

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

In re Application of <b>ANTHONY BANKS</b> For Executive Clemency.)	) Case No. S262365
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**MEMORANDUM IN SUPPORT OF FIRST AMENDMENT COALITION'S  
MOTION TO UNSEAL CLEMENCY-RELATED COURT RECORDS**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT.

The Governor has made a habit of flouting a procedure as unambiguous as could be. It is one that this Court has repeatedly ruled the Governor must follow: 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. Order, Case No. S251879 (Mar. 13, 2019) (“the Wright matter”). Moreover, before the Court may seal records, the Governor must demonstrate “overriding interests exist that overcome the right of public access to these records”; and 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 2.550 *et seq.* The Court has issued similar orders in 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”), which led to motions by the Governor to “File Clemency Matters Under Seal” in the same matters. In companion rulings, the Court found the Governor’s motions to file under seal problematic, again ordering him to follow the California Rules of Court. *See* Orders, Case Nos. S255392, S252284, S252277, S252279, S252271, and S252285 (Sept. 11, 2019) (collectively, “the September 2019 Orders”).

Yet on May 26, 2020, and not for the first time, Governor Gavin Newsom lodged numerous records labeled “confidential” without making the required showing, or even attempting to do so. Records filed in connection with the Request for Clemency (“Clemency Records”), Case No. S262365, captioned Banks on Clemency (the “Banks matter”) are unavailable to the public in their entirety. This is improper. The public has a right of access to clemency files just as it has a right of access to any materials filed in California courts. California law makes clear, as this Court recognized in response to FAC’s prior motions, that the burden is on the proponent of sealing to justify sealing. The procedure followed by the Governor in the Banks matter improperly places the burden on the public to both identify instances where records have been automatically sealed, and further to independently move for unsealing of such records. California Rule of Court 2.550 *et seq.* requires the reverse. The Governor must demonstrate, before anything is sealed from public view, that such sealing is justified.

By ignoring this well-defined procedure and continuing to make such filings under seal, the Governor resists not only the Court’s order in the Wright matter but also at least half-a-dozen others issued since. In fact, in the May 2019 Orders, this Court ordered the Governor to resubmit sealed records in *six* clemency-related matters in compliance with California Rules of Court 8.45 and 8.46. But rather than follow the Court’s unequivocal direction, the Governor has doubled down on this improper practice, making it routine.

Accordingly, on behalf of the public, the First Amendment Coalition (“FAC”) respectfully moves this Court to issue an order to unseal the Clemency Materials lodged by the Governor in the Banks matter – and to make clear, that going forward, the Governor must comply with the California Rules of Court when submitting materials pursuant to Article V, section 8 of the California Constitution. **Specifically, FAC requests that the Court issue an order consistent with its prior orders, and further, to direct the Governor not to file any future Recommendations for Clemency in a manner that is inconsistent with the Rules of Court and this Court’s December 19, 2018, March 13, 2019, May 2019, and September 2019 Orders.**

## **II. FAC’S MOTIONS TO UNSEAL.**

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 has previously filed seven motions with this Court to unseal clemency-related records.

### **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 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.<sup>1</sup> On May 22, 2019, the Court ordered the Governor to resubmit records in those five clemency matters – as well as a sixth, the Burton matter<sup>2</sup> – in compliance with California Rules of

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<sup>1</sup> 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).

<sup>2</sup> 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 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.<sup>3</sup>

### **C. The Banks Matter**

FAC now moves to unseal clemency materials in yet another matter initiated by Governor Newsom's administration. 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. Despite the Court's repeated instruction, the Governor again flouts the California Rules of Court and the public's right of access to the clemency file.

### **III. 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 the submission of the instant clemency recommendation request to the Court. There is nothing in these provisions that requires a blanket of secrecy be thrown over the process. In fact,

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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 right of access to the clemency file.

<sup>3</sup> 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.

as shown below, the same California Constitution that establishes this unique 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.

*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).

*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) (citation omitted) (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.....”); *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 1, § 3(b)(1) of the California Constitution requires broad public access to judicial records. In *Savaglio v. Wal-Mart Stores, Inc.*, 149 Cal. App. 4th 588, 597 (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. 1, §3(b)(1)] 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, the Clemency Materials, as well as clemency-related records in other matters, may be sealed, if at all, only after judicial review and articulated findings. The party seeking 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) (citing *Estate of Hearst*, 67 Cal. App. 3d 777, 785 (1977)). 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) (citations omitted).

In accordance with these well-established principles, this Court recognized “the public right of access” to the clemency-related records in the Wright matter and made express, enumerated findings to support limited nondisclosure.

Specifically, this Court identified “overriding interests” that “overc[a]me the right

of public access to these 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).

#### IV. 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). For the above reasons, FAC respectfully requests that this Court order the Governor to immediately follow the California Rules of Court with respect to the Clemency Materials in the Banks matter and in all future clemency proceedings.

Dated: August 21, 2020

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## 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 First Amendment Coalition's Motion to Unseal Clemency-Related Records is produced using 12-point Roman type including footnotes and contains approximately 1,997 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: August 21, 2020

DAVIS WRIGHT TREMAINE LLP  
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By: /s/ Thomas R. Burke  
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*Attorneys for First Amendment Coalition*

## PROOF OF SERVICE

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800, San Francisco, CA 94111.

On August 21, 2020, I served the following document:  
**MEMORANDUM IN SUPPORT OF FIRST AMENDMENT  
COALITION'S MOTION TO UNSEAL CLEMENCY-RELATED  
COURT RECORDS** as follows:

**[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 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 San Francisco, California addressed as set forth below:

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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 August 21, 2020, at Oakland, California.

/s/ Aysha D. Lewis  
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