CASE #: C094735

IN THE COURT OF AI
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NO. _____

KELLY CLARK, DIANE WOOTON, and KIONA MILLIRONS,

Petitioners,

vs.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent.

SACRAMENTO COUNTY DISTRICT ATTORNEY'S OFFICE, SACRAMENTO POLICE DEPARTMENT – *a political subdivision of the City of Sacramento,* and CITY OF SACRAMENTO,

Real Parties in Interest.

On Petition for Writ of Mandate from the Superior Court of the State of California for the County of Sacramento
The Honorable Shellyanne Chang
Superior Court Case No. 23-2020-80003417-CU-WM-GDS

PETITION FOR WRIT OF MANDATE AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

Petitioners Kelly Clark, Kiona Millirons, and Dianne Wooton know of no entities or person who require disclosure under subsections (1) or (2) of Rule 8.208(e) of the California Rules of Court. Cal. Rules of Court, rule 8.208(e)(3).

Dated: September 01, 2021

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INTRODUCTION

Amber Clark, a Sacramento librarian, was shot to death in December 2018 by a library patron with a history of violent and threatening conduct. In the wake of her shooting, Amber's family members have sought to understand how the shooter, whose history may have disqualified him from possessing firearms and ammunition, was nevertheless able to obtain the weaponry that he used to kill her. That search ultimately led them to file public-records requests with the City of Sacramento Police Department and the Sacramento County District Attorney's Office, who arrested and are prosecuting Amber's killer.

These requests were denied, ostensibly on the ground that turning information over to Amber's family would jeopardize the investigation of her death, even though the identity of the shooter is already known to all parties and not subject to any dispute. So Amber's family sought relief in superior court, requesting an order that the City and the County release the records that crime victims are expressly entitled to under the California Public Records Act.

In superior court, the City and the County failed to explain how the records requested by Amber's family would jeopardize the investigation into her killing. Instead, they offered boilerplate justifications for their general opposition to releasing records from any investigation. In response, Amber's family argued—and the superior court was persuaded—that the

City's and the County's policy objections did not satisfy their burden under the Public Records Act with respect to the particular records at issue.

After noting that the City and the County had failed to meet their burden, however, the superior court did not order disclosure. Instead, the court sua sponte gave them a second bite at the apple: it requested secret supplemental briefing from the City and the County, for the court's eyes only. The City and the County then filed secret briefs and declarations, not one word of which Amber's family members, or their attorneys, have ever been permitted to see, let alone respond to. On the basis of these secret arguments, the superior court came to a different conclusion, deciding now that the City and the County had justified their withholding of *all* requested records. When the Petitioners raised concerns about the process at oral argument, the superior court questioned what they could possibly say that could rebut the City's and the County's justifications, and indicated that the superior court itself should not question the rationales proffered by the City and the County. The result: the superior court created an irrebuttable presumption in favor of withholding—and did not evaluate the parties' arguments impartially and fairly.

This was error, both procedurally and on the merits. Procedurally, the superior court denied Amber's family due process by excluding them entirely from the decisionmaking process, foreclosing their ability to rebut the City's and the County's secret arguments. And without the benefit of

that rebuttal, the court was persuaded by arguments whose flaws are apparent even on the limited public record. The superior court's decision should be reversed.

PETITION

Petitioners, Kelly Clark, Kiona Millirons, and Dianne Wooton, petition this Honorable Court for a writ of mandate directed to Respondent, Sacramento County Superior Court, and by this verified petition allege:

A. The Parties

1. Petitioners here are Kelly Clark, Kiona Millirons, and Dianne Wooton. They are the surviving family members of Amber Clark, a Sacramento librarian who was killed on December 11, 2018. Kelly Clark was Amber's husband, Kiona Millirons was her sister, and Dianne Wooton was her mother. They are the petitioners in the superior court case *Kelly Clark et al. v. Sacramento County District Attorney's Office et al.*, Sacramento Superior Court Case Number 34-2020-80003417.

2. Petitioners commenced the Action by filing a Complaint for Declaratory Relief and Verified Petition for Writ of Mandate on June 29, 2020, seeking to enforce their right to receive public records related to the murder of Amber Clark, pursuant to the California Public Records Act ("PRA"), Government Code Section 6250, et seq.[1] (Petitioners' Appendix ("PA"), vol. I, pp. 1-40.)

[1] All references are to the California Government Code unless otherwise specified.

3. Respondent is the Sacramento County Superior Court, which exercised judicial functions in this case.

4. Real parties in interest are the Sacramento County District Attorney's Office, Sacramento Police Department, and City of Sacramento, which are the defendants and respondents in the case identified in paragraph 1. They are referred to collectively as "Defendants" in this petition.

B. Jurisdiction and Timeliness of the Petition

5. This Court has jurisdiction over this matter pursuant to Government Code section 6259, subdivision (c), which provides that a superior court's order granting or denying access to documents under the PRA is "immediately reviewable by petition to the Court of Appeal for the issuance of an extraordinary writ." (See also *MinCal Consumer Law Group v. Carlsbad Police Dept.* (2013) 214 Cal.App.4th 259, 264 [153 Cal.Rptr.3d 577] [statutory writ is "the sole and exclusive means to challenge the trial court's ruling" in PRA cases].) Section 6259(c) forecloses the right to a direct appeal and provides for appellate review of PRA decisions via a petition for writ of mandamus. "The legislative objective was to expedite the process and thereby to make the appellate remedy more effective." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 112 [40 Cal.Rptr.2d 839, 893 P.2d 1160].)

6. Although appellate review by extraordinary writ petition is discretionary, that discretion is "quite restricted" in instances such as this where there is no remedy by appeal. (*Powers v. City of Richmond*, *supra*, 10 Cal.4th 85, 114.) "[W]hen writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters." (*Ibid*.)

7. This Petition is timely. On August 4, 2021, pursuant to section 6259, subdivision (c), and Petitioners' showing of good cause, the superior court extended the deadline to file this petition to September 1, 2021. (PA, vol. IV, p. 965.) This petition was filed on September 1, 2021.

C. Chronology of Pertinent Events

8. On December 11, 2018, Amber Clark was murdered by a library patron, Ronald Seay, who shot Amber in the head as she sat in her car outside the North Natomas Public Library in Sacramento, California. (PA, vol. I, p. 4.) Mr. Seay was quickly apprehended and has been in state custody since December 12, 2018. (PA, vol. I, p. 8.)

9. Federal and state laws prohibit people with certain types of criminal and mental-health histories from possessing firearms or ammunition. (PA, vol. I, p. 10.) Mr. Seay has a long history of involvement

with the criminal justice system, of mental-health issues, and of displaying erratic, threatening, and aggressive behavior. (PA, vol. I, pp. 8-10.) Because of this history, and to prevent other such tragedies from occurring, Amber's family seeks to learn how Mr. Seay acquired the firearms he used to kill Amber. (*Ibid*.)

The PRA Requests

10. On March 3, 2020, Petitioners filed separate, identical PRA requests with the Sacramento Police Department and the Sacramento District Attorney's Office. (PA, vol. I, pp. 11-12.) Both requests sought the following categories of documents, all of which were focused on determining the provenance of the firearm Seay used to kill Amber or on factors that could have prohibited Seay from purchasing or possessing a firearm:

i. Records reflecting any firearms trace request made to the ATF, and any firearms trace results received from ATF or any other law enforcement agency, concerning any firearm(s) recovered in connection with the homicide of Amber Clark.

ii. All property vouchers or similar records describing any firearm(s), ammunition, ammunition casing(s), or firearm magazine(s) recovered in connection with the homicide of Amber Clark.

iii. Any other records reflecting a description of the firearm(s), ammunition, ammunition casing(s), or firearm magazine(s) involved in the offense, including but not limited to those reflecting the serial number, make, and/or model of any firearm(s) recovered.

iv. Any records relating to the purchase, sale, or transfer of any firearm(s), ammunition, or firearm magazine(s) recovered in connection with the homicide of Amber Clark.

v. Records of any witness statement solely concerning when, where, how any firearm(s), ammunition, or firearm magazine(s) used in the homicide of Amber Clark were obtained by Ronald Seay.

vi. Records reflecting the name(s) and address(es) of all person(s) from whom the firearms(s), ammunition, or firearm magazine(s) used in the homicide of Amber Clark were obtained by Ronald Seay.

vii. Records of any statement made by Ronald Seay solely concerning the firearm(s), ammunition, or firearm magazine(s) used in the homicide of Amber Clark, or solely concerning when, where, and/or how any such firearm(s), ammunition, or firearm magazine(s) were obtained by Ronald Seay.

viii. Any records relating to statements made by Ronald Seay prior to the homicide of Amber Clark in which Mr. Seay indicated that he wanted to harm other people, including but not limited to statements made by Mr. Seay in June 2018 and documented by the University of Missouri at St. Louis Police Department.

ix. Records of any search, conducted by the Sacramento Police Department in October 2018, for Ronald Seay's previous criminal arrests or convictions.

x. Records of any communications with other law enforcement agencies about the firearm(s), ammunition, or firearm magazine(s) used in the homicide of Amber Clark, or concerning when, where, and/or how any such firearm(s), ammunition, or firearm magazine(s) were obtained by Ronald Seay.

(PA, vol. I, pp. 18-28.)

11. The PRA exempts from disclosure "[r]ecords of complaints to, or investigations conducted by, or … investigatory or security files

compiled by" law enforcement agencies. (Gov. Code, § 6254, subd. (f).) The legislature, however, has carved out a substantial exception to that exemption for crime victims. Under the victims' exception, law enforcement agencies are required to disclose to victims "the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants." (*Ibid*.) A law enforcement agency may still withhold this information if "the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation." (*Ibid*.) Petitioners' PRA requests explained that Petitioners qualified as victims for purposes of the exception. (PA, vol. I, pp. 18, 24.)

12. On March 5, 2020, the Sacramento County District Attorney's Office denied the Petitioners' PRA request in full, citing the investigative records exemption of section 6254, subdivision (f). (PA, vol. I, pp. 30-32.) The District Attorney's Office's denial letter asserted that "much of the material … requested" would not fall within the victims' exception "even at the conclusion of the criminal prosecution of Ronald Seay." (*Id*. at p. 32.)

13. On April 30, 2020, the Sacramento Police Department likewise denied the Petitioners' PRA request in full. The Police Department's denial letter stated that it did not have any records responsive to requests (iv), (v), (vi), and (vii) above, and invoked sections 6254, subdivisions (f) and (k), and 6255, subdivision (a), of the Government Code, section 1040 of the Evidence Code, and sections 13100 et seq. and 13300 et seq. of the Penal Code as its bases for withholding documents responsive to the remaining requests. (PA, vol. I, pp. 34-35.)

Litigation in the Superior Court

14. On June 29, 2020, Petitioners filed a complaint for declaratory relief and verified petition for writ of mandate in the Superior Court for the County of Sacramento. (PA, vol. I, pp. 1-40.) The Defendants filed timely answers. (PA, vol. I, pp. 52-66; PA, vol. I, pp. 67-80.)

15. On September 4, 2020, Petitioners served a set of special interrogatories on the Defendants, seeking a list of documents that the Defendants were withholding and their basis for withholding each document. (PA, vol. I, pp. 102-107; PA, vol. I, pp. 180-185.) The interrogatories also asked for the factual bases for the affirmative defenses that the defendants had asserted in their answers, such as their contention that Petitioners have "unclean hands." (PA, vol. I, p. 183.)

16. In October 2020, the Defendants moved for an order that they need not answer the Petitioners' first set of special interrogatories. (PA, vol.

I, pp. 81-93; PA, vol. I, pp. 157-171.) The Petitioners opposed these motions, arguing that the information they sought via the special interrogatories would serve to "streamline this litigation by allowing the parties to meaningfully identify which documents are in dispute, evaluate claims of exemption and privilege, and avoid unnecessary motion practice." (PA, vol. II, p. 282.)

17. At oral argument on the motions for a protective order, Judge Chang of the superior court questioned whether the Petitioners qualified as victims under the PRA (PA, vol. II, pp. 415-416), before noting that whether the Petitioners were entitled to an index of withheld documents was "within the purview of the Court and the Court's discretion." (PA, vol. II, p. 420.) Three days after oral argument, on December 21, 2020, the superior court granted the motions for a protective order in their entirety. (PA, vol. II, pp. 429-434.)

18. In early 2021, the parties briefed the merits of the petition for a writ of mandate. Petitioners filed an opening memo of points and authorities with a supporting declaration and, subsequently, a reply brief. (PA, vol. II, pp. 435-465; PA, vol. III, pp. 466-726; PA, vol. IV, pp. 847-870.) Defendants each filed an opposing memo of points and authorities, each with a pair of supporting declarations. (PA, vol. IV, pp. 727-744; PA, vol. IV pp. 745-756; PA, vol. IV, pp. 757-760; PA, vol. IV, pp. 761-785; PA, vol. IV, pp. 786-843; PA, vol. IV, pp. 844-846.) All these documents

were publicly filed. Among other things, Petitioners argued that the declarations submitted by the Defendants in support of withholding under section 6254, subdivision (f), failed to make the necessary particularized showing that disclosure of the records would endanger any witness or jeopardize the investigation into Amber's murder. (PA, vol. IV, pp. 860-863.)

19. The superior court issued an order dated April 9, 2021, vacating the oral argument set for the following day and directing the Defendants to submit supplemental briefing. (PA, vol. IV, pp. 876-883.) The order indicated that the Defendants had not met their burden under the PRA:

> The Court shares Petitioners' concerns with regard to the generalized nature of Respondents' supporting declarations. Subdivision (f) requires particularized concerns that disclosure would "endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation." Respondents' declarations discuss generic concerns of *potential* issues that could arise in *any* circumstance wherein information is produced prior to the conclusion of the underlying criminal prosecution. This does not, however, provide the Court with evidence to conclude that in *this* case, disclosure of the *requested information* would endanger a witness or successful completion of the investigation or conviction of Ronald Seay.

(*Id.* at p. 882.) Nevertheless, the superior court declined to resolve the petition based on the materials submitted and—even though no party had requested this—instead provided the Defendants with another chance to

meet their burden. This time the superior court sought secret briefs from only one side, directing the Defendants "to file, **under seal for the Court's review only**, a supplemental brief addressing each category of documents and identifying how, based on the specific facts at issue in this case and the current posture of the prosecution's case of Ronald Seay, disclosure would endanger a witness or the successful completion of the investigation." (*Ibid.*)

20. Petitioners filed a motion for reconsideration on April 26, 2021. (PA, vol. IV, pp. 884-893.) Petitioners objected to the use of secret evidence and briefs and argued that any concerns could be addressed by issuing a protective order and directing that the supplemental briefing be sealed for attorneys' eyes only. (*Id.* at pp. 890-892.) The Defendants opposed the motion for reconsideration, and the superior court denied it on April 29, 2021. (PA, vol. IV, p. 909.)

21. The superior court issued a tentative ruling, dated July 2, 2021, indicating that it had reviewed supplemental briefs from the Defendants, along with declarations of Rod Norgaard (the prosecutor assigned to Ronald Seay's case at the time), Kelsey Johnson (counsel for the County), and Leslie Walker (counsel for the City) (PA, vol. IV, p. 915.) The Petitioners (and their counsel) were never allowed to see those briefs and declarations. Nevertheless, the tentative ruling held that the Defendants

had, through their secret supplemental submissions, met their burden to justify withholding of the documents. (PA, vol. IV, p. 919.)

22. Upon receipt of the tentative ruling, the Petitioners advised the superior court that they wished to contest it. At oral argument, Petitioners argued that the lack of adversarial process and use of secret briefs was contrary to law, unprecedented, and undermined the PRA. But the superior court questioned why Petitioners' counsel needed access to the Defendants' briefs:

> How do you believe that either Petitioner's counsel or Plaintiff's counsel in this case or the Plaintiffs themselves could assist the Court in the analysis of whether or not these documents would endanger the successful completion of an investigation or the successful conviction of Ronald Seay. With all due respect, Petitioner's counsel is not privy to any kind of trial strategy and frankly wouldn't be familiar with any trial strategy that the DA's Office would employ or the Police Department in their investigation and collection of the facts. So under these particular circumstances I'm not sure Petitioner's counsel could assist the Court in this particular analysis.

(PA, vol. IV, pp. 930-931.) The superior court further questioned whether even a superior court judge may overrule a prosecutor's decision to withhold documents:

> **But how can the Petitioner's counsel second-guess the trial strategies of the assigned Deputy District Attorneys?** If they say these documents are critical and may compromise their prosecution of Mr. Seay, how can the Petitioner's counsel say, you know, well, we don't believe them or we don't think that's appropriate or we don't think it's really going to undermine the Prosecution. That's the Court's concern is that even if the Court, and I don't agree that Petitioner's counsel should -- or Petitioners should be privy to the work product and the thought

> processes of the Deputy DA's assigned to this case. But even assuming the Court were to allow Petitioner's counsel access to this information, if you disagree, and frankly **I'm not sure the Court can even disagree**. I'm not the prosecutor, you are not the prosecutor, and you're not the one that's going to be making those trial decisions.

(*Id.* at pp. 931-932, emphasis added.) Also at oral argument, the Petitioners learned of an additional declaration (of Alison Dunham, the prosecutor currently assigned to Ronald Seay's case) that had been submitted for in camera review and had not been disclosed in the tentative ruling. (*Id.* at pp. 936-937.)

23. The superior court took the matter under advisement at the conclusion of the hearing. (PA, vol. IV, p. 943.)

24. The superior court issued its final order on July 22, 2021. (PA, vol. IV, pp. 953-963.) It adopted the holding of its July 2, 2021 tentative ruling, and supplemented that ruling with rejoinders to the arguments Petitioners had raised at oral argument. (*Id.* at pp. 960-962.) The superior court again emphasized that "Petitioners' counsel are not involved in the criminal case and are not in a position to second guess the trial strategy of the assigned prosecutors." (*Id.* at p. 961.) The final order also confirmed that the superior court never looked at any of the records at issue, but instead relied only on the declarations and arguments in Defendants' secret submissions. (*Ibid.*)

D. Basis for Relief

25. The superior court's decision to solicit secret briefing from the Defendants and to exclude the Petitioners from the court's decisionmaking violated the Petitioners' right to due process and itself constitutes reversible error.

26. What is more, the bare justification that the superior court provided for its decision on the merits includes rationales that are factually implausible or legally irrelevant, indicating that the court improperly deferred to the Defendants on the ultimate issues in this case.

PRAYER

Petitioners pray that this Court:

1. Issue an extraordinary writ of mandamus directing the respondent superior court (a) to vacate its judgment and its order denying Petitioners' Petition for Writ of Mandate and (b) to issue a new order granting the Petition for Writ of Mandate;

2. Award Petitioners their attorney's fees and costs in this proceeding pursuant to section 6259, subdivision (d), of the Government Code; and

3. Grant Petitioners any other relief as may be just.

Respectfully submitted,

DATED: September 1, 2021

By: _____

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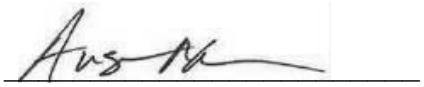
VERIFICATION

I, Austin Manes, declare:

I am an attorney admitted to practice before the courts of the State of California, and I am counsel for Petitioners Kelly Clark, Kiona Millirons, and Dianne Wooton.

I have reviewed the records and files that are the basis of this Petition for Extraordinary Writ of Mandamus. I make this declaration because I am more familiar with the particular facts, including the state of the record, than are my clients. I have read the foregoing Petition and know the facts set forth therein to be true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on September 1, 2021 in San Francisco, California.



Austin Manes,
Attorney for Petitioners.

MEMORANDUM OF POINTS AND AUTHORITIES

The one-sided process that the superior court employed below both denied the Petitioners due process and resulted in an incorrect decision on the merits. Procedurally, the superior court erred by inviting secret briefing from the Defendants, and then deciding the merits of the Petitioners' case on the basis of arguments and evidence that the Petitioners were not allowed to see, much less to refute. This procedure contravened basic precepts of our adversarial system and cannot be justified by any of the authorities on which the superior court purported to rely. And on the merits, although the superior court disclosed little of its rationale in its final ruling, the brief explanation that it did offer contained obvious flaws, underscoring the importance of adversarial input to judicial decisionmaking. Because the record below reveals that the Defendants failed to carry their burden under the proper adversarial process, the superior court's decision should be reversed.

I. The Superior Court Erred by Basing Its Decision on Secret Briefing That Petitioners Were Not Permitted to View or Test.

Our judicial system relies on the adversarial process to reach results that are both just and correct. It is a "basic precept" and "fairness principle" that "in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker … in private." (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40

Cal.4th 1, 5 [50 Cal.Rptr.3d 585, 145 P.3d 462].) Yet that is precisely what happened below: the superior court decided this case based on argument and evidence from only one side. Without the benefit of the Petitioners' views, the court adopted the Defendants' evidence and argument, deferring uncritically to their assertions of prosecutorial need. In doing so, the court did not perform its judicial role and denied the Petitioners due process, setting a precedent that will seriously undermine the ability of victims to obtain information under the PRA. The decision below should be reversed.

A. The Adversarial System of Justice Requires That Each Side Have Access to the Other Side's Arguments and Evidence.

"[O]ur adversarial system of justice … is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question. [Citation.]'" (*Penson v. Ohio* (1988) 488 U.S. 75, 84 [109 S.Ct. 346, 102 L.Ed.2d 300]; accord *People v. Ayala* (2000) 24 Cal.4th 243, 263 [99 Cal.Rptr.2d 532, 6 P.3d 193].) "The adversarial system works … because allowing two or more sides to present evidence to a neutral decisionmaker is an epistemologically sophisticated way *to get at the truth*." (*Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 935 [79 Cal.Rptr.2d 389].)

Consequently, California courts have reiterated "'the firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions.'" (*Concepcion v. Amscan Holdings, Inc.*

(2014) 223 Cal.App.4th 1309, 1326 [168 Cal.Rptr.3d 40], quoting *Abourezk v. Reagan* (D.C. Cir. 1986) 785 F.2d 1043, 1061.) In *Concepcion*, the superior court relied on "information not provided to [the opposing party] and which [the opposing party] had no opportunity to challenge." (*Id.* at p. 1312.) The Court of Appeal reversed and remanded for a new hearing, at which "only evidence made available" to the opposing party could be presented to and considered by the superior court. (*Ibid.*) Similarly, in *Conservatorship of Schaeffer* (2002) 98 Cal.App.4th 159 [119 Cal.Rptr.2d 547], the Court of Appeal vacated the superior court's decision because the superior court had "read and considered" a report from one party's counsel that "neither [the petitioner] nor her counsel were permitted to review." (*Id.* at p. 161.) The Court of Appeal noted that the petitioner "could not … present any evidence or argument to counter the report, because she was not permitted to see it." (*Id.* at p. 165.) Observing that "[e]x parte proceedings are of course highly disfavored," the court ruled that the petitioner's due process rights had thus been violated. (*Id.* at pp. 164-165.)

This rejection of secret, one-sided proceedings "'is not mere idle formalism.' [Citation.]" (*People v. Ayala*, *supra*, 24 Cal.4th 243, 263, quoting *U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1257.) As the California Supreme Court has noted, one-sided proceedings suffer from "inherent deficiencies." (*Kling v. Superior Court* (2010) 50 Cal.4th 1068,

1079 [116 Cal.Rptr.3d 217, 239 P.3d 670], disapproved in part on another ground in *Facebook, Inc. v. Superior Court (Touchstone)* (2020) 10 Cal.5th 329, 345, fn. 6 [267 Cal.Rptr.3d 267, 471 P.3d 383].) “‘“Not only are facts and law from the [excluded party] lacking, but the [included] party’s own presentation is often abbreviated because no challenge from the [excluded party] is anticipated ….”’” (*Ibid*.) “Moreover, ‘with only [one] party present to assist in drafting the court’s order there is a danger the order may sweep “more broadly than necessary.”’ [Citation.]” (*Ibid*.)

Similarly, the Ninth Circuit has identified “two crucial functions” served by “an adversary proceeding.” (*U.S. v. Thompson*, *supra*, 827 F.2d 1254, 1260.) First, counsel can “point out to the [trial] judge where the [other side]’s stated reason[s] may indicate bad faith.” (*Ibid.*) (This function is especially “crucial” when the superior court would otherwise rely solely on “affidavits signed by persons whose interests precisely paralleled those of [the party being heard].” (*United Farm Workers v. Superior Court of Santa Cruz County* (1975) 14 Cal.3d 902, 908 [122 Cal.Rptr. 877, 537 P.2d 1237].)) Second, counsel can “argue that the reasons advanced by the [other side] were legally improper.” (*Thompson*, at p. 1260.) Although trial judges “might be able to detect some of these deficiencies” on their own, “that is not [their] normal role under our system of justice.” (*Ibid.*) The judge “would have to take on the role of [opposing] counsel … while at the same time keeping an open mind so as to rule on the motion impartially.” (*Ibid.*)

As such, "there might be arguments [the trial judge] would overlook if unassisted by an advocate." (*Id.* at pp. 1260-1261.) After all, as the First Appellate District has explained, "'it is unreasonable to expect the courts to do as thorough an investigation as would a party interested in forcing disclosure.'" (*American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 87 [134 Cal.Rptr.3d 472], quoting *Mead Data Cent., Inc. v. U.S. Dept. of the Air Force* (D.C. Cir. 1977) 566 F.2d 242, 250, fn. 10.)

B. The Superior Court Violated These Fundamental Adversarial Principles by Requesting Secret Briefing From the Defendants and Basing Its Decision Thereon.

The concerns that courts have expressed about one-sided proceedings have been borne out in this case. After the Defendants failed to justify their withholding of records via an open and adversarial process, the superior court directed the Defendants to submit additional briefing that only the court could access. And it was on the basis of *this* secret, unrebutted briefing that the superior court ultimately ruled for the Defendants. Such a process is "'anathema in our system of justice.'" (*People v. Ayala*, *supra*, 24 Cal.4th 243, 263, quoting *U.S. v. Thompson*, *supra*, 827 F.2d 1254, 1258-1259.)

1. The Petitioners Were Excluded from the Superior Court's Decisionmaking Process.

In the proceedings below, both sides initially submitted briefs and supporting declarations according to the normal adversarial procedure. The Petitioners laid out their arguments in favor of disclosure of the requested records, and the Defendants publicly presented their arguments against. At no time during this process—or during the earlier briefing surrounding the Defendants' requests for a protective order—did the Defendants assert that the openness of the proceeding prevented them from justifying their opposition to disclosure. (See PA, vol. I, pp. 81-93; PA, vol. I, pp. 151-171; PA, vol. II, pp. 389-405, PA, vol. IV, pp. 727-744; PA, vol. IV, pp. 761-785.) Nor did they seek any intermediate step, such as attorneys' eyes only designations. (*Ibid.*)

After reviewing the parties' submissions, the superior court concluded that Defendants had failed to meet their burden. Whereas the Public Records Act "requires particularized concerns" about disclosure, the Defendants had provided merely "generic concerns of *potential* issues." (PA, vol. IV, p. 882.) The court determined that the Defendants had failed to provide "evidence to conclude that in *this* case, disclosure of the *requested information* would endanger a witness or successful completion of the investigation or conviction of Ronald Seay." (*Ibid.*)

That should have been the end of the case. The Defendants bore the burden of establishing that the requested records were exempt from disclosure (*Internat. Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329 [64 Cal.Rptr.3d 693, 165 P.3d 488]), and the superior court's initial ruling makes clear that they failed to meet that burden. (PA, vol. IV, p. 882.) But instead of ordering disclosure, the court requested "more information" from the Defendants, to be filed in secret. It ordered the Defendants "to file, **under seal for the Court's review only**, a supplemental brief" explaining their "particular concerns" as to "*this* case." (*Ibid.*)

In the end, the Defendants filed at least two supplemental briefs, as well as at least four declarations, all of which only the court could review. (See PA, vol. IV, pp. 956, 961.) The Petitioners, and their counsel, have never had access to these documents. In its July 2021 tentative ruling, the court relied on the Defendants' secret briefs and declarations to conclude that "all responsive documents and information contained therein are exempt from production under section 6254, subdivision (f) of the PRA." (PA, vol. IV, pp. 919, 960.)

Even then, the superior court did not disclose the contents of the Defendants' secret briefs and declarations:

> The Court is limited in what details it can publicly disclose to support its decision since the prosecution of Ronald Seay is ongoing. However, it states generally that Respondents'

> declarations filed in support of their supplemental briefs demonstrate that the disclosure of information responsive to the PRA requests could be used for impeachment purposes, taint the jury pool, interfere with the sanity portion of Ronald Seay's criminal trial, and discourage cooperation among fellow law enforcement agencies."

(PA, vol, IV, p. 960.) It was this unexplained and conclusory decision that the Petitioners were left to confront.

At oral argument, deprived of the ability to respond to the secret assertions made by the Defendants, the Petitioners focused on the impropriety of the court's one-sided briefing process. (See PA, vol. IV, pp. 922-929.) But the court dismissed the Petitioners' objections, stating that it was "not sure how Petitioner's counsel could assist the Court." (PA, vol. IV, p. 931.) Indeed, the court suggested that adversarial briefing was unnecessary because the court did not intend to scrutinize the Defendants' arguments: On the central question whether the requested records are "critical and may compromise the[] prosecution of Mr. Seay," the court not only dismissed the relevance of the Petitioners' views but stated that it was "not sure *the Court* can even disagree" with the Defendants' claims. (PA, vol. IV, p. 932, italics added.) The court explained, "in the end I believe that the Court would have to defer to the attorneys who are assigned to the current prosecution of this case." (PA, vol. IV, p. 934.)

This deference to the Defendants inhered in the court's final ruling: "If there were a disagreement between counsel as to whether release of a

document would compromise the successful completion of the investigation or safety of a witness, the Court would likely defer to the judgment of the assistant district attorneys trying the criminal case[.]" (PA, vol. IV, p. 961.) For this reason, the court formally ruled that adversarial briefing would have been pointless: in the court's words, it "would not assist the Court in this case." (*Ibid.*)

2. The Procedure the Court Adopted Contravened Basic Principles of Due Process and Our Adversarial System of Justice.

The superior court's effective exclusion of the Petitioners from the judicial process plainly violates the well-established principles set forth in Section I.A above. The court stated outright that its decision was based on the Defendants' ex parte, in camera submissions (see PA, vol. IV, p. 961), in direct contravention of the principle set forth in *Concepcion v. Amscan Holdings, Inc.*, *supra*, 223 Cal.App.4th 1309, 1326. And there can be no doubt that it was indeed the Defendants' secret briefs and declarations that won the day, since the court's previous ruling had found the Defendants' *public* briefs and declarations insufficient. (See PA, vol. IV, p. 882.)

What is more, despite the superior court's conclusion that briefing from the Petitioners would have been useless, the California Supreme Court's admonitions in *Kling v. Superior Court*, *supra*, 50 Cal.4th 1068, 1079, ring true here. As further discussed below, the superior court ruled that "all responsive documents and information … are exempt from

production," even though some of the bases for withholding listed by the court cannot plausibly apply to all the requested records. (PA, vol. IV, p. 965.) This suggests that the court's ruling "'may sweep "more broadly than necessary."'" (*Kling*, at p. 1079, quoting *Dept. of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, 1093 [245 Cal.Rptr. 293].) Relatedly, it cannot be discounted that the court may have "overlook[ed]" arguments that the Petitioners would have made, had they had access to the Defendants' secret briefs. (*U.S. v. Thompson*, *supra*, 827 F.2d 1254, 1260-1261; see also *Kling*, at p. 1079 [emphasizing that "'factual and legal contentions from diverse perspectives can be essential'" to judicial decisionmaking], quoting *People v. Ayala*, *supra*, 24 Cal.4th 243, 262.)[2]

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[2] As but one example of the Petitioners' ability to raise easily overlooked points, in response to the Defendants' generalized concern below that releasing records might "allow the requestor to conduct his or her own investigation" (PA, vol. IV, p. 759), Petitioners informed the superior court not only that they had already conducted their own investigation but that the district attorney had been apprised of that fact. (See PA, vol. IV, pp. 862-863). Additionally, the absence of adversarial briefing means that a court may overlook factual discrepancies that require explanation. For instance, the superior court's Final Order (based on secret briefing) notes "that the City and County represent under oath that they have no records responsive to Request Nos. 1, 4, 5, 6, 7, or 10." (PA, vol. IV, p. 960, fn. 4.) This directly contradicts what Defendants said in their public briefing, where each stated that they had records responsive to requests 1 and 10, among others. (See PA, vol. IV, p. 733 [table indicating possession of records responsive to Requests 1 through 3 and 8 through 10]; see also PA, vol. IV, p. 735, fn. 1 [same]; PA, vol. IV, p. 780 [arguing to "exempt the production of the records responsive the Request 1 [sic] … and Request 10"].) No explanation for this sudden reversal is evident from the superior court's order.

The secrecy of the Defendants' supplemental briefs and declarations meant that, for the Petitioners, the final hearing on their petition was no hearing at all. For "[t]he right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one." (*Morgan v. U.S.* (1938) 304 U.S. 1, 18 [58 S.Ct. 773, 82 L.Ed. 1129].) Consonant with this general principle, a straightforward application of *Conservatorship of Schaeffer*, *supra*, 98 Cal.App.4th 159, 165, indicates that the procedure followed by the superior court violated the Petitioners' right to due process.

* * *

Over eighty years ago, the United States Supreme Court overturned the result of a one-sided administrative proceeding out of respect for "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." (*Morgan v. U.S.*, *supra*, 304 U.S. 1, 19.) By way of analogy, the court remarked that, "[i]f in an equity cause, a special master or the trial judge permitted [one party's] attorney to formulate the findings upon the evidence, conferred *ex parte* with [that party's] attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be *no hesitation* in setting aside the report or decree as having been made without a fair hearing." (*Id.* at pp. 19-20, second

italics added.) Those principles apply squarely to this case, and this Court should not hesitate to overturn the decision below.

II. None of the Bases the Superior Court Articulated Justified Its Actions.

The superior court put forward several grounds to support of its use of secret briefing and evidence, but none of those grounds holds up to scrutiny.

A. The PRA Does Not Contemplate Secret, In Camera Briefing or Argument.

To begin with, neither the PRA nor the case law applying it provides a basis for soliciting secret, one-party briefs and affidavits to determine the merits of a case. There is no basis for the superior court's actions in the statutory text. As for case law, Petitioners know of no PRA decision endorsing the procedure used here, and the superior court's order identifies none.

1. Text of the PRA

In its order, the superior court reasoned that because section 6259 permits in camera review of the requested *records* in some instances, a court can solicit and review in camera *briefing and evidence* as well. (See PA, vol. IV, p. 958.) That does not follow, and it disregards the Legislature's careful wording of section 6259, which directs courts to "decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the

parties and any oral argument and additional evidence as the court may allow." (Gov. Code, § 6259, subd. (a).) The plain language of this section authorizes in camera review only of "the record" (i.e., "the public record" at issue),[3] and only if additional requirements set forth in the Evidence Code are met. (See *ibid.*) The remaining materials that may be before the court—namely, the "papers filed by the parties," the "oral argument," and any "additional evidence"—are not subject to this in camera process, and the statute cannot be read the superior court's way without changing its words. (See *ibid.*; see also *In re D.B.* (2014) 58 Cal.4th 941, 948 [169 Cal.Rptr.3d 672, 320 P.3d 1136] ["When statutory language is unambiguous, we must follow its plain meaning" and "are not free to rewrite the law."].) The Legislature clearly knew how to permit in camera review in the limited circumstances it wanted, and the wording of section 6259 indicates that it chose not to extend this procedure to the parties' briefing, argument, or evidence.[4] Nonetheless, the superior court here did the exact opposite of

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[3] This meaning is plain from the context of the preceding sentence of the statute, which uses the term "the records" to refer to the public records that are at issue: "the court shall order the officer or person charged with withholding *the records* to disclose *the public record* or show cause why the officer or person should not do so." (Gov. Code, § 6259, subd. (a), italics added.)

[4] This conclusion is underscored by the statute's express qualification that in camera examination of the requested public record takes place only "if permitted by subdivision (b) of Section 915 of the Evidence Code." (Gov. Code, § 6259, subd. (a).) That provision of the Evidence Code concerns the procedure for ruling on certain claims of privilege, and allows for in camera

what the Legislature allowed: it reviewed briefing and evidence in secret but failed to even look at the actual "records" at issue in this case. That was error.

It makes sense that the Legislature elected to treat the underlying public records differently than the parties' briefing, argument, or evidence. When the very issue in dispute is access to public records, permitting that access as part of litigation could be premature. But the opposite is true of a defendant's briefing and evidence; those *must* be available to a petitioner for the adversarial process to function. And the Defendants should not now be heard to claim that it was impossible to state their case in filings to which the Petitioners had access, given that the Defendants never raised such an argument until the superior court, sua sponte, ordered secret briefing.

Use of secret, in camera briefing and evidence is also contrary to the principles of transparency and government accountability embodied in the California Constitution and at the heart of the PRA. The Constitution declares that "[t]he people have the right of access to information concerning the conduct of the people's business" (Cal. Const., art. I, § 3, subd. (b), par. (1)), and the PRA affirms that "access to information

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disclosure only of "the information claimed to be privileged"—not briefing, argument, or supplemental evidence. (Evid. Code, § 915, subd. (b).)

concerning the conduct of the people's business is a fundamental and necessary right of every person in this state" (Gov. Code, § 6250). As the Supreme Court recently explained, "[t]he whole purpose of CPRA is to ensure transparency in government activities," because "[o]pen access to government records is essential to *verify* that government officials are acting responsibly and held accountable to the public they serve." (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 625 [214 Cal.Rptr.3d 274, 389 P.3d 848] [rejecting construction of PRA that would have allowed "sensitive information [to] routinely evade public scrutiny"].) The superior court's solicitation of—and reliance on—secret briefs and secret evidence to rule against disclosure converts the statute from a tool for accountability into a rubber stamp for withholding.

2. Case Law Interpreting the PRA

None of the cases that the superior court cites in its July 22, 2021 order provides a basis to solicit in camera briefing and evidence from only one side, or to issue a merits ruling based on those secret submissions. The order cites both *Register Division of Freedom Newspapers v. County of Orange* (1984) 158 Cal.App.3d 893 [205 Cal.Rptr. 92] (*Freedom Newspapers*) and *Yarish v. Nelson* (1972) 27 Cal.App.3d 893 [104 Cal.Rptr. 205] to illustrate that a superior court has discretion to examine the requested public records in a PRA case in camera. (PA, vol. IV,

p. 958.)[5] The issue here, however, is not the superior court's authority to review the underlying public records, but whether it can take one side's briefing and declarations in camera and preclude the other side from responding. Unsurprisingly, *Freedom Newspapers* and *Yarish* say nothing about secret briefs.

The superior court also relied upon *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001, 1013 [131 Cal.Rptr.2d 553] (*Coronado*) for the proposition that courts can rely on sworn representations about requested public records in lieu of an in camera review of the records themselves. (See PA, vol. IV, p. 961.) But again, the court's error was not its failure to conduct an in camera inspection of the underlying public records; rather, the court erred by soliciting and relying on secret briefing and declarations to resolve the merits. Nothing in *Coronado* suggests that the party representations on which the court relied were kept secret from the requestors. (See *Coronado*, at p. 1013.) Indeed, as in *Coronado*, the parties below "never asked the trial court to conduct" an in camera review of the requested records in the first place, to say nothing of briefs or supporting evidence. (*Ibid.*) Like *Freedom Newspapers*

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[5] *Freedom Newspapers* discusses in camera inspection of a settlement agreement between the county and an inmate, which record was the subject of the newspaper's PRA request. (158 Cal.App.3d 893, 898, 902.) *Yarish* discusses in camera inspection of prison records, which likewise were the subject of a reporter's PRA request. (27 Cal.App.3d 893, 903-904.)

and *Yarish*, *Coronado* simply reiterates that in camera review of *requested public records* is discretionary; it says nothing to suggest that a superior court can solicit secret argument and evidence from one party and then issue a decision based on the secret filings.

B. The Rules Governing Sealed Filings Are Irrelevant, and the Superior Court Did Not Follow Them Anyway.

The superior court also based its decision to solicit secret briefing and evidence on the California Rules of Court, finding that "the rules governing sealing, CRC 2.550, *et seq.*, allow the sealing of said documents [Defendants' supplemental briefing and declarations] in their entirety." (PA, vol. IV, pp. 958-959.) But this reliance is misplaced, for two reasons.

First, the sealing rules are not controlling because the superior court did not seal the records as that term is used by the Rules. (See Cal. Rules of Court, rule 2.550(b)(2) ["A 'sealed' record is a record that by court order is not open to inspection by the public."].) The superior court did not simply deny *public* access to certain court records: it denied Petitioners the opportunity to meaningfully participate in the adjudication of their claims. At the core of its reasoning, the superior court balanced the supposed need for secrecy against "the right to public access" to the sealed filings. (PA, vol. IV, p. 959.) But whether the public has access to a particular court record and whether the litigants do are two separate questions. (Cf. *Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383,

394 [166 Cal.Rptr.3d 166] [describing series of sealing motions in PRA case and making clear that litigants had access to materials whose public access was disputed].) Here, Amber's family's right to have their counsel review, contest, and respond to briefs and evidence going to the merits of their lawsuit is grounded not in the public's right to open courts, but rather in their own due process rights as litigants. (See *ante*, Part I.) The superior court erred in applying rules for sealed filings that have no bearing on—and that fail to account for the rights at stake in—the in camera procedure that it used.

Second, even if the sealing rules were somehow applicable to the superior court's novel in camera supplemental briefing procedure, the superior court did not apply them correctly. The April 9 order made none of the required factual findings. (See Cal. Rules of Court, rule 2.550(e)(1) ["An order sealing the record must: (A) Specifically state the facts that support the findings[.]"].)[6] This is unsurprising, given that Defendants neither sought sealing nor offered any basis for sealing. (Cf. PA, vol. IV,

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[6] Petitioners do not concede that that superior court had an adequate factual basis for sealing the secret briefs and declarations. But because the briefing and evidence that allegedly support sealing *are themselves sealed*, and because the superior court's "findings" in support of sealing amount to little more than a recitation of the applicable legal standard (see PA, vol. IV, pp. 958-959), Petitioners are unable to adequately evaluate whether these "findings" amount to an abuse of discretion.

p. 882 [ordering Defendants to file supplemental briefs under seal].)[7] Furthermore, the superior court did not adequately consider less restrictive means to protect the identified interests. The Rules require that a sealing order "[d]irect the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal." (Cal. Rules of Court, rule 2.550(e)(1)(B); see also *Glassdoor, Inc. v. Superior Court* (2017), 9 Cal.App.5th 623, 638 [215 Cal.Rptr.3d 395] [criticizing sealing order that "swept far too broadly," where "[m]uch of [the sealed document] obviously implicates no confidential information" and thus "provided no basis to seal the [document] in its entirety, nor for the trial court's boilerplate findings that the sealing order was 'narrowly tailored' and that '[n]o less restrictive means exist[ed] to achieve and further [sealing proponent's] interests in the confidential information'"].) Here, by contrast, the superior court simply ordered the blanket sealing of all supplemental filings, based on a perfunctory recitation of the legal standards for sealed filings. (See PA, vol. IV, pp. 958-959.) In doing so, it failed to properly consider alternatives like

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[7] To the extent that the July 2 order purports to correct this omission by making findings based on the secret briefs themselves, it runs afoul of rule 2.551(b)(2), which requires that "all parties that have appeared in the case" be served with the papers that form the basis for sealing (in redacted or unredacted form). Here, by contrast, Petitioners have not received a copy of *any* supplemental briefing or evidence—even in redacted form.

public filing with redactions or, as the Petitioners suggested to the court, an attorneys' eyes only designation that would have facilitated the adversarial process while preventing wider disclosure.[8] That, too, was error.

C. The Superior Court's Analogy to *Pitchess* Motions in Criminal Discovery is Flawed.

The superior court also defended its reliance on secret briefing and evidence by comparing it to "when a defense affidavit filed in support of a *Pitchess* motion is permitted to be filed under seal." (PA, vol. IV, p. 961, citing *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 72 [63 Cal.Rptr.3d 948, 163 P.3d 939].) This last analogy also fails.

To begin with, the *Pitchess* hearing process takes place in the context of a criminal prosecution, when a defendant seeks impeachment information about police misconduct, and implicates the "protection of the defendant's constitutional rights." (*Kling v. Superior Court*, *supra*, 50 Cal.4th 1068, 1079.) It is because of those fundamental rights that "'[t]he Legislature granted the defense special protections'—permitting criminal

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[8] Although the superior court mentioned and rejected the possibility of attorneys' eyes only designations, its reasoning reflected the errors of due process discussed above (see *ante*, Part I). The court identified no harm that would flow from disclosing the secret briefing solely to Petitioners' attorneys and instead asserted that doing so would have "no utility" because "the Court would likely defer to the judgment of the assistant district attorneys" regardless. (PA, vol. IV, p. 961.) Dismissing an alternative for legally improper reasons cannot constitute adequate consideration. (Cf. *David v. Hernandez* (2014) 226 Cal.App.4th 578, 592 [172 Cal.Rptr.3d 204] ["legal error establishes an abuse of discretion"].)

defendants to make the necessary showing of need for any sought materials outside the presence of the prosecution." (*Facebook, Inc. v. Superior Court*, *supra*, 10 Cal.5th 329, 357, quoting *Kling*, at p. 1075.) But the City and County do not have constitutional rights to withhold documents that they are trying to vindicate in this public-records case, so it would have been error for the superior court to follow the *Pitchess* process here.

And even that is not what happened. The actual *Pitchess* process contains several procedural safeguards, none of which the superior court followed in this case. First, a party who "wishes to file a *Pitchess* affidavit under seal" must request permission from the court. (*Garcia v. Superior Court*, *supra*, 42 Cal.4th 63, 73.) Second, the requesting party must serve "a proposed redacted version" of the affidavit "on opposing counsel." (*Ibid.*) Third, the court must then hold a hearing to test whether the sealing of the redacted portions of the affidavit is truly necessary. (*Ibid.*) And opposing counsel is given "an opportunity to propound questions for the trial court to ask" despite its exclusion from the hearing. (*Ibid.*) Nothing resembling that process happened below. Accordingly, *Garcia* does not support the superior court's decision to forgo the adversarial process in deciding the merits of Petitioners' claim.

III. The Superior Court's Decision Is Incorrect on the Merits.

Although the superior court devoted only a brief portion of its opinion to the merits of the case, the little reasoning it revealed suggests

that the court's conclusion on the merits was erroneous. To be sure, the very brevity of the court's discussion—and the fact that Petitioners were denied access to the submissions urging the court to the conclusion it drew—make it difficult for Petitioners, and this Court, to parse the superior court's reasoning. (See *American Civil Liberties Union of Northern California v. Superior Court*, *supra*, 202 Cal.App.4th 55, 87 ["In camera inspection in the trial court … creates problems for appellate review" because it generates "trial court opinions [that] 'are generally stated in conclusory terms, and the disappointed requestor is not in a position to challenge those conclusions or even to assist the appellate court in focusing its inquiry.'"], quoting *Mead Data Cent., Inc. v. U.S. Dept. of the Air Force*, *supra*, 566 F.2d 242, 250, fn. 10.) Nevertheless, even the court's brief discussion raises serious substantive issues.

Specifically, the court's entire rationale for finding that disclosure could endanger the successful completion of the Ronald Seay investigation boils down to a single sentence stated in conclusory terms. In total, the court found "generally that Respondents' declarations filed in support of their supplemental briefs demonstrate that the disclosure of information responsive to the PRA requests could be used for impeachment purposes, taint the jury pool, interfere with the sanity portion of Ronald Seay's

criminal trial, and discourage cooperation among fellow law enforcement agencies." (PA, vol. IV, p. 960.)[9]

These four vaguely stated rationales reveal little about the superior court's reasoning, and essentially nothing about its evidentiary foundation. Nor does the court's order parse which rationale applies to which category of requested documents and whether these rationales are a basis for withholding documents under the PRA. Nevertheless, serious substantive issues are evident with at least two of the court's stated rationales.[10]

First, it is not clear how the court's observation that unspecified records "could be used for impeachment purposes" in Ronald Seay's criminal case (PA, vol. IV, p. 960) could justify withholding those

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[9] The sole ground for the superior court's refusal to order disclosure under the victims' access provision of section 6254, subdivision (f), was that disclosure would endanger the successful completion of the Defendants' investigation of Ronald Seay. (See PA, vol. IV, pp. 959-960.) The court did not find that disclosure would "endanger the safety of a witness or other person involved in the investigation" (Gov. Code, § 6254, subd. (f)), and that exception to the victims' access provision is not at issue in this appeal. (See PA vol. IV, pp. 959-960.)

[10] Petitioners do not concede that any of the superior court's four bases for withholding are correct; there is simply not enough information in the court's order (and none from Defendants' secret filings, which remain sealed) for Petitioners to fully evaluate the extent to which these findings are factually or legally erroneous. It is unclear, for example, whether the superior court held that producing trace information (which would describe the provenance of Ronald Seay's firearms) would interfere with the sanity portion of his criminal trial—a conclusion that would appear to be entirely unsupported.

documents. As a criminal defendant, Mr. Seay is entitled to impeachment material regardless of its disclosure to Petitioners. (See *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]; *Giglio v. United States* (1972) 405 U.S. 150 [92 S.Ct. 763, 31 L.Ed.2d 104]; see also *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28, 40 [251 Cal.Rptr.3d 320, 447 P.3d 234] [describing *Brady* obligations].) This disclosure obligation runs to any "evidence that is 'favorable to [the] accused' and 'material either to guilt or to punishment,'" meaning that it either "'helps the defense or hurts the prosecution, as by impeaching a prosecution witness.'" (*Association for Los Angeles Deputy Sheriffs*, at p. 40, first quoting *Brady*, at p. 87, then quoting *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132 [63 Cal.Rptr.3d 297, 163 P.3d 4].) Statutory and ethical obligations may require even more. (See, e.g., Pen. Code, § 1054.1, subds. (d), (e) [statutory disclosure obligation]; Rules Prof. Conduct, rule 3.8(d) & com. 3 [ethical disclosure obligation].) Given that the government already has the obligation to disclose such information to Mr. Seay *himself*, it is hard to imagine how disclosing to Petitioners records that "could be used for impeachment purposes" could make any difference with respect to Mr. Seay's trial.[11]

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[11] By the same token, if Defendants contend that requested records are immaterial and therefore not required to be disclosed under *Brady*, that would defeat any theory of harm arising from their disclosure to Petitioners.

Second, the superior court's conclusion that disclosure of unspecified records may "discourage cooperation among fellow law enforcement agencies" (PA, vol. IV, p. 960) is also legally unsupported. This concern is not a cognizable basis for withholding information from crime victims under section 6254, subdivision (f), which permits withholding only if "disclosure would endanger the successful completion of the investigation"—here, the investigation of Mr. Seay—"or a related investigation." (Gov. Code, § 6254, subd. (f).) The superior court's concern about "discourag[ing] cooperation" is a generalized, forward-looking concern not tied to the investigation of Mr. Seay or any specific "related investigation." (Cf. PA, vol. IV, pp. 845-846 [affidavit from prosecutor raising concerns about "future investigations" and "future criminal cases"].) That generalized concern is outside the scope of the statutory exemption. Agencies cannot sidestep their obligations under the PRA on the ground that entities with which they hope to interact in the future might be discouraged from doing so by the disclosure rights Californians enjoy under the law. Nor is there any basis to conclude that disclosure in this case—where the defendant has been apprehended and is alleged to have acted without accomplices—will interfere with the investigation of Amber's murder by discouraging cooperation with other law enforcement agencies.

These errors are evident even from the mere 50 words that make up the superior court's reasoning. It is impossible for Petitioners to discern

what additional errors might underlie the superior court's other asserted bases—the purported dangers of "taint[ing] the jury pool" and "interfer[ing] with the sanity portion of Ronald Seay's criminal trial" (PA, vol. IV, p. 960)—which serves only to underscore that the superior court should have subjected Defendants' arguments and evidence to proper adversarial process.

Finally, it appears that the superior court simply deferred to Defendants on the ultimate issue before the court. Even in circumstances where a nonadversarial procedure is proper, the exclusion of one side heightens the court's duty to exercise critical scrutiny because the rigorous testing afforded by the adversary process is absent. (See *Facebook, Inc. v. Superior Court*, *supra*, 10 Cal.5th 329, 358 [during in camera or ex parte proceedings, "the court assumes a heightened obligation to undertake critical and objective inquiry, keeping in mind the interests of others not privy to the sealed materials"].) Here, the superior court did not critically evaluate the Defendants' evidence and argument, saying that even if it had permitted Petitioners' attorneys to see and respond to the Defendants' secret submissions, "the Court would likely defer to the judgment of the assistant district attorneys trying the criminal case." (PA, vol. IV, p. 961.) In essence, while simultaneously excluding Petitioners from the merits of their case, the superior court granted the Defendants an irrebuttable presumption in favor of withholding under the guise of deference to

prosecutorial trial strategy. That inverts the Defendants' burden under the PRA, and should not stand. (See *Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733, 789 [267 Cal.Rptr.3d 32] ["'The entity attempting to deny access has the burden of proof' to demonstrate that the claimed exemption applies."], quoting *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 767 [60 Cal.Rptr.3d 445].)

IV. Entry of Judgment in Petitioners' Favor is Appropriate Because Defendants Failed to Meet Their Burden.

In the open portion of the proceedings below, the Defendants sought to meet their burden by arguing that the requested disclosure "would endanger the successful completion of the investigation" of Ronald Seay (Gov. Code, § 6254, subd. (f)), and by filing declarations attesting to that notion. (See PA, vol. IV, p. 845; PA, vol. IV, pp. 758-759.)

These declarations, however, presented only generalized, speculative concerns, and strongly suggested that Defendants have a *policy* of not complying with public-records requests. In other words, their withholding in this instance was not derived from any facts particular to this case. (See, e.g., PA, vol. IV, p. 758 ["The Sacramento Police Department does not disclose the contents of investigatory records in advance of criminal trials and appeals for several reasons."]; PA, vol. IV, pp. 845-846.) But a general policy of nondisclosure cannot withstand the Public Records Act's

requirement that withholding of a record be justified with respect to "the record in question" (Gov. Code, § 6255, subd. (a)).

The superior court ultimately ruled that the Defendants had met their burden, but only on the basis of the Defendants' secret supplemental briefing. (See PA, vol. IV, p. 960.) Yet for the reasons previously discussed in Parts I and II, these supplemental briefs and declarations were not properly before the court, and thus the court erred by considering them. (Cf. *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1055 [188 Cal.Rptr.3d 537].) This court need not remand the case to determine how it would come out in the absence of the secret filings, however, because the superior court was quite clear, in its original ruling, that the Defendants had at that point failed to meet their burden of justifying withholding under section 6254, subdivision (f). (See PA, vol. IV, p. 882.)

Nor do the Defendants' alternative bases for withholding require remand. In the proceedings below, the Defendants also argued that the withholding was justified by the public interest: They cited section 6255, which allows for withholding where "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosing the record" (Gov. Code, § 6255, subd. (a)), and they cited section 6254, subdivision (k), which allows for withholding of records that are considered privileged or exempted under other provisions of law (see Gov. Code, § 6254, subd. (k)). (The only argument Defendants made in this

connection was under the Evidence Code, which permits the withholding of official information whose disclosure would be "against the public interest." (Evid. Code, § 1040, subd. (b)(2).)) But the superior court found that the Defendants had failed to substantiate this argument as well. (See PA, vol. IV, p. 883 [noting that the City had "not articulated how any potential dissemination of this information would be contrary to the public interest"].)

Finally, the County, but not the City, additionally argued below that Petitioners had failed to join indispensable parties—namely, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and Ronald Seay himself. (PA, vol. IV, pp. 769-773.)[12] The superior court did not even mention this baseless argument in any of its three orders, and there is no reason to suppose that the court would give it serious consideration on remand. Thus, remanding for entry of judgment in Petitioners' favor is appropriate based on the record properly before this Court and the superior court.

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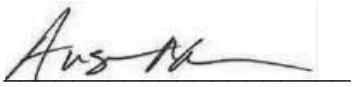
[12] The County asserted that the ATF was indispensable because any firearm trace data in the County's possession was nevertheless "'own[ed]'" by "presumably the ATF or other federal agency." (PA, vol. IV, p. 771.) The County provided neither legal nor factual authority for this presumption. (*Ibid*.) And as to Ronald Seay, the County argued that he was indispensable because "[o]ne could reasonably presume Mr. Seay has a position on" Petitioners' records request. (PA, vol. IV, p. 773.) Whether or not this presumption is reasonable, it does not in any event transform Seay into a legally indispensable party. (See Code Civ. Proc., § 389, subd. (a).)

CONCLUSION

The superior court committed reversible error by inviting and relying on secret, one-sided briefing. And because the Defendants failed to meet their burden to justify withholding, this Court should issue a writ of mandamus directing the superior court to grant Petitioners' Petition for Writ of Mandate and to order disclosure of the requested records to Petitioners. At a minimum, however, a writ should issue directing the superior court to vacate its July 22 order and to grant Petitioners' counsel access to all briefing and evidence submitted in this case, so that further proceedings below may conform to the adversarial process.

Respectfully submitted,

DATED: September 1, 2021

By: 

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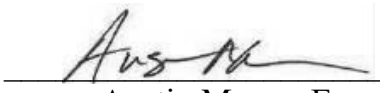
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1)

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Petition is produced using 13-point Times Roman scalable type, including footnotes, and contains 11,023 words, which is less than the 14,000 words permitted by this rule. Counsel riles on the word count generated by the word processer used to prepare this Petition.

DATED: September 1, 2021



Austin Manes, Esq.