Case No. B280676

IN THE

CALIFORNIA COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION EIGHT

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent,

LOS ANGELES SHERIFF'S DEPARTMENT, SHERIFF JIM MCDONNELL and COUNTY OF LOS ANGELES,

Real Parties in Interest

APPEAL FROM ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
THE HONORABLE JAMES C. CHALFANT, PRESIDING LOWER COURT CASE NO.: BS166063

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF ACLU SOUTHERN CALIFORNIA, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AND DIGNITY AND POWER NOW IN SUPPORT OF LOS ANGELES SHERFIFF'S DEPARTMENT, SHERIFF JIM McDONNELL and COUNTY OF LOS ANGELES

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To the Honorable Presiding Justice and to the Honorable Justices of the Court of Appeal, State of California, Second Appellate District:

Pursuant to California Rule of Court 8.520(f), proposed *Amici Curiae*, the ACLU of Southern California, California Attorneys for Criminal Justice ("CACJ"), California Public Defenders Association, and Dignity and Power Now ("DPN") (collectively "*Amici*"), respectfully apply for leave to file the accompanying *amicus curiae* brief in support of the Los Angeles Sheriff's Department, Sheriff Jim McDonnell, and the County of Los Angeles.[1]

Amici and their counsel are the sole authors of the *amicus curiae* brief. No person or entity other than *Amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief.

Amici have strong interests in the issues presented by this proceeding:

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately one million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous

[1] A full list of *amici curiae* and their relevant experience as prosecutors or defense attorneys is attached as Exhibit 1 to the *AMICI CURIAE* BRIEF OF ACLU SOUTHERN CALIFORNIA, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AND DIGNITY AND POWER NOW IN SUPPORT OF LOS ANGELES SHERIFF'S DEPARTMENT, SHERIFF JIM MCDONNELL, AND COUNTY OF LOS ANGELES.

cases before this Court and other courts throughout the nation and involving the meaning and scope of the rights of criminal defendants, including the prosecution's obligation to disclose impeachment and exculpatory information to the defendant, both as direct counsel and as *amicus*. Because this case directly implicates those issues, its proper resolution is a matter of concern to the ACLU and its members. The ACLU of Southern California is an affiliate of the ACLU.

California Attorneys for Criminal Justice is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including the defense of the constitutional rights of individuals and the improvement of the quality of the administration of criminal law. CACJ's membership consists of approximately 1,700 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than thirty-five years, CACJ has appeared before this Court as an *amicus curiae* on matters of importance to the administration of justice and to its membership. In particular, CACJ has filed *amicus* briefing in cases before this Court addressing *Pitchess* and its related statutes, including in *Galindo v. Superior Court* (2010) 50 Cal.4th 1 and *People v. Mooc* (2001) 26 Cal.4th 1216.

California Public Defenders Association is an association of some 4,000 criminal defense attorneys in California, who have an ongoing interest in clarifying that California recognizes a broad entitlement to all "exculpatory evidence" and that the *Brady* standard of materiality is a higher standard that only applies when a party is seeking to vacate a judgment.

Dignity and Power Now is a Los Angeles based non-profit civil and human rights organization. Its work over the last five years has and continues to be dedicated to supporting currently and formerly incarcerated people as well as their families who have experienced Sheriff misconduct in the jail system or in their neighborhoods. Specifically, DPN built a county-wide coalition responsible for proposing, creating, and implementing civilian oversight of the Sheriff's Department to ensure greater transparency and accountability for LASD personnel. This case has a direct impact on the policies and practices of transparency and accountability of the Sheriff's Department, which has been at the center of DPN's work, and is a primary concern to its members, their families, and communities across Los Angeles County.

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Amici believe that their views will assist the Court in resolving these issues by addressing them from the perspective of criminal defense counsel and their clients and an organization that has as part of its mission the protections of the rights of the accused in criminal proceedings.

DATED: March 3, 2017

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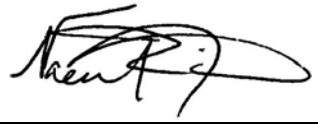
By: 

Naeun Rim
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1875 Century Park East, 23rd Floor, Los Angeles, California 90067-2561.

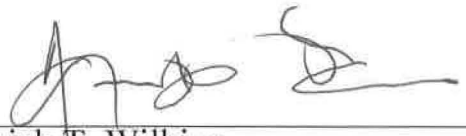
On March 3, 2017, I served the following document(s) described as on the interested parties in this action as follows:

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF ACLU SOUTHERN CALIFORNIA, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AND DIGNITY AND POWER NOW IN SUPPORT OF LOS ANGELES SHERFIFF'S DEPARTMENT, SHERIFF JIM McDONNELL and COUNTY OF LOS ANGELES

BY MAIL: By placing a true copy thereof in sealed envelopes addressed to the parties listed on the attached Service List and causing them to be deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with our firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

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

Executed on March 3, 2017, at Los Angeles, California.



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Amici Curiae, the ACLU of Southern California, California Attorneys for Criminal Justice, California Public Defenders Association, and Dignity and Power Now (collectively "*Amici*"), submit this *amicus curiae* brief as various organizations who have an ongoing interest in the prosecution and law enforcement's obligation to disclose impeachment and exculpatory information to the defense.[1]

I.
INTRODUCTION

After a thorough process of briefings and hearings, the Trial Court in this matter issued an order allowing the Los Angeles County Sheriff's Department ("Department" to notify the Los Angeles County District Attorney's Office that there may be exculpatory or impeachment material in specific Deputies' personnel files. ALADS now seeks emergency relief, claiming that such disclosures violate state law. But as shown below, ALADS is wrong because such disclosures are designed to comply with the Due Process requirements of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), and its progeny. Indeed these types of disclosures have been called "laudably established procedures" by the California Supreme Court, *People v. Superior Court* (2015) 61 Cal.4th 696, 721 (*Johnson*), and they

[1] A full list of *amici curiae* is attached as Exhibit 1.

have been accepted as appropriate by numerous prosecuting and law enforcement agencies.

II.
THE TRIAL COURT DID NOT EXCEED ITS JURISDICTION BY GRANTING A PARTIAL PRELIMINARY INJUNCTION

Apart from its claims on the merits, ALADS makes a threshold argument that the Trial Court's order, partially granting ALADS's motion for a preliminary injunction, exceeded its jurisdiction and violated ALADS's Due Process rights because the specific relief granted by the Trial Court was not presented in a noticed motion. (ALADS Mem. in Supp. of Pet. for Stay ("ALADS Mem.") at pp. 29-33.) But this argument ignores the Trial Court's discretionary authority to craft appropriate equitable relief and is without merit. In granting injunctive relief, "the court need not decide wholly for the plaintiff or the defendant. It may grant partial injunctive relief; it may impose terms and conditions on the relief granted; and it may substitute its own form of relief for the one demanded by the plaintiff." 6 Witkin Cal. Procedure (5th ed. 2008) Provisional Remedies § 361; *see also Bennett v. Lew* (1984) 151 Cal. App. 3d 1177, 1186 (same); *Oceanside Community Ass'n v. Oceanside Land Co*. (1983) 147 Cal. App. 3d 166, 177 ("An equity court has broad powers to fashion a remedy . . . [and] is not strictly limited to the particular relief requested in the prayer of the complaint.").

The Trial Court correctly recognized that, when there is an active prosecution, the Department is a part of the prosecution's team, and the prosecutor has a duty under *Brady* to disclose "potentially impeaching evidence . . . known to the police." *see, e.g., Kyles v. Whitley* (1995) 514 U.S. 419, 437 (*Kyles*) (the prosecution is required to turn over exculpatory evidence in the possession of prosecution team – which includes the police). To the extent ALADS sought to enjoin the Department from disclosing deputies' names to the prosecution even when those deputies were potential witnesses in an active criminal prosecution, the Trial Court concluded that this restriction would conflict with the prosecution's *Brady* obligations, and thus ALADS was not likely to succeed on that claim. Its partial grant of relief is therefore consistent with its findings and well within its equitable powers.

III.

ALADS ASKS THIS COURT TO DEFY THE CALIFORNIA SUPREME COURT'S RECENT HOLDING IN *JOHNSON*

In 2015, the California Supreme Court decided *Johnson, supra*, 61 Cal. 4th 696. This decision considered the disclosure obligations of the prosecution when it had been provided by the San Francisco Police Department with a list of officers with potentially exculpatory information in their personnel files. ALADS's arguments are flatly contravened by *Johnson*.

As discussed more fully below, *Johnson*'s holding has two points, a specific one and a more general one. Either is fatal to ALADS's claims here.

A. *Johnson*'s Specific Holding That The Prosecution Is Obligated To Disclose The Names of Officers With *Brady* Material In Their Files Means That Such Disclosures Cannot Be And Are Not Prohibited By *Pitchess*

ALADS claims that the Sheriff's *Brady* list violates the *Pitchess* statute. But *Johnson* relied on the validity of just such a list in concluding that prosecutors could satisfy their *Brady* obligations without personally reviewing the personnel files of the officers who were potential witnesses in a criminal case. This means that ALADS's position was squarely rejected by the California Supreme Court.

In *Johnson*, no party asserted that the *Brady* list violated *Pitchess.* Indeed, it appears that all parties conceded its propriety. Instead, *Johnson* considered two questions raised by the interplay of *Pitchess* and *Brady* triggered by the police department's decision to disclose to the prosecution the names of two testifying officers on its *Brady* list: (1) Did the *Pitchess* statutory scheme permit the prosecution to directly review those officers' confidential personnel records without a court order? (2) If not, does *Brady* require the prosecution to therefore make a *Pitchess* motion, obtain those records, and then produce them to the defense? *Johnson, supra*, 61 Cal. 4th at 709. The Court answered no to both questions, and held (1) the *Pitchess* scheme did not permit prosecutors direct

access to officer personnel files, and (2) *Brady* did not require the prosecution to actually obtain the records through a *Pitchess* motion, so long as it disclosed to the defense what it had been told by the police department – that the officers had potentially exculpatory material in their personnel files. *Id*. at 705. "That way, defendants may decide for themselves whether to bring a *Pitchess* motion." *Id*.

In so holding, the Court relied on the existence of a "*Brady* list" – a list of officers whose records contained "sustained allegations of specific *Brady* misconduct reflective of dishonesty, bias, or evidence of moral turpitude," *Johnson, supra*, 61 Cal. 4th at 706, created by the police department and disclosed to the prosecution, *id.* at 721. The Court recognized that *Brady* imposed on the prosecution an affirmative constitutional duty to disclose "material exculpatory evidence, including potential impeaching evidence . . . known to others acting on the prosecution's behalf, including the police." *Id*. at 709 (emphasis in original) (citing *Kyles, supra*, 514 U.S. at 437). It concluded that the prosecution could satisfy this duty by disclosing to the defense that an officer was on this list and allowing the defense to file their own *Pitchess* motion. *Id*. at 716. Conversely, it recognized that the *Brady* obligation was satisfied *only* when this disclosure was made: "[T]he prosecution fulfills its *Brady* obligation if it shares with the defendant any information it has regarding whether the personnel records contain *Brady* material . . . . In this case, this means the prosecution fulfilled its obligation

when it informed defendant of what the police department had told it, namely, that the personnel records of the officers in question might contain *Brady* material and that the officers are important witnesses." *Id.*

Thus, while *Johnson* did not directly address the validity of a *Brady* list or the prosecution's duty to turn over names of officers on that list (because neither party challenged it),[2] *Johnson* certainly *relied* on the existence of and prosecution access to this list when it held that the prosecution satisfies its *Brady* affirmative-disclosure requirement by producing the names of officers whose personnel records may contain *Brady* material. The Court explicitly relied on the police department's disclosure of the *Brady* list to the prosecution, stating clearly: "we also conclude that the prosecution fulfills its *Brady* duty as regards the police department's tip *if it informs the defense of what the police department informed it*, namely, that the specified records might contain exculpatory information." *Id.* at 705 (emphasis added). It also reasoned that there was no suppression under *Brady* "[i]f the prosecution informs the defense of what it knows regarding information in confidential personnel records, and the defense can seek that information itself." *Id.* at 715. Given that the knowledge of the police is imputed to the prosecution for *Brady* purposes, disclosure of the *Brady* list to the prosecution is a necessary

[2]Indeed, the Court recognized that the parties did not disagree that *Brady* compelled disclosure of the names provided to the prosecution: "When the police department informed the district attorney that the officers' personnel records might contain *Brady* material, the prosecution had a duty under Brady to provide this information to the defense. No one disputes that." *Johnson, supra*, 61 Cal. 4th at 715 (internal citations omitted).

component of *Johnson*, as the prosecution's own ignorance of the content of the files does not allow it to circumvent its obligations under *Brady*. *See Kyles*, *supra*, 514 U.S. at 437-38 ("[W]hether the prosecutor succeeds or fails in meeting this obligation [to learn of favorable evidence known to the police] . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.")

Thus, the *Brady* list has a constitutional dimension in that it enables the prosecution to satisfy their Due Process/*Brady* obligations by affirmatively informing the defense that there is exculpatory information in the personnel file. This means that the validity of the *Brady* list was an essential part of *Johnson*'s holding. Indeed, if ALADS were correct and it were illegal for a law enforcement agency to notify the prosecution that officers have potential *Brady* material in their personnel files, then this Court must conclude that *Johnson* held that the prosecution may rely on the *Brady* list to fulfill its constitutional Due Process obligation without even considering whether the list was legal.

Amici are not the first to conclude that the legality of the disclosure of a *Brady* list to prosecutors is a necessary element of the *Johnson* ruling. Indeed, the California Attorney General came to the same conclusion several months after *Johnson* was decided.

In an Opinion issued on October 13, 2015, the Office of the Attorney General considered whether the California Highway Patrol could create a *Brady* list similar to that discussed in *Johnson*.[3] The Attorney General noted that although the question in *Johnson* was not directly about the validity of the list, *Johnson* clearly accepted its validity, which caused the Attorney General to conclude that such lists are valid:

> The issue raised in our second question was touched on, but not squarely decided, in the *Johnson* opinion. The Court plainly described, and approved of, a policy substantially similar to the one we consider here, but did not set out legal reasoning to support that approval. *We believe the Supreme Court's approval of the policy was logically necessary to its decision*, and we therefore regard the *Johnson* decision as good authority for the proposition that such a policy is legally valid. We now explicitly find that Penal Code section 832.7(a) does not preclude CHP from providing *Brady* list information to a district attorney for purposes of facilitating *Brady* compliance.

California Attorney General Opinion dated October 13, 2015, 98 Ops.Cal.Atty.Gen 54 (2015), 2015 WL 7621362 at *2 (emphasis added).

ALADS claims that *Brady* lists violate *Pitchess*. But *Johnson* clearly relied on the existence and disclosure of the list to hold that the prosecutor satisfied its *Brady* obligation by providing to the defense the names appearing on this list, which means it was a necessary part of the Supreme Court's decision. There really

[3]As described in the Opinion, the relevant question was: "To facilitate compliance with *Brady v. Maryland*, may the California Highway Patrol lawfully release to the district attorney's office the names of officers against whom findings of dishonesty, moral turpitude, or bias have been sustained, and the dates of the earliest such conduct?" 98 Ops.Cal.Atty.Gen. 54, 2015 WL 7621362 at *1 (2015)

cannot be any dispute about this conclusion and, tellingly, ALADS does not even try to offer any way to explain away the necessary conclusion from *Johnson*. Especially in the context of ALADS's demand for emergency relief, the clear holding of *Johnson*, bolstered by the Attorney General's indisputable characterization of that holding, means that it is ALADS, not the Sheriff, that is asking this Court to overturn settled law.

ALADS's argument also cannot be squared with the prosecution's disclosure obligations under *Brady*. Under *Brady*, a prosecutor must turn over all exculpatory or impeachment evidence to the defense, and failure to do so for evidence that reasonably might have produced a different outcome requires a new trial. *Brady, supra*, 373 U.S. at 87; *Giglio v. United States* (1972) 405 U.S. 150, 153-154. The prosecutor's obligation to disclose exculpatory evidence encompasses evidence held by the prosecution team, including law enforcement, regardless of whether the prosecution knows about the evidence or not. *Kyles*, *supra*, 514 U.S. at 437-38. And, the disclosure obligation applies even if the defense does not request the information. *United States v. Agurs* (1976) 427 U.S. 97, 107. At bottom, ALADS is arguing that the prosecution need not inform the defense that there might be exculpatory information in the personnel file of officers who may testify, because the defense can seek the information itself through a *Pitchess* motion. But that argument ignores the prosecution's obligation to disclose exculpatory evidence

even if the defense does not ask for it, and even if it is in the possession of law enforcement.

There are only three ways the prosecution can have sufficient knowledge about potential *Brady* material in the officer's personnel file so that it can satisfy its affirmative *Brady* obligation: (1) by having access to the file without utilizing the *Pitchess* procedure;[4] (2) by making a *Pitchess* motion; and (3) by being notified about potential impeachment material in the personnel file by the law enforcement agency, either through a so-called *Brady* list, or on a case-by-case basis. *Johnson* forecloses the first option. *See, supra,* 61 Cal. 4th at 714. *Johnson* also held that the prosecution need not make a *Pitchess* motion and review the personnel files *so long as it informs the defense* that exculpatory information may be in the file after receiving that information from the law enforcement agency. *Id.* at 715-16. Thus, the third option, which is exactly what Judge Chalfant's order permits, is clearly lawful, and, indeed is the minimum that is constitutionally required.

It is the position of *Amici* that because Judge Chalfant limited disclosure of names on the Department's *Brady* list to the prosecution only when a deputy is involved in a criminal prosecution, his decision can only be reconciled with

[4]In federal proceedings, where the *Pitchess* scheme does not apply, the Ninth Circuit rule is that prosecutors must *directly* examine personnel files of testifying federal agents upon a defendant's request. *U.S. v. Henthorn* (9th Cir. 1991) 931 F.2d 29, 31. "Absent such an examination, [the prosecution] cannot ordinarily determine whether it is obligated to turn over the files." *Id*.

Johnson if the Department discloses the fact that a deputy's file has potential *Brady* material *whenever* there is an active prosecution involving that deputy. Thus, not only does Judge Chalfant's order authorize the Department to disclose to the prosecution those on the *Brady* list when there is an active prosecution, it recognizes that *Brady* and *Johnson* compel this disclosure.[5] If the prosecution does not have access to the Department's *Brady* list, the prosecution cannot comply with its affirmative *Brady* obligations unless the Department is notified of active prosecutions and discloses whether the deputies involved may have exculpatory information in their personnel files. In the absence of a list, the prosecution cannot simply fail to obtain this information from the relevant policing agency, nor can prosecutors blame an internal policy that does not ensure that they obtain *Brady* information in every case and instead relies on happenstance.[6] *See, e.g.*, *Kyles*, 514 U.S. at 438 (holding that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police" and requiring prosecutors to establish "procedures and

[5]Judge Chalfant wrote, "Under Brady, the prosecution has a constitutional duty to disclose exculpatory material to the defense, including potentially impeaching evidence known to the police when it acts on the prosecution's behalf," and the Department may give prosecutors "the names of deputies in compliance with its Brady duty who may be subject to a Pitchess motion . . . [when] the need to do so arises." (PI 0193.)

[6] *See, e.g.*, Los Angeles County District Attorney Legal Policies Manual 14.06.01 (rev. Feb. 7, 2017), available at http://da.lacounty.gov/sites/default/files/Revised%20Brady%20Policy.pdf (last accessed Mar. 3, 2017) ("[Deputy district attorneys ("DDAs") are occasionally put on notice that a peace officer witness's personnel file may contain potential impeachment information when, for example, they learn that the peace officer has been placed on leave pending an administrative investigation, or, pursuant to a legally valid written policy, a law enforcement agency notifies the [Los Angeles County District Attorney] that a peace officer employee's personnel file contains potential impeachment information. Under these circumstances, DDAs must bring the possible existence of impeachment evidence to the attention of the defense.").

regulations . . . to carry [the prosecutor's] burden and to insure communication of all relevant information on each case" (internal citation and quotations marks omitted)).

B. *Johnson*'s General Holding: *Pitchess Cannot* Curtail *Brady* Rights and Obligations

As discussed above, *Johnson* clearly approves of *Brady* lists. This alone is enough to require that ALADS's writ be rejected. But there is also a more general holding in *Johnson* – and many other cases – that reveals an even more fundamental flaw in ALADS's position. This general holding is the recognition that under our federal system, the *Pitchess* statutes cannot and could never curtail *Brady* rights and obligations that are founded on federal constitutional bases.

Johnson clearly recognizes this rule. "The *Pitchess* scheme does not unconstitutionally trump a defendant's right to exculpatory evidence as delineated in *Brady*." *Johnson, supra*, 61 Cal.4th at 719-20 (quotation marks and citation omitted). In a case where *Brady* and *Pitchess* lead to different results, the supremacy of federal constitutional rights means that *Pitchess* always gives way to *Brady* and never the opposite. Accordingly, "all information that the trial court finds to be exculpatory and material under *Brady* must be disclosed, notwithstanding [the *Pitchess* statutory] limitations." *Id*. at 720.

Again, this conclusion is not surprising, and it has long been recognized by California courts. *See, e.g., City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 14 (*Brandon*) ("the *Pitchess* process operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information") (internal quotation omitted); *People v. Mooc* (2001) 26 Cal.4th 1216, 1225, as modified (Jan. 29, 2002) (*Mooc*) (*Pitchess* scheme "must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial").

Once this first premise is acknowledged, the proper outcome of this case – namely the rejection of ALADS's position – is unavoidable:

> **First**: Nothing in the *Pitchess* scheme can "unconstitutionally trump a defendant's right to exculpatory evidence as delineated in *Brady*[;]" *Johnson, supra*, 61 Cal.4th at 719-20.
>
> **Second:** These *Brady* rights impose the well-established duty on the prosecutor to search for exculpatory information and make affirmative disclosure to the defense regardless of whether the defense makes a request for the information. *Strickler v. Greene* (1999) 527 U.S. 263, 280; *United States v. Agurs* (1976) 427 U.S. 97, 107.
>
> **Third**: *Johnson* held that a prosecutor can satisfy this duty by turning over the information received from a *Brady* list. *Johnson, supra*, 61 Cal.4th at 705.

If one were to reject the first premise of this logic, the entire *Pitchess* scheme would be subject to challenge as violating the federal Due Process rights as set out in *Brady*. The doctrine of separation of powers provides that statutes

should be construed to avoid creating constitutional questions whenever possible, *see, e.g.*, *People v. Superior Ct.* (1996)13 Cal. 4th 497, 509 (*Romero*), which is exactly why courts like *Johnson* have always read the *Pitchess* scheme as not preventing disclosure of *Brady* material, even if *Pitchess* bars disclosure. *See*, *e.g.*, *Johnson*, *supra*, 61 Cal. 4th at 720 (although *Pitchess* limits disclosures to complaints that are not more than five years old, older complaints must be nevertheless disclosed if they fall within *Brady*); *Brandon*, *supra*, 29 Cal.4th at 14 (citizen complaints older than five years may be subject to disclosure under *Brady*, notwithstanding five-year limitation of *Pitchess* scheme).

ALADS's position represents a dangerous misreading of the interplay between *Brady* and *Pitchess*, one that threatens to overturn decades of settled law and threatens to create a larger constitutional challenge to the *Pitchess* scheme itself. Indeed, this Court should clearly reject ALADS's erroneous position that *Pitchess* can and does somehow restrict the disclosure of material that would otherwise be discoverable under *Brady*.

IV.
ALADS'S PETITION IS RIDDLED WITH DEMONSTRABLY ERRONEOUS ASSERTIONS

As shown earlier, the central premise of ALADS's Petition is wrong. This means that the Petition must be rejected and the preliminary injunctive order

affirmed. However, it is still worth pointing out that not only is the central premise wrong, but so are a number of other assertions made "in passing" throughout the Petition. Indeed, it appears that ALADS not only asks this Court to somehow "overturn" *Johnson* but actually also seeks to overturn decades of settled *Brady* jurisprudence. As shown below, each of these assertions is not even debatable.

A. ALADS is Wrong When It Says That The Trial Court's Ruling Would Upset Settled Law – Disclosures Like Those Authorized By The Trial Court Are Not Novel And *Barring* Them Would Upset The Status Quo

ALADS claims that Judge Chalfant's ruling upsets "the past 50 years" of *Brady* jurisprudence. (ALADS Mem. at p. 27.) But in fact, it is ALADS that seeks to upset the status quo by asking this Court to declare illegal a practice that has been approved and is in effect in other California law enforcement agencies.

As discussed earlier, *Johnson* itself conclusively shows that *Brady* lists cannot be prohibited by California statute. (As noted, *Johnson* relied on the *Brady* list to conclude that the prosecution could comply with its *Brady* duties of affirmative disclosure by notifying the defense that law enforcement officers who might testify were on the list and letting the defense decide whether to file a *Pitchess* motion.) Of course, a clear holding of the California Supreme Court is controlling on the issue. But it is worth noting that the *Johnson* court declared "laudable" the *Brady* list protocol adopted by the San Francisco Police

Department. *Johnson, supra*, 61 Cal. 4th at 721 ("In this case, the police department has laudably established procedures to streamline the *Pitchess/Brady* process. It notified the prosecution, which in turn notified the defendant, that the officers' personnel records might contain *Brady* material."). So San Francisco can and apparently does use this protocol. Moreover, the California Attorney General approved of a *Brady* list protocol created by the California Highway Patrol ("CHP") and noted, "The Policy is modeled on policies already in use by *a number* of district attorneys' offices and law enforcement agencies." AG Opinion, 98 Ops.Cal.Atty.Gen 54 (2015), 2015 WL 7621362 at *5 (emphasis added). This opinion was directed to the District Attorney of Ventura County, and it concluded that *Johnson* clearly meant that the CHP's protocol was appropriate, which meant that the CHP *could* adopt a *Brady* list protocol akin to San Francisco's. *See id.*

Thus, ALADS's claim that the Trial Court's solution somehow overturns the status quo is belied by the fact that at least "a number of district attorneys' offices and law enforcement agencies" employ just such a "laudable" solution. On the contrary, if this Court were to conclude that *Brady* lists are somehow *in*appropriate, it would not only run contrary to settled Supreme Court law but would also result in a patchwork of different procedures in different districts.[7]

[7]Indeed, because the CHP is a statewide agency, would they need to apply different rules in different appellate districts?

B. ALADS Is Wrong When They Say That *Brady* Does Not Apply Until After The Preliminary Hearing – California Courts Uniformly Find That *Brady* Rights Apply Before The Preliminary Hearing

In a striking example of the erroneous premises in the Petition, ALADS claims that there is no obligation to disclose *Brady* material "at any point prior to a preliminary hearing." (ALADS Mem. at 37.) This bold assertion would come as a surprise to anyone practicing in criminal court, whether for the prosecution or the defense, where discovery is regularly provided before the preliminary hearing. This practice is well-founded because California courts uniformly hold that "the prosecution's duty to disclose material evidence that is favorable to the defense (hereafter the *Brady* obligation) applies to preliminary hearings." *People v. Gutierrez* (2013) 214 Cal. App. 4th 343, 348 (*citing Stanton v. Superior Court* (1987) 193 Cal. App. 3d 265, 267.)

In light of this uniform law, it is not surprising that ALADS's reliance on *United States v. Ruiz* (2002) 536 U.S. 622, is misplaced. Contrary to ALADS's assertion, *Ruiz* did not hold that there is a general exemption from *Brady* during the early stages of a criminal case. Instead, *Ruiz* addressed a much different question, namely whether a defendant can enter a knowing and voluntary guilty plea while waiving the right to receive *Brady* material:

> In this case, the Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty,

> waive her right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that the prosecutors would have had to make had the defendant insisted upon a trial. We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information. We conclude that it does not.

Id. at 629. That the Constitution allows defendants to choose to waive their *Brady* rights while pleading guilty provides no support whatsoever to ALADS's claim that *Brady* does not apply before the preliminary hearing. Moreover, California case law says it *does* apply. ALADS's arguments on this point must be rejected.

C. ALADS Is Wrong When They Say That Law Enforcement Has No *Brady* Obligation – The Case They Cite For This Notion Says Nothing Of The Sort

ALADS cites *In re Brown* (1998) 17 Cal.4th 873, 881 (*Brown*), for the supposed notion that it is "beyond dispute" that "the obligation to produce *Brady* material lies **solely** with the prosecution" as opposed to law enforcement. (ALADS Mem. at p. 36 (emphasis in original).) ALADS claims that this supposed rule means that the Sheriff's Department need not concern itself with *Brady*.

But this assertion is just wrong. First of all, *Brown* does not stand for this at all. The question in that case was not whether law enforcement has obligations under *Brady*. It was whether a failure to produce *Brady* material can be excused by the prosecutor's ignorance of its existence. Indeed, *Brown* pointed out that law enforcement in that case *had* attempted to disclose the *Brady* material. *Brown,*

supra, 17 Cal.4th at 881 (referring to the "crime lab's attempt to transmit the worksheet"). Despite this attempt to notify the prosecution, *Brown* held that the *Brady* failure was chargeable to the prosecution because "the duty was nondelegable *at least to the extent the prosecution remains responsible for any lapse in compliance*." *Id.* (emphasis added). This italicized modifier makes clear that when *Brown* says the duty is nondelegable, it is only saying that prosecutors always retain responsibility for compliance, meaning the prosecutor cannot escape the consequences of noncompliance by blaming law enforcement. It says nothing about whether law enforcement must comply with *Brady* as well.[8] Indeed, ALADS's entire premise is suspect because it would be a strange system indeed if the United States Constitution required prosecutors to discover material from other members of the prosecution team, *Kyles, supra*, 514 U.S. at 437, while California law required those other members of that same team to withhold material from those prosecutors who were trying to comply with their constitutional obligations. In the end, *Brown* does not say what ALADS claims it does, and ALADS can cite no authority for its novel claim.

[8]The term "nondelegable" as used in *Brown* implies this conclusion. When the law says a duty is nondelegable, this does not mean that the delegatee never has a duty. It means only that the delegator *retains* a duty as well. *See, e.g., Black's Law Dict.* (10th ed. 2014) (defining non-delegable duty as, "A duty for which the principal retains primary (as opposed to vicarious) responsibility for due performance even if the principal has delegated performance to an independent contractor. For example, a landlord's duty to maintain common areas, though delegated to a service contractor, remains the landlord's responsibility if someone is injured by improper maintenance.").

D. ALADS Is Wrong When It Says That Personnel Files Are Not Subject To *Brady – Johnson* Clearly Held The Opposite

As discussed above, *Johnson* clearly accepts that the personnel files at issue in the San Francisco *Brady* list are subject to *Brady*. But ALADS somehow claims that *no* personnel files are *ever* subject to *Brady* because they are not created as part of the prosecution team. (ALADS Mem. at p. 40.)

The first response to this surprising claim is that if ALADS is correct, *Johnson* makes no sense. Why would the California Supreme Court analyze whether the *Brady* list protocol, whereby the prosecution informs the defense that an officer has exculpatory information in his personnel file based on the *Brady* list provided by the police department, satisfies *Brady* if *Brady* never applies in the first place? Second, the argument that the agency possesses personnel files in a non-investigative capacity is irrelevant because *Brady* and its progeny talk about exculpatory evidence in possession of the prosecution team, not exculpatory evidence held by the prosecution team for one purpose rather than for another. Indeed, ALADS's citation of purported authority on this point involves a fair bit of sleight-of-hand.

ALADS cites *Catzim v. Ollison* (C.D. Cal. 2009) 2009 WL 2821424 (*Catzim*), an unpublished federal habeas decision. In that decision, the District Court rejected the defendant's habeas petition on multiple grounds, including the

quote offered in ALADS's Memorandum. But that quotation was clearly dicta (in an unpublished decision) because the Court also held that the petitioner had shown nothing more than speculation that there was any exculpatory evidence in the file at issue and "[m]ere speculation that a government file may contain *Brady* material is not sufficient to require a remand for an *in camera* inspection, much less a reversal for a new trial." *Id.* at *8 (quoting *United States v. Navarro* (7th Cir. 1984) 737 F.3d 625, 631). Thus, *Catzim* is certainly too thin a reed on which to base ALADS's argument that personnel files are necessarily exempt from *Brady*. And even if *Catzim* did stand for that position (it does not), an unpublished federal case can hardly outweigh the California Supreme Court's decision in *Johnson*. Recall that in *Johnson* the California Supreme Court expressly noted that personnel files implicate *Brady*, which is why the Court needed to consider the prosecution's *Brady* obligations with respect to those files. *See Johnson, supra*, 61 Cal. 4th at 709 (noting that question presented was "What must the prosecution do with this information [about the contents of the personnel file] to fulfill its *Brady* duty?") There is simply no way to square ALADS's claim that information in personnel files does not implicate *Brady* with *Johnson*'s careful consideration of how prosecutors must fulfill their *Brady* duties with respect to that information.

V.

CONCLUSION

ALADS asks this Court to overturn decades of well-established precedent and effectively overrule an issue that has already been settled by the California Supreme Court. For all of the foregoing reasons, the Court should deny ALADS petition.

DATED: March 3, 2017

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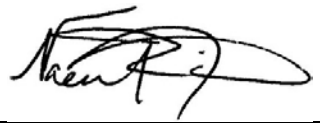
By: 

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief conforms to California Rules of Court, rules 8.200 and 8.204, and that it contains 5,288 words in 14-point Times New Roman font, as calculated by Microsoft Word 2016.

DATED: March 3, 2017

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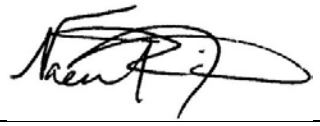
By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1875 Century Park East, 23rd Floor, Los Angeles, California 90067-2561.

On March 3, 2017, I served the following document(s) described as on the interested parties in this action as follows:

***AMICI CURIAE* BRIEF OF ACLU SOUTHERN CALIFORNIA, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AND DIGNITY AND POWER NOW IN SUPPORT OF LOS ANGELES SHERFIFF'S DEPARTMENT, SHERIFF JIM McDONNELL and COUNTY OF LOS ANGELES**

BY MAIL: By placing a true copy thereof in sealed envelopes addressed to the parties listed on the attached Service List and causing them to be deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with our firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

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

Executed on March 3, 2017, at Los Angeles, California.

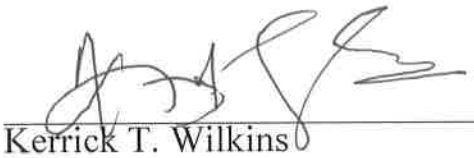

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Exhibit 1: List of *Amici* in Alphabetical Order

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3. California Public Defenders Association
4. Dignity and Power Now