In the Supreme Court of the State of California

Application of Wright for Executive Clemency. **First Amendment Coalition,** **Petitioner,** v. **Governor Edmund G. Brown Jr.** **Respondent.**	Case No. S251879

RESPONDENT GOVERNOR EDMUND G. BROWN JR'S OPPOSITION TO MOTION TO UNSEAL CLEMENCY-RELATED COURT RECORDS

PETER A. KRAUSE
Legal Affairs Secretary
*DANIEL J. CALABRETTA
Deputy Legal Affairs Secretary
State Bar No. 230304
Office of Governor Edmund G. Brown Jr.
State Capitol, Suite 1173
Sacramento, CA 95814
(916) 445-0873
Daniel.Calabretta@gov.ca.gov
Attorneys for Respondent Governor Edmund G. Brown Jr.

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INTRODUCTION

The Governor's constitutional power to grant clemency is the ultimate discretionary act of the chief executive. There are no standards governing the exercise of the Governor's clemency authority, which is subject only to legislation regarding "application procedures." (Cal. Const., art. V, § 8, subd. (a).) In granting a pardon or commutation, the Governor may consider whatever information he deems relevant, and may make the decision on whatever basis he chooses. As such, "pardon and commutation decisions have not traditionally been the business of courts." (*Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 276.)

Petitioner's Motion to Unseal ignores the unique character of the materials in a clemency file and instead invites this Court to treat them like any other judicial records. But unlike typical judicial proceedings, in which litigants and the public have an interest in ensuring that the court has conducted its proceedings in accordance with all relevant procedural and substantive requirements, in executive clemency proceedings there are no guiding rules or standards. Although the California Constitution requires that before granting a pardon to an individual convicted of more than one felony the Governor obtain the recommendation of a majority of the Justices of this Court, that recommendation is not based on a substantive view of the merits of an application. (*Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or*

Commutation (2018) 4 Cal.5th 897, 897 (hereafter *March 2018 Admin. Order*).) Rather, even in the case of an individual who has been convicted of more than one felony, the Governor still has virtually unfettered discretion to grant an application for clemency, subject only to this Court's determination of whether a grant would be an abuse of that power. (*Ibid.*)

Because the clemency power is not subject to any objective standards, the Governor's interest in ensuring the confidentiality of the materials he reviews in connection with a pardon or commutation application is compelling. Courts have repeatedly recognized an executive privilege that protects the Governor's decisionmaking process from public scrutiny. That is particularly important for materials contained in the files related to an application for clemency (Clemency Materials), which contain highly sensitive, and potentially embarrassing, materials about an applicant, as well as the candid views of victims, the District Attorney, and others who have historically relied on the confidentiality of those materials. Because public disclosure of clemency files would have a chilling effect on the willingness of victims, witnesses, and others to participate candidly in the process — and even on the willingness of governors to consider clemency — Clemency Materials have always been treated as confidential by all three branches of government, whether by statute, procedure, or historic practice. That includes the very records being sought in this case, which this Court by its own Internal Operating Practices and Procedures

has properly deemed confidential within the meaning of rule 8.45(b)(5) of the California Rules of Court.

The Legislature has recently examined the clemency process, and determined that the clemency application and certificate granting clemency must be made public, and no more. (Pen. Code, § 4807.) It is worth noting, however, that there is more public involvement in an application, like Senator Wright's, involving an individual convicted of more than one felony. The clemency process for these "twice convicted" cases involves a publicly-noticed hearing before the entire Board of Parole Hearings, including the opportunity for any member of the public to present their views to the Board, in person or in writing.

Not satisfied with this process, and tacitly conceding that it is unable to obtain Clemency Materials from the Governor's Office, petitioner attempts to leverage this Court's role in twice-convicted cases to obtain Clemency Materials. Petitioner seeks not the records produced by this Court, if any, but rather the complete files sent by the Governor in connection with all clemency applications that come before this Court. In doing so, Petitioner rests its arguments on inapposite authority regarding the sealing of court records and generalized common law and constitutional principles that have no application in the unique context of the Governor's clemency power, or to the extraordinarily narrow role this Court has concluded applies to its review of applicants who have been convicted of

more than one felony. Accordingly, the Governor respectfully requests that the Court deny the Motion and return the records regarding the case at issue to the Governor's Office in accordance with Penal Code section 4852.

BACKGROUND

I. The Governor's Clemency Authority

The clemency power to grant pardons, commutations of sentence, or reprieves from execution of judgment (typically, the death penalty) is rooted in the ability of the English King or Queen to forgive crimes against the crown. (See Moylan & Carter, *Clemency in California Capital Cases* (2009) 14 Berkeley J. Crim. L. 37, 41.) Executive clemency "exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. . . .[I]t has always been thought essential in popular governments, as well as monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases." (*March 2018 Admin. Order*, *supra,* at p. 989, quoting *Ex Parte Grossman* (1925) 267 U.S. 87, 120–121.) As such, "[e]xecutive clemency is an ad hoc 'act of grace' that may be granted for any reason without reference to any standards." (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 419.) As Justice Cardozo explained it, a clemency application "is a petition for mere grace and mercy.... It grows out of the action of the courts, but it seeks to reverse their action by an appeal to motives and arguments which are not

those of jurisprudence.... At such a time anything is pertinent that may move the mind to doubt or the heart to charity. It is not necessary that reason be convinced; it is enough that compassion be stirred." (*Andrews v. Gardiner* (Ct. App. N.Y. 1918) 224 N.Y. 440, 437.) Because executive clemency is unmoored from objective standards, it has historically been outside the judicial process. (*Ohio Adult Parole Auth. v. Woodard*, *supra*, 523 U.S. 272, 285.)

Like the Constitution of the United States, the power to grant pardons, commutations, or reprieves has existed in California's Constitution since its inception. The California Constitution currently provides:

> Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it. 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.

(Cal. Const., art. V, § 8, subd. (a).) An individual may apply to the Governor for a pardon in one of two ways: by obtaining a Certificate of Rehabilitation from a Superior Court, which acts as an application for a pardon (Pen. Code, § 4852.16), or by filing a direct application with the

Governor. An application for a Commutation of Sentence must be filed directly with the Governor. However the Governor receives an application for clemency, the application and other materials in the applicant's file are sent to the Board of Parole Hearings for investigation prior to the Governor acting on the application. (See Pen. Code, § 4812[1]; see also Office of Governor Edmund G. Brown Jr., *How to Apply for a Pardon* <https://www.gov.ca.gov/wp-content/uploads/2017/07/How-To-Apply-for-a-Pardon-10.24.18.pdf> (as of November 23, 2018).) After the Board's investigation, the Board returns the file to the Governor's Office for the Governor's further review.

As part of its investigation for a pardon, the Board typically sends the applicant a Pardon Applicant Questionnaire, which asks the individual about the circumstances of the offense, why they wish to receive a pardon, and why they believe they are entitled to one. It also asks about their marital status, children, financial status, including employment, and

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[1] Section 4812 provides: "Upon request of the Governor, the Board of Parole Hearings shall investigate and report on all applications for reprieves, pardons, and commutation of sentence and shall make such recommendations to the Governor with reference thereto as to it may seem advisable. To that end the board shall examine and consider all applications so referred and all transcripts of judicial proceedings and all affidavits or other documents submitted in connection therewith, and shall have power to employ assistants and take testimony and to examine witnesses under oath and to do any and all things necessary to make a full and complete investigation of and concerning all applications referred to it. Members of the board and its administrative officer are, and each of them is, hereby authorized to administer oaths."

whether the applicant has filed for Bankruptcy in the last ten years. (See Declaration of Daniel J. Calabretta, Ex. A.) The Questionnaire also requests information regarding an applicant's education, military service, or any licenses they may have. The Board's investigators routinely interview the applicant as well as any references he or she has listed. They obtain the individual's full criminal history, driving record, court records, or any other material the investigator believes may be relevant to the Governor's consideration of the application. (Calabretta Decl., ¶ 5.) Frequently, the Governor's Office will ask the assigned Investigator to obtain specific information or answer a particular question raised by the application. In this way, there can be a back and forth between the Board and the Governor's Office, which if disclosed would reveal the deliberative process of the Governor and his staff. (Calabretta Decl., ¶ 6.)

Commutation investigations are even more thorough and comprehensive. (Declaration of Kristina B. Lindquist, ¶ 5.) Investigators from the Board of Parole Hearings review the inmate's criminal history, Probation Officer's Report, appellate history of the case, military history, prison conduct, psychological evaluations, education records, evaluations by work supervisors, and more. They travel to the prison to interview the inmate personally and ask relevant questions delving into the individual's childhood, family situation, drug use, gang involvement, and history of abuse as a child. They ask the inmate to explain the reasons for his or her

participation in criminal activity. Investigators will call those who claim to have details of an inmate's innocence. They will also contact individuals who may have witnessed abuse around the time of the crime, obtain the criminal histories of other individuals, and examine hospital records or arrest reports that may or may not substantiate claims of intimate partner battery. And, they learn about the ways in which the inmate has prepared him or herself for re-entry into the community via education, vocational certification, or self-help groups. They consider material — including complete reports of inmates dropping out and debriefing from gangs or reporting criminal activity in the prisons — that if disclosed, would pose significant risk to the safety and security of prison staff and inmates.

The investigators ask prison staff for their impression of the inmate, their interactions with peers and staff, and suspected involvement in criminal or gang-related activities in prison. They consider points made by victims or their surviving family members or friends, witnesses to the crime, jurors, attorneys, and many others. The Governor's Office will ask investigators to focus on specific issues in certain cases and there is regular interaction between the Board's investigative staff and the Governor's attorneys about the scope and content of investigations and whether the investigation should continue.

In the case of an individual who has been convicted of more than one felony, the Governor's Office may request that the full Board consider

the pardon or commutation application so that it may make the written recommendation of whether the individual should be granted clemency as required by Penal Code section 4813. As required by the Bagley Keene Open Meetings Act, the Board will agendize a public meeting ten days before the meeting in which it will consider the application. At the Board meeting, it will accept the testimony of the applicant, the District Attorney, victims, or any interested member of the public in support or in opposition to the application. Thus, contrary to the assertion of Petitioner, there is an opportunity for the public to participate in the clemency process as it relates to an applicant who has more than one felony conviction.

Once the Board of Parole Hearings has made a written recommendation pursuant to Penal Code section 4813, the Governor's Office may transmit the file to this Court for a recommendation as to whether the Governor should grant a pardon or commutation. (Cal. Const., art. V, § 8, subd. (a).) Penal Code section 4851 requires that the full file, including "all papers and documents relied upon in support of and in opposition to the application, including prison records and recommendation of the Board of [Parole Hearings]" be transmitted to the Supreme Court for its review.

Recognizing the sensitive nature of these records, the Internal Operating Practices and Procedures of the California Supreme Court requires that they be kept confidential. Rule XIV provides:

> 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. The 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. (See Gov. Code, § 6254, subds. (c), (f), & (l); Civ. Code, § 1798.40, subd. (c).) *Accordingly, the court treats these files as confidential and does not make them available to the public.*

(Emphasis added.) By statute, if the Court recommends that an application be granted, the full file must be returned to the Governor's Office. (Pen. Code, § 4852 ["If a majority of the justices recommend that clemency be granted, the Clerk/Executive Officer of the Supreme 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."].)

Once the Supreme Court has made a recommendation that clemency be granted, the Governor may act on the application as he would any other clemency application. The Governor's deliberations as to whether an individual should be granted are, of course, confidential. (See generally *Santos v. Brown* (2015) 238 Cal.App.4th 398.) As a matter of practice, when Governor Brown grants clemency, the certificate is immediately released to the public. (Calabretta Decl., ¶ 7.) In 2012 the Legislature enacted a statute requiring the Governor each year to file a report with the Legislature "that shall include each application that was granted for each case of reprieve, pardon, or commutation by the Governor, or his or her

predecessor in office, during the immediately preceding regular session of the Legislature, stating the name of the person convicted, the crime of which the person was convicted, the sentence and its date, the date of the reprieve, pardon, or commutation, and the reason for granting the same." (Sen. Bill No. 1171 (2011-2012 Reg. Sess.) § 133 [amending Pen. Code, § 4807, subd. (a)].) That report, including the application and statement of reasons for each granted pardon or commutation, is expressly made available to the public. (Pen. Code, § 4807, subd. (b).)

II. The First Amendment Coalition's Public Records Act Request and Motion to Unseal

On October 15, 2018, the First Amendment Coalition emailed the Governor's Legal Affairs Secretary requesting a copy of former Senator Roderick Wright's pardon application and a copy of the letter from the Legal Affairs Secretary to the Clerk of this Court transmitting his file. (Declaration of David Snyder in Support of Petitioner's Motion to Unseal Clemency-Related Court Records at Ex. E.) In a letter dated October 18, 2018, the Governor's Office provided a copy of the Letter, which was publicly available on this Court's website (See *id.*, Ex. F; see also Cal. Supreme Ct., Internal Operating Practices and Proc., XIV [requiring that the fact that an application for recommendation for executive clemency has been filed to be made public].) The Governor's Office denied the request for the application itself, however, citing Government Code section 6254,

subdivision (*l*) [exempting "[c]orrespondence of and to the Governor or employees of the Governor's office" and records in the custody of or maintained by the Governor's Legal Affairs Secretary]; section 6255 [exempting records where the public interest in nondisclosure outweighs the public interest in disclosure]; and Penal Code section 4807, subd. (b) [requiring the Governor to submit an annual report to the Legislature that includes each clemency application that was granted, and expressly providing that it shall be made available to the public]. (See Snyder Decl., Ex. F.)

On November 20, 2018,[2] the First Amendment filed the instant Motion to Unseal Clemency-Related Court Records. In its Motion, the First Amendment Coalition requested an order not just granting it access to the full clemency file regarding Mr. Wright, but "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 requests filed in this Court." (Mot. at p. 2.) The Motion and supporting papers broadly cite the California Rules of Court, the common law, and the federal and state constitutions. (Id. at p. 4.) On

[2] Because it was requested over a holiday weekend, the Governor's Office prepared this response. The Attorney General's Office has agreed to represent the Governor in future proceedings on this matter, if any.

November 21, 2108, this Court requested a written response by November 26, 2018.

III. The Governor Grants Pardons and Commutations

On November 21, 2018, the Governor granted 38 pardons and 70 commutations. (See Office of Governor Edmund G. Brown, Jr., Governor Brown Grants Executive Clemency, <https://www.gov.ca.gov/2018/11/21/governor-brown-grants-executive-clemency-3/> (as of November 24, 2018).) Among those pardoned was former Senator Roderick Wright, for whom this Court had previously made the recommendation required by article V, section 8 of the California Constitution for the Governor to grant a pardon. In the pardon certificate, the Governor explained that his decision was based on the fact that following Senator Wright's conviction, "in a bipartisan vote the Legislature enacted Senate Bill 1250 (2017-2018 Leg. Sess.), which clarifies the law regarding the domicile of an elected official. The Legislative history of that bill specifically cited Mr. Wright's conviction as the reason why clarity in this area of the law was necessary." (Calabretta Decl., Ex. B.) By practice, once a pardon has been granted, the Governor's Office makes the pardon application available to anyone who requests it, even in advance of filing the annual report to the Legislature required by Penal Code section 4807. (Calabretta Decl., ¶ 7.) A copy of that application is being made public in connection with this filing. (See Calabretta Decl., Ex. C.)

ARGUMENT

Consistent with the historic practice of all three branches of government, this Court treats Clemency Materials as confidential. That determination has a sound basis in law. The common law and evidentiary privilege of executive privilege and deliberative process require that these records remain confidential to protect the decisionmaking process of the Governor, who even in the case of applicants who have multiple felony convictions is still responsible for making the ultimate decision as to whether an individual should be granted clemency. In addition, provisions of the California Public Records Act, the Information Practices Act, and other laws similarly protect these records from disclosure.

This treatment of Clemency Materials as confidential does not run afoul of this Court's procedures regarding sealing of documents; in fact, those procedures have no application to materials deemed confidential. Similarly, neither the common law nor federal or state constitutional provisions relied upon by Petitioner apply to material that has historically been treated as confidential and not subject to public disclosure.

I. Clemency Materials Are Confidential

Recognizing that releasing Clemency Materials would reveal the deliberative process of the Governor in making one of the most discretionary decisions an Executive can make, all three branches of government have historically treated these records as confidential. During

this Administration, the Governor's Office has refused to release any clemency materials other than those expressly required by law to be made public, including the pardon certificate and pardon application once granted, and in the case of those applicants convicted of more than one felony the public meeting minutes of the Board of Parole Hearings and the correspondence between the Governor's Legal Affairs Secretary and this Court transmitting the file. (Calabretta Dec., ¶ 8.) With one exception where this office requested formal briefing from the parties, Every Public Records Act request for additional information regarding a clemency application has been denied, citing many of the same exemptions asserted in response to the First Amendment Coalition's request.

The Legislature in 2012 considered which materials from a clemency file should be made public, and concluded that only the clemency certificate, which contains the Governor's reasons for granting clemency, as well as the application itself, should be released. (See Pen. Code, § 4807.) Moreover, at the end of an administration, the Legislature has concluded that clemency applications that have been closed and sent to the State Archives may be kept confidential for up to 25 years. (See Gov. Code, § 6268.) These laws evince a legislative determination that Clemency Materials should not otherwise be disclosed to the public.

Similarly, this Court has expressly stated that the Clemency Materials it receives are to remain confidential. As discussed above, *supra*

at p 9–10, the Internal Operating Practices and Procedures of this Court specify that the "papers and documents transmitted to the court by the Governor with the application often contain material that the Governor may have a right to withhold from the public" and that the court "treats these files as confidential and does not make them available to the public." Although petitioners make much of the fact that the rule provides that the Governor "may" have a right to withhold these records from the public, in a response to the First Amendment Coalition in this very case, the Governor in fact asserted that right. (Snyder Decl., Ex. F.) Notably, neither the First Amendment Coalition nor any other group or individual has challenged the determination that the Clemency Materials are not subject to disclosure under the provisions of the Public Records Act cited by the Court in its Operating Practices and Procedures.

This protection of Clemency Materials has strong support in the law governing access to public records. In *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325, this Court recognized that "even democratic governments require some degree of confidentiality to ensure, among other things, a candid exchange of ideas and opinions among responsible officials." (*Id.*) In that case, the Los Angeles Times requested the Governor provide a copy of his appointment schedules, calendars, notebooks, and other documents that would list his daily activities as governor. (*Id.* at p. 1329.) This Court adopted the federal common law

"deliberative process" or "executive privilege" exception and denied the request. Grounding that privilege in the official information privilege of Evidence Code section 1040 (*id.* at p. 1339 n. 9.), as well as Government Code section 6255 (*id.* at p. 1344), the Court described that privilege as "protecting the 'decision making processes of government agencies,'" including that of the Governor himself (*id.* at p. 134, quoting *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 150). Regarding the request for calendar entries, the Court opined:

> If the law required disclosure of a private meeting between the Governor and a politically unpopular or controversial group, that meeting might never occur. Compelled disclosure could thus devalue or eliminate altogether a particular viewpoint from the Governor's consideration. Even routine meetings between the Governor and other lawmakers, lobbyists or citizens' groups might be inhibited if the meetings were regularly revealed to the public and the participants routinely subjected to probing questions and scrutiny by the press.

(*Id.* at p. 1344.) While the Court recognized the public's interest in knowing with whom the Governor was meeting, it concluded that that interest was outweighed by the fact that "if the public and the Governor were entitled to precisely the same information, neither would likely receive it. . . . To disclose every private meeting or association of the Governor and expect the decisionmaking process to function effectively, is to deny human nature and contrary to common sense and experience." (*Id.* at p. 1345, internal citations omitted.)

The rationale in *Times Mirror* applies even more forcefully in the context of Clemency Materials, which contain much more sensitive information than mere calendar entries. As described above, *supra* at p. 6–8, the Clemency Materials contain detailed information about an individual applicant, including his prior criminal history and his finances, information about his family members and employers, and the specific circumstances of his prior criminal activity, much of which may not be anywhere in the public record. The clemency file also can contain information that is extraordinarily embarrassing to the individual seeking clemency. Moreover, the file contains the report of the confidential investigation by the Board of Parole Hearings, which is prepared at the Governor's direction. In the case of applications for commutation of sentence, the file also includes detailed information about the individual's conduct (and sometimes misconduct) in prison, which could pose serious safety issues if it were made public. (Lindquist Decl., ¶ 5.)

The file also contains letters in support and opposition to clemency for a particular individual. If individuals knew their identity could be revealed in supporting or opposing a particular candidate, they might well decide to not submit a letter at all, depriving the Governor of valuable information as he considers whether to grant clemency to an applicant. (Lindquist Decl., ¶ 6.) Whether grounded in the common law executive privilege, the official information privilege contained in Evidence Code

section 1040, or the balancing test contained in the Public Records Act at Government Code section 6255, the privilege recognized by this Court in *Times Mirror* protects these records from disclosure.

Courts have acknowledged the chilling effect disclosure can have on applications to the Governor. In *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, the Court of Appeal for the Third Appellate District refused a request to release the applications of individuals seeking to be appointed by the Governor to a vacant seat on a local board of supervisors. The court concluded the Governor's Office properly denied the request on the basis of the deliberative process privilege identified in *Times Mirror*. Although the First Amendment Coalition there conceded that "the disclosure of staff evaluations and recommendations regarding the suitability of individuals for appointment would be protected by the deliberative process privilege," it argued that the materials submitted by the applicant were not subject to the deliberative process privilege. The court of appeal disagreed, noting that as part of the application process, "applicants must respond to questions that probe deeply into their personal and political backgrounds." (*Id.* at p. 171.) "That process of review is greatly benefited by an applicant's candor in disclosing potentially embarrassing facts that may be of only marginal relevance to the person's abilities. Candor is less likely to be forthcoming if the applicant knows the facts will be disclosed regardless of the outcome."

(*Id.* at p. 172.) In reaching this conclusion, the Court noted that after the appointment is made, "the press may probe and report on the appointee with all the vigor we expect from our free press." (*Id.* at p. 173.) These rationales apply squarely to the clemency process.

In addition to the common law executive privilege and the official information privilege contained in Evidence Code section 1040, various statutory exemptions to the Public Records Act apply to Clemency Materials.[3] First, applications for executive clemency are handled by Governor Brown's Legal Affairs Secretary and his staff, and are exempt from disclosure on that basis. (See Gov Code, § 6254, subd. (*l*).) Moreover, recognizing the importance of allowing the Governor to obtain candid opinions from members of the public, Government Code section 6254, subdivision (*l*) also exempts from disclosure "Correspondence of and to the Governor or employees of the Governor's office". Furthermore, much of the clemency record is prepared by the Board of Parole Hearings, and constitutes an investigatory file complied by a state agency for correctional or law enforcement purposes. (Gov. Code, § 6254, subd. (f).)

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[3] Although Respondent recognizes that the Motion is not made under the Public Records Act, and that the Information Practices Act discussed in the following paragraph does not apply to this Court, the Legislature's determination for how such a request should be treated is relevant to the Motion, particularly since Petitioner primarily relies on general common law principles and a generalized right of access to records in the state and federal constitutions. Moreover, these provisions form the basis for this Court's current practice of treating the records as confidential.

In addition, given the sensitive nature of the information contained in the Clemency Materials, it would also be properly withheld under Government Code section 6254, subdivision (c), which protects against the release of certain files that would "constitute an unwarranted invasion of personal privacy." (See also Cal. Const., art. 1, § 1 [guaranteeing right to privacy].)

Apart from the Public Records Act, other laws protect against disclosure of the Clemency Materials. For instance, the Penal Code prohibits the disclosure of summary criminal history information contained in the file. (Pen. Code, § 11076; see also *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press* (1989) 489 U.S. 749, 780 [release of federal criminal history under Federal Freedom of Information Act would constitute an unwarranted invasion of privacy].) Information from an inmate's central file is also considered confidential (Cal. Code Regs., tit. 15, §§ 3370(e), 3261.2(e)), as are Probation Officer Reports (Pen. Code, § 1203.05.) The Information Practices Act of 1977, which is based on the right to privacy contained in article I, section 1 of the California Constitution (see Civ. Code, § 1798.1), protects from disclosure "any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history." (Civ. Code, §§ 1798.3, subd. (a); 1798.24.) The protections the Legislature has

given to Clemency Materials are so strong that those records are expressly exempted from a general requirement that an agency provide personal information to the individual to whom the information pertains. (Civ. Code, § 1798.40, subd. (c) ["This chapter shall not be construed to require an agency to disclose personal information to the individual to whom the information pertains, if the information meets any of the following criteria: (c) Is contained in any record which could identify an individual and which is compiled at any stage of the process of enforcement of the criminal laws, from the arrest or indictment stage through release from supervision and including the process of extradition or *the exercise of executive clemency*" (emphasis added)].)

The Clemency Materials do not lose these protections merely by transmission to the Supreme Court. Nor should the Governor be forced to waive them in order to obtain the recommendation of this Court as required by the California Constitution. If Petitioner's Motion is granted, there will in effect be a two track system for clemency applications. For applications involving one felony conviction, the process will remain confidential, and the applicant and those in support or opposition to an application can present their candid views to the Governor without fear that these materials will be released to the public. For those who have two or more felonies in their past, however, their entire file, including highly sensitive and in some cases embarrassing information, would be released to the public. Many

individuals would decline to offer their support or opposition to an applicant, knowing their identity and the content of their opinion would be made public. (Lindquist Decl., ¶ 6.) The Governor — and this Court — would almost certainly be deprived of valuable information in making a decision as to whether clemency should be granted in such cases. The law does not compel this result.

The historic practice of all three branches of government — executive, legislative, and judicial — as well as common law principles and statutory provisions, all make clear that Clemency Materials are confidential, and should remain so.

II. The Rules of Court Do Not Compel Disclosure of Clemency Materials

Petitioner's first argument, and indeed, the premise of their entire motion, is that the Clemency Materials were never sealed and thus should be released just like any other court record. The Rule of Court regarding sealed records, however, is inapplicable to confidential records such as the Governor's clemency files. Article 3 of Title 8 of the Rules of Court differentiates between sealed records and confidential records. Confidential records are records that are "required by statute, rule of court, or other authority except a court order under rules 2.550–2.551 or rule 8.46 to be closed to inspection by the public or a party." (Cal. Rules of Court, Rule 8.45(b)(5).) As explained above, this Court's Internal Operating Practices

and Procedures, and in particular rule XIV, treats these records as "confidential." So too are they considered confidential under the Public Records Act, Information Practices Act, Evidence Code section 1040, and common law principles of executive privilege. As confidential records, they are not subject to public inspection. (Cal. Rules of Court, Rule 8.45(d)(1).) Moreover, confidential records such as these are not subject to the requirements to seal otherwise-public records. Rule of Court 8.46, which governs sealed records, expressly "does not apply to confidential records." Accordingly, the motion to unseal generally, and the specific argument that the Court's Internal Operating Practices and Procedures are inconsistent with the Rules of Court, ignore the fact that these records are "confidential" under the Rules of Court and therefore are not subject to an order to seal.

III. The Common Law Right of Access Does Not Apply to Clemency Materials

For many of the same reasons identified above, the common law right of access does not apply to confidential materials such as the Clemency Materials. In the very case cited by Petitioners, *Overstock.com, Inc. v. Goldman Sachs Group, Inc.*, the court of appeal specified that courts 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." ((2014) 231 Cal.App.4th 471, 483.) Here, the records

are exempted from disclosure under the Court's Internal Operating Practices and Procedures, which designate the records as confidential. As explained above, that determination is consistent with, if not compelled by, various statutes and common law doctrines.

Although petitioners can point to no case involving Clemency Materials, they argue that public inspection is required to ensure adequate "public oversight." (Memorandum in Support of Petitioner's Motion to Unseal Clemency-Related Court Records (Memorandum) at p. 19.) While public oversight of the judiciary is no doubt a vital public interest, that interest is significantly weakened where the Court is not engaged in its traditional role of adjudicating the rights or responsibilities of a parties in a specific case or controversy. In its *Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation*, this Court makes clear that it is not engaging in "a substantive view on the merits of an application; the court takes no position on whether the Governor should, as an act of mercy or otherwise, extend clemency to a particular applicant." (*March 2018 Admin. Order*, *supra*, 4 Cal.5th 897, 897.) Rather, the Court's only role, in its words, is to ensure that a grant of clemency would not "represent an abuse of that power." (*Ibid.*) Although the Court did not explain what an abuse might be, the materials it cited in discussing the origins of the requirement that this Court review clemency applications for individuals convicted of more than one

felony suggest it is aimed at instances of undue political influence or outright corruption. (*Id.* at p. 899.) Such an abuse of authority will almost certainly be evident of the face of the application (which is required to include any compensation provided by the applicant, Pen. Code, § 4807.2), or in the clemency certificate itself, which must include the reason for granting the application (Pen. Code, § 4807). These documents must be made available to the Legislature, and to the public. (*Ibid.*) Moreover, at least with respect to applications involving individuals with multiple felony convictions, review by this Court is preceded by an open meeting of the Board of Parole Hearings, in which any member of the public may participate and offer public comment.

The other concerns identified by the petitioners that purportedly justify access to Clemency Materials will be satisfied by access to other records and proceedings that are unquestionably open to the public. For instance, petitioners argue that the common law requires access to Clemency Materials because such access "will inform the public about the working 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." (Memorandum at p. 20.) With respect to the allegations

brought against Wright in his criminal prosecution, and the various public agencies involved in his criminal prosecution, his trial was fully open to the public. Any evidence or filing in that proceeding is available to petitioner or any member of the public through the trial court. Indeed, numerous stories were written about the criminal proceedings, which led to Senator Wright's resignation from the California State Senate. The public thus had a tremendous amount of access to and information about Senator Wright's trial and conviction. Regarding the workings of the Board of Parole Hearings, the fact of Mr. Wright's case was noted on its public agenda,[4] a public hearing was held at which any individual could testify, and the results of the Board's vote were released to the public.[5]

Regarding petitioner's desire for insight into the working of the Governor's Office when it considers clemency, that is simply something to which they are not entitled. Clemency is the ultimate discretionary act – it is subject to no standards and is "rarely, if ever, [an] appropriate subject[ ] for judicial review." (*Ohio Adult Parole Auth. v. Woodard*, *supra*, 523 U.S. 272, 276.) It is "an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without any reference

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[4] https://www.cdcr.ca.gov/BOPH/2018_Board_Meetings/docs/18-09_Board_Mtg_docs/September-2018-Agenda-Updated-9-12-18.pdf (as of November 25, 2018).

[5] https://www.cdcr.ca.gov/BOPH/docs/enbanc/2018/enBanc09-18-18.pdf (as of November 26, 2018).

to standards." (*Solem v. Helm* (1983) 463 U.S. 277, 300–301.) Accordingly, the public's interest in the decisionmaking process, including the materials on which the Governor is relying in acting on a clemency application, is minimal. For instance, in *Santos*, the Court of Appeal rejected an effort to import the substantive and procedural requirements of Marsy's Law onto the clemency process. (*Santos v. Brown, supra*, 238 Cal.App.4th 398.) Concluding that executive clemency was not a "proceeding," much less a proceeding in the "criminal justice system," the Court rejected an effort to require the Governor to provide victims and the district attorney an opportunity to be heard before a commutation of sentence was granted. (*Ibid.*) "Clemency," the court noted, "is different." (*Id.*, at p. 420.) Just as the normal procedures governing other aspects of the criminal justice system were inapplicable to the Governor's exercise of his clemency power, so too are common law decisions regarding access to records inapplicable to the materials on which the Governor relies.

IV. There Is No Constitutional Right of Access to Clemency Materials

Neither the First Amendment nor Proposition 59 require that this Court make the Clemency Materials available to petitioners or the general public. Although there is a general right of access to court records under the First Amendment, that right is not absolute, and does not apply to confidential records. (*Mercury Interactive Corp. v. Klein* (2007) 158

Cal.App.4th 60, 96 [caselaw "cannot be construed as finding a presumption of public access to all court-filed documents"]; *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298 [concluding that a First Amendment right does not attach to confidential documents].) Moreover, the mere transmission of privileged and confidential files to the Supreme Court in accordance with the Constitution and statutes does not strip clemency materials of their privileged character. Because, as discussed above, Clemency Materials are properly designated as confidential by this Court, no First Amendment right attaches.

Nor is there any First Amendment right to participate in these proceedings. As petitioner acknowledges, in determining access to particular proceedings, 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." (See Memorandum at p. 23, quoting *Press-Enter. Co. v. Sup. Ct.* (1986) 478 U.S. 1, 8.) Neither requirement is met in this case.

Although petitioners claim they have established that Clemency Materials "are the type of record that was understood to be available to the public at the time the statutes governing clemency procedures were passed and amended" (Memorandum at p. 24), they have established no such thing. First, they argue that the California Constitution "does not contemplate the sealing of the clemency records." (*Id.* at p. 21.) They cite

to no provision in the Constitution, however, because none exists: the Constitution is silent on the matter, and thus it does not provide any evidence as to whether clemency proceedings were historically open to the press or not. Second, petitioners point to the fact that the original version of the statute requiring the Governor to obtain the recommendation of a majority of Supreme Court justices did not specify whether records were publicly available. (*Id.*) Again, however, silence on the matter does not establish that the process has been open to the public. As petitioners note, however, since 1929 the Penal Code has *expressly provided* that this Court shall return Clemency Materials to the Governor upon a favorable recommendation. (See Memorandum at p. 21; see also Pen. Code, § 4852.)

The only example petitioners can point to involving a public clemency proceeding is the very example this Court recently disavowed. As the petitioners describe *In re Billings* (1930) 210 Cal. 669, in which the Supreme Court was determining whether to recommend a the Governor grant clemency, 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." (Memorandum at p. 21–22.) In its March 2018 Administrative Order, however, this Court expressly rejected that approach. "Subsequent history is consistent with a recognition that an intensive examination of the merits of a clemency petition exceeds this court's proper

role in our system of separated powers." (*March 2018 Admin. Order*, *supra*, 4 Cal.5th 897, 901.) Rather, this Court adopted Justice Langdon's dissent in that case, which stated that the clemency power "rests with the Governor, and may be exercised by him only for reasons of his own." (*Ibid*, quoting *Billings, supra*, 2010 Cal. at p. 784 (dis. opn. of Langdon, J.).) That petitioners can point to only one clemency proceeding in the history of California that was open to the public, one which this Court has concluded was based on an improper understanding of the Court's role, establishes that there is no historical right of access to clemency proceedings to which the First Amendment could attach.

Moreover, Petitioner cannot establish that the "public access plays a significant positive role in the functioning of the particular process in question," a process that "the governor conducts in a private setting within the confines of his or her office. . . ." (*Santos v. Brown*, *supra*, 238 Cal.App.4th 398, 431 (conc. opn. of Murray, J.).) One of the primary justifications for the pardon process is to temper the strictness of the criminal justice system as well as the public's demand for justice in a particular case. As Alexander Hamilton explained it:

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest, in proportion as it

> is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.

(*The Federalist Papers, No. 74, Hamilton* (Penguin Books 1987) p. 422.) The public's participation in clemency proceedings is thus in direct tension with the reasons for its existence. Rather, any remedy for its abuse is at the ballot box. (See *Cavazos v. Smith* (2011) 565 U.S. 1, 9 ["If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention."].)

Finally, Proposition 59 does not provide an independent right of access to the Clemency Materials. As courts have repeatedly recognized, "Proposition 59 is simply a constitutionalization of the [California Public Records Act]. As such, the proposition did not change existing law except as can be gleaned from its language." (*Sutter's Place Inc. v. Superior Court* (2008) 161 Cal.App.4th 1370, 1382.) Nothing in Proposition 59 changed any of the laws justifying the treatment of the Clemency Materials as confidential, and petitioners do not contend otherwise. Although they

rely on *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 597, that case concerned whether it was proper to *seal* court records. As discussed above, see *supra* at p. 23–24, the procedures regarding sealed records are inapplicable to records that by court rule or statute are deemed "confidential" as are the Clemency Materials at issue in this case. And to the extent Proposition 59 enshrined the Public Records Act into the Constitution, that Act does not require access be granted to Clemency Materials, see *supra* at p. 16–21, and petitioners do not argue otherwise.

CONCLUSION

For the reasons stated in this Opposition, the Governor respectfully requests that the Motion to Unseal be denied.

Dated: November 26, 2018 Respectfully submitted,

PETER A. KRAUSE
Legal Affairs Secretary

DANIEL J. CALABRETTA
Deputy Legal Affairs Secretary
Attorneys for Governor Edmund G. Brown Jr.

CERTIFICATE OF COMPLIANCE

I certify that the attached OPPOSITION TO MOTION TO UNSEAL CLEMENCY-RELATED COURT RECORDS uses a 13 point Times New Roman font and contains 7,885 words.

Dated: November 26, 2018

PETER A. KRAUSE
Legal Affairs Secretary

DANIEL J. CALABRETTA
Deputy Legal Affairs Secretary
Attorneys for Intervenor and Respondent State of California

PROOF OF SERVICE

Application of Wright for Executive Clemency

Case No. S251879

I am employed in the Office of Governor Edmund G. Brown Jr. I am over the age of 18 years and not a party to this matter. My business address is State Capitol, Suite 1173, Sacramento, CA 95814. On November 8, 2018, I served Governor Edmund G. Brown Jr's OPPOSITION TO MOTION TO UNSEAL CLEMENCY-REALATED COURT RECORDS; DECLARATION OF DANIEL J. CALALBRETTA IN SUPPORT OF OPPOSTION; and DECLARATION OF KRISTINA B. LINDQUIST IN SUPPORT OF OPPOSITION by the methods indicated below:

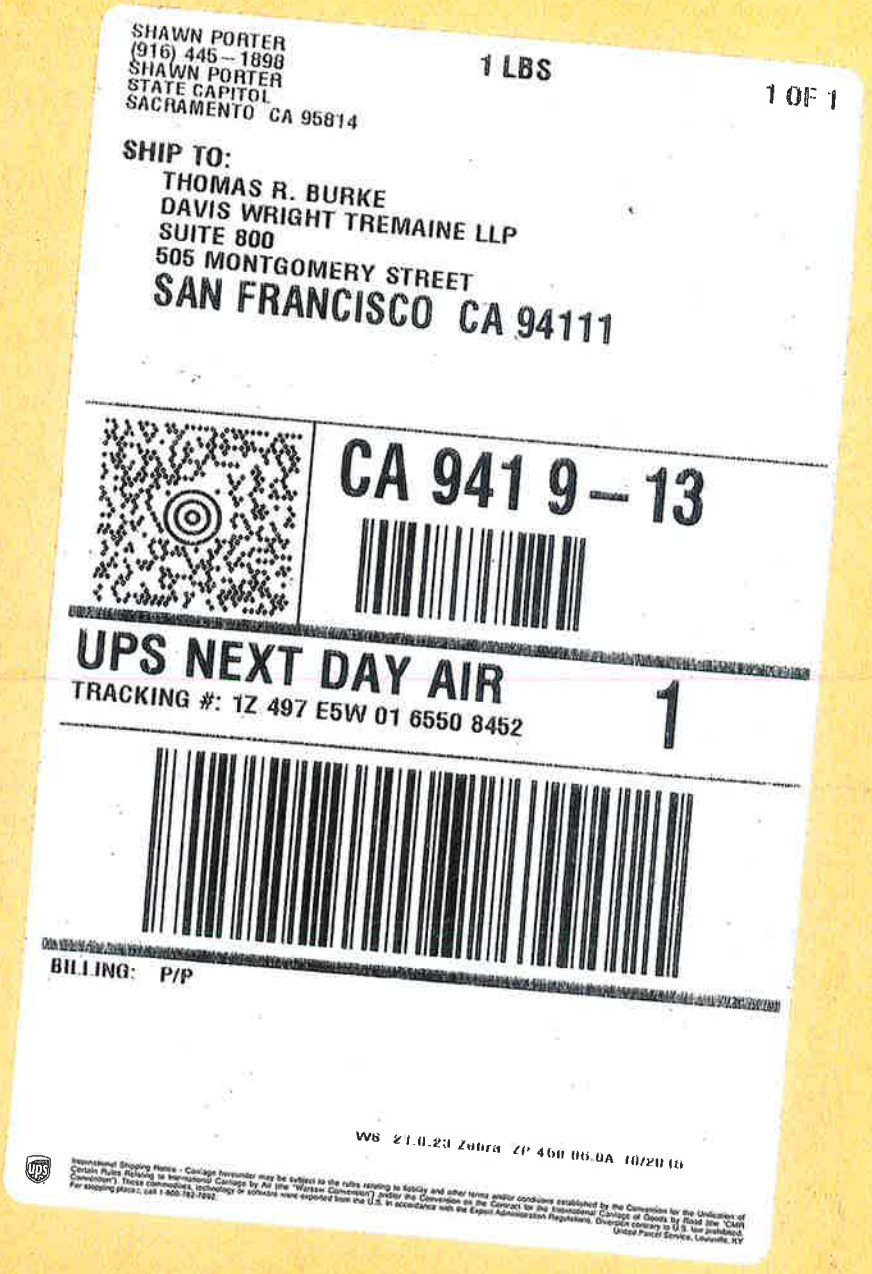
☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below. I am readily familiar with the office's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

Thomas R. Burke Davis Wright Tremaine LLP 505 Montgomery Street, Suite 800 San Francisco, CA 94111	Attorneys for Petitioner, First Amendment Coalition thomasburke@dwt.com

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 26, 2018, at Sacramento, California.

Alexander Ritchie

ALEXANDER RITCHIE


SHAWN PORTER
(916) 445-1898
SHAWN PORTER
STATE CAPITOL
SACRAMENTO CA 95814
1 LBS
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SHIP TO:
THOMAS R. BURKE
DAVIS WRIGHT TREMAINE LLP
SUITE 800
505 MONTGOMERY STREET
SAN FRANCISCO CA 94111
CA 941 9-13
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