORKING PAPER NO. 09-15 at p. 3 & fn. 7, brackets added.)

California (2007) 34 Cal.App.4th 755, 761-762 [no liability for mountain lion attack on public hiking trail](opn. by Gilbert, J.); *Estate of Hilston ex rel. Hilston v. State* (Mont. 2007) 160 P.3d 507 at ¶¶ 15-18 [no liability to elk hunter's estate for his death resulting from grizzly bear attack]; cf. *Palumbo*, *supra*, 487 So.2d at pp. 353-354 [alligator attack on swimmer]; *Williams v. Gibbs*, *supra*, 123 Ga.App. at p. 678 [rattlesnake in grass near parking lot].)

Hence, a picnicker who is bitten by a black widow spider lurking under a picnic table in the Riverside park adjacent to the Historic Mission Inn outdoor restaurant would have no liability claim against the City's Parks & Recreation Department for failing to prevent or warn against the attack. (Cf. *Arroyo v. State of California*, *supra*, 34 Cal.App.4th at pp. 762-764.) However, if the same kind of indigenous spider migrates across the street to a retaining wall next to Mission Inn's patio dining area and hides in plaintiff's sweater, Respondent owes a duty of care to eradicate that spider.

On this record, the Court of Appeal's opinion seemed inclined to impose a greater duty on the landowner for actually taking precautions—there were possibly two or three black widows identified by hotel staff on the property. Mission Inn hired a pest control company who routinely provided extermination services for the restaurant consistent with industry standards, the pest control company was advised of the sightings and instructed to respond to those reports as part of its service. According to the Court of Appeal, this was not adequate: "the pest control company may have recommended the spraying of pesticide targeted at black widows and the Mission Inn may have refused the recommendation." (Opn. at p. 9, 22-23.)

The opinion's analysis cannot be reconciled with *Brunelle* and analogous cases, holding that precautions taken to "de-bug" the premises need only be "reasonable"—otherwise, the landowner's duty would be unlimited and "absolute."

This spider bite *a fortiori* defines the landowner's "duty" according to the Court of Appeal's reasoning—because *this* specific black widow was not located and exterminated *before* it bit the patron. (Contra *Brunelle*, *supra*, 215 Cal.App.3d at p. 130: "Plaintiff argues that defendant had knowledge there were other dangerous insects, i.e., black widow spiders and scorpions, on his property and thus should have taken precautions and/or warned plaintiff against the danger. This argument is not persuasive."].)

Such expansive notions of "duty" represent "a tremendous burden, both financial and emotional" for landowners and restaurant operators. (See Priest, *The Expansion of Modern U.S. Tort Law and its Excesses* (2010) 1, 22, 28 <http://buckleysmix.com/wp-content/uploads/2010/10/Priest1.pdf> [as of Dec. 28, 2016] [characterizing liability in modern tort law as an "instrument" that "harms economic welfare in the U.S. and places the U.S. at a substantial competitive disadvantage to other nations" because "the increased insurance burden acts as a deadweight tax on innovation" and observing that past increases in liability judgments result in products and services being withdrawn from the market]; Klemm Analysis Group, *Impact of Litigation on Small Business* (Oct. 2005) Small Business Administration, Office of Advocacy <https://www.sba.gov/sites/default/files/files/rs265tot.pdf> [Survey found the impact of litigation on small business goes "well beyond the purely financial impact of legal fees and damages. Because most small business owners are invested in their small businesses, litigation causes not just financial loss, but also substantial emotional hardship, and often changes the tone of the business."]; Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty to Exercise Reasonable Care* (Feb. 22, 2009 draft) 1, 17-18 <http://tortssymposium.law.wfu.edu/papers/geistfeld.pdf> ["The availability of liability insurance does not mean that courts can ignore the financial burden that is borne by individuals subject to an uncertain duty"].)

The opinion does not give due consideration to these societal costs of the duty imposed; as required by a proper application of the *Rowland* factors.

C. Is There a Duty to Warn Patrons of Black Widows?

The opinion's alternative "duty to warn" analysis is also inconsistent with better reasoned precedent, including *Vasilenko* and *Parsons*. (Cf. opn. at p. 17: "Reasonable measures might include having an exterminator spray a pesticide targeted at black widow spiders or *placing warning signs on the property*." (Italics added).)

Brunelle rejected plaintiff's argument that "warning" houseguests of spiders or other pests seen on the property could have effectively prevented the risk of spider bites. (*Brunelle*, *supra*, 215 Cal.3d at pp. 129-130.)

Vasilenko rebuked that argument as well: "Vasilenko also contends that landowners can warn of the danger of crossing the street, perhaps by

posting a sign. But the danger posed by crossing a public street midblock is obvious, and there is ordinarily no duty to warn of obvious dangers. … 'to require warnings … would produce such a profusion of warnings as to devalue those warnings serving a more important function.' (Rest.3d Torts, Liability for Physical and Emotional Harm, § 18, com. f, p. 208.)." (*Vasilenko*, *supra*, 3 Cal.5th at p. 1088.)

Numerous other cases are in accord with this common sense view. (*Parsons*, *supra*, 15 Cal.4th at p. 474 [rejecting arguments "that defendant might have guarded against his [horseback riding] injuries by employing various preventative measures—[e.g.,] … temporarily 'blocking off' the area with warning cones or tape, posting warning signs, providing riders with a schedule of collection times, or a combination of these methods"]; *Arroyo v. State of California*, *supra*, 34 Cal.App.4th at p.764 [placing signs "in the park warning of snakes and ticks … do not create or exacerbate the degree of danger normally associated with hiking trails" and did not require more signs warning of potential dangers associated with mountain lions in the area].)

Whether posting signs warning patrons that black widow spiders might be present in and around the one block area of the outdoor patio can effectively prevent bites is speculative at best. How large should those warning signs be? In order to be prominently displayed, should the signs be posted at the entrance? On each table? On the back of menus? Should the warning sign depict, in addition to black widows, scorpions, flying insects or other "wildlife" indigenous to the area that might harm or injure patrons?

The ineffectiveness of warnings that convey no meaningful information, and instead are designed merely to avoid the prospect of lawsuits, are a topic of popular satire: "Consumers are told that their coffee is hot, that a knife blade is sharp, that it is unwise to fold a walker with a baby sitting in it. Oh, and avoid the moose on the road: It could kill you." (Richard Lorant, *Warning: Don't Read Over Open Flame*, L.A. TIMES (Nov. 5, 1995), p. A-25.)

Add: Spiders may bite if you eat lunch on the patio outdoors.

D. Conclusion

The petition for review raises important questions of California law, and the Court of Appeal's published decision conflicts with prior cases requiring resolution by this court. Accordingly, ASCDC respectfully submits that review should be granted.

Respectfully submitted,

BUCHALTER
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By:_____

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PROOF OF SERVICE

Coyle v. Historic Mission Inn Corp., S250147

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to the action. My business address is BUCHALTER, APC, 500 Capitol Mall, Suite 1900, Sacramento, CA 95814.

On September 2, 2018, I served the following document described as: ASCDC Rule 8.500(g) Letter in Support of Petition for Review on the following persons at the following addresses (including e-mail addresses, if applicable):

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The document was served by the following means:

[X] (BY ELECTRONIC SERVICE VIA TRUEFILING) Based on a court order, I caused the above-entitled document to be served through **TrueFiling**, addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the **TrueFiling Receipt/Confirmation** will be filed, deposited, or maintained with the original documents in this office.

☒ (BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and:

☒ Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 2, 2018 at Sacramento, California.

Harry W.R. Chamberlain II