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*Appearing Pursuant to Penal Code section 1424*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>Plaintiff,<br>**v.**<br>**CHAMISE CAMERON CUBBISON,**<br>Defendant. | Case No. 23CR02523-B<br>**ATTORNEY GENERAL'S OPINION IN OPPOSITION TO MOTION TO RECUSE DISTRICT ATTORNEY'S OFFICE**<br>Date: December 19, 2023<br>Time: 9:00 a.m.<br>Dept: A |

## INTRODUCTION

Defendant Chamise Cubbison, the former Mendocino County Auditor-Controller, faces one felony count of misappropriation of public funds (Pen. Code, §424) related to her involvement in a $68,106 embezzlement scheme with former Mendocino County Payroll Manager, and co-defendant, Paula June Kennedy. Defendant claims recusal of the entire Mendocino County District Attorney's Office is required due to prior disagreements between herself and District Attorney David Eyster regarding two reimbursement claims that occurred before the current case was filed. Recusal is not required.

First, defendant relies on the incorrect legal standard, claiming she only has to show the "appearance" of a conflict, when the statute requires proof of an actual conflict. Second, defendant presents no evidence that she has been subjected to unfair treatment. This case was initiated by county officials not connected to the district attorney's office and independently investigated by the Mendocino County Sheriff's Office. Following a team charging meeting among district attorney staff, DA Eyster declined to file the three charges recommended by the Sheriff and instead filed only a single count. DA Eyster also provided defendant's attorney with all discovery two months prior to filing charges and he has not spoken publicly about the merits of this case.

Lastly, defendant has no right to an evidentiary hearing under the recusal statute. She has failed to meet her burden of affirmatively presenting evidence that the entire district attorney's office is biased. The recusal statute prohibits defendant from using an evidentiary hearing to search for a conflict. As a result, defendant's motion must be denied.

**STATEMENT OF FACTS**

While employed as Assistant Mendocino County Auditor-Controller, defendant rejected two reimbursement claims submitted by District Attorney David Eyster for the 2018 and 2019 District Attorney's End of Year Staff Workshop and Continuing Education. Disagreement between defendant and the district attorney's office about the validity of the claims continued from December 2019 to March 2020. (Chris Andrian Declaration at ¶¶ 7-11.)

After Auditor-Controller Lloyd Weer retired, the Mendocino County Board of Supervisors ("Board") considered appointing defendant to the position. On September 4, 2021, DA Eyster appeared at the Board meeting and expressed his opposition both verbally and in writing to defendant's appointment. DA Eyster also proposed dissolving the Auditor-Controller position and replacing the office with a County Chief Financial Officer. The Board declined to appoint defendant and instead deemed her the "Acting Controller-Auditor." (Andrian Decl. at ¶¶ 5-6.)

On January 12, 2022, the Board appointed defendant as Auditor-Controller. (Andrian Decl. at ¶ 4.) On February 2, 2022, defendant sent a memo to the district attorney's office questioning a travel claim submitted for reimbursement. (Andrian Decl. at ¶ 12.) In June 2022, defendant was

elected to the newly created office of Mendocino County Auditor-Controller/Treasurer-Tax Collector.

On September 1, 2022, DA Eyster received a phone call from the Mendocino County Chief Executive Officer and County Counsel expressing their concern that Mendocino County Payroll Manager Paula June Kennedy may have engaged in financial improprieties. They also had reason to suspect defendant's involvement in the embezzlement scheme and asked DA Eyster's opinion on how to proceed. DA Eyster suggested they contact the Mendocino County Sheriff's Office because the District Attorney's Office generally does not initiate investigations or act as the lead investigative agency regarding allegations of public or private theft. (See Attorney General's Ex. 1, Declaration of District Attorney David Eyster at pp. ¶¶ 3-7.)

After completion of their investigation, the sheriff submitted evidentiary materials to the district attorney's office and recommended charging defendant and Kennedy with felony violations of Penal Code sections 504a [Embezzlement], 424 subdivision (a)(1), [Misappropriation of Public Funds], and 182 subdivision (a) [Conspiracy]. District Attorney Investigators performed follow-up investigation. DA Eyster and his staff reviewed all of the materials. (Eyster Decl. at ¶¶ 10-12.)

On October 13, 2023, defendant and Kennedy were each charged with one felony count of misappropriation of public funds in the amount of $68,106.[1] (Pen. Code, §424, subd. (a)(1). (Eyster Decl. at pp. ¶¶ 12.) On October 17, 2023, the Board suspended defendant without pay.[2] (Andrian Decl. at ¶ 12.)

[1] On August 9, 2023, two months prior to charges being filed, DA Eyster provided the crime reports and other discovery to defendant's attorney, Chris Andrian. DA Eyster also proposed a day-of-arraignment disposition of the case which defendant elected not to accept at her October 17, 2023, arraignment. (Eyster Decl. at ¶13.)

[2] Defendant submits several exhibits consisting of articles reflecting, as defense counsel contends, the "extensive media coverage" of this matter. (Andrian Decl. at ¶¶ 12-13.)

## ARGUMENT

### I. DEFENDANT HAS THE BURDEN OF DEMONSTRATING A SERIOUSLY GRAVE CONFLICT SHOWING AN ACTUAL LIKELIHOOD OF UNFAIR TREATMENT

Penal Code section 1424 provides that a motion to recuse a district attorney "shall not be granted unless it is shown by the evidence that a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial." "Section 1424 was enacted in 1980 'in response to the substantial increase in the number of unnecessary prosecutorial recusals under the 'appearance of conflict' standard set forth in [*People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255].' [Citation.]" (*People v. Petrisca* (2006) 138 Cal.App.4th 189, 194.)

A defendant has the burden to prove two elements in order to justify recusal under Penal Code section 1424. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.) First, a defendant must show a conflict of interest. (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833.) A conflict only exists where "'the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.' [Citation.]" (*Ibid*.) Second, the defendant must show that any such conflict is "so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*Ibid*.) In other words, "there must be 'an actual likelihood of unfair treatment.'" (*People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1485, citing *Haraguchi, supra*, 43 Cal.4th at p. 719.)

The party seeking recusal bears the burden of proof. (*People v. Hamilton* (1988) 46 Cal.3d 123, 140; *Love v. Superior Court* (1980) 111 Cal.App.3d 367, 372.) Placing the burden on the party seeking recusal is consistent with the presumption that a district attorney "has performed [his or her] official duty properly." (*People v. Superior Court* (*Martin*) (1979) 98 Cal.App.3d 515, 521.) In order to satisfy his burden of proof, defendant must present "*evidence of overriding bias*." (*People v. Millwee* (1998) 18 Cal.4th 96, 123.)

Defendant's burden is especially high where, as here, he seeks recusal of an entire district attorney's office. California courts have emphasized that "[d]isqualification of an entire prosecutorial office from a case is disfavored." (*People v. Petrisca, supra*, 138 Cal.App.4th at p. 195; *People v. Hernandez* (1991) 235 Cal.App.3d 674, 679-680.) This principle has been stated

in a number of ways: "Recusal of an entire district attorney's office is an extreme step. The threshold necessary for recusing an entire office is higher than that for an individual prosecutor." (*People v. Cannedy*, *supra*, 176 Cal.App.4th at p. 1481.) "The showing must be especially persuasive when the defendant seeks to recuse an entire prosecutorial office. . . ." (*People v. Hamilton*, *supra*, 46 Cal.3d at p. 139; *People v. Alcocer* (1991) 230 Cal.App.3d 406, 414.) "Recusal of an entire District Attorney's Office is not a step to be taken lightly. . . ." (*People v. McPartland* (1988) 198 Cal.App.3d 569, 574.) "Particular caution should be exercised when the request is that an entire prosecutorial office be recused." (*Kain v. Municipal Court* (1982) 130 Cal.App.3d 499, 504.) "[T]here are instances in which recusal of an entire prosecutor's office is justified in order to protect the integrity of the judicial process. *But such cases are rare*." (*Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, 120 (emphasis added), superseded by Pen. Code, § 1424 on other grounds; see also *People v. Petrisca*, *supra*, 138 Cal.App.4th at p. 195.)

The judicial reluctance to recuse an entire district attorney's office reflects the law's disdain for outcomes where "'the district attorney is prevented from carrying out the statutory duties of [her] elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their [locally] elected representative in the prosecution of crime in the county.' [Citation.]" (*People v. Eubanks* (1996) 14 Cal.4th 580, 594, fn. 6.) Motions to disqualify are also disfavored because they are often used as just another trial tactic, brought to delay, shop for a perceived less aggressive prosecutor, or to unfairly tarnish the name and reputation of an adversary. As one federal court has warned:

> [T]he attempt by an opposing party to disqualify the other side's lawyer must be viewed as part of tactics of an adversary proceeding. As such it demands judicial scrutiny to prevent literalism from possibly overcoming substantial justice to parties.

(*J.P. Foley & Co. v. Vanderbilt* (2d Cir. 1975) 523 F.2d 1357, 1360; accord, *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23 ["[m]otions to disqualify counsel are especially prone to tactical abuse"].)

## II. DEFENDANT HAS NOT MET HER BURDEN OF DEMONSTRATING A SERIOUSLY GRAVE CONFLICT AFFECTING THE ENTIRE MENDOCINO COUNTY DISTRICT ATTORNEY'S OFFICE

Defendant fails to satisfy her burden of proving with admissible evidence that the Mendocino County District Attorney's Office should be recused due to an office-wide conflict. First, defendant relies on the incorrect legal standard, claiming she only has to prove the "appearance" of a conflict. Second, defendant presents no evidence that she has been subjected to unfair treatment during the prosecution of this case or that there is a likelihood she will not be treated fairly in the future. There is no basis for recusal. Defendant's motion should be denied.

### A. The Mere Appearance of a Conflict Does Not Warrant Recusal

Defendant claims recusal is necessary because it "appears" a conflict may exist in this case. She is incorrect. Defendant has the burden of proving an actual likelihood that she will be treated unfairly, not merely the appearance of a conflict.

A conflict requiring recusal must be "real, not merely apparent," and disqualification is not permitted under Penal Code section 1424 "merely because the district attorney's further participation in the prosecution would be unseemly, would appear improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system." (*People v. Eubanks*, *supra*, 14 Cal.4th at p. 591; *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at p. 719; *People v. Millwee*, *supra*, 18 Cal.4th at pp. 122-124; see, e.g., *People v. Cannedy*, *supra*, 176 Cal.App.4th at p. 1485 [reversing an office-wide grant of recusal where, "[p]rior to ruling on the motion, the [trial] court expressed, in essence, that it would be cleaner if the Attorney General, rather than the district attorney, prosecuted the case"]; *People v. McPartland*, *supra*, 198 Cal.App.3d at p. 574 ["recusal cannot be warranted solely by how a case may appear to the public"].)

"There is simply no basis, in Penal Code section 1424 or case law, to infer that [the "appearance of a conflict"] standard has any application in a criminal matter." (*Spaccia v. Superior Court*, *supra*, 209 Cal.App.4th at p. 753.) Penal Code section 1424 prohibits recusal "solely on the ground of the appearance of impropriety" (*People v. Jenan* (2006) 140 Cal.App.4th 782, 791-792), and it is well settled that "neither a district attorney nor an entire district attorney's

office could be recused for a mere appearance of impartiality, but could only be recused when there existed an actual likelihood of unfair treatment" (*Spaccia v. Superior Court, supra,* 209 Cal.App.4th at p. 104).

Here, defense counsel submits a declaration wherein he asserts his personal opinion that recusal is warranted due to the appearance of a conflict and how the community might perceive that apparent conflict. Defense counsel also invites DA Eyster to recuse himself so as to improve the public appearance of the case. (Andrian Decl. at ¶17 [" Best practices sometimes suggest that even the appearance of a conflict of interest may be enough to cause an attorney to separate him or her or their office from the case."].) He further surmises that "Mendocino County would be better served by [DA] Eyster stepping away." (Andrian Decl. at ¶18.) However, it is well established that "failing 'the smell test' is not enough to deny parties representation by the attorney of their choice," (*Smith, Smith & King v. Superior Court (Oliver)* (1966) 60 Cal.App.4th 573, 582), and even the appearance of an impropriety which "would be highly destructive of public trust" is, standing alone, "no longer a ground for recusal of the district attorney" (*People v. Eubanks, supra*, 14 Cal.4th at p. 593).

This Court must focus on the correct legal recusal standard—whether defendant has come forward with competent evidence demonstrating an actual likelihood she will not receive a fair trial if she is prosecuted by the Mendocino County District Attorney—and not on how proceeding with the local prosecutor may appear to the public.

### B. Defendant Has Presented No Evidence That Prior Disputes Regarding Reimbursement Claims Will Cause the Mendocino County District Attorney's Office to Treat Her Unfairly in the Current Case

Defendant speculates that prior disputes between herself and DA Eyster regarding various reimbursement claims will cause him and Mendocino County line prosecutors to handle her case unfairly in the future. However, "[s]heer speculation does not constitute sufficient evidence of potential bias to recuse an entire prosecutorial office from a case." (*People v. Hernandez* (1991) 235 Cal.App.3d 674, 680.) In fact, defendant presents no evidence of past or current unfair treatment. As with all elected District Attorneys, DA Eyster is ethically bound to exercise

independent judgment in all criminal matters and defendant fails to submit evidence that he is not fulfilling that ethical duty.

Indeed, the legal presumption is that prosecutorial duties, such as charging and prosecuting a criminal case, have been properly and constitutionally exercised. (*Murgia v. Municipal Court*, *supra*, 15 Cal.3d 286, 305; *People v. Smith*, *supra*, 155 Cal.App.3d 1103, 1128-1129; *People v. Battin*, *supra*, 77 Cal.App.3d at pp. 635, 666, 668; Evid. Code, §§ 606, 664.) Defendant offers no evidence to rebut that presumption. Instead, defendant repeatedly speculates that her prior disagreements with DA Eyster *could lead* to a distraction at trial and *might* impact jury selection. Contrary to defendant's speculation, there is no evidence that defendant has either been treated unfairly or is likely to be treated unfairly in her criminal case.

Rather, the evidence before this court demonstrates defendant has been treated no differently than any other criminal defendant. County officials separate from the district attorney's office initiated the investigation into this case. Following the sheriff's investigation, the district attorney's office conducted limited follow-up investigation and defendant fails to present any evidence of impropriety related to those actions. Moreover, after a team charging meeting, DA Eyster declined to file the three felony charges recommended by the Mendocino County Sheriff's Office and instead only filed a single count. In addition, to facilitate pre-filing discussions and negotiations, DA Eyster provided defendant's attorney with all discovery two months prior to filing charges and proposed a day-of-arraignment disposition. Finally, since filing, DA Eyster has not publically commented about either the merits of the case or defendant personally. Defendant has failed to present any evidence to this Court rebutting the presumption that the prosecutor's duties in this case have been properly and constitutionally exercised. (Evid. Code, §§ 606, 664.)

Furthermore, defendant does not articulate how, specifically, the facts alleged create a conflict. The existence of the disagreement between defendant and DA Eyster regarding the reimbursement claims is not in dispute. Defendant fails to demonstrate a nexus between that prior disagreement and a likelihood of future unfair treatment. Defendant certainly cannot identify any past unfair treatment in this case; she presents no direct evidence of a conflict. As such, it would

be unreasonable to extrapolate from the defense declaration or exhibits that DA Eyster will fail to prosecute this case in an evenhanded manner.

Defendant claims her case is similar to *People v. Conner* (1983) 34 Cal.3d 141, where the court found the district attorney's office too emotionally involved when a deputy district attorney was the actual victim of an attempted escape and gun assault in the courtroom. (Def. Mot. at p. 5.) The Supreme Court upheld the recusal order, noting the incident was "harrowing" and resulted in an "emotional involvement," given that a deputy district attorney was the victim. (*Id*. at p. 148.) Unlike *Conner*, this case does not involve a prosecutor as the victim or witness to a crime. Rather, the claimed conflict involves a disagreement about reimbursement claims. That is a far cry from the emotional involvement stemming from a coworker and colleague being the victim of a violent crime prosecuted by the district attorney. Defendant has presented no evidence of office-wide "emotional involvement" on par with that in *Conner*.

In addition, the instant prosecution is unlike the recent cases of *People v. Lastra* (2022) 83 Cal.App.5th 816 and *People v. Pomar* (2023) 95 Cal.App.5th 504. In *Lastra*, the elected District Attorney filed charges against Black Lives Matter protesters on the same day he posted social media comments about the case and his wife posted statements urging the public to contribute financially to her husband's campaign. The Court of Appeal found that the DA's comments revealed an extraneous influence on his decision-making process and emphasized that his social media comments occurred contemporaneously with his filing of charges. (*People v. Lastra*, *supra*, 83 Cal.App.5th at pp. 821-822, emphasis added.) In contrast, defendant fails to demonstrate that the past public dispute regarding reimbursement claims operated as an extraneous influence in DA Eyster's decision-making process when filing this case.

In *Pomar, supra,* 95 Cal. App. 5th 504, the Court of Appeal upheld the trial court's recusal of the San Francisco District Attorney's Office from a murder case where the victim was a cousin of the elected district attorney's husband and the district attorney had made public comments about the case in a newspaper article which was published while she was working for a campaign to recall the former district attorney. Here, there is no pending case involving a victim related to the district attorney. Additionally, in *Pomar* the district attorney repeatedly commented on the

pending homicide, whereas DA Eyster has made no public comments about the merits of defendant's criminal case. Moreover, unlike *Pomar*, where the court found the district attorney harbored animosity towards the defendant as a result of the murder, DA Eyster's public comments at the 2021 Board meeting merely demonstrated his conviction that defendant was not qualified for the Auditor-Controller position, as opposed to evincing personal animosity.

Finally, defendant's attack on the weight of the evidence in this case has no bearing on the issue of recusal. Defendant attempts to bolster her assertion that the evidence is weak, noting that she did not personally receive any of the misappropriated $68,106 funds. However, defendant's opinion about the probability of a conviction is irrelevant to the issue of recusal. The evidence in this case is established and changing prosecutors would not alter the state of the evidence. Defendant may challenge the strength of the evidence in a motion to dismiss - - that is the appropriate vehicle for testing the evidence, not a recusal motion. Recusal is required only when there is a likelihood of unfair treatment by the prosecution.

Defendant fails to present evidence of a single prosecutorial decision or action that has affected her right to a fair trial. She has presented no evidence that the Mendocino County District Attorney's Office has taken, or is likely to take, any steps in this prosecution that are not within the exercise of evenhanded prosecutorial discretion.

## III. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Defendant is not entitled to an evidentiary hearing under the recusal statute. (Pen. Code, § 1424.) In 1998, the Legislature amended Penal Code section 1424, imposing a mandatory duty upon defendants to support recusal motions with competent affidavits and also imposing a similar requirement on trial courts to review those affidavits and then to decide whether or not an evidentiary hearing is "necessary." The intent of Legislature was to reduce the number of unnecessary evidentiary hearings in recusal cases. When Assemblyman Cunneen offered his amendment to § 1424, the Bill Analysis for the State Senate Committee on Public Safety noted:

> Motions to recuse a district attorney's office are rarely granted. Unfortunately, they are being filed with greater frequency. . . . Recusal motions are being filed without any declarations under oath, based simply on unverified assertions by the defendant's lawyers. These attorneys rely on the fact that the statute, in its present form, does not specifically require the filing of a declaration. Deep-pocketed defendants are using

> recusal motions to unfairly force pre-trial evidentiary hearings where they conduct lengthy fishing expeditions at the expense of the crime victims and the prosecutors who are often forced to testify under oath for several hours.
>
> AB 154 would limit these abuses by adopting some commonsense procedural rules that are consistent with motion practice in general. Specifically, the bill would require . . . the motion to be supported by affidavits of witnesses competent to testify to the facts as set forth in the affidavits. . . . *Lastly, the measure would provide that no hearing would occur unless there are disputed issues of fact that could not be resolved through the use of affidavits.*

(AB 154 (1999) Bill Analysis, *http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0151-0200/ab_154_cfa_19990713_1634* (emphasis added).)

In *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, the Court of Appeal outlined the factors to guide a trial court's discretion in determining whether to permit testimony at a recusal hearing. Justice Chin, then writing for the Court of Appeal, stated:

> An evidentiary hearing should be held only when the court cannot with confidence decide the issue on the written submissions. Such instances should be rare, as when an important evidentiary gap in the written record must be filled, or a critical question of credibility can be resolved only through live testimony. [Citation.] Of course, whether to conduct an evidentiary hearing is a matter left to the discretion of the trial court.

(*Id*. at p. 583, fn. 5.)

The trial court's decision whether to hold an evidentiary hearing on a recusal motion is reviewed on appeal using an abuse of discretion standard. (*Spaccia v. Superior Court*, *supra*, 209 Cal.App.4th at p. 109.) In order to meet that standard when an evidentiary hearing is denied, "the party seeking an evidentiary hearing must make a prima facie showing by affidavit . . . [containing] *admissible* evidence, which would sustain a favorable decision if the evidence submitted by the movant is credited." (*Id.* at pp. 111-112.)

In this case, there is no basis for an evidentiary hearing because there is no fundamental dispute as to any facts which could result in recusal. This is not a case where there are "gaps" in the written record, but instead one where defendant fails to properly allege a conflict affecting the entire Mendocino County District Attorney's Office. Defendant has not "made a prima facie showing by affidavit . . . which would sustain a favorable decision." (*Spaccia v. Superior Court*,

*supra*, 209 Cal.App.4th at p, 109.) Defendant is not entitled to an evidentiary hearing to "go fishing" for facts or issues her motions fails to provide.

## CONCLUSION

For all of the foregoing reasons, defendant's motion to disqualify the Mendocino County District Attorney's Office should be denied.

Dated: December 12, 2023

Respectfully submitted,

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GEOFFREY S. LAUTER
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*/s/ Sharon E. Loughner*
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# DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: *People v. Cubbison*
No.: 23CR02523-B

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the Odyssey electronic filing system. Participants who are registered with Odyssey will be served electronically. Participants in this case who are not registered with Odyssey will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On December 12, 2023, I electronically served the attached

ATTORNEY GENERAL'S OPINION IN OPPOSITION TO MOTION TO RECUSE DISTRICT ATTORNEY'S OFFICE

by transmitting a true copy via this Court's Odyssey system. Because one or more of the participants in this case have not registered with the Court's Odyssey system or are unable to receive electronic correspondence, on December 12, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 12, 2023, at San Francisco, California.

| A. Bermudez | */s/ A. Bermudez* |
|---|---|
| Declarant | Signature |

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