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January 13, 2021

Mr. Jorge E. Navarette
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: First Amendment Coalition's Letter Brief In Response To Court's Proposed Administrative Order Concerning Clemency Records, In Connection With Matter *Application of Burton (Susan) for Clemency* (S255392)

Dear Mr. Navarette:

The First Amendment Coalition ("FAC") submits this Letter Brief in response to the Court's November 24, 2020 Proposed Administrative Order which amends the Internal Operating Practices and Procedures regarding applications for a recommendation of clemency from the Governor. The proposed amendment is a significant improvement to the existing language in the Internal Operating Practices and Procedures, which prioritizes confidentiality and secrecy over the public's well-established right of access to court records. FAC requests, however, that the proposed amendment be changed to be consistent with and emphasize the primacy of the California Rules of Court with respect to requests to file materials under seal.

FAC previously filed seven motions to unseal clemency-related records, which consumed significant time and resources – an effort that the public cannot be expected to undertake for all future clemency matters. FAC's experience illustrates why the Rules of Court strike the proper balance. Those rules require that court records are presumptively open to the public from the outset and place the burden to justify secrecy on the party seeking to file records under seal. There is no good reason why those rules, which have withstood the test of time, should not apply when the Governor asks to file confidential records. That is the proper balance to strike between any purported need for secrecy and the public's rights of access to court records.

The Court has consistently ruled that the records filed pursuant to the California Constitution, Article V, section 8, seeking clemency for "twice-convicted felons," must comply with California Rule of Court 2.550 *et seq*. – that is, the Governor must file a motion to request that such records be filed under seal. *See*, Order, Case No. S251879 (Mar. 13, 2019) ("the

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Wright matter"). Moreover, before the Court accepts sealed records, the Governor must demonstrate "overriding interests exist that overcome the right of public access to these records." *Id.*; Cal. Rules of Court 2.550 *et seq*. The Governor also must show that "a substantial probability exists that the overriding interests will be prejudiced if the records are not sealed," that the proposed sealing is "narrowly tailored," and that no less restrictive means exist to achieve the overriding interest. *Id.*; Cal. Rules of Court, Rules 2.550, 8.46. The Court has issued similar orders in response to other motions to unseal filed by the First Amendment Coalition ("FAC")*, see* Orders, Case Nos. S255392, S252284, S252277, S252279, S252271, and S252285 (May 22, 2019) (collectively, "the May 2019 Orders").

The May 2019 Orders led to motions by the Governor to "File Clemency Matters Under Seal" in the same matters. In companion rulings, the Court consistently denied the Governor's motions to file under seal, again ordering him to resubmit the record to the Court in the manner required by the California Rules of Court. *See* Orders, Case Nos. S255392, S252284, S252277, S252279, S252271, and S252285 (Sept. 11, 2019) (collectively, "the September 2019 Orders"). The proposed amendment flips the burden, creating a host of unnecessary complications in the process.

The Executive Branch has the resources to comply with the Rules of Court from the outset. The public is not only constrained by having to find counsel willing to file such motions, but also by the poor position created by the proposed amendment. Any such motion will start with a severe disadvantage because, in part, so little information is contained in the letter from the Office of Legal Affairs that is posted on the Court's docket. There is also uncertainty as to when the Court may act on the Governor's request, so it is unclear when a motion to unseal must be filed. Further complicating matters, the proposed amendment states that the Court will not even entertain such motions if filed after the record has been returned to the Governor, forcing the public to operate on an uncertain timeline and rush to file motions faster than the Court rules on them.

Moreover, requiring the Governor to comply with the Rules of Court only after a motion to unseal is filed will greatly increase the workload for all concerned and put a strain on private and judicial resources. The Court will be forced to consider repeated motions to unseal – which will likely be redundant by virtue of the fact that the public is operating in the dark, with limited information from the Office of Legal Affairs' letter – and then also consider the Governor's motions to file under seal. In short, putting the onus on the public to assert its right of access adds an unnecessary step to the process. By contrast, requiring the Governor to comply with the Rules of Court from the outset will allow the public to make an informed decision about which subset of matters may warrant an objection to the proposed sealing.

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I. FAC'S MOTIONS TO UNSEAL

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 has previously filed seven motions with this Court to unseal clemency-related records. These motions have consumed a considerable amount of time and effort by FAC (with only four full-time employees) and its *pro bono* attorneys. The public will not always be able to mount this type of effort. FAC's experience illustrates why the approach long required by the California Rules of Court strikes the proper balance. The Governor, with the resources available to the Executive Branch, should bear the burden of justifying secrecy from the outset.

A. The Wright Matter

On November 20, 2018, FAC filed a Motion to Unseal Clemency-Related Court Records in the Wright on Clemency matter, Case No. S251879 (the "Wright matter"). In response, this Court issued a minute order on December 19, 2018, granting FAC's motion with respect to the Wright matter and directing the Governor to resubmit those records in compliance with California Rules of Court 8.45, 8.46 and 8.47. The Governor then moved to file approximately twenty pages from the Wright clemency file under seal, which FAC opposed. Governor's Motion, Case No. S251879 (filed January 2, 2019); FAC Opposition, Case No. S251879 (filed January 16, 2019). On March 13, 2019, this Court issued an order granting in part and denying in part the Governor's motion to file under seal, finding, with limited exceptions, that the public's right of access overcame the justifications for nondisclosure. Order, Case No. S251879 (Mar. 13, 2019). The Court ordered the Governor to file the requested documents on or before March 20, 2019, with redactions limited to confidential personal information. *Id*.

B. Other Clemency Matters – And Motions Still Pending Before This Court

In addition to requesting access to the Wright clemency records, on December 27, 2018, FAC filed additional motions to unseal clemency-related court records in five then-pending clemency matters.[1] On May 22, 2019, the Court ordered the Governor to resubmit records in

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[1] *See* FAC's Motion to Unseal Clemency-Related Court Records in the Wong on Clemency matter, Case No. S252271 ("Wong" matter); FAC's Motion to Unseal Clemency-Related Court Records in the Harris on Clemency matter, Case No. S252277 ("Harris" matter); FAC's Motion to Unseal Clemency-Related Court Records in the Rodriguez on Clemency matter, Case No. S252279 ("Rodriguez" matter); FAC's Motion to Unseal Clemency-Related Court Records in the Flowers on Clemency matter, Case No. S252284 ("Flowers" matter); FAC's Motion to Unseal Clemency-Related Court Records in the Guzman on Clemency matter, Case No. S252285 ("Guzman" matter).

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those five clemency matters – as well as a sixth, the Burton matter[2] – in compliance with California Rules of Court 8.45 and 8.46. In each of those six matters, motions filed by the Governor to seal clemency materials in part remain pending before this Court.[3]

C. The Banks Matter

FAC also moved to unseal clemency materials in yet another matter initiated by the Governor. The Governor filed the Banks matter on May 26, 2020 – a year after the Court issued six orders reminding the Governor to follow the California Rules of Court, and 16 months after the Court described the already unmistakable procedure in the Wright matter.

II. THE CALIFORNIA CONSTITUTION, THE CALIFORNIA RULES OF COURT AND THE COMMON LAW MANDATE PUBLIC ACCESS TO COURT RECORDS.

Article V, § 8(a) places a hard brake on the Governor's pardon powers, and Penal Code §§ 4851–4852 establish the procedure for requesting a clemency recommendation from the Court. There is nothing in these provisions that requires blanket secrecy over the entire file submitted by the Governor. In fact, as shown below, the same California Constitution that establishes this unique clemency procedure also mandates public access to judicial records.

This Court has expressly recognized that the public has a right of access to clemency-related court records in the Wright matter. *See* Order, Case No. S251879 (filed Mar. 13, 2019). As FAC has stated in prior motions to unseal clemency materials, this right of access is secured by the California Rules of Court, the common law, and the federal and state constitutions. As with all other records considered by the Court in making judicial decisions, the materials filed by the Governor are court records that should be available to the public except in those cases in which this Court makes a finding, on the record, that the document or a portion thereof must be redacted or sealed.

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[2] On May 7, 2019, FAC again moved to unseal clemency materials, this time in a new matter initiated by Governor Newsom's administration. Governor Newsom filed Case No. No. S255392, captioned Burton on Clemency (the "Burton matter"), on April 23, 2019. Although this was more than four months after this Court issued its order requiring the Governor to comply with the California Rules of Court in the Wright matter, and more than a month after this Court reaffirmed that the public has a right of access to clemency-related records, *see* Order, Case No. S251879 (Mar. 13, 2019), Governor Newsom failed to comply with the California Rules of Court or otherwise acknowledge the public's right of access to the clemency file.

[3] On December 6, 2019, the Governor filed motions to seal clemency materials in part in the Burton, Flowers, Wong, Harris, Rodriguez, and Guzman matters. On January 22, 2020, FAC opposed each of these motions.

First, 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). Sealing is a remedy that should only be employed under extraordinary circumstances, after the court "expressly finds facts that establish," *inter alia*, that "an overriding interest [ ] overcomes the right of public access to the record," "[t]he proposed sealing is narrowly tailored," and "[n]o less restrictive means exist to achieve the overriding interest." Rule 2.550(d); *see also* Rule 8.46(d)(6). Moreover, a sealing order must "[s]pecifically state the facts that support the findings." Rule 2.550(e)(1); *see also* Rule 8.46(d)(6).

Second, the common law right of access independently applies to clemency-related court records. 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 . . . ." (citation omitted)); *Mushet v. Dept. of Public Service*, 35 Cal. App. 630, 636-38 (1917) ("At common law every interested person was entitled to the inspection of public records."). 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 (citation omitted). This presumption of public access to court records can be overcome only by "compelling countervailing reasons." *Pantos v. City & County of San Francisco*, 151 Cal. App. 3d 258, 262-63 (1984).

Third, the constitutional right of access, secured at both the federal and state levels, likewise applies to clemency-related court records. Article I, § 3(b)(1)-(2) of the California Constitution requires broad public access to judicial records. In *Savaglio v. Wal-Mart Stores, Inc.*, 149 Cal. App. 4th 588 (2007), the Court of Appeal overturned a sealing order that had been entered without first complying with the California Rules of Court, observing that, "Lest there be any question, [Art. I, §3(b)] 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.

Moreover, as the United States Supreme Court recognized, open court proceedings allow "the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Courts around the country have held that the strong presumption of openness in court proceedings extends to a presumption of openness in court records. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983).

Because the presumption of access applies under the above authorities, clemency files may be sealed, if at all, only after judicial review and articulated findings. The party seeking

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nondisclosure – here, the Governor – has the burden of establishing interests sufficient to overcome that presumption. *See Copley Press, Inc. v. Superior Court*, 63 Cal. App. 4th 367, 374 (1998). If the party seeking nondisclosure meets this burden, the court must adopt the party's "enumerated findings expressly." *McNair v. National Collegiate Athletic Ass'n*, 234 Cal. App. 4th 25, 32 (2015).

In accordance with these well-established principles, this Court recognized "the public right of access" to the clemency files in the Wright matter and made express, enumerated findings to support limited nondisclosure. Specifically, this Court identified "overriding interests" that "overcome the right of public access" to certain records, namely, "an interest in maintaining the confidentiality of specific personal information and attorney communications contained within the records," and ordered that any sealing be "narrowly tailored." Order, Case No. S251879 (Mar. 13, 2019). FAC respectfully contends that this same procedure should apply to all clemency matters going forward, and should be incorporated into the proposed amendment to part XIV.A of the Court's Internal Operating Practices and Procedures.

Accordingly, FAC respectfully submits, for this Court's consideration, the following language for the first paragraph of the proposed amendment. This proposal incorporates the language from this Court's September 11, 2019 Orders:

> An application for a recommendation for executive clemency comes before this court pursuant to article V, section 8, subdivision (a) of the California Constitution and Penal Code section 4851. When such applications are received by the Clerk's Office, they are given a file number, and the fact that they have been filed is a matter of public record. Such applications must be submitted to this court in the manner prescribed by the California Rules of Court, rules 8.45 and 8.46(d)(2)-(5). The court will then review any proposed redactions, if necessary, and make the findings required by California Rules of Court, rules 2.550(d) and (e) and 8.46(d)(6). When a clemency record is before the court, a person challenging any proposed redaction to the record must file a motion to unseal the record. The extent to which the redacted contents of the record will be made available to the public is evaluated on a case-by-case basis.

FAC does not suggest any changes to the second paragraph of the proposed amendment.

CONCLUSION

As the U.S. Supreme Court has observed, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980). The burden should not be placed on the public to first decipher the clemency request from the Governor and then guess by when a motion to unseal must be filed. For the above reasons, FAC respectfully

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requests that this Court revise its Proposed Administrative Order and the proposed amendment therein, and require compliance with the Rules of Court from the outset when the Governor seeks to file records under seal.

Sincerely,

DAVIS WRIGHT TREMAINE LLP

_/s/ Thomas R. Burke________________________________
Thomas R. Burke

FIRST AMENDMENT COALITION

_/s/ Glen Smith____________________________________
Glen Smith
Litigation Director

Attorneys for First Amendment Coalition

cc: Anna Theresa Ferrari, Office of the Attorney General
Eliza Hersh, Deputy Legal Affairs Secretary, Office of the Governor

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PROOF OF SERVICE

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of Los Angeles, California, and not a party to the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 865 South Figueroa Street, Suite 2400, Los Angeles, CA 90017-2566.

On January 13, 2021, I hereby certify that I electronically filed the foregoing **FIRST AMENDMENT COALITION'S LETTER BRIEF IN RESPONSE TO COURT'S PROPOSED ADMINISTRATIVE ORDER CONCERNING CLEMENCY RECORDS** through the Court's electronic filing system, TrueFiling. I certify that participants in the case who are registered TrueFiling users will be served via the electronic filing system (TF3).

[X] U.S. Mail: I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence is deposited with the United States Postal Service in a sealed envelope or package that same day with first-class postage thereon fully prepaid. I served said document on the parties referenced below by placing said document in a sealed envelope or package with first-class postage thereon fully prepaid, and placed the envelope or package for collection and mailing today with the United States Postal Service at Los Angeles, CA:

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

Executed on January 13, 2021, at Riverside, California.

/s/ Ellen Duncan
Ellen Duncan

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