S271287
No. _____

Ng el. IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

KELLY CLARK, DIANNE 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.

AFTER A DECISION BY THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT, CASE NO. C094735

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SACRAMENTO, CASE NO. 23-2020-80003417-CU-WM-GDS
THE HONORABLE SHELLYANNE CHANG

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

1. The victims' access provision of the Public Records Act mandates disclosure of certain information to crime victims, except when the information would endanger the police investigation or its completion, or a related investigation. In adjudicating the applicability of this statutory exception, may a court simply defer to ex parte, secret briefing and affidavits from the government, or must the court engage in substantive judicial review?

2. Does Section 6259 of the Public Records Act, which enumerates a court's authority to review public records in camera, also implicitly allow the court to solicit and rely on secret briefing and affidavits from the government when deciding whether to order the disclosure of public records?

WHY REVIEW SHOULD BE GRANTED

Review is necessary to settle important questions of law that affect the fundamental, constitutional rights of victims of crime in California—including their rights to access government records and to seek redress in the courts. This Court has recognized that "access to information concerning the conduct of the people's business is a *fundamental and necessary right* of every person in this state," and that the California Constitution requires narrow construction of any statute purporting to limit that right. (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38

Cal.4th 1065, 1071 [44 Cal.Rptr. 3d 663, 136 P.3d 194], emphasis added, citing Gov. Code, § 6250, citing Cal. Const., art. I, § 3, subd.(b).) The Constitution further recognizes that the "rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern." (Cal. Const., art. I., § 28, subd. (a)(l).) Here, Petitioners are victims of crime that have been denied their fundamental right to access government records, including law enforcement records to which they were specifically granted access by the victims' access provision of the Public Records Act ("PRA").

The superior court subverted both the spirit and letter of the PRA by deferring entirely to law enforcement on what records they wished to produce, rather than exercising its own judgment. This error raises an important question of law because such deference would render the victims' access provision meaningless and undercut the Constitution's guarantee of access to public records and its protections for crime victims. Moreover, the superior court did so by relying on ex parte, secret briefing and affidavits from law enforcement that Petitioners were never allowed to see or rebut, effectively removing Petitioners from the adversarial process and denying them a fair and impartial adjudication. This Court should grant review to preserve the fundamental, constitutional rights of every Californian who may be a victim of crime or may seek access to public

documents in the courts. Alternatively, it should grant and transfer this case to the Court of Appeal for merits briefing.

STATEMENT OF THE CASE

Amber Clark, a Sacramento librarian, was shot to death outside her workplace in December 2018 by Ronald Seay, a library patron with a history of violent and threatening conduct. Mr. Seay was quickly apprehended and is being tried for her murder in the Sacramento County Superior Court.

Amber Clark's surviving family members, Petitioners Kelly Clark, Kiona Millirons, and Dianne Wooton, sought public records in March 2020 from the Sacramento Police Department and the Sacramento District Attorney's Office, seeking to learn how Mr. Seay acquired the firearms he used to kill Amber. These requests sought records concerning the provenance of the firearm, as well as information relating to factors that could have prohibited Mr. Seay from purchasing or possessing a firearm. (Petitioners' Appendix ("PA"), vol. I, pp. 18-28.)[1] Amber's family wished to identify parties who share legal responsibility for her death (thus allowing them to seek civil redress). They also hoped that the information

[1] Page citations are to the Appendix of Exhibits submitted with the Petition for Writ of Mandate to the Court of Appeal—Third Appellate District on September 1, 2021, in this case.

in the requested records would allow them to seek policy changes so that fewer families would go through what they did. (PA, vol. I, p. 5.)

Petitioners explained that, as Amber Clark's surviving husband, sister, and mother, they qualify as victims within the meaning of the victims' access provision of the PRA. (PA, vol. I, pp. 18-28.) While the PRA broadly exempts from disclosure "[r]ecords of complaints to, or investigations conducted by, or … investigatory or security files compiled by" law enforcement agencies, the victims' access provision nonetheless allows crime victims to access certain information in police records. (Gov. Code, § 6254, subd. (f).) Specifically, 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, [and] the statements of all witnesses, other than confidential informants." (*Ibid.*) A law enforcement agency may withhold this information only if "the disclosure would endanger the safety of a witness or other person involved in the investigation, or … would endanger the successful completion of the investigation or a related investigation." (*Ibid.*)

The Sacramento County District Attorney's Office and the Sacramento Police Department denied the Petitioners' PRA requests in full. (PA, vol. I, pp. 30-35.)

Litigation in the Superior Court

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. In early 2021, the parties briefed the merits of the petition before the superior court. All the documents in this initial round of briefing—including the parties' briefs as well as supporting declarations—were publicly filed. Among other things, Petitioners argued that the declarations submitted by the Sacramento County District Attorney's Office, Sacramento Police Department, and City of Sacramento (collectively, "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.

On April 9, 2021, the superior court issued an order agreeing that, because Defendants had not established a case-specific justification for nondisclosure, they had not met their burden under the victims' access provision:

> 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.

(PA, vol. IV, 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 Defendants with another chance to meet their burden, this time via secret briefing. The superior court directed 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.*)

Petitioners filed a motion for reconsideration on April 26, 2021, objecting to the use of secret briefing. Although the superior court initially denied that motion on procedural grounds, it ultimately considered—and rejected—Petitioners' objections on the merits in a tentative ruling dated July 2, 2021.[2] (PA, vol. IV, pp. 917-18.)

That July 2 tentative ruling indicated that the superior court had reviewed supplemental briefs from Defendants, along with a number of witness declarations. (PA, vol. IV, p. 915.) Petitioners (and their counsel) were never allowed to see or respond to those briefs or declarations. As of

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[2] Defendants argued to the Court of Appeal that Petitioners had waived their arguments about due process. (See Preliminary Opp. at p. 8.) But Petitioners' objection was not forfeited for the simple reason that the superior court ruled on it. (See, e.g., *People v. Thomas* (2021) 63 Cal.App.5th 612, 627 [277 Cal.Rptr.3d 818].)

the April 9 ruling, Defendants had not met their burden under the PRA, but the July 2 tentative ruling held that Defendants had, through their subsequent secret submissions, met their burden to justify withholding of the documents. (PA, vol. IV, p. 919.)

At oral argument on the tentative ruling, Petitioners argued that the lack of adversarial process and use of secret briefs violated due process and undermined the PRA. But the superior court rejected those foundational premises and questioned why it should even consider arguments by Petitioners:

> 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. 930-31.) The superior court questioned even its own ability to 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. 931-32, emphasis added.)

The superior court took the matter under advisement at the conclusion of the hearing and issued its final order on July 22, 2021. (PA, vol. IV, pp. 953-63.) That order adopted the holding of the July 2 tentative ruling, supplementing that ruling with rejoinders to the arguments Petitioners had raised at oral argument. (*Id.* at pp. 960-62.) 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 had not looked at any of the requested records, but instead relied only on the new declarations and arguments in Defendants' secret submissions. (*Ibid.*)

Litigation in the Third District Court of Appeal

Petitioners sought review of the superior court's decision in the Third District Court of Appeal, by petitioning for a writ of mandate as required by the Public Records Act. (See Gov. Code, § 6259, subd. (c).)

The Court of Appeal denied this petition for writ of mandate without an opinion on October 1, 2021.[3]

ARGUMENT

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. This radical departure from the normal adversarial process has profound implications for a statute whose purpose is to vindicate the "fundamental and necessary right of every person in this state" to "access … information concerning the conduct of the people's

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[3] It did so notwithstanding this Court's instruction that, in PRA cases—where the Legislature provides for review by extraordinary writ and has eliminated the right to review by appeal—the discretion that ordinarily rests with the Court on an extraordinary writ is "quite restricted." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113 [40 Cal.Rptr.2d 839, 893 P.2d 1160].) "[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." (*Id*. at 113-14.)

business." (Gov. Code, § 6250; *see also* Cal. Const. art. I, § 3, subd. (b)(1) [enshrining right of public access in state constitution].)

The superior court has set a dangerous and unsupported precedent that undermines the ability of crime victims to obtain information. It appears to have adopted Defendants' evidence and argument wholesale, deferring completely to their assertions of prosecutorial need and recognizing supposed harms that go well beyond those that might reasonably be recognized under the statute. In doing so, the court essentially wrote the victims' access provision out of the PRA and denied Petitioners due process. This relegates crime victims to the status of second-class litigants, when the legislature in fact conferred on them a special statutory right of access. And it undercuts the will of California voters, who in 2008 amended the state constitution through Marsy's Law to declare that "[t]he rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern." (Cal. Const., art. I., § 28, subd. (a)(l), (a)(2).)

The petition should be granted and the decision below reversed.

In the alternative, Petitioners urge this Court to grant and transfer the Petition to the Court of Appeal, Third Appellate District for a decision on the merits, pursuant to California Rules of Court, rule 8.500(b)(4) and in line with this Court's guidance that where the Legislature has eliminated appellate review other than via extraordinary writ, the appellate court's

discretion to deny review is limited. (*Powers v. City of Richmond*, *supra*, 10 Cal.4th 85, 113.)

I. The Superior Court Created an Irrebuttable Presumption in Favor of Withholding and Credited Harms that Should Not Be Cognizable Under the Statute.

A. The Superior Court Substituted the Defendants' Judgment for Its Own.

In the proceedings below, both sides initially submitted briefs and supporting declarations according to the normal adversarial procedure. Petitioners laid out their arguments in favor of disclosure of the requested records, and Defendants publicly presented their arguments against. Among other things, Petitioners pointed out that the Defendants presented only generalized, speculative concerns about disclosure, and that the evidence suggested that Defendants have a *policy* of not complying with public-records requests. In other words, Defendants' withholding in this instance was not based on 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. 845-46.)

After reviewing the parties' submissions, the superior court agreed that Defendants had failed to meet their burden. (PA, vol. IV, p. 882 [finding insufficient "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"].) That should have been the end of the case. 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 Defendants, to be filed in secret. (*Ibid.*)[4]

In the end, Defendants filed two supplemental briefs, as well as at least four declarations, for the court's eyes only. In its July 2021 tentative ruling, the superior court relied on 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 Defendants' secret briefs and declarations, stating that it was "limited in what details it can publicly disclose to support its decision." (PA, vol. IV, p. 960.)

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[4] The superior court ordered Defendants to submit secret supplemental briefing despite the fact that at no time had Defendants contended that the openness of the proceeding prevented them from justifying their opposition to disclosure. Nor had Defendants sought any intermediate step, such as attorneys' eyes only designations.

At oral argument, deprived of the ability to respond to the secret assertions made by Defendants, Petitioners focused on the impropriety of the court's one-sided briefing process. But the court dismissed 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 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 Petitioners' views but stated that it was "not sure *the Court* can even disagree" with 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.)

The court reiterated its deference to Defendants in its 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.*)

The superior court's deference to Defendants effectively inverted the burden that the government normally bears in PRA cases. (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].) The exclusion of one side *heightens* the court's duty to scrutinize arguments and evidence because the rigorous testing afforded by the adversary process is absent—even in circumstances where a nonadversarial procedure is proper. (See *Facebook, Inc. v. Superior Court* (2020) 10 Cal.5th 329, 358 [267 Cal.Rptr.3d 267, 471 P.3d 383] [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 appears to have simply accepted Defendants' arguments and evidence without scrutiny, inquiry, or testing, admitting that even if it had permitted Petitioners' attorneys to see and respond to Defendants' secret submissions, it "would likely defer" to Defendants' view of the case. (PA, vol. IV, p. 961.) In essence, the superior court granted Defendants an irrebuttable presumption in favor of withholding under the guise of deference to prosecutorial trial strategy.

This was particularly troubling in this context, where crime victims seek to enforce their particular rights under the PRA. In the words of amicus curiae Youth ALIVE!:

> In instances where victims are seeking information from law enforcement, and are not given any explanation on why they cannot receive that information it not only compounds the trauma they experience in seeking to heal after harm, but engenders mistrust in the very system that is designated to serve and protect them.

(*Clark v. Sup'r Court of Sacramento County*, Letter of amicus curiae Youth ALIVE! to Court of Appeal, Sep. 15, 2021.) This inversion of the burden of proof under the PRA harms petitioners and crime victims across the state of California, and it should not be allowed to stand.

B. The Superior Court Recognized Harms that the PRA Ought Not Contemplate.

Although the superior court devoted only a brief portion of its opinion to the merits of the case, the little reasoning it did provide reveals that the court's conclusion on the merits was based on factors that should not be cognizable under the PRA.[5] The court's entire rationale for finding

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[5] To be sure, the very brevity of the court's discussion—and the fact that Petitioners were denied access to Defendants' submissions—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* (2011) 202 Cal.App.4th 55, 87 [134 Cal.Rptr.3d 472] ["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

that disclosure could endanger the successful completion of the Ronald Seay investigation boils down to a single sentence: 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.)

These are not cognizable bases for withholding records from crime victims under any commonsense reading of the plain text of the PRA. Take, for example, the court's observation that unspecified records "could be used for impeachment purposes" in Ronald Seay's criminal case. (PA, vol. IV, p. 960.) Like all criminal defendants, 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*

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in focusing its inquiry.'"], quoting *Mead Data Cent., Inc. v. U.S. Dept. of the Air Force* (D.C. Cir. 1977) 566 F.2d 242, 250, fn. 10.) But the superior court's refusal to disclose the basis for its decision should not be permitted to insulate that decision from judicial review.

obligations].) This disclosure obligation encompasses 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].) Given that the government already has the obligation to disclose such information to Mr. Seay *himself*, the notion that records can be withheld from Petitioners to somehow protect their use "for impeachment purposes" makes no sense.[6] This Court should make clear that this is not a cognizable basis for withholding public records.

Similarly, the superior court's conclusion that disclosure of unspecified records may "discourage cooperation among fellow law enforcement agencies" (PA, vol. IV, p. 960) should not be a cognizable basis for withholding information from crime victims. The statutory language of the victims' access provision 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).) By contrast, the superior

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

court's concern about "discourag[ing] cooperation" is a generalized, forward-looking concern not tied to the investigation of Mr. Seay or any "related investigation." (Cf. PA, vol. IV, pp. 845-46 [affidavit from prosecutor raising concerns about "future investigations" and "future criminal cases"].)[7] That generalized concern cannot be squared with the scope of the statutory exemption. Agencies should not be permitted to sidestep their obligations under the PRA on the ground that entities with which they hope to interact in the future might wish to avoid disclosure of public records at all costs.

II. The Superior Court Construed the PRA to Permit Secret, One-Sided Briefing.

The superior court's decision is dangerous for a second, significant reason, independent of its construction of the victims' access provision: The decision announces that courts have discretion to solicit and rely upon secret briefing when deciding PRA cases. But such a one-sided process is incompatible with both the PRA itself and the bedrock adversarial principles that underlie due process in our system of justice. The superior court's unusual approach creates a loophole in the PRA that not only undermines the statutory text but also contravenes its purpose of ensuring

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[7] There is no basis to conclude that discouraging cooperation with other law enforcement agencies would interfere with the investigation *in this case*, where the defendant has been apprehended and is alleged to have acted without accomplices.

public accountability and providing a fair and transparent mechanism for adjudicating important questions of public access. This Court should close that loophole.

A. The Adversarial System and Due Process Require That Each Side Know 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, in almost all settings, California courts adhere to "'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.) This rejection of secret, one-sided proceedings "'is not mere idle formalism.'" (*People v. Ayala*, *supra*, 24 Cal.4th 243, 263, quoting *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1257.) As this 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, supra*, 10 Cal.5th 329, 345, fn. 6.) """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 …."""" (*Kling v. Superior Court, supra*, 50 Cal.4th 1068, 1079.) "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." (*United States 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* (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." (*United States v. Thompson*, *supra*, 827 F.2d 1254, 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 1260-61.) After all, "'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 Unsettled These Fundamental Adversarial Principles by Basing Its Decision on Secret Briefing from the Defendants.

The concerns that courts have expressed about one-sided proceedings have been borne out in this case. After Defendants failed to justify their withholding of records via an open and adversarial process, the superior court directed 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 Defendants. This Court has called such a process "'anathema in our system of justice.'" (*People v. Ayala*, *supra*, 24 Cal.4th 243, 263, quoting *United States. v. Thompson*, *supra*, 827 F.2d 1254, 1258-59.)

The superior court's effective exclusion of Petitioners from the judicial process contravenes the important principles set forth in Section II.A above. The court stated outright that its decision was based on Defendants' ex parte, in camera submissions (see PA, vol. IV, p. 961), in direct conflict with the "main rule" set forth in *Concepcion v. Amscan Holdings, Inc.*, *supra*, 223 Cal.App.4th 1309, 1326.[8] The Court of Appeal's refusal to set aside the superior court's order thus sets a dangerous precedent for future PRA litigation.

C. The Superior Court Reinterpreted the PRA to Permit Secret, One-Sided Briefing.

In addition to its neglect of due process, the superior court's decision portends a dangerous new interpretation of the PRA, inventing a nonadversarial process for adjudication that vitiates the process envisioned by the Legislature and deviates from the text of the statute, as well as from all relevant case law.

1. Text of the PRA

The PRA 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

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[8] There can be no doubt that it was indeed Defendants' secret briefs and declarations that won the day, since the court's previous ruling had found Defendants' *public* briefs and declarations insufficient. (See PA, vol. IV, p. 882.)

additional evidence as the court may allow." (Gov. Code, § 6259, subd. (a).) The superior court interpreted this provision to permit not only in camera review of the requested *records* but in camera review of *briefing and evidence* as well. (See PA, vol. IV, p. 958.)

The superior court's interpretation disregards the Legislature's careful wording of section 6259, whose plain language authorizes in camera review only of "the record" (i.e., "the public record" at issue). And even that is permitted 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. Nonetheless, under its novel interpretation of the statute, the superior court here did just the opposite: it reviewed briefing and evidence in secret but failed to look at the actual "records" at issue.

2. Case Law Interpreting the PRA

No case of which Petitioners are aware, including the cases cited by the superior court, has previously indicated that the PRA 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 court's order cites both *Register Division of Freedom Newspapers, Inc. 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] (*Yarish*), which illustrate that a superior court has discretion to examine the requested public records in a PRA case in camera. (PA, vol. IV, p. 958.)[9] 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. *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

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[9] *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, 903-04.)

review of the records themselves. (See PA, vol. IV, p. 961.) But nothing in *Coronado* suggests that the party representations on which the court relied could be kept secret from the requestors. (See *Coronado*, at 1013.) Like *Freedom Newspapers* 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. This makes sense. 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.

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 concerning the conduct of the people's business is a fundamental and necessary right of every person in this state" (Gov. Code, § 6250). As this Court 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 converted the statute from a tool for accountability into a rubber stamp for withholding.

* * *

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. United States*, (1938) 304 U.S. 1, 18 [58 S.Ct. 773, 82 L.Ed. 1129].) 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. United States*, *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

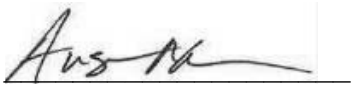
affording an opportunity to his opponent to know their contents and present objections, there would be *no hesitation* in setting aside the report or decree as having been made without a fair hearing." (*Id.* at 19-20, second italics added.) Those principles would seem to apply squarely to this case, and this Court should not hesitate to clarify that they apply equally in the PRA context.

CONCLUSION

For the foregoing reasons, in order to settle important questions of law regarding the Public Records Act, Petitioners respectfully request that this Court grant this Petition for Review. In the alternative, Petitioners request that this Court grant and transfer the Petition, pursuant to California Rules of Court, rule 8.500(b)(4), to the Third Appellate District for a decision on the merits.

Respectfully submitted,

DATED: October 12, 2021

By: 

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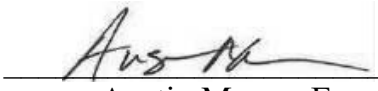
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c) and 8.486(a)(6))

Counsel of Record hereby certifies that pursuant to rule 8.204(c) and 8.486(a)(6) of the California Rules of Court, the enclosed Petition is produced using 13-point Times Roman scalable type, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and this certificate, and contains 6,365 words, which is less than the 8400 words permitted by this rule. Counsel relies on the word count generated by the word processor used to prepare this Petition.

DATED: October 12, 2021



Austin Manes, Esq.

EXHIBIT A

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

KELLY CLARK et al.,
Petitioners,
v.
THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent;
SACRAMENTO COUNTY DISTRICT ATTORNEYS OFFICE et al.,
Real Parties in Interest.

C094735
Sacramento County
No. 23202080003417CUWMGDS

BY THE COURT:

The petition for writ of mandate is denied.

BLEASE, Acting P.J.

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cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Clark et al. v. The Superior Court of Sacramento County
C094735
Sacramento County Super. Ct. No. 23202080003417CUWMGDS

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action; my business address is 990 Marsh Road, Menlo Park, CA 94025.

On **October 12, 2021**, I served the foregoing document as described below on the interested parties in this action as follows:

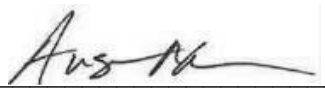
PETITION FOR REVIEW

Clerk Court of Appeal, Third Appellate District 914 Capitol Mall, 4th Floor Sacramento, CA 95814	Court of Appeal Case No. C094735
Clerk of the Court Sacramento County Superior Court 720 Ninth Street Sacramento, CA 95814	*Respondent*
Kelsey D. Johnson Deputy County Counsel COUNTY OF SACRAMENTO 700 H Street, Suite 2650 Sacramento, CA 95826 johnsonkel@saccounty.net	Attorneys for Sacramento District Attorney's Office, *Real Party in Interest.*
Leslie Z. Walker Susana A. Wood Senior Deputy City Attorney CITY OF SACRAMENTO 915 I. Street, 4th Floor Sacramento, CA 95814 LWalker@cityofsacramento.org SAWood@cityofsacramento.org	Attorneys for City of Sacramento and Sacramento Police Department, *Real Parties in Interest.*

X **BY MAIL**: Following ordinary business practices at the Menlo Park, California office of Kramer Levin Naftalis & Frankel LLP, I placed the sealed envelope for collection and mailing with the United States Postal Service on that same day. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, such correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Menlo Park, California, in the ordinary course of business.

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on October 12, 2021 in Menlo Park, California.



Austin Manes, Esq.