NO. _S251879

IN THE

SUPREME COURT OF CALIFORNIA

FIRST AMENDMENT COALITION,

Petitioner,

v.

GOVERNOR OF THE STATE OF CALIFORNIA,

Respondent

In Re The Matter of Petitioner's Motion to Unseal

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION TO UNSEAL CLEMENCY-RELATED COURT RECORDS

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*Thomas R. Burke (State Bar No. 141940)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111
(415) 276-6500
thomasburke@dwt.com

Rochelle L. Wilcox (State Bar No. 197790)
Selina MacLaren (State Bar No. 300001)
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa St., Suite 2400
Los Angeles, California 90017-2566
(213) 633-6800
(213) 633-6899 fax

Attorneys of Record for First Amendment Coalition

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On behalf of the public, Petitioner First Amendment Coalition ("FAC") respectfully requests that this Court issue an order directing the Clerk of the Court to unseal the Request for Recommendation for Clemency and the Record lodged by Governor Jerry Brown in Case Number S251879, involving former state Sen. Roderick Wright, and, further, to allow access to any other pending clemency requests, records, and related materials (collectively, "Clemency Materials") currently filed under seal with this Court and, prospectively, all future Clemency Materials filed in this Court.

The California Rules of Court, as well as the rights of access provided under the common law and the federal and state constitutions, guarantee the public the right to inspect court records absent articulated findings that the right must give way to a countervailing interest. The current procedure followed by this Court and the Governor's Office for Clemency Materials, however, does not abide by these federal and state requirements. Currently, all clemency requests and supporting documents submitted by the Governor to this Court are automatically placed under an indefinite seal, apparently without articulated judicial findings that closure serves any interest, let alone one sufficient to overcome the strong presumption of public access. FAC respectfully submits that Clemency Materials reviewed by this Court to "provide a check on potential abuse of the power conferred on" the Governor (*Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation,* 4 Cal. 5th 897, 899 (2018) ("March 2018 Admin. Order")), like all other records considered by the Court in making judicial determinations, are court records that should be available to the public except in those individual cases in which this Court makes a finding, on the record, that the document or a portion thereof must be redacted or sealed. Through this motion,

Petitioner requests that this Court apply its own well-established access rules to Clemency Materials filed in this Court.

I. BACKGROUND

A. Clemency Procedure

Under the California Constitution, the Governor has the power to grant clemency in the form of "reprieve, pardon, and commutation, after sentence." Cal. Const. art. V, § 8. Article V, Section 8 of the California Constitution provides that for twice-convicted felons, the Governor may not exercise this clemency power without this Court's recommendation. Cal. Const. art. V, § 8(a) (stating that the Governor "may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring").

The statutes adopted by the Legislature to implement this constitutional provision require that the Governor obtain an investigation and written recommendation from the Board of Parole Hearings ("BPH"). Pen. Code § 4813. After obtaining the BPH recommendation – and even if the BPH does not make a recommendation favorable to the applicant but the Governor decides to obtain this Court's recommendation nonetheless – the Governor submits the clemency "application, together with all papers and documents relied upon in support of and in opposition to the application, including prison records and recommendation of the Board of Prison Terms," to this Court "for consideration of the justices." Pen. Code § 4851. If a majority of the justices recommend that clemency be granted, the Clerk of this Court "shall transmit the application, together with all papers and documents filed in the case, to the Governor; otherwise the documents shall remain in the files of the court." Pen. Code § 4852. *See*

also Operating Practices and Procedures of the California Supreme Court ("Internal Court Rules"), at 11 (affirming the above procedure).

This Court recently interpreted its role in the clemency process as one not looking to the merits of the application, but rather "a more traditional judicial function: to determine whether the applicant's claim has sufficient support that an act of executive clemency, should the Governor choose to grant it, would not represent an abuse of that power." March 2018 Admin. Order at 897.

Yet, under the current practice, the materials considered by this Court in deciding whether to recommend the grant of clemency are placed under seal by default and remain sealed indefinitely. This Court's internal administrative rules explain that "[t]he papers and documents transmitted to the court by the Governor with the application often contain material that the Governor may have the right to withhold from the public." Internal Court Rules at 11, citing Gov. Code §§ 6254(c), (f), & (l); Civ. Code § 198.40(c). Based on the possible presence of materials the Governor "might" be entitled to treat as confidential, the Court treats the entire files as confidential "and does not make them available to the public." *Id.*

As a result, although this Court operates in its traditional judicial capacity when reviewing claims for clemency for individuals convicted of two or more felonies, the judicial records reviewed by this Court in making its recommendation are perpetually sealed from public view, apparently with none of the requisite findings justifying such sealing.

B. Public Interest in the Clemency Materials

The public has a profound interest in understanding these clemency proceedings. A primary purpose of the pardoning power is to "correct[ ] miscarriages of justice that

occurred in the judicial process." *See* Mary-Beth Moylan and Linda E. Carter, *Clemency in California Capital Cases*, 14 Berkeley J. Crim. L 37, 39 (2009); *see also* March 2018 Admin. Order at 898 (noting that clemency "'exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law'" and "is a check entrusted to the executive for special cases'" (citing *Ex parte Grossman*, 267 U.S. 87, 120-21 (1925)). Indeed, Justice Rehnquist called clemency "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted," and "the 'fail-safe' in our criminal justice system." *Herrera v. Collins*, 506 U.S. 390 (1993).

This "fail-safe" of the criminal justice system goes to the core of the public interest in understanding government activities. When clemency is sought to correct perceived mistakes in the criminal justice system, such as where an individual has been falsely accused, convicted, and sentenced, the public has an undisputedly strong interest in understanding those flaws in the criminal justice system. On the other hand, when clemency is sought as an act of executive mercy on individuals who have been found guilty and sentenced to a life sentence with no possibility of parole, the public has an interest in understanding whether the individuals pose a threat to the community. The Clemency Materials filed with this Court shed light on an otherwise opaque process in which the Governor can exercise extraordinary power. This is particularly true where the individual is a second time offender, as is the case with the applications that come before this Court for review. The public also has an independent interest in overseeing the conduct of the Governor and any public officials to which clemency is granted, in order to root out public corruption. March 2018 Admin. Order at 899 (discussing the history of article V, section 8).

There is an additional reason the public is interested in clemency proceedings: they provide the public with information about the functioning of the judiciary. As this Court has recognized, in most states, "the only oversight of clemency rest[s] with the voters who elect the Governors." March 2018 Admin. Order at 898 (internal quotations and citation omitted). California, however, is unique in that "it assigns to members of the judicial branch – sitting in their judicial capacity – a formal role in the clemency process." *Id*. at 899. As explained further below, the public has a right, embodied in the California Court Rules, the common law, and the federal and state constitutions, to inspect judicial records and observe judicial proceedings.

The final clemency recommendation of this Court and the ultimate outcome of the clemency application does not provide the public with the necessary information to perform its myriad oversight functions and learn about the clemency process. Instead, that information is likely to be found in the Governor's Request and Record, which is continuously maintained under seal.

C. The FAC's request

The First Amendment Coalition ("FAC") is a non-profit organization based in San Rafael, California, with a mission to advance free speech, promote open government, and enable public participation in civic affairs. FAC's activities include public education, legislative oversight, and litigation related to First Amendment rights and open government.

FAC was alerted to the process by which the Governor solicits an opinion from the Supreme Court under Article V § 8(a) of the California Constitution in September 2018, in response to media reporting that Governor Jerry Brown has issued a record number of pardons and clemency requests during his time in office. *See* Declaration of

David Snyder ("Snyder Decl."), ¶¶ 3, 7. Media accounts report that Governor Brown has granted over 1,000 pardons, in contrast with less than twenty pardons granted by former Governor Arnold Schwarzenegger and zero pardons granted by former Governor Gray Davis. Snyder Decl., Ex. A. In addition, Governor Brown has issued 82 commutations, which grant parole hearings to individuals previously sentenced without parole – this number, too, is staggeringly high compared to his predecessors. Snyder Decl., Ex. A. Some of these clemency actions involve twice-convicted felons and are therefore weighed by this Court. Upon information and belief, there are currently around 30 pending clemency requests that have recently been submitted to this Court by the Governor's legal affairs secretary. Smith Decl., ¶ 11, Ex. H. Although the public has always had a strong interest in clemency matters, that interest is heightened today, where clemency proceedings appear to be a gubernatorial priority.

In response to this reporting and what the Executive Director of FAC determined to be a strong public interest in clemency procedures, FAC pursued public access to the clemency records in one particular case related to Sen. Roderick Devon Wright, Case Number S251879. Snyder Decl., ¶¶ 6, 8–10. Wright is a Los Angeles-area Democrat and former state public official who was found guilty in 2014 of eight counts of perjury and voter fraud arising out of claims that he lied about living in the Senate district he ran for in 2008 and voted fraudulently in five different elections.[1] He was sentenced to 90 days in jail but served about an hour in jail time, was on probation for two-and-a-half

[1] *See* Reid Wilson, *California state senator sentenced to 90 days in jail served about an hour*, Wash. Post (Nov. 3, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/11/03/california-state-senator-sentenced-to-90-days-in-prison-serves-about-an-hour/?noredirect=on&utm_term=.4d75700225d1.

years, and was barred from running for office.[2] After his conviction, Wright resigned from his seat in the state Senate.[3] In September 2018, the California Board of Parole Hearings recommended a pardon for Wright at the request of Governor Jerry Brown. On October 10, 2018, Governor Brown submitted a request and record seeking a recommendation from this Court to pardon Wright. These submissions appear on this Court's public-facing docket as two documents filed on October 10, 2018, entitled the "Request for Recommendation for Clemency" (the "Request") and the "Confidential record from Governor's Office," consisting of "One Binder" (the "Record) (collectively, the "Wright Clemency Materials"). Snyder Decl., Ex. B.

FAC made a California Public Records Act request to the Governor's Office for the Wright Clemency Materials. Snyder Decl., ¶ 8. In response, the Deputy Legal Affairs Secretary replied by letter dated October 18 that only the request filed with this Court, and not the record submitted therewith, would be released. Snyder Decl., ¶ 8. On November 1, 2018, FAC's Legal Fellow visited the Office of the Court Clerk in San Francisco in an effort to view the Wright Clemency Materials. Snyder Decl., ¶ 9. The Clerk stated that the record could not be viewed by the public. Snyder Decl., ¶ 9. On November 6, 2018, FAC, on behalf of the public, submitted a letter request to Supreme Court Clerk and Executive Officer Jorge E. Navarette requesting a copy of the Wright Clemency Materials and explaining the basis for their request, namely, the presumption

[2] *See* Wilson, *supra* n.1; Melody Gutierrez, *Jerry Brown asks state's high court to review possible pardon of former Sen. Roderick Wright*, San Francisco Chronicle (Oct. 12, 2018), https://www.sfchronicle.com/politics/article/Jerry-Brown-asks-state-s-high-court-to-review-13303435.php.

[3] *See* Wilson, *supra* n.1.

of public access to court files and proceedings. Snyder Decl., ¶ 10, Ex. G. FAC's letter request referred to the Wright Clemency Materials and also requested access to similar clemency requests and records in other materials currently pending before this Court. Snyder Decl., Ex. G. FAC has not received a response to this letter request. Snyder Decl., ¶ 10.[4]

For the reasons below, FAC respectfully urges this Court to issue an order directing the Clerk to promptly unseal the Wright Clemency Materials and any other clemency records retained by this Court in prior matters, and to grant prospective relief necessary to make all requests for clemency and supporting records presumptively public upon filing with this Court in all other pending clemency requests and all future requests.

II. ARGUMENT

A. This Court's own rules require disclosure of the Clemency Materials.

The California Rules of Court support a principle of openness for judicial records. As courts in this state have repeatedly recognized, public policy "requires public records

[4] Matters such as the Wright matter are in the public interest for many reasons, including that they involve public officials and, thus, any grant of clemency risks at least the appearance, if not the actuality, of being improperly motivated by political interests. Indeed, many requirements imposed on the Governor today arise from statutes passed in the aftermath of the controversy of former Governor Arnold Schwarzenegger granting clemency to Esteban Núñez, the son of a prominent politician and political ally, who went to prison for voluntary manslaughter. *See* Christina Bucci, *Chapter 437: Revamping Clemency Procedures and Requirements in California*, 43 McGeorge L. Rev. 747, 748 (2012); *accord* Debbi Baker, *Schwarzenegger commuted his sentence, now Nunez to be freed*, San Diego Union-Tribune (Apr. 8, 2016) (noting that when asked whether the pardon was influenced by his relationship with the political ally, Schwarzenegger replied, "Well, hello! I mean, of course you help a friend."), https://www.sandiegouniontribune.com/news/whats-now/sdut-esteban-nunez-to-be-released-prison-next-week-2016apr08-story.html. In addition, President Donald Trump has issued pardons to individuals that have connections with him, either through his political allies or his time in the private sector. *See* Peter Baker, *Trump Wields Pardon Pen to Confront Justice System*, N.Y. Times (May 31, 2018), https://nyti.ms/2xqBS3w.

and documents to be available for public inspection to prevent secrecy in public affairs." *Copley Press, Inc. v. Superior Court*, 63 Cal. App. 4th 367, 373 (1998) ("*Copley I*") (citation omitted); *see also Estate of Hearst*, 67 Cal. App. 3d 777, 784 (1977) ("If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism."); *In re Shortridge*, 99 Cal. 526, 530 (1893) ("[I]t is a first principle that the people have the right to know what is done in their courts."). Accordingly, courts in this state are required to make on-the-record, factual findings sufficient to justify any sealing of court records.

Under the California Court Rules, a record not filed in the trial court may be sealed *only if* a party "serve[s] and file[s] a motion or application in the reviewing court, accompanied by a declaration containing facts sufficient to justify the sealing." Rule 8.46(d)(2); *see also* Supreme Court Rule Regarding Electronic Filing 11(b) (incorporating Rules 8.45-8.47 for electronic filings). The Court Rules make clear that sealing is a remedy that should only be employed under extraordinary circumstances, after the court "expressly finds facts that establish" the following:

> (1) There exists an overriding interest that overcomes the right of public access to the record;
> (2) The overriding interest supports sealing the record;
> (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
> (4) The proposed sealing is narrowly tailored; and
> (5) No less restrictive means exist to achieve the overriding interest.

Rule 2.550(d); *see also* Rule 8.46(d)(6) ("The court may order a record filed under seal only if it makes the findings required by rule 2.550(d)-(e)."). Moreover, a sealing order must:

> (A) Specifically state the facts that support the findings; and (B) Direct 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. All other portions of each document or page must be included in the public file.

Rule 2.550(e)(1).

In *McNair v. National Collegiate Athletic Assn.*, 234 Cal. App. 4th 25, 29 (2015), the court relied on the access principles embodied in the California Rules of Court in denying a motion to seal part of an appellate record. The NCAA argued that nondisclosure was necessary to protect the confidentiality of its enforcement proceedings, but the court found that this interest was not a privilege akin to an overriding interest supporting sealing. The court noted that "[t]he constitutional right of public access to, and the presumption of openness of, documents submitted at trial or as a basis for adjudication in ordinary civil cases are designed to protect the integrity of our judicial system," *id*. at 39, and, moreover, that this constitutional right is "embodied in the California Rules of Court," *id*. at 32. Citing these rules, the court acknowledged that even if the motion to seal had been unopposed, the court "ha[s] an independent obligation to review the [ ] motion and to make express findings before we may grant a motion to seal" the record. *Id*. at 33 n.6. Because the movant failed to meet its burden of demonstrating prejudice that would result from disclosure of the record, the court denied the motion to seal.

The principles embodied in the California Rules of Court require disclosure of the Clemency Materials filed with this Court. This presumption of openness can be overcome only upon express findings of fact demonstrating that such sealing is necessary to protect an overriding interest and that the sealing is narrowly tailored to protect such interest. As explained in Part D, *infra*, that process appears not to have been followed, nor can that showing be made here.

B. The common law right of access applies to the Clemency Materials.

California courts have long championed the public's right under the common law to inspect judicial records. *See, e.g., Sander v. State Bar*, 58 Cal. 4th 300, 316-18 (2013) (discussing the common law presumption of access and noting that "[a]bsent strong countervailing reasons, the public has a legitimate interest and right of general access to court records....."); *Craemer v. Superior Court*, 265 Cal. App. 2d 216, 220 & fn. 3 (1968); *Mushet v. Dept. of Public Service*, 35 Cal. App. 630, 636-638 (1917) ("At common law every interested person was entitled to the inspection of public records"). Under the common law, "court records are open to the public unless they are specifically exempted from disclosure by statute or are protected by the court itself due to the necessity of confidentiality." *Overstock.com, Inc. v. Goldman Sachs Grp., Inc.*, 231 Cal. App. 4th 471, 483, (2014) (quotations and citations omitted). This presumption of public access to public records can be overcome only by "compelling countervailing reasons." *Pantos v. City & County of San Francisco*, 151 Cal. App. 3d 258, 262-63 (1984).

This recognition of the common law right long predates the United States Constitution. *See United States v. Mitchell*, 551 F.2d 1252, 1257-58 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). For centuries, "[i]t has been justified on the ground of the public's right to know, which encompasses public documents generally, and the public's right to open courts, which has particular applicability to *judicial records*." *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) (emphasis added). The right originated in England, where citizens were permitted access to public records if they could demonstrate a legal interest in the records. *See Brown v. Cumming*, 109 Eng. Rep. 377, 378 (K.B. 1829). Later, this

right was recognized as an essential characteristic of American democracy. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 567 (1980).

As this Court recognized in *Sander*, the purpose of the common law right of access is "[t]o prevent secrecy in public affairs." 58 Cal. 4th at 318 (quoting *Estate of Hearst*, 67 Cal. App. 3d at782). A presumption of disclosure of court records informs the public about conduct within all three branches of government and "ensur[es] the integrity of judicial proceedings in particular and of the law enforcement process more generally." *KNSD Channels 7/39 v. Superior Court*, 63 Cal. App. 4th 1200, 1203 (1998) (quoting *United States v. Hubbard*, 650 F.2d 293, 315 (D.C. Cir. 1980)). When determining whether the right should attach to a particular judicial record, courts consider whether disclosure of that record would "'contribute significantly to public understanding of government activities.'" *Sander*, 58 Cal. 4th at 324 (internal quotations and citation omitted); *see also Saunders v. Superior Court*, 12 Cal. App. 5th Supp. 1, 21 (2017) (considering whether disclosure of records seized under a search warrant, which were not official records of the court, would "contribute to the public's understanding of the court's activities").

In California, the common law right of access applies to all court records that "accurately and officially reflect[] the work of the court." *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 113 (1992) ("*Copley II*"). The court in *Copley II* was clear that the common law right of access is not limited to court orders, but instead encompasses "the various documents filed in or received by the court . . . and the evidence admitted in court proceedings." *Id.*; *see also Nixon*, 435 U.S. at 597-98 (applying the common law right of access in federal court and recognizing that the right

is derived not from the right to open trial, but rather from a more general right of access to all "public records and documents"). Because the focus of the common law inquiry is the role of the records in the judicial system and the value that disclosure would have to public oversight functions, a lack of history of openness does not preclude this Court from finding that the common law right of access attaches today. *See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1214 n.32 (1999) (collecting cases and authorities illustrating this point); *In re Nat'l Broadcasting Co.*, 653 F.2d 609, 612 (D.C. Cir. 1981) (even though right "was first recognized at a time when records were documentary in nature, it is now settled that the right extends to records which are not in written form, such as audio and video tapes").

Once it is established that the common law right of access attaches to a record, courts engage in a balancing test, weighing the presumption of access against competing interests. *See Overstock.com, Inc.*, 231 Cal. App. 4th at 484. The weight accorded to the presumption of access in this balancing test depends on the role of the record in the exercise of judicial power and the value that would result, in terms of public oversight, if the records were disclosed to the public. *See id.*

The common law right of access clearly applies to the Clemency Materials. Because the Court reviews these records to carry out its constitutionally-mandated review of the Governor's clemency recommendations for twice-convicted felons, as this Court put it, the Clemency Materials are filed to enable this Court to engage in "traditional judicial" functions. March 2018 Admin. Order at 899.

Public access to such records will educate the public about the Court's clemency activities and would also afford an opportunity for the public to "keep a watchful eye on

the workings of public agencies," *Nixon*, 435 U.S. at 598, such as the Governor's Office and law enforcement agencies involved in the initial criminal prosecutions. The grant of clemency is an extraordinary governmental power. The "case" for either erasing a jury verdict or commuting a sentence duly arrived at *after* a conviction involves both the Governor and this Court for clemency requests involving twice-convicted felons. Indeed, the public's right to inspect public records is particularly high where the records reflect the workings of multiple branches of government. *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch."). Where the judiciary accedes to a request from the executive, as often is the case in clemency proceedings, transparency is essential to promoting public trust in the judicial outcome. *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) (noting that transparency is especially important "when a judicial decision accedes to the requests of a coordinate branch, lest ignorance of the basis for the decision cause the public to doubt that 'complete independence of the courts of justice [which] is peculiarly essential in a limited Constitution'" (citation omitted)).

Here, the Clemency Materials will inform the public about the workings of the Governor's office, the Board of Parole Hearings, and the various public agencies involved in the original criminal prosecution. Moreover, the public interest in understanding judicial procedures related to public corruption and allegations of harm to the public — such as the allegations brought against Wright in his criminal prosecutions — is particularly high. *California ex rel. Lockyer v. Safeway, Inc.*, 355 F. Supp. 2d 1111,

1124 (C.D. Cal. 2005) ("the public's interest in access to a proceeding involving the State's allegations of harm to the public weighs especially heavily in favor of access"); *Leucadia, Inc. v. Applied Extrusion Tech., Inc*., 998 F.2d 157, 161 (3d Cir. 1993) (discussing the "bright light cast upon the judicial process by public observation"). As such, Clemency Materials currently sealed in this Court, and the materials in the Wright matter in particular, are at the core of public records open to the public under the common law.

The history of the clemency process lends further support to the notion that the Clemency Materials are public records protected under the common law access right. *First,* the California Constitution does not contemplate sealing of the clemency records. *Second*, the earliest iterations of the statutes governing clemency procedure never mentioned, let alone required, indefinite sealing as part of the clemency review process. In 1880, the state legislature amended the law to state that for every twice-convicted felon after January 1, 1880, the Governor would have to obtain a written recommendation from this Court to grant clemency. *See* Pen. Code § 1418 (1880). This early iteration never contemplated the modern practice whereby this Court returns the Clemency Materials to the Governor upon a favorable recommendation. Instead, this requirement was added decades later, in 1929. *See* Pen. Code § 1418 (1929).

Third, this Court initially treated this information as presumptively public. Shortly after Penal Code section 1418 was enacted, this Court issued the only known opinion in which the Court provided publicly-accessible reasons for its clemency recommendations. *See In re Billings,* 210 Cal. 669 (1930). In that case, the Court conducted "an extraordinary investigation" – hearing live testimony and actually visiting

the applicant in state prison – all of which was evidently open to public inspection and the subject of media attention. *Id*. at 691. *In re Billings* illustrates that the statutes governing the clemency procedure today were passed against a historic backdrop of public access to these court records, consistent with the access rights long recognized under the common law. Accordingly, the common law right of access should apply to the Clemency Materials.

C. The constitutional right of access applies to the Clemency Materials.

In addition to the common law right of access, the public enjoys a constitutional right of access, secured at both the federal and state level, to the Clemency Materials.

As the United States Supreme Court repeatedly has recognized, court proceedings are presumptively open to the public. Indeed, "[a]s early as 1685, Sir John Hawles commented that open proceedings were necessary so 'that the truth may be discovered in civil as well as criminal matters.'" *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) (citation omitted). This tradition of openness "is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers, Inc.*, 448 U.S. at 569, 580 n.17 (1980) ("historically both civil and criminal trials have been presumptively open").

The Supreme Court explained in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982), that public access to court proceedings allows "the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government." Courts around the country have further explained that these policy considerations animating the strong presumption of openness in court proceedings extends to a presumption of openness in court records. In *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983), for example, the Sixth

Circuit vacated a sealing order and allowed public access to a Federal Trade Commission report and other documents filed with the trial court concerning the FTC's method of testing "tar" and nicotine levels of cigarettes, explaining: "In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Id.* at 1179; *accord United States v. El-Sayegh*, 131 F.3d 158, 160 (D.C. Cir. 1997) ("The First Amendment guarantees the press and the public to aspects of court proceedings, including documents.").[5]

In deciding whether the First Amendment right of access applies to a particular record, California courts consider "whether the place and process have historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986). If both these questions are answered affirmatively, the constitutional right of access applies. In assessing the first part of the inquiry, courts are not bound by prior sealing practices; what matters is whether a historical analogue of the record or proceeding at issue was open to the public, because "[a] new procedure that substituted for an older one would presumably be evaluated by the tradition of access to

[5] The First Amendment right to inspect records is particularly acute where the records evaluate potential criminal misconduct by public officials. *See, e.g., In re Symington*, 209 B.R. 678, 681 (Bankr. D. Md. 1997) (finding a constitutional right of access where "the overriding public interest in learning the facts about criminal misconduct allegedly committed by a debtor while currently serving as the Governor of Arizona … outweigh[ed] the interest of the debtor and his mother in preserving the confidentiality of personal financial records"); *SEC v. Stratton Oakmont, Inc*., 24 Media L. Rep. 2179 (D.D.C. 1996) (unsealing the findings of an independent consultant in an action brought by the Securities and Exchange Commission seeking sanctions against a company that detailed then-New York Sen. Alfonse D'Amato's dealings with the company).

the older procedure." *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (citation omitted). As explained in Part B, *supra*, the Clemency Materials are the type of record that was understood to be available to the public at the time the statutes governing clemency procedure were passed and amended. In addition, for the reasons explained above, openness of Clemency Materials would play a significant positive role in the functioning of the criminal justice system by allowing the public to serve as a necessary check on a system that involves multiple branches of government. *See* Part B, supra.

The California Constitution independently provides a public right of access to the Clemency Materials. Enacted in 2004, Proposition 59 amended the state Constitution to state: "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. art. 1, § 3(b)(1). The California Constitution thus mandates that courts in this state "construe the rules in a manner favoring a right of access to court filings." *Mercury Interactive Corp. v. Klein*, 158 Cal. App. 4th 60, 101 (2007) (further noting that "We agree with that proposition as a general matter, as have other courts.").

California courts have applied Proposition 59 to court records such as the Clemency Materials. For example, in *Savaglio v. Wal-Mart Stores, Inc.*, 149 Cal. App. 4th 588, 597 (2007), the court in a civil class action case reversed a sealing order over documents filed conditionally under seal without the requisite findings justifying the sealing under the rules of court. In doing so, the court expressly found that Proposition 59 applied to court records: "With the passage of Proposition 59 effective November 3, 2004, the people's right of access to information in public settings now has state

constitutional stature, grounding the presumption of openness in civil court proceedings with state constitutional roots." *Id*. In addressing whether the class plaintiffs waived the right to seek a belated sealing order by failing to comply with the rules for sealing below, the court also invoked Proposition 59's mandatory construction rules: "Lest there be any question, Proposition 59 requires us to broadly construe a statute or court rule 'if it furthers the people's right of access' and to narrowly construe the same 'if it limits the right of access.'" *Id.* at 600. Applying those rules, the court held that plaintiffs' conduct manifested a waiver and, independently, that the trial court lacked discretion to entertain a belated motion to seal after the 10-day window for filing such motions under the Rules of Court. *Id*. at 601 (citing Cal. R. Ct. 2.551(b)(3)). Thus, even if this Court determines that the rights of access under the common law and the federal constitution do not apply to the Clemency Materials here, this Court should still find that California's Constitution, which enshrines a broader access right to court records, provides a right of access to the Clemency Materials.

D. The strong presumption of access to court records requires that materials, such as the Clemency Materials here, be sealed, if at all, only after judicial review and articulated findings.

Where a presumption of access applies, the burden to establish interests sufficient to overcome that presumption rests with the party seeking to deny public access. *See Copley I*, 63 Cal. App. 4th at 374 (citing *Estate of Hearst*, 67 Cal. App. 3d at 785). Under the common law, the party bearing the burden to overcome the presumption of access must demonstrate "compelling countervailing reasons" to overcome the common law presumption of access. *Pantos*, 151 Cal. App. 3d at 262-263. This burden is high. *See Estate of Hearst*, 67 Cal. App. 3d at 785 (in a civil case, the trial court may preclude public access to judicial records "under exceptional circumstances and on a showing of

good cause"). The burden to overcome the constitutional right of access is even higher: the party must show that closure serves a compelling interest, that there is a substantial probability that the interest would be harmed by disclosure, and that there are no adequate alternatives to closure. *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1467 (9th Cir. 1990).

If the party seeking nondisclosure meets this burden, the court is required to adopt the party's "enumerated findings expressly." *McNair*, 234 Cal. App. 4th at 32 (citations omitted). Any subsequent denial of access to court records must be limited "by narrow and well-defined orders." *Copley I*, 63 Cal. App. 4th at 374 (citing *Estate of Hearst*, 67 Cal. App. 3d at 785); *see also Press-Enter. v. Superior Court*, 464 U.S. 501, 512 (1984) (in sealing records that are subject to the First Amendment right of access, courts must consider and use less restrictive alternatives).

Because the Clemency Materials appear to be automatically sealed by default, no party seeking a sealing order is held to its high burden of demonstrating interests sufficient to overcome the access right. Not only are the claimed interests in nondisclosure never provided to the public, they are also unlikely to exist. The interests that courts have found can overcome the presumption of public access include:

> an accused's interest in a fair trial; a civil litigant's right to a fair trial; protection of minor victims of sex crimes from further trauma and embarrassment; privacy interests of a prospective juror during individual voir dire; protection of witnesses from embarrassment or intimidation so extreme that it would traumatize them or render them unable to testify; protection of trade secrets; protection of information within the attorney-client privilege; enforcement of binding contractual obligations not to disclose; safeguarding national security; ensuring the anonymity of juvenile offenders in juvenile court; ensuring the fair administration of justice; and preservation of confidential investigative information.

McNair, 234 Cal. App. 4th at 33 (citing *NBC Subsidiary*, 20 Cal. 4th at 1222, fn. 46).

None of these interests is served by sealing the Clemency Materials, which contain the clemency "application, together with all papers and documents relied upon in support of and in opposition to the application, including prison records and recommendation of the Board of Prison Terms," that are sent to this Court "for consideration of the justices." Pen. Code § 4851. Because the Clemency Materials relate to individuals who have been publicly convicted and sentenced, and whose criminal records have therefore already been disclosed to the public, the rights to a fair trial, the privacy of witnesses and jurors, and the confidentiality of ongoing investigations are not at issue. *See also KNSD Channels 7/39*, 63 Cal. App. 4th at1204 ("once the evidence is presented in open court before the jury, the public's interest in access to that evidence is particularly clear"). Nor is there any indication that the Clemency Materials contain trade secrets, information within a privilege, or information likely to place someone in "clear and present danger of attack." *Estate of Hearst*, 67 Cal. App. at 784-85.

Any purported interest in nondisclosure must be compelling to satisfy the high burden. Even when records contain highly sensitive information, a court may only seal the record "in exceptional circumstances upon a showing of compelling reasons." *Copley I*, 63 Cal. App. 4th at 376 (granting motion to unseal court records reflecting the settlement amount reached between school district's insurance carrier and minor student who was sexually assaulted). There has been no argument here that the Clemency Materials contain highly sensitive information.

This Court's seemingly automatic sealing of the Clemency Materials is not based on the assertion of any of the above interests. Rather, the Court's internal administrative guidance simply cites to the California Public Records Act ("CPRA") and the

Information Practices Act ("IPA") and explains that the Clemency Materials "often contain material that the Governor may have the right to withhold from the public." Internal Court Rules at 11 (citing Gov. Code §§ 6254(c), 62, & (l); Civ. Code § 1798.40(c)).

Petitioners respectfully submit that the reliance on the CPRA and the IPA in this instance is misplaced. Both the CPRA and the IPA govern the disclosure obligations of public agencies and therefore have no application to *judicial records*, which is what the Clemency Materials become at the moment they are lodged with this Court for consideration in judicial decision-making. *See Sander*, 58 Cal. 4th at 322-23 (noting "the differences between the common law approach to public records and the CPRA's approach," and concluding "that a common law right of access continues to exist in records of those public entities not governed by the CPRA in which there is a legitimate public interest, if that interest is not outweighed by other interests"); *Copley II*, 6 Cal. App. 4th at 111-12 ("Notwithstanding the statutory exception in the [CPRA], court records are public records open to inspection."). Accordingly, the presumption of access is not undermined by any exemptions that the Governor may assert under the CPRA, do not control whether the Clemency Materials may be maintained under seal in this Court.

Although the Governor's CPRA disclosure obligations cannot justify sealing of court records, it is possible that certain individual clemency records may implicate the privacy, fair trial, or other interests listed above. When that happens, redaction, rather than wholesale sealing, is the proper remedy to satisfy the requirements of narrow tailoring. *Cf. Sander*, 58 Cal. 4th at 319 n.7. Moreover, any sealing should be temporary. *See Estate of Hearst*, 67 Cal. App. 3d at 784-85 ("The court . . . [possesses] limited

power, exercisable under exceptional circumstances and on a showing of good cause, to restrict public access to portions of court records on a *temporary* basis." (emphasis added)); *Copley I*, 63 Cal. App. 4th at 374 ("Due to its temporary nature and its infringement upon the public right to know, a sealing order in a civil case is always subject to continuing review and medication, if not termination, upon changed circumstances." (citing *Mary R. v. B. & R. Corp.*, 149 Cal. App. 3d 308, 317 (1983))); *Application of Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990) (finding a common law right to inspect a warrant application where the defendant had pleaded guilty and "the need for secrecy is over"). As soon as the overriding interests cease to exist, the record should be unsealed, because even a brief unjustified closure violates the public's rights. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[t]he loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Associated Press v. United States*, 705 F.2d 1143 (9th Cir. 1983) (vacating an order sealing pretrial court documents for "only" 48 hours on this basis); *Valley Broadcasting Co. v. United States Dist. Court*, 798 F.2d 1289, 1292 (9th Cir. 1986) (emphasizing the need for immediate relief).

FAC therefore respectfully requests that this Court grant prospective relief in the form of a change in Court procedure in its handling of clemency matters to ensure that all documents supporting clemency requests be sealed only after a review and, to the extent appropriate, articulation of on-the-record findings by the Court. FAC further requests public access to the materials filed in connection with future clemency requests immediately upon filing with this Court, and, to the extent sealing or redaction of individual records is necessary, that such sealing will be temporary and promptly

revisited after this Court has completed its judicial review. Finally, Petitioner requests disclosure of the Wright Clemency Materials. During the pendency of this Court's consideration of this motion, FAC respectfully requests that the Court retain the Wright Clemency Materials, rather than return the original documents to the Governor's office.[6]

For the above reasons, Petitioner respectfully requests that this Court order the Clerk to immediately unseal the Clemency Materials in the Wright matter and any other records currently under seal in connection with other clemency requests, and grant prospective relief to ensure public access to Clemency Materials in all future requests.

Dated: November 20, 2018

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
Rochelle L. Wilcox
Selina MacLaren

By _____
Thomas R. Burke

Attorneys for Petitioner
First Amendment Coalition

[6] Upon information and belief, when the Clemency Materials are returned to the Governor, they move to the state archive, depriving the public of any insights into the governmental process for decades.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief in support of Petitioner First Amendment Coalition's Motion to Unseal Clemency-Related Records is produced using 12-point Roman type including footnotes and contains approximately 7,189 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 20, 2018

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
Rochelle L. Wilcox
Selina MacLaren

By _____
Thomas R. Burke

Attorneys for Petitioner
First Amendment Coalition