[*Exempt From Filing Fee*
Per Cal. Gov. Code § 6103]

LEWIS BRISBOIS BISGAARD & SMITH LLP
TONY M. SAIN, SB# 251626
E-Mail: Tony.Sain@lewisbrisbois.com
TORI L. N. BAKKEN, SB# 329069
E-Mail: Tori.Bakken@lewisbrisbois.com
ABIGAIL J. R. McLAUGHLIN, SB# 313208
E-Mail: Abigail.McLaughlin@lewisbrisbois.com
633 West 5th Street, Suite 4000
Los Angeles, California 90071
Telephone: 213.250.1800
Facsimile: 213.250.7900

Attorneys for Respondents/Defendants, CITY OF FRESNO and Chief PACO BALDERRAMA, in his official capacity as City of Fresno Chief of Police

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO, CENTRAL DIVISION

BRIAN HOWEY,

Petitioner/Plaintiff,

vs.

CITY OF FRESNO and PACO BALDERRAMA, IN HIS OFFICIAL CAPACITY AS CITY OF FRESNO CHIEF OF POLICE,

Respondents/Defendants.

Case No. 23CECG01468
[*Assigned for All Purposes to: Hon. Stephanie Negin, Dept. 404*]

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR JUDGMENT

[*Filed Concurrently with Declaration of Abigail J.R. McLaughlin; Request for Judicial Notice*]

Date: August 2, 2023
Time: 1:30 p.m.
Dept.: 404

Petition Filed: April 18, 2023

Respondents/Defendants CITY OF FRESNO and Chief PACO BALDERRAMA, in his official capacity as City of Fresno Chief of Police (collectively "Respondents") hereby Oppose Petitioner/Plaintiff BRIAN HOWEY's ("Petitioner") motion for an order and judgment granting Petitioner's Verified Petition for Writ of Mandate Under the California Public Records Act ("CPRA") and the California Constitution and Complaint for Declaratory and Injunctive Relief ("Petitioner") and hereby state as follows:

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION & SUMMARY OF ARGUMENT.

In support of his California Public Records Act ("CPRA") request for records involving an TASER use of force incident between Michael Sanders and City of Fresno Police Department ("FPD") officers, Petitioner proffers a flawed and overly broad definition of "great bodily injury" ("GBI") as used in Penal Code section 832.7, subdivision (b) that is contrary to law, reason, and the precepts of statutory construction. Petitioner's definition would render the absurd result of causing records related to any and all uses of force by officers to be disclosable under the CPRA, contrary to Legislative intent. Rather, the plain reading and legislative history of Section 832.7(b) supports a narrower definition of GBI: a life-threatening and potentially permanent, disabling injury. Thus, under this proper definition of GBI, it was proper for Respondents to refuse to disclose records subject to the investigatory records exemption under Government Code section 7923.600, subdivision (a) pursuant to Petitioner's CPRA request.

2. RELEVANT FACTUAL BACKGROUND.

A. Pertinent Incident & Forensic Facts.

As noted by Petitioner, on August 20, 2004 Michael Sanders was involved in an incident with FPD officers where TASER uses of force were deployed against him in both drive-stun (touch) and dart modes; Mr. Sanders was not shot with a firearm, and the only other non-TASER force used on him was manual restraint for detainment and handcuffing. After the uses of force, Mr. Sanders died. (*Sanders v. City of Fresno* (E.D. Cal. 2008) 551 F.Supp.2d 1149, 1155-1162 However, an autopsy was later performed on Mr. Sanders by a Fresno County medical examiner. *Sanders*, *supra*, 551 F.Supp.2d at p. 1162. The cause of death was determined to be "complication of cocaine intoxication" and the manner of death was "accident."[1] (Howey Decl. ¶ 3 & Exh. A, p. 2.) When

[1] In his Motion, as to the notion that the records at issue are disclosable because the officers' use of force "resulted" in death, Petitioner waived that argument here. (*See* Mot. at 14:16-17.) However, Respondents nonetheless note that Mr. Sanders' autopsy and cause of death explicitly contradict Petitioner's assertion that "the numerous Taser strikes may have contributed to Mr. Sanders' death." Further, the standard is whether the use of force *caused* the death, and on the record here, the officers' use of the TASERs did not proximately cause Mr. Sanders' death; as such, the requested records are also not disclosable under such waived basis. (*See* Howey Decl. ¶ 3 & Exh. A, p. 6.)

examining Mr. Sanders' body, the medical examiner, Michael J. Chambliss, M.D., searched "for areas of deep injury" and found "[o]nly small areas of subcutaneous hemorrhage [under-skin bruising]. . . beneath the penetrating taser probes." (*Id.* at p. 3.) Dr. Chambliss denoted 11 TASER probe puncture wounds, with one showing "surrounding carbonization": none of which were deemed the cause of death (*See id.* at p. 10.)

B. Summary Judgment On Related Claims In Federal Civil Rights Case.

Subsequently, in the California Eastern District Court opinion granting summary judgment on plaintiff Lavette Sanders' (Mr. Sanders' widow) Complaint against the City of Fresno and FPD police officers involved in the incident, the Court specifically noted that "Tasers are generally considered non-lethal or less lethal force," and "view[ed] the use of a Taser as an intermediate or medium, though not insignificant, quantum of force that causes temporary pain and immobilization": as opposed to deadly force. (*Sanders*, *supra*, 551 F.Supp.2d at p. 1168; *see also id.* at p. 1170 ("Further, it seems like a strike from a solid baton can be at least equally forceful, if not more so, than a Taser."). Under the facts viewed in the light most favorable to Ms. Sanders, the federal Court determined that there was no violation of Mr. Sanders' constitutional right to be from excessive force as to all of the involved officers' uses of force, *including* the TASER deployments. *Id.* at 1171, 1173-1176. After Plaintiff appealed, the Ninth Circuit affirmed the District Court's granting of summary judgment on all claims in favor of defendants. (*Sanders v. City of Fresno* (9th Cir. 2009) 340 Fed. Appx. 377, 377-378.)

C. Petitioner's CPRA Request & City Response.

Regarding Petitioner's June 6, 2022 CPRA request for records related to the use of force on Mr. Sanders, Respondents do not dispute Petitioner's timeline of the events nor the exhibits provided in reference thereto. Respondents stand by their response that the records requested by Petitioner are not disclosable/exempt and not subject to any exception to nondisclosure because the incident does not "involv[e] the use of force against a person by a peace officer or custodial officer that resulted in death or great bodily injury," contrary to Petitioner's assertion. Pen. Code § 832.7(b)(1)(A)(ii).

3. THE REQUESTED RECORDS ARE NOT DISCLOSABLE BECAUSE THE INCIDENT DID NOT INVOLVE A USE OF FORCE THAT RESULTED IN GREAT BODILY INJURY.

It is undisputed in this matter that Petitioner's CPRA request involves records subject to the investigatory records exemption; rather the question is whether the Penal Code section 832.7, subdivision (b) *exception* to such exemption applies.[2] (*See* Mot. at 17:25-2:3; Gov. Code §§ 7922.000, 7922.530, subd. (a).) Petitioner asserts that Respondents may not claim that the requested records are exempt from disclosure under Government Code section 7923.600, subdivision (a) because the records relate to a use of force causing great bodily injury, triggering an exception that restores disclosability. However, Petitioner's definition of great bodily injury ("GBI") is overbroad and subverts the Legislature's intent in enacting SB 1421 *et al*.

A. Petitioner's Definition of "Great Bodily Injury" is Flawed and Overly Broad.

Petitioner's Motion asserts that GBI (as used in Penal Code section 832.7, subdivision (b)) should be based on Penal Code section 12022.7(f), which defines GBI as "a significant or substantial physical injury." As Petitioner argues, such definition would allow GBI to include a broad array of injuries, resulting in abrasions/scrapes, contusions/bruises, burns, punctures, lacerations, and even just physical pain. (Mot. at 16:13-23.)

i. The Broad GBI Definition Would Make All Uses Of Force Disclosable.

However, the practical implications of Petitioner's broad definition must be considered. If the broadest Penal Code definition of GBI was held to apply to Penal Code section 832.7, subdivision (b), such definition would essentially devour the privilege afforded by Government Code section 7923.600, subdivision (a). This is because, in such an event, *virtually any and all police uses of force would fall into the CPRA-discoverable category of officer uses of force resulting*

[2] As the Court is aware, under the CPRA, there are several **exemptions** to the CPRA's public records disclosure requirements (such as the police investigatory records exemption) that make certain records non-disclosable; there are several **exceptions** to certain exemptions under certain circumstances (such as the exception that restores CPRA disclosability to police investigatory records of officer-involved shootings, or OIS); and there are also certain **caveats** to those exceptions that restore excepted records to non-disclosable status (such as during the administrative investigation of an OIS) in narrow circumstances. *See, e.g.*, Gov. Code §§ 7921.000, 7923.600; Pen. Code § 832.7.

in death or GBI. In other words, the broad GBI definition would effectively void the Government Code section 7923.600, subdivision (a) exemptions from disclosure for uses of force that resulted in minor scrapes, bruises, abrasions, burns, lacerations, or even physical pain.

Given Petitioner's overly broad scope of such a hole in the investigative records exemption, and given that the Legislature appeared to take great pains to preserve such privilege (as explained in more detail below), there is little support for the contention that the Penal Code section 12022.7, subdivision (f) definition of "great bodily injury," especially as such term has been expanded by case law, applies to the exception to the investigative records exemption here.

ii. Broad GBI Would Lower The Threshold For Use Of Deadly Force.

This is particularly the case when one considers that, as shown below, relative to police uses of force, GBI is used interchangeably with serious bodily injury ("SBI") to refer to a kind of force likely to result in injuries *far more* severe than mere abrasions, contusions, lacerations, punctures, minor burns, or physical pain. (*See, e.g.*, *People v. Arnett* (2006) 139 Cal.App.4th 1609, 1613 (when it comes to police use of force standards, "great bodily injury" and "serious bodily injury" have "substantially the same meaning".) Specifically, in the context of police use of force, GBI is typically paired with death as the type of result that, in order to be avoided, deadly force may be used. (*See* Section 3(B)(i), *infra*.)

Significantly then, applying the broad Penal Code section 12022.7, subdivision (f) definition of GBI to police use of force in the CPRA context would also have the bizarre side effect of lowering the threshold for when officers could use deadly force. This is because, under both California and federal law, law enforcement officers are authorized to use deadly force when, from the perspective of a reasonable officer under the totality of the circumstances known to the force-wielding officer at the time, it is objectively reasonable for the force-wielding officer to reasonably believe that he or she faces an immediate threat of death or *great bodily injury*. (*People v. Morales* (2021) 69 Cal.App.5th 978, 994 (holding that self-defense by deadly force is lawful when the person is facing "imminent attack that might result in death or great bodily injury"); *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1105-1106 (concluding that officers' deadly force is authorized to prevent "great bodily injury"); *Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272

(approving jury instruction that officer deadly force is reasonable where the officer "reasonably believed" a suspect "posed an immediate threat of great bodily injury or death"); *Acosta v. City & Cnty. of San Francisco* (9th Cir. 1996) 83 F.3d 1143, 1145 n.3 (observing that deadly force is lawful to protect against "great bodily injury"); *see also Graham v. Connor* (1989) 490 U.S. 386, 396-397.)

While GBI in the police use of force has not been defined down by the case law to the Penal Code level of embracing mere physical pain, if the broad Penal Code "great bodily injury" definition applied to police use of force and CPRA disclosures thereof, logically, this would also mean that officers would be authorized to shoot for nothing more than a reasonable belief that they were about to face a painful bruise. *Compare People v. Washington* (2021) 210 Cal.App.4th 1042, 1047-1048 ("some physical pain or damage, such as lacerations, bruises, or abrasions" constitutes great bodily injury under Cal. Pen. Code, § 12022.7(f)) *with Munoz*, *supra*, 120 Cal.App.4th at pp. 1105-1106 (concluding that officers' deadly force is authorized to prevent "great bodily injury").) Thus, Petitioner's proffered broad definition of GBI creates a legal absurdity that should not be perpetuated by this Court.

B. Great Bodily Injury Only Includes Life-Threatening and Potentially Permanent, Disabling Injuries.

In contrast to Petitioner's flawed, overbroad definition of GBI, the appropriate definition of GBI rests largely in the Government Code and the case law associated with police use of force: and its narrower strictures are more consistent with the canons of statutory construction and the apparent legislative history in revising and narrowing the scope of disclosability under SB 1421 etc.

i. This Narrower Definition is Supported by Statute and Case Law.

Controlling California case law holds that, in the context of police uses of force, GBI and SBI are essentially the same thing. (*See People v. Knoller* (2007) 41 Cal. 4th 139, 143 n.2 (stating that "the two terms are 'essentially equivalent'"); *Arnett*, *supra*, 139 Cal.App.4th at p. 1613; *see also* Pen. Code § 835a (amend. 2019) (an officer "is justified in using deadly force…when an officer reasonably believes, based on the totality of circumstances, that such force is necessary . . . to defend against an imminent threat of death or serious bodily injury … ").

Moreover, in statutes relating to police use of force, such as those requiring annual reporting on officer-involved shootings and "incident[s] in which the use of force by a peace officer against a civilian results in serious bodily injury or death," SBI is defined as "a bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ." (Gov. Code § 12525.2, subd. (d)(4).)

Additionally, the non-shooting category of CPRA-discoverable force involves two types of force: one that results in death, and another that results in great bodily injury. Particularly since rejected prior versions of the 2019 legislation were broader, and meant to include *all* uses of force (as discussed below), this pairing of GBI with death suggests that GBI is meant to be the kind of injury serious enough to be *comparable* to death. (*See* Section 3(B)(ii), *infra*.) This would thus place the CPRA/Government Code definition of GBI/SBI in line with those authorities defining police-related "deadly force" as being "force that creates a substantial risk of causing death or serious bodily injury." (Pen. Code § 835a, subd. (e)(1); *Tennessee v. Garner* (1985) 471 U.S. 1, 9 n. 8; *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 706 ("deadly force" is "force employed [that] 'creates a substantial risk of causing death or serious bodily injury'"); *accord Koussaya v. City of Stockton* (2020) 54 Cal.App.5th 902, 932-934 (explaining the 2020 amendments to Penal Code § 835a); *Long Beach Police Officers Assn. v. City of Long Beach* (1976) 61 Cal.App.3d 364, 368, 375.)

Notably, in terms of severity of injury, case authorities on deadly force always pair "death" and a definition of SBI/GBI that is more consistent with the Government Code definition: namely, in such authorities, SBI/GBI does <u>not</u> include less serious injuries like abrasions, bruises, punctures, physical pain, and the like – but, rather, SBI/GBI only includes life-threatening and potentially permanent, disabling injuries. (*See id*.; *see also Thompson v. Cnty. of Los Angeles* (2006) 142 Cal.App.4th 154, 165-166 (use of a police dog – whose bite injuries typically result in punctures, lacerations, and contusions – does *not* constitute deadly force under California law).) Moreover, the CPRA is also housed in the *Government* Code, where the narrower definition of SBI/GBI consistent with case law definitions of police-related SBI/GBI can be found.

Accordingly, properly construing GBI narrowly avoids the absurdly broad construction of Petitioner while more closely hewing to the definition supported by related statutory and case law.

ii. The Legislature Intended a Narrower Scope of GBI & Disclosable Force.

As stated by Petitioner in his Motion, "[t]he legislature expressly adopted the term 'great bodily injury,' and one may not 'rewrite a statute to posit an unexpressed intent' or 'speculate that the Legislature meant something other than what it said.'" (Mot. at 15:16-18.) However, it is Petitioner who is rewriting Penal Code section 832.7, subdivision (b) in contradiction to the Legislature's intent in passing and codifying SB 1421. "In ascertaining the meaning of a statute, we look to the intent of the Legislature as expressed by the actual words of the statute[.]" (*California State University, Fresno Assn., Inc. v. Cnty. of Fresno* (2017) 9 Cal.App.5th 250, 266 (quoting *Wasatch Property Mgmt. v. Degrate* (2005) 35 Cal.4th 1111, 1117).) Here, not only do the actual words of the statute support Respondents' narrower definition of GBI as life-threatening and potentially permanent, disabling injuries, but also the legislative history confirms the same.

Significantly, as to TASERs in particular, since at least 2010, courts have recognized that the TASER dart mode (the shoot-from-a-distance mode) can incapacitate a person temporarily, accompanied by significant pain, and that the types of injuries typically caused by TASER devices in dart mode include "puncture wounds or burns" and fall-related abrasions: injuries that courts have classified as "significant," while also holding that such injuries are not "serious" or "life-threatening" – unless a person is incapacitated from a high position, such that the fall causes death. (*See, e.g.*, *Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 813-814; *Brooks v. City of Seattle* (9th Cir. 2010) 559 F.3d 1018, 1025, 1028 (distinguishing dart mode as causing loss of muscle control and fall-related abrasions from drive-stun mode, which does not); *see generally Armatuni v. 5230 Hollywood* (Los Angeles Super. Ct. June 3, 2022) 2022 Cal. Super. LEXIS 37762, *7-8 (restating plaintiffs' TASER allegations). By contrast, also since at least 2010, courts have recognized that the types of injuries typically caused by TASER devices in drive-stun mode include only pain or de minimis, insignificant, temporary injuries: because the drive-stun mode "inflicts only transitory, localized pain" without "incapacitating muscle contractions or significant lasting injury." (*See, e.g.*, *Brooks, supra*, 559 F.3d at pp 1025-1028; *Crowell v. Kirkpatrick* (2d Cir. 2010)

400 Fed. Appx. 592, 595 (observing that TASER drive stun mode causes only pain, no permanent injury); *Brossart v. Janke* (8th Cir. 2017) 859 F.3d 616, 626 n. 6 (TASER drive-stun mode causes only pain and "de minimis" injury); *see generally In re Brandon O* (2009) 174 Cal.App.4th 637, 643; *In re M.S.* (2021) 70 Cal.App.5th 728, 731 n. 2; *Fujikawa v. City of San Jose*, 2017 Cal.App.Unpub. LEXIS 7451, *7 n. 4 (2017) (distinguishing TASER dart mode from drive stun); *but see* Cal. R. Ct. 8.1115(a)-(b) (unpublished cases may not be cited).)

This is important to understanding the scope of the *current* law because, before 2019, the case law shows that the known non-deadly injuries typically caused by TASER devices included: puncture wounds and associated subdural hemorrhages, electrical burns, local (drive-stun) or significant/incapacitating (dart mode) pain, and, as to drive-stun mode only, fall-related abrasions. (*See, e.g.*, *Brooks, supra*, 559 F.3d at pp 1025-1028; *Bryan*, *supra*, 630 F.3d at pp. 813-814.)

Specifically, it is well known in the case law and otherwise that electronic control weapons (TASERs) typically cause punctures in their probe or dart stun mode, and they cause burn-like dots or abrasions in their drive-stun mode. (*See*, *e.g.*, *Carroll v. Ellington* (5th Cir. 2015) 800 F.3d 154, 166 (acknowledging that puncture wounds on the chest and flank could be consistent with TASER probe deployments); *see also Mattos v. Agarano* (9th Cir. 2011) 661 F.3d 433, 443 (distinguishing the neuromuscular full body incapacitation of TASERs in dart mode versus the pain-only effects of TASERs in drive stun to contact mode).) It is also well known in the case law and otherwise that impact weapons, like police batons and flashlights, typically cause contusions and possibly fractures. (*See*, *e.g.*, *People v. Odom* (2016) 244 Cal.App.4th 237, 241 (observing that parallel contusions could be consistent with being struck by a police baton); *Ervin v. Merced Police Dept*. (E.D. Cal. 2015) 2015 U.S. Dist. LEXIS 136655, *26-30 (police baton use that fractured teeth evaluated by court as non-deadly force); *Valiavacharska v. Celaya* (N.D. Cal. 2011) 2011 U.S. Dist. LEXIS 109164, *1-2 (police baton fractured fingers).) Whereas it is also well known in the case law and otherwise that police K9 dog bites typically cause punctures and lacerations. (*See*, *e.g.*, *Hernandez v. Town of Gilbert* (D. Ariz. 2019) 2019 U.S. Dist. LEXIS 61480, *28-29 (police K9 dog bites caused lacerations and fractures to suspect's foot); *Vargas v. Whatcom Cty. Sheriff's Office* (W.D. Wash. 2021) 2021 U.S. Dist. LEXIS 29770, *9 (police K9 dog bites caused punctures to foot,

nerve damage, and chronic pain); *Martus v. Terry* (D. Nev. 2011) 2011 U.S. Dist. LEXIS 36296, *4-5, 8-14 (police K9 dog bites caused punctures to hip and loss of the tip of the suspect's index finger, but force still analyzed as non-deadly).)

Yet, under prevailing case law, **none of these uses of force are considered to be deadly force**: rather a TASER in drive-stun mode is considered to be non-deadly/low force; while a TASER in dart mode, impact weapons like police batons, pepper spray, and police K9 dog bites are all considered to be non-deadly/intermediate force under prevailing case law. (*See Bryan*, *supra*, 630 F.3d at pp. 825-826 (TASERs are non-lethal force, but when used in dart mode, they are non-lethal intermediate force requiring the presence of a threat of harm to be justified; also noting that pepper spray and impact weapons are non-deadly force); *Brewer v. City of Napa* (9th Cir. 2000) 210 F.3d 1093, 1098 (police K9 dogs' bites are non-deadly intermediate force); *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1161 (pepper spray and baton strikes are non-deadly intermediate force); *Forrester v. City of San Diego* (9th Cir. 1994) 25 F.3d 804, 806-808 (pain compliance techniques such as firm grip restraint, pressure holds, and arm/wrist twisting are non-deadly force); *Deorle v. Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1279-1280 (impact weapon, including cloth-cased shot akin to a rubber bullet, was non-deadly force as a matter of law); *Thomson v. Salt Lake County* (10th Cir. 2009) 584 F.3d 1304, 1316 (potential for greater harm does not transform use of a police dog into deadly force); *Jackson v. Cnty. of San Bernardino*, 191 F.Supp.3d 1100, 1114-1115 (C.D. Cal. 2016) (noting that TASERs are not lethal force unless used on a person in danger of falling to their death, *i.e.*, a known substantial risk of death).)

Under controlling case law, "deadly force" is force which, from the perspective of the force-wielding officer under the totality of the circumstances, at the time it is used, creates a foreseeable and substantial risk of death or great bodily injury. (*See. e.g.*, Pen. Code § 835a ("deadly force" is "force that creates a substantial risk of causing death or serious bodily injury"); *accord Garner*, *supra*, 471 U.S. at p. 9 n.8; *Smith*, *supra*, 394 F.3d at pp. 701, 706 ("deadly force" is "force employed [that] creates a substantial risk of causing death of serious bodily injury"); *see also Thompson*, *supra*, 142 Cal.App.4th at pp. 163-166 (use of a police dog – whose bite injuries typically result in punctures, lacerations ,and contusions – does *not* constitute deadly force under California law);

Luchtel v. Hagemann (9th Cir. 2010) 623 F.3d 975, 980; *Tekle v. United States* (9th Cir. 2007) 511 F.3d 839, 844-845; *Bryan*, *supra*, 630 F.3d at pp. 825-826.)

However, if Petitioner's broader definition of GBI were applied, because all of these force options are all likely to cause physical pain, all non-deadly force options – TASERs, batons, pepper spray, K9s – would automatically become "deadly force" under California law – contrary to controlling case law . Specifically, the legislative history of SB 1421 reveals that Petitioner's broad definition of GBI cannot be consistent with the definition of GBI used for purposes of determining disclosability of police uses of force under the CPRA. (*Hughes v. Pair* (2009) 46 Cal. 4th 1035, 1046 ("When statutory language is reasonably subject to more than one interpretation . . . we may consider extrinsic aids, such as legislative history. But we also look to legislative history to confirm our plain-meaning construction of statutory language.") (cleaned up).)

Of note, a precursor to SB 1421 was SB 1286. Introduced on February 19, 2016, SB 1286 bill desired to "require . . . certain peace officer…personnel records and records relating to complaints against peace officers and custodial officers to be available for public inspection pursuant to the [CPRA], including: [¶] [any] record related to the investigation or assessment of any use of force by a peace officer that is likely to or does cause death or serious bodily injury, including but not limited to, the discharge of a firearm, use of an electronic control weapon or conducted energy device [TASER], and any strike with an impact weapon to a person's head." (Request for Judicial Notice, Exh. A at p. 6 (emphasis added).) Notably, SB 1286 died in committee.

Like SB 1286, the originally-introduced version of SB 1421 that amended Penal Code section 832.7 mandated disclosure, through the CPRA, of records related to: (1) incidents involving the discharge of a firearm at a person by an officer; (2) incidents involving the discharge of an electronic control weapon or conduct energy device at a person by an officer; (3) incidents involving a strike with an impact weapon or projectile to the head or neck of a person by an officer; and (4) incidents involving use of force by an officer which results in death or serious bodily injury, as defined in Penal Code section 243, subdivision (f). (Request for Judicial Notice, Exh. B; *id.*, Exh. C at p. 6.) Thus, this early version of SB 1421 also defined the type of injury that rendered investigative reports disclosable under the CPRA more narrowly than Petitioner does in this matter:

especially considering that, under the Penal Code, "'Serious bodily injury' means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." (Pen. Code § 243, subd. (f)(4).)

As is evident, **this language explicitly <u>including</u> incidents involving TASERs and impact weapons** along with incidents involving discharge of a firearm and that result in death and serious bodily injury **does <u>not</u> appear in the final statute**. (*See* Pen. Code § 832.7; *accord* AB 748 (amended on August 17, 2018 to include incidents involving TASERs and impact weapons, but final language of Gov. Code § 6354(f) (2019) removed such language.) Notably, even with this much broader range of excepted records than what was ultimately adopted, the Senate Floor Analysis explicitly stated that "SB 1421 opens police officer personnel records in *very limited* cases, allowing local law enforcement agencies and law enforcement oversight agencies to provide greater transparency around **only the most serious police complaints**." (Request for Judicial Notice, Exh. D at p. 7 (emphasis added).) It would be absurd to interpret the legislative intent as extending "the most serious police complaints" to those that, according to the Petitioner's GBI definition, do no more than cause physical pain or abrasions (scrapes) and contusions (bruises).

Furthermore, embracing the precept that the incidents where disclosures should be permitted should be "very limited," the bill was then *further* amended by the Legislature to *remove* from the list of CPRA-disclosable force use of an electronic control weapons (TASERs), as well as removing from the list of disclosable force strikes with impact weapons or projectiles to the head or neck of a person. (Request for Judicial Notice, Exhs. E, F; *id.*, Exh. G at p. 1.) By narrowing the scope of CPRA-disclosable force, to exclude TASERs and batons from the excepted list, and by stating that the definitions of disclosable force were intended to be "very limited" to only the "most serious" uses of force, the Legislature showed that its intent here was more consistent with the narrower construction of GBI that is used in evaluating police uses of force. More importantly, if – in its revision of the CPRA – the Legislature intended the broader Penal Code definition of GBI to apply to police force, then the legislative history would not indicate (as it does) that the Legislature intended to *narrow* the scope of disclosability away from weapons that merely cause contusions,

abrasions, lacerations, and punctures – as TASER and impact weapons do. It would be entirely inconsistent with the canons of statutory construction to believe that, in its attempt to *narrow* the scope of CPRA disclosability under the Penal Code section 832.7 exception, the Legislature adopted a term, GBI, that instead broadened the scope of disclosure to include, effectively, *all* uses of force. This is further supported by the fact that, in 2020, Senator Skinner (who introduced SB 1421) introduced SB 776 in another attempt to broaden the Penal Code section 832.7 exception to all uses of force: an attempt that failed. (Request for Judicial Notice, Exh. H.)

As a result, Plaintiff's broad definition of GBI is both inconsistent with how GBI is defined in the context of police use of force and it leads to absurd results; thus, the broad version cannot be the legally correct definition of CPRA GBI. This is particularly true considering the fact that California police chiefs' acquiescence to then-bill SB 1421 was reportedly contingent upon the Legislature's addition of the "limiting" GBI language. (McLaughlin Decl., Exh. I (reporting that the California Police Chiefs Association had approved the final draft of the bill a week before passage).) It is absurd to believe that the police community would have embraced a definition of GBI relative to use of force that is wholly alien to and broader than their understanding of GBI/SBI as a fatal or near-fatal/permanent injury situation in the context of police use of force. (*See id*.; *see generally* Code Civ. Proc. § 1859; *In re Williamson* (1954) 43 Cal.2d 651, 654 ("It is the general rule [of statutory construction] that where the general statute standing alone would include the same matter [conduct] as the special [specific] act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment."); *accord People v. Murphy* (2011) 52 Cal.4th 81, 86; *Morton v. Mancari* (1974) 417 U.S. 535, 550 ("where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment"); *Townsend v. Little* (1883) 109 U.S. 504, 512; *Collandrez v. City of Rio Vista* (2021) 61 Cal.App.5th 1039, 1052.)

iii. Statutory Construction Canons Support this Narrower Definition of GBI.

Because Petitioner's GBI definition would lead to absurd results that appear contrary to the legislative intent, the narrower GBI interpretation is better supported by common notions of

statutory construction, despite Petitioner's arguments to the contrary. To elaborate, under the canons of statutory construction for courts:

> When we interpret a statute, [o]ur fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. [Then], we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.

(*See Collandrez*, *supra*, 61 Cal.App.5th at p. 1052 (citing *Becerra v. Superior Ct*. (2020) 44 Cal.App.5th 897, 917; *Weiss v. City of Del Mar* (2019) 39 Cal.App.5th 609, 618 (internal citations and quotation marks omitted)); *see generally In re Williamson*, *supra*, 43 Cal.2d 651; *People v. Murphy*, *supra*, 52 Cal.4th 81.)

Along these lines, "whenever possible, significance must be given to every word [in a statute] in pursuing legislative purpose, and the court should avoid a construction that makes some words surplusage." (*See Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330; *accord Collandrez*, *supra*, 61 Cal.App.5th at p. 1052; *Office of Inspector General v. Superior Ct.* (2010) 189 Cal.App.4th 695, 708 (quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22).) Thus, under the canons of statutory construction, a "statute should be interpreted to avoid an absurd result." (*Wasatch Property Mgmt. v. Degrate* (2005) 35 Cal.4th 1111, 1122 (a "statute should be interpreted to avoid an absurd result"); *Newark Unif. Sch. Dist. v. Superior Ct*. (2015) 245 Cal.App.4th 887, 899 (Courts "may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results.") (cleaned up) (quoting *Riverside Cnty. Sheriff's Department v. Stiglitz* (2014) 60 Cal.4th 624, 630).)

As a result, given the fact that applying the broad Penal Code construction of GBI, to police use force would result in obliterating the case law distinctions between deadly force and non-deadly force, while also lowering the threshold for use of deadly force (increasing officer shootings); and given that the broad construction of GBI would also effectively eliminate the investigatory records

exemption and other guardrails the Legislature imposed to keep the scope of the SB 1421 exception's disclosability "very limited"; and given the legislative history showing that the scope of the 2019+ exception was intended to be *narrowed* by the amendments, not broadened, it would be absurd to interpret the SB 1421 use of the term "great bodily injury" to be consistent with the Penal Code definition of GBI, as such has been expanded by case law to include physical pain; and thereby to sweep virtually all uses of force into the CPRA-disclosable category.

As such, in light of the foregoing, the only reasonable statutory construction available here is that when the Legislature adopted the term "great bodily injury" in the context of police uses of force that would become disclosable under the CPRA, the Legislature meant to embrace the interpretation of GBI that officers are trained to use when evaluating various types of force and distinguishing deadly force from non-deadly force. Thus, namely, for purposes of determining whether police force incidents are disclosable under the 2019+ amendments to the CPRA, the weight of the authorities clearly supports the *narrower* definition of GBI: that only force that causes death or a life-threatening and potentially permanent, disabling injury is CPRA disclosable under the applicable exception. In other words, when applying all of these statutory construction principles here, the proper definition of GBI for purposes of determining the disclosability of police force under the CPRA is more consistent with the Government Code definition of SBI (which case law treats as interchangeable with GBI in the context of analyzing police use of force): namely, force that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ is disclosable; while lesser force – such as non-deadly force that causes merely minor fractures, lacerations, punctures, contusions, abrasions or physical pain (like TASERs or batons) – is *not* disclosable.

C. Under the Proper Definition of GBI, the Requested Records are *Not* Disclosable Under the CPRA.

Petitioner asserts that the injuries to Mr. Sanders during the incident involving him and City of Fresno police officers are "more than enough to establish great bodily injury," referencing the "at least ***eleven*** puncture wounds" and asserting that the TASER strikes "burned the flesh of [Mr. Sanders'] groin to a crisp." (Mot. at 15:11-15.) However, Petitioner's assertion of burnt flesh is

without support – the autopsy report did note that "[o]ne of the puncture wounds shows surrounding carbonization," but when the medical examiner searched for areas of deep injury, "[o]nly small areas of subcutaneous hemorrhage [we]re identified beneath the penetrating probes. No deep hemorrhage [was] seen." (Howey Decl. ¶ 3 & Exh. A, pp. 3, 10.) As explained above, TASERs are an intermediate or moderate, *not* deadly, use of force because "[n]o evidence is presented that Tasers constitute force that creates a substantial risk of death." *Sanders*, *supra*, 551 F.Supp.2d at p. 1168 (also noting that Mr. Sanders "clearly did not die immediately, . . . was able to breathe and converse with the officers . . ., and the coroner's report indicate[d] that he died due to complications associated with cocaine ingestion."); *see Jackson*, *supra*, 191 F.Supp.3d at pp. 1114-1115.

Here, Mr. Sanders did not suffer a life-threatening and potentially permanent, disabling injury. Rather, he suffered from puncture wounds with only small areas of subcutaneous hemorrhage and a single area showing carbonization, *i.e.* burns, which are expected injuries from TASER dart and/or drive-stun deployment. *See, e.g.*, *Brooks, supra*, 559 F.3d at pp 1025-1028; *Bryan*, *supra*, 630 F.3d at pp. 813-814. As discussed at length in Section 3(B)(ii), *supra*, these are *not* injuries classified as GBI in the proper context of police use of force and disclosability under the CPRA: which omitted TASERs and batons from disclosable force. Thus, Penal Code section 832.7, subsection (b) is inapplicable to the CPRA request at issue here and the exemption to disclosure remains under Government Code section 7923.600, subdivision (a). Respondents acted properly in asserting such exemption and not producing further records in response to Petitioner's CPRA request and, thus, Respondents' justification for nondisclosure was valid.

4. CONCLUSION.

For the foregoing reasons, Respondents respectfully request that the Court deny Petitioner's motion in its entirety, including denying attorneys' fees, and enter judgment in Respondents' favor.

DATED: July 5, 2023

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Tony M. Sain*
TONY M. SAIN
ABIGAIL J. R. McLAUGHLIN
Attorneys for Respondents/Defendants,
CITY OF FRESNO, et al.

CALIFORNIA STATE COURT PROOF OF SERVICE
Howey, Brian v. City of Fresno, et al.
Fresno SC Case No. 23CECG01468; C/M# 54983-03

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, CA 90071.

On July 5, 2023, I served true copies of the following document(s): RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR JUDGMENT

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

☒ (BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent from e-mail address Corinne.Taylor@lewisbrisbois.com to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on July 5, 2023, at Los Angeles, California.

/s/ Corinne Taylor
Corinne Taylor

SERVICE LIST
Howey, Brian v. City of Fresno, et al.
Fresno SC Case No. 23CECG01468; C/M# 54983-03

David Loy, Esq.
Khrystan Policarpio, Esq.
FIRST AMENDMENT COALITION
534 4th Street, Suite B
San Rafael, California 94901-3334
Telephone: 415.460.5060
Email: dloy@firstamendmentcoalition.org
kpolicarpio@firstamendmentcoalition.org

Attorneys for Plaintiff/Petitioner, BRIAN HOWEY

Tenaya Rodewald, Esq.
Matthew G. Halgren, Esq.
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
1540 El Camino Real, Suite 120
Menlo Park, California 94025-4111
Telephone: 650.815.2600
Email: trodewald@sheppardmullin.com
mhalgren@sheppardmullin.com

Attorneys for Plaintiff/Petitioner, BRIAN HOWEY