No. S241885
(Court of Appeal Nos. E058293 and E062777)
(Inyo County Superior Court No. SI CV PB 1253232)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DAVID HITZ, Trustee of the L.L. Nunn Trust,
Respondent,

vs.

KINCH HOEKSTRA, EDWARD KEONJIAN, Trustees of the L.L. Nunn Trust,
Appellants and Petitioners.

REPLY IN SUPPORT OF PETITION FOR REVIEW

After a Decision by the Court of Appeal,
Fourth District, Division Two
Case No. E058293 c/w E062777

On Appeal from the Superior Court of California,
County of Inyo, Case No. SICVPB 12-53232
(The Honorable Dean T. Stout)

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TABLE OF CONTENTS

Page

I. INTRODUCTION. 6

II. RESPONSE TO RESPONDENT'S STATEMENT OF FACTS. 7

III. THE DISTINCTION BETWEEN "PRIMARY" AND "SECONDARY" PURPOSES OF A TRUST DOES NOT SUPPORT APPLICATION OF EQUITABLE DEVIATION IN THIS CASE. 8

IV. EQUITABLE DEVIATION DOES NOT PERMIT MODIFICATION OF A TRUST'S PURPOSE. 10

A. Equitable Deviation Derives from and Is Limited by the Court's Equitable Power over the Administration of Trusts, Whereas the *Cy Près* Power is Far More Extensive. 10

B. Statutory Equitable Deviation Does not Support Modification of a Trust's Purpose. 12

C. Authorities Cited by Respondent Do Not Support the Result Reached Here. 15

V. THE DEARTH OF CALIFORNIA LAW ON THE ISSUE RAISED IN THIS PETITION SUPPORTS THE GRANT OF REVIEW. 21

VI. CONCLUSION. 22

TABLE OF AUTHORITIES

Page (s)

CALIFORNIA CASES

Estate of Halm
(1925) 196 Cal. 778 9

Estate of Loring
(1946) 29 Cal.2d 423 ..... 19, 22

Estate of Sigourney
(2001) 93 Cal.App.4th 593 12

Estate of Traung
(1962) 207 Cal.App.2d 818 ..... 15, 16, 18

Holt v. College of Osteopathic Physicians
(1964) 61 Cal.2d 750 13

In re Los Angeles County Pioneer Society
(1953) 40 Cal.2d 852 14

In re Metropolitan Baptist Church
(1975) 48 Cal.App.3d 850 13

Lynch v. Spilman
(1967) 67 Cal.2d 251 13

Pacific Home v. County of Los Angeles
(1953) 41 Cal.2d 844 ..... 13, 14

People v. Gionis
(1995) 9 Cal.4th 1196 21

People v. Zamora
(1976) 18 Cal.3d 538 21

Santa Catalina Island Conservancy v. County of Los Angeles
(1981) 126 Cal.App.3d 221 ..... 9, 18

Stanton v. Wells Fargo Bank etc. Co.
(1957) 150 Cal.App.2d 763 ..... 16, 18

Stewart v. Towse
(1988) 203 Cal.App.3d 425 11

TABLE OF AUTHORITIES
(Continued)

Page(s)

OTHER STATE CASES

Allen v. Trustees of Nasson Institute
(Me. 1910) 77 A. 638 19

Blumenthal v. White
(Conn. Ct. App. 1996) 683 A.2d 410 ..... 16, 17, 18

Colin McK. Grant Home v. Medlock
(S.C. Ct. App. 1986) 349 S.E.2d 655 18

Furman Univ. v. McLeod
(S.C. 1961) 120 S.E.2d 865 18

Manufacturers Nat. Bank v. Woodward
(Me. 1944) 38 A.2d 657 20

South Carolina Nat. Bank v. Bonds
(S.C. 1973) 195 S.E.2d 835 18

Town of South Kingstown v. Wakefield Trust Co.
(R.I. 1926) 134 A. 815 20

FEDERAL STATUTES

26 U.S.C. § 501, subd. (c)(3) 8

STATE STATUTES

Prob. Code § 15409 ..... 11, 12

Prob. Code § 17200 ..... 10, 11

Prob. Code, § 18502 8

RULES

Cal. Rules of Court, Rule 8.504(b)(1) 7

TABLE OF AUTHORITIES
(Continued)

Page(s)

OTHER AUTHORITIES

Bogert, The Law of Trusts and Trustees
(rev. ed. Sept. 2016).....10

6 Scott and Ascher on Trusts (5th ed. 2007).....11, 12, 17

I. INTRODUCTION.

In their Petition for Review ("Petition"), Petitioners Kinch Hoekstra and Edward Keonjian established that permitting a charitable trust's purpose to be modified through any rule of law other than *cy près* is a novel expansion of California law that this Court should review. Respondent David Hitz, in his Answer to Petition for Review ("Answer"), contends otherwise, and moreover, argues that changing the purpose of a charitable trust through equitable deviation is both routine and unlikely to happen again.

Clearly, both of Respondent's claims cannot be correct, and neither is. As discussed below, nearly every charitable trust has an overarching purpose (such as education) and a specific purpose. The situation underlying the Court of Appeal opinion below (for which Petitioners' request for publication is pending) is capable of replication anytime a trustee secures the opinion of an expert that a trust's overarching purpose could be better served by modifying its specific purpose. And the situation underlying the Court of Appeal opinion is not routine, as evidenced by the fact that neither Petitioners nor Respondent have found any California case that addresses the specific point at issue.

As explained in our Petition, the Court of Appeal, for all intents and purposes, eliminated the doctrine of *cy près* from California law. For the reasons set forth below and in our Petition, this Court should grant review.

II. RESPONSE TO RESPONDENT'S STATEMENT OF FACTS.

Respondent opens his brief with a 12-page statement of facts, contending that Petitioners intentionally omit important details. Nothing could be farther from the truth. A petition for review is required to frame the issues presented for review "in terms of the facts of the case but without unnecessary detail." (Cal. Rules of Court, rule 8.504(b)(1).) That is precisely what Petitioners did in their petition for review. The facts that L.L. Nunn was a mine manager and owner, banker, and pioneer (Answer at 5) are interesting but unnecessary. The important facts, all accurately represented, are what the L.L. Nunn Trust stated, how the trial court construed the Trust, and the trial court's rationale for the application of statutory equitable deviation. Those facts were all accurately represented in approximately three pages by Petitioners. (Petition for Review at 9-12.)

Petitioners summarized the pertinent facts for this petition: the Trust has an overarching purpose of educational work and a specific purpose of the education of promising young men. Further, the trial court found that Deep Springs might be better as a coeducational school, but that Deep Springs was certainly not close to failure, and was even found to be healthy. No other facts are necessary for the determination of this petition.

III. THE DISTINCTION BETWEEN "PRIMARY" AND "SECONDARY" PURPOSES OF A TRUST DOES NOT SUPPORT APPLICATION OF EQUITABLE DEVIATION IN THIS CASE.

Respondent, and the Court of Appeal, incorrectly rely on an artificial distinction between "primary" (or "overarching") and "secondary" trust purposes to justify the result reached in this case: allowing trust property dedicated to the education of promising young men to be used for the education of promising young people.

Every charitable trust must necessarily have a generic (or overarching or primary) charitable purpose, such as the support of education. (26 U.S.C. § 501, subd. (c)(3) [An organization may qualify for exemption from federal income tax if it is organized and operated exclusively for one or more of the following purposes: religious, charitable, scientific, testing for public safety, literary, educational, fostering national or international amateur sports competition, the prevention of cruelty to children or animals]; see Prob. Code, § 18502, subd. (a) ["Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.].)

As one California court put it:

> [a] venerable line of California cases has defined the term "charity" as "a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

(*Santa Catalina Island Conservancy v. County of Los Angeles* (1981) 126 Cal.App.3d 221, 239 [quoting *Estate of Halm* (1925) 196 Cal. 778, 782].)

It is, however, the specific (or secondary) purpose that distinguishes one educational trust from another.

Once courts are permitted to modify specific charitable purposes for more general ones under equitable deviation, as the Court of Appeal permits here, a court may simply decide that there would be more or better education if the specific trust purposes were thrown out entirely. A trust for a college could be found to be less efficient at accomplishing the overarching charitable purpose of the furtherance of education than using that trust property for primary education.

Petitioners submit that this Court should grant review to consider whether this facile modification of a trust's purpose should be the new law in California.

IV. EQUITABLE DEVIATION DOES NOT PERMIT MODIFICATION OF A TRUST'S PURPOSE.

A. Equitable Deviation Derives from and Is Limited by the Court's Equitable Power over the Administration of Trusts, Whereas the *Cy Près* Power is Far More Extensive.

In arguing that this Court's review is not necessary to settle an important issue of law, Respondent posits that the "decision below does nothing more than apply well-settled principles of trust administration." (Answer at 15.) Respondent is incorrect. Changing an express specific purpose of a charitable trust through equitable deviation is *not* an ordinary exercise of the court's power over trust administration. Respondent quotes section 396 of the Bogert treatise as "discussing th[e] precise issue" that deviation can be used to change a charitable trust's purpose. However, the same section of the same treatise clearly states: "The court has no power to modify the purposes of a charitable trust except by the use of the cy pres power." (Bogert, The Law Of Trusts And Trustees (rev. ed. Sept 2016) § 396, fn. 18 (emphasis added).)

Respondent brought his Amended Petition under Probate Code section 17200, subd. (a), (b)(13): "[A] trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust . . . [which] include . . . [a]pproving or directing the modification or

termination of the trust." Probate Code section 17200 authorized the petition brought by Respondent to seek relief under section 15409. (See *Stewart v. Towse* (1988) 203 Cal.App.3d 425, 428.) When parties petition the court under section 17200, they are seeking relief relating to the "internal affairs" or the administration of the trust. Therefore, necessarily, the modification sought under 15409 is limited by the court's "general power over trust administration." (See 6 Scott & Ascher on Trust (5th ed. 2007), § 39.5.) Although this power over trust administration is broad, in exercising these same general powers over administration of a charitable trust, the court

> ordinarily does not substitute one purpose for another. In exercising the cy pres power, however, the court may permit the application of trust property to a charitable purpose other than that designated in the terms of the trust, if accomplishment of the designated purpose has become unlawful, impossible, impracticable or wasteful. In other words, cy pres is a much more extensive power than the ordinary powers of the court to permit deviations from the terms of the trust.

(6 Scott & Ascher on Trusts (5th ed. 2007) § 39.5 at p. 2701-2702 [emphasis added].) This is true even when the courts are authorized to modify the dispositive provisions of a trust using equitable deviation.

> We are constrained to add for the trial court's guidance that a trust can be modified if provisions are ambiguous or if "slavish adherence" to the terms of the trust would defeat the primary purpose of the trust; but neither Probate Code Appendix section 17200 nor the common law of trusts permits the creation of a new agreement under the guise of a modification or reformation.

(*Estate of Sigourney* (2001) 93 Cal.App.4th 593, 605.) Indeed, it is telling that the entire chapter dedicated to equitable deviation in the treatise Scott and Ascher on Trusts does not mention the doctrine's application to modify the purpose of a charitable trust. (See 6 Scott & Ascher, Ch 33. "Termination and Modifications: General Principles", pp. 2149-2201.)

B. Statutory Equitable Deviation Does not Support Modification of a Trust's Purpose.

Respondent argues, incorrectly and without support, that "Section 15409 authorizes a court to modify a trust's secondary purpose to accomplish its primary purpose." (Answer at 4.) Section 15409 says nothing about allowing the modification of any trust purpose, and no party has cited any authority holding that section 15409 permits modification of a trust's purpose. Respondent contends that it is "a bizarre result" that a trust with the specific and explicit charitable purpose of supporting a men's college should be required to use its trust property solely for that men's college unless it is impossible, impracticable, or illegal to do so. But this is exactly what California law requires.

However, this raises the larger policy question with which Petitioners are deeply concerned, and which we submit this Court should undertake review to decide: whether trustees should have the power (through application to the courts) to deviate from clearly expressed charitable purposes which are also, broadly speaking, dispositive provisions

when it is not necessary to do so (i.e., when *cy près* conditions aren't satisfied). As noted above, virtually all charitable trusts express both a general purpose and a more specific purpose, along with means for achieving the more specific purpose. Under the Court of Appeal opinion here, a donor cannot lock in a specific purpose, because the presence of a more general purpose under which the specific purpose necessarily falls allows trustees to modify these specific charitable purposes. To be sure, it may make sense to override specific purposes when the *cy près* conditions are met, and donors can be expected to give against the background of that understanding. But the holding here is really something new. And while some might welcome it, it is unlikely to have a salutary effect on future charitable giving.

California has expressed a strong public policy that charitable trust property must not be diverted from its declared purpose. (*In re Metropolitan Baptist Church* (1975) 48 Cal.App.3d 850, 857.) Thus, California courts have adopted a strict construction of the charitable trust doctrine when applying it to charitable corporations. A charitable corporation organized exclusively for charitable purposes holds its assets – including any subsequent donations and revenues – in trust for the purposes enumerated in its articles of incorporation. (*Lynch v. Spilman* (1967) 67 Cal.2d 251, 263; *Holt v. College of Osteopathic Physicians* (1964) 61 Cal.2d 750, 756; *Pacific Home v. County of Los Angeles* (1953) 41 Cal.2d

844, 852; *In re Los Angeles County Pioneer Society* (1953) 40 Cal.2d 852, 860.) This Court has held:

> [A]ll the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation's purposes, and notwithstanding the absence of any express declaration by those who contribute such assets as to the purpose for which the contributions are made. In other words, the acceptance of such assets under these circumstances establishes a charitable trust for the declared corporate purposes as effectively as though the assets had been accepted from a donor who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes.

(Pacific Home, supra, 41 Cal.2d at p. 852.)

Respondent posits that equitable deviation from administrative or dispositive provisions applies when "the whole of the intention of the settlor cannot be carried out, but the trust nevertheless does not fail since the primary intention of the settlor can be accomplished." (Answer at 3.) Respondent then contrasts this with the Restatement (Second) on *cy près*, where "the court permits or directs application of the trust property to a *different charitable purpose* from that designated by the settlor." (Emphasis by Respondent.) Both of these premises are correct: (1) when the whole of the intention of the settlor cannot be carried out, the particular administrative or dispositive provision may be modified, in the name of the trust purposes; and (2) courts in applying *cy près* may permit or direct application of the trust property to a different charitable purpose.

But the trial court did the latter under the guise of the former, and this was error. For the court found that a charitable purpose of the trust is to educate only promising young men; however, pursuant to the trial court's modification, the trust res may be directed to educate young women, which is a different charitable purpose.

C. Authorities Cited by Respondent Do Not Support the Result Reached Here.

Respondent posits that applying equitable deviation to further a primary purpose by changing its secondary purposes is well established in the world of charitable trusts. Yet, each case cited by Respondent either involves a private trust, or the "secondary purpose" being modified is an administrative provision. For instance, in *Estate of Traung* (1962) 207 Cal.App.2d 818, 830, the court held *not* that a "secondary" dispositive provision should yield to the "primary" where the two dispositive provisions conflict, but rather "where there is a conflict between a dispositive provision and an administrative direction the latter should give way." The court held:

> The terms of the trust having to do with the manner in which the trustee should act in order to obtain the primary objectives are not on the same level of importance but are rather minor and auxiliary. The jurisdiction of equity to enforce trusts should and does include power to vary the details of administration which the settlor has prescribed in order to secure the more important result, namely, obtaining for the beneficiaries the advantages which the settlor stated he wished them to have.

(*Ibid.*) In *Estate of Traung*, the secondary "purposes", which Respondent maintains are "the means for carrying out the dominant purpose" and so should yield to the primary purpose (Answer at 22 [citing Bogert treatise]) were the "time of payments to be made to the beneficiaries", in other words, administrative provisions. (*Traung, supra,* 207 Cal.App.2d at p. 830.) The education of promising young men as set forth in the Purpose Paragraph of the L.L. Null Trust is hardly analogous.

Nor is Respondent aided by *Stanton v. Wells Fargo Bank etc. Co.* (1957) 150 Cal.App.2d 763. Respondent cites that case for the proposition that "using the doctrine of deviation to further a trust's primary purpose by modifying a secondary purpose is nothing new . . . [and] the rule applies to charitable trusts, too." (Answer at 22.) Like *Traung*, *Stanton* held that "courts will not permit the main purpose of a trust to fail by compelling slavish adherence to the administrative limitations of the trust instrument. Where the main purpose of the trust is threatened the courts will and should grant permission to deviate from restrictive administrative provisions." (*Stanton, supra*, 150 Cal.App.2d at p. 770 [emphasis added].)

Although the South Carolina court in *Blumenthal v. White* (Conn. Ct. App. 1996) 683 A.2d 410, cited by Respondent, modified a dispositive provision, that case is distinguishable because the trust deed there contained a reversionary interest – a forfeiture – in the testator's heirs. Such forfeiture is not at issue here. The existence of any reversionary interest

prevents the court's application of *cy près* because it rids the trustees of the necessity to seek the court's application of the *cy près*. (See 6 Scott & Ascher, § 39.7.2, at p. 2782 ["When the terms of a charitable trust provide that if the trustees do not apply the property in the manner directed, it is to revert to the settlor or the settlor's estate, the trust is subject to a condition subsequent."].) Courts strictly construe these types of forfeiture provisions, and even if there has been a breach of the condition, "a court may refuse to decree the termination of the charitable trust and a forfeiture of the property if it is inequitable to do so." (*Id.* at p. 2793.) Indeed, even the presence of a gift over provision to another specific charitable purpose averts the "failure" and therefore *cy près* need not apply. (*Id.* at pp. 2796-2797 ["the event upon which the gift over is to take effect may be the failure of the original charitable trust. In such a case, the property does not revert to the settlor or the settlor's estate, nor does cy pres apply."].) Rather than allow the charitable gift to forfeit, *Blumenthal* essentially removed the reversionary interest (which was a dispositive provision) to further the charitable purpose of the trust.

Moreover, *Blumenthal*'s description of the trust's purposes conflates the terms "primary" with "general." Respondent latches onto this wording throughout his Answer, thereby manufacturing a hierarchy of purpose within the Nunn Trust where none existed before. Applying the trial court's and Respondent's preferred nomenclature, all charitable trusts could

be reduced to one of five or six primary purposes such as furthering education, health, welfare, religion, and the provision of public goods. (See *Santa Catalina Island Conservancy, supra*, 126 Cal.App.3d at p. 239.) And even those more general purposes could be subsumed by modifying these more specific purposes to yield to a greater "primary" purpose such as "benefitting mankind". Each of those purposes is a means to the end of benefiting mankind and yet arguably dispositive. Were specific charitable trust purposes, like the specific purpose of the L.L. Nunn Trust, at risk of being subordinated to such banalities, the world of charitable giving would be greatly impoverished.

Respondent relies on South Carolina law for the proposition that expansion of a trust's beneficiaries is "neither novel nor beyond the scope of equitable deviation." (Answer at 23, quoting *Colin McK. Grant Home v. Medlock* (S.C. Ct. App. 1986) 349 S.E.2d 655, 660 ("*Medlock*").) Petitioner submits that the Court should not put any weight on South Carolina law in this instance as that state's courts, unlike California's, have repeatedly rejected the doctrine of *cy près* in favor of liberalized equitable deviation to modify charitable purposes, as was done in *Medlock*. (See also *South Carolina Nat. Bank v. Bonds* (S.C. 1973) 195 S.E.2d 835, 840; *Furman Univ. v. McLeod* (S.C. 1961) 120 S.E.2d 865, 872.)

Neither *Traung*, *Stanton*, *Blumenthal,* or *Medlock,* nor the secondary sources cited by the Court of Appeal and by Respondent, in anyway

support this unorthodox and novel application of equitable deviation to change a charitable trust's purpose.

Respondent incorrectly relies on *Estate of Loring* (1946) 29 Cal.2d 423, 436 for the proposition that common law equitable deviation has been applied to charitable trusts. This proposition is irrelevant because the court below applied statutory equitable deviation, not common law equitable deviation. In any event, Respondent's reliance on *Loring* fails. *Loring* involved only modification of the distributive provisions of the trust at issue: the amount of money that was available to distribute was less than the amount set forth in the testator's will, and this Court was required to choose between allocating less money to fund a hospital smaller than the one envisioned by the testator, or funding no hospital at all. (*Id.* at p. 434.) The cases the Court cites to exemplify "the equitable power of a court to modify [a] trust" (*id.* at p. 436) hold:

- A court may not use money set aside in trust to establish an institute for "the education of young ladies" to be used to maintain a coeducational high school. (*Allen v. Trustees of Nasson Institute* (Me. 1910) 77 A. 638, 639.) The Maine Supreme Court held that, even if coeducation was more widespread in 1910 (when the case was decided) than in 1881 (when the will at issue was written) or 1882 (when the testator died), "such change, while it might tend to prove the

unwisdom of the bequest in the light of subsequent events, would not authorize its perversion to objects not contemplated by the testator." (*Id.* at p. 640.)

- Where a trust was set up to provide a town with a library, and there was no money for the operating expenses of the library, the income from the trust fund not used to repair the library building or buy books could be used for such operating expenses. (*Manufacturers Nat. Bank v. Woodward* (Me. 1944) 38 A.2d 657, 659.)
- A town may sell a plot of land donated and previously operated as a school, provided the proceeds are used for the same charitable purpose, where, in the 80 years since the donation, the town changed such that due to "the dangerous condition of vehicular traffic upon that street, the tract may no longer furnish a suitable location for a public school." (*Town of South Kingstown v. Wakefield Trust Co.* (R.I. 1926) 134 A. 815, 817.)

Plainly, none of these cases, all presented as examples of common law equitable deviation, holds that a court may change the purpose of a charitable trust under conditions other than those permitting *cy près*.

* * * * *

In sum, no California authority, no on-point out-of-state authority, and no secondary authority supports the result reached here. This Court should grant review to determine whether the result should be permitted under California law.

V. THE DEARTH OF CALIFORNIA LAW ON THE ISSUE RAISED IN THIS PETITION SUPPORTS THE GRANT OF REVIEW.

The mere fact that both parties rely so heavily on out-of-state law and secondary sources in their briefing before this Court is, we submit, another reason for the Court to grant review. This Court has often noted the dearth of California authority on a given point when examining out-of-state law with the goal of advancing our own law. (See, e.g., *People v. Gionis* (1995) 9 Cal.4th 1196, 1211 ("Although there is a dearth of California case law directly addressing the issue, authorities in other jurisdictions appear to uniformly hold that the attorney-client privilege does not protect statements made after an attorney declines employment."); *People v. Zamora* (1976) 18 Cal.3d 538, 563, fn. 25 ("In light of the disagreement over the propriety of holding such a hearing and the trial court's justifiable uncertainty on the issue because of the paucity of authority, we believe that we should comment on the subject even though none of the parties have questioned the trial court's ruling.").)

Respondent's Answer relies on eight out-of-state case (compared to six California cases) and seven secondary sources. Petitioners cite three non-California cases and six secondary sources. *Loring, supra*, 29 Cal.2d 423, discussed in another section of this brief, looks largely to foreign law for its rule of decision. There are very few cases addressing statutory equitable deviation, none addressing the points of law raised by Petitioners, and the newest cases addressing equitable deviation are from well before the turn of the century. California would be well served by this Court opining as to the scope of statutory equitable deviation.

VI. CONCLUSION.

For the foregoing reasons, and for those set forth in their petition, Petitioners respectfully request that this Court grant their petition for review.

DATED: June 23, 2017

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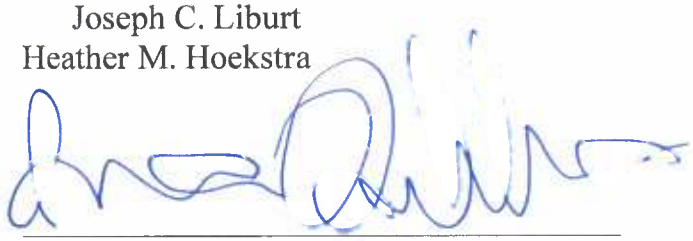

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CERTIFICATE OF COMPLIANCE WITH RULE 8.204

Pursuant to Rule 8.204 of the California Rules of Court, the attached REPLY IN SUPPORT OF PETITION FOR REVIEW is proportionately spaced, has a typeface of 13 points or more and contains 3,918 words, including footnotes.

DATED: June 23, 2017

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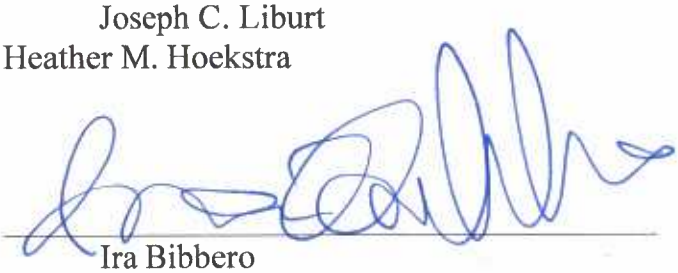
By: 
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In the Supreme Court of the State of California

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 2121 Avenue of the Stars, Suite 2800, Los Angeles, CA 90067.

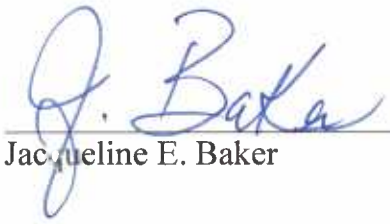
On June 23, 2017, I served true copies of the following document(s) described as **REPLY IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Browne George Ross LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.

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

Executed on June 23, 2017, at Los Angeles, California.



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