IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

Division ____

First Amendment Coalition; KQED Inc., Petitioners, **Superior Court of California for the County of San Francisco**, Respondent, **Rob Bonta, Attorney General of the State of California; California Department of Justice**, Real Parties in Interest.	Case No. (related to Becerra v. Superior Court, No. A157998)

San Francisco County Superior Court, Case No. CPF-19-516545
Dept. 611, Hon. Curtis E. A. Karnow, Judge

Petition for Writ of Mandate and Memorandum in Support — Gov. Code § 6259 (Public Records Act Review)

Thomas R. Burke (SBN 141930)
Davis Wright Tremaine LLP
505 Montgomery St., Suite 800
San Francisco, CA 94111-6533
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
Email: thomasburke@dwt.com

Attorney for Plaintiff/ Petitioner
KQED Inc.

Michael T. Risher (SBN 191627)
Law Office of Michael T. Risher
2081 Center St., #154
Berkeley CA 94702
Telephone: (510) 689-1657
Facsimile: (510) 225-0941
Email: michael@risherlaw.com

Attorney for Plaintiff/Petitioner
First Amendment Coalition

Sarah E. Burns (SBN 324466)
Davis Wright Tremaine LLP
865 S. Figueroa St. Suite2400
Los Angeles, CA 90029
Telephone: (213) 633-6808
Facsimile: (213) 633-6899
Email: sarahburns@dwt.com

Attorney for Plaintiff/Petitioner
KQED Inc.

David E. Snyder (SBN 262001)
David Loy (SBN 229235)
Monica Price (SBN 335464)
First Amendment Coalition
534 4th Street, Suite B
San Rafael, CA 94901-3334
Telephone: (415) 460-5060
Facsimile: (415) 460-5155
Email: dsnyder@firstamendmentcoalition.org
dloy@firstamendmentcoalition.org
mprice@firstamendmentcoalition.org

Attorneys for Plaintiff/Petitioner
First Amendment Coalition

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with Rule 8.208 of the California Rules of Court, Plaintiffs/Petitioners First Amendment Coalition and KQED Inc., by and through their undersigned counsel, certify that there are no interested entities or persons that must be listed in this Certificate under Rule 8.208.

Dated: August 17, 2022

Law Office of Michael T. Risher

/s/ Michael T. Risher
Michael T. Risher

Attorney for First Amendment Coalition

Davis Wright Tremaine LLP

/s/ Thomas R. Burke
Thomas R. Burke
Sarah E. Burns

Attorneys for KQED Inc.

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INTRODUCTION

Four years ago, the Legislature amended California's open-government laws to give the public "a right to know all about serious police misconduct" and certain uses of force. Stats. 2018 ch. 988 § (1)(b) (SB 1421). To carry this out, it required that "[n]otwithstanding … any other law," every "record relating to" such incidents "shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act" *Id*. § 2(b)(1) (codified at Penal Code § 832.7).

The Attorney General – whose legal guidance is followed by agencies throughout California – nevertheless contends that agencies can withhold records covered by SB 1421 whenever any other State law makes them confidential. The superior court agreed and allowed the State to withhold tens of thousands of potentially responsive records under confidentiality provisions found in the Penal Code, the Government Code, and the Unemployment Insurance Code.

This was error. Allowing the government to withhold records covered by the police-transparency statute simply because they would ordinarily be confidential in non-misconduct cases violates the plain, unambiguous statutory requirement that records

subject to the new statute are not confidential "[n]otwithstanding … any other law," as well as the explicit legislative intent to allow the public to know "all about" these incidents. This interpretation would bar public access to records that the Legislature has said are not confidential. It is also completely unnecessary, because SB 1421's detailed provisions for withholding and redaction provide ample authority for agencies to withhold information when there are legitimate reasons to do so.

Moreover, even if the government may withhold records subject to SB 1421 based on some provisions of state law found outside of that statute, it cannot do so based on the confidentiality provisions it here invokes. Those provisions directly conflict with the statutory language that records covered by SB 1421 "shall not be confidential," as well as with Legislative intent to allow public access to records of independent oversight agencies such as the Attorney General and the Office of the Inspector General, which monitors the prison system.

This Court's earlier decision in this case is not to the contrary because it did not involve a confidentiality statute. *See Becerra v. Superior Court*, 44 Cal. App. 5th 897, 923-25 (2020). The question

there was whether the government could rely on the CPRA's catchall balancing test based on its claim that the burden of locating and providing records would clearly outweigh the public interest in their release. *Id.* In holding that it could, this Court emphasized that this one provision does not conflict with any of SB 1421's provisions. *See id.* at 925. At the same time, the opinion expressly recognized that other "provisions of law that conflict with section 832.7(b) … are inapplicable" to records covered by the transparency statute. *Id.* (citation omitted). Unlike Government Code § 6255, the provisions here at issue do conflict with § 832.7(b) because they are confidentiality provisions; applying a confidentiality provision to records that "shall not be confidential" under the new transparency statute creates a stark conflict.

In addition, one provision asserted by the State simply does not apply to the types of records here at issue: that section, Government Code § 11183, prohibits disclosure only of "private" records relating to "confidential or private transactions, property or business." § 11183. It cannot be used to prevent public access to public records that are "not … confidential" under SB 1421. Absent action by this Court, the Attorney General's flawed

interpretation of California's landmark Right to Know law will be followed by other agencies throughout the state.

Because the court's order is reviewable only by way of this petition, Gov't Code § 6259(a), this Court should issue an order to show cause and then, after briefing and argument, issue a peremptory writ of mandate reversing the superior court's order.

VERIFIED PETITION FOR WRIT OF MANDATE

1. This Petition seeks to enforce Plaintiffs' right to public records under the California Constitution and the California Public Records Act, (CPRA), Government Code § 6250 *et seq*.[1]

A. Parties

2. Plaintiff/Petitioner First Amendment Coalition (FAC) is a non-profit corporation that is dedicated to advancing free-speech rights, ensuring open and accountable government, and promoting public participation in civic affairs. *See* 1 Petitioners' Appendix ("PA") 15. FAC, which is based in Marin County, has long fought to ensure access to public records in California and was active in supporting SB 1421. FAC is a member of the public under Government Code § 6252 and is

[1] All undesignated section references are to the Government Code, except references to § 832.7, which refers to that section of the Penal Code.

beneficially interested in the outcome of these proceedings; it has a clear, present and substantial right to the relief sought herein and no plain, speedy and adequate remedy at law other than that sought herein.

3. Plaintiff KQED Inc. is a community-supported media organization providing coverage of news and culture to Northern California via radio, television, and digital media. 1 PA 15. To fulfill its mission to inform the public, KQED depends on access to public records. As such, KQED is within the class of persons beneficially interested in Defendants' performance of their legal duties under the California Public Records Act.
4. Defendant/ Real Party in Interest California Department of Justice is a State agency that employs hundreds of sworn peace officers and maintains records relating to those officers and to other California peace and correctional officers.
5. Defendant/Real Party in Intertest Rob Bonta is the Attorney General of the State of California. Under Article 5, § 13 of the California Constitution, he is the "chief law officer of the State." He is the head of the Department of Justice and ultimately responsible for its actions.
6. Respondent Superior Court of the State of California, County of San Francisco issued the order here challenged.

B. Jurisdiction, Venue, and Mandatory Writ Review

7. The superior court had jurisdiction over this matter under Article VI § 10 of the California Constitution and §§ 6258, 6259.
8. Venue was uncontested below and is proper because the records at issue are located in Sacramento County, meaning that suit may be brought in any county in which the Attorney General has an office. The Attorney General has an office in San Francisco.
9. This Court has jurisdiction under Article VI § 10 of the California Constitution and § 6259(c), which states that "an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ."
10. On July 8, 2022, the superior court issued an order that, in part, supported the decision of Defendants not to release parts of the records at issue. 4 PA 791.
11. On July 19, the superior court signed an order extending the usual 20-day deadline for any party to petition for appellate review of the court's July 8 order by 20 days under § 6259(c). 4 PA 826-27. This Petition

is therefore timely if filed on or before August 17, 2022. *See* § 6259(c).

12. When "a writ petition was the only authorized mode of appellate review … an appellate court must judge the petition on its procedural and substantive merits." *Leone v. Med. Bd. of Cal.*, 22 Cal. 4th 660, 670 (2000). *See also* Code of Civ. Proc. § 1086 ("The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law."). Thus, when the California Supreme Court upheld the constitutionality of the CPRA's mandatory writ-review procedure, it emphasized that because "writ review is the exclusive means of appellate review of a final order or judgment [under § 6259], an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters." *Powers v. City of Richmond*, 10 Cal. 4th 85, 114 (1995) (lead op. of Kennard, J.); *see id.* at 118 (George, J. concurring) (explaining that writ-review provision "was enacted not to diminish the rights of individuals … who seek disclosure of governmental information under the Public Records Act" to obtain appellate review).

13. This Court should therefore issue an order to show cause and address the merits of the case.

C. Standard of Review

14. In reviewing a superior court order under § 6259, this "court conducts an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence." *Becerra v. Superior Ct.*, 44 Cal. App. 5th 897, 913 (2020) (citation omitted); *see, e.g*, *ACLU of Northern California v. Superior Ct.*, 202 Cal. App. 4th 55, 66 (2011) ("*ACLUNC*").

D. Burden of Proof

15. The government bears the burden to show that a record or part thereof is exempt from disclosure under the CPRA. *Becerra*, 44 Cal. App. 5th at 914; *see Sander v. State Bar of Cal.*, 58 Cal. 4th 300, 323 (2013) ("The CPRA establishes a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency, and the record must be disclosed unless a statutory exception is shown.").
16. This includes the burden to show that a record "is exempt from disclosure under section 6254, subdivision (k) by virtue of the *Pitchess* statutes" or other confidentiality provisions. *Pasadena Police Officers Ass'n v. Superior Ct.*, 240 Cal. App. 4th 268, 290 (2015).

17. The government must meet this burden with a "detailed justification" for withholding each record. *ACLUNC*, 202 Cal. App. 4th at 85. This explanation must be "specific enough to give the requester a meaningful opportunity to contest the withholding of the documents and the court to determine whether the exemption applies." *Id.* at 83-85 (citation omitted). The government must justify any redaction, just as it must justify withholding entire documents. *See id.* at 82-85.

E. Authenticity of Exhibits

18. The exhibits submitted in conjunction with this petition are true copies of the original documents on file with respondent court, the certified reporter's transcript of the indicated hearing in the respondent court, and the register of actions from the superior court's online case-records access system.

F. Legal Background: the CPRA, *Pitchess* Statutes, and SB 1421

19. Under the CPRA, all records that are prepared, owned, used, or retained by any public agency, and that are not subject to the CPRA's statutory exemptions from disclosure, must be made publicly available for inspection and copying upon request. *See* § 6253(a), (b); *Becerra*, 44 Cal. App. 5th at 918.
20. The CPRA has numerous exemptions from disclosure, three of which are relevant to this case.

21. Section 6255(a) allows agencies to withhold records if "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."
22. Section 6254(f) exempts "[r]ecords of complaints to, or investigations conducted by… the Department of Justice, … and any state or local police agency." This allows law enforcement agencies to withhold a broad array of records relating to criminal and administrative investigations, including investigations of peace officers. *See Williams v. Superior Ct.*, 5 Cal. 4th 337, 341, 348-49, 354-62 (1993) (allowing government to withhold all records relating to closed criminal and administrative investigations of deputy sheriffs). This protection never expires. *See id*.
23. Section 6254(k) allows agencies to withhold "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." It "is not an independent exemption" to disclosure. *Copley Press, Inc. v. Superior Ct.*, 39 Cal. 4th 1272, 1283 (2006). Instead, it "merely incorporates other prohibitions established by law." *Id*. (citation omitted). This includes the so-called *Pitchess* statutes, Penal Code § 832.7(a), which prohibit public access to law-enforcement personnel records. *See Becerra*, 44 Cal. App. 5th at 914-15.

24. Before 2019, § 832.7(a) and § 6254(f) worked together to block almost any public access to records that could shed light into law enforcement's use of excessive force or misconduct. Law-enforcement personnel records — including records of any complaints as well as the results of any investigations of those complaints — were broadly confidential under the *Pitchess* statutes. *See Becerra*, 44 Cal. App. 5th at 914-15. Other records that might reveal misconduct such as incident reports and audio or video recordings misconduct were exempt from production under § 6254(f). *See Williams*, 5 Cal. 4th at 341, 348-49, 354-62. Because of these broad protections, there was little or no need for law-enforcement agencies to argue that other statutes barred access to these types of records.

25. In 2018, however, the Legislature enacted SB 1421 to require public access to certain records of police misconduct and uses of force. *See* 2018 Cal. Legis. Serv. Ch. 988 (SB 1421), *codified in part at* § 832.7(b). In doing so, it declared that the public "has a right to know *all about* serious police misconduct, as well as about officer-involved shootings and other serious uses of force." *Id*. at § 1(b) (emphasis added). Thus, as of 2019, the law mandates disclosure of records relating to incidents such as the discharge of a firearm, use of force, sexual misconduct, and dishonesty in certain contexts. § 832.7(b)(1) & (2), *as amended by* Stats. 2018,

ch. 988 § 2 (SB 1421); *see Becerra*, 44 Cal. App. 5th at 925.

26. The statute applies to records that were created before 2019. *See Walnut Creek Police Officers' Ass'n v. City of Walnut Creek*, 33 Cal. App. 5th 940, 941-42 (2019).
27. The records made disclosable pursuant to the CPRA by SB 1421 include those related to an officer's discharge of a firearm at a person or use of force resulting in death or great bodily injury, as well as records relating to an incident in which an officer was found to have committed sexual assault or certain types of dishonesty. *See* § 832.7(b)(1).
28. The Legislature has since amended some of the relevant provisions, effective January 2022. *See* Stats. 2021 Ch. 402 (SB 16).
29. SB 16 added to the types of incidents that require disclosure to include those involving a sustained finding of prejudice, discrimination, unlawful arrests, or illegal searches. § 832.7(b)(1)(D), (E).
30. Because those changes took effect after Defendants had completed their search for records and nearly all their production, this case does not involve these new categories.
31. SB 16 also changed the numbering of several paragraphs of § 832.7(b). Most significantly for this brief, SB 16 added a new paragraph (b)(2), meaning that subsequent paragraphs have been renumbered (for

example, former (b)(3) and (b)(4) are now (b)(4) and (b)(5), respectively).

32. Citations in this Petition are to the current version of the law, because that is the version that this Court must apply. *See Flores v. Dep't of Transp.*, 76 Cal. App. 5th 678, 681-82 (2022).

G. Procedural Background

33. This litigation proceeded in two stages. The first stage culminated in this Court's opinion in *Becerra*, which resolved questions relating to the scope of SB 1421 and whether the Department must disclose records in its possession relating to officers employed by other agencies. The current second stage involves questions about the government's authority to withhold documents as exempt from disclosure.

1. Stage One: Litigating the scope of SB 1421

34. The first stage of the litigation is described in detail in *Becerra*, 44 Cal. App. 5th at 910-13.

35. In short, soon after SB 1421 took effect, Plaintiffs requested a number of records from the State under the new statute.

36. The State mostly denied these requests, making two broad claims.

37. First, it asserted that it could withhold records created before the new law went into effect. 1 PA 91-93.

38. Second, the State asserted that it did not have to disclose records that it obtained from other law-enforcement agencies. *See* 44 Cal. App. 5th at 910-11;
39. Plaintiffs thus filed this suit to enforce their requests and asked the superior court to order production.
40. The superior court rejected both of the Attorney General's arguments. 1 PA 96-98. It also rejected the State's argument that the CPRA's catch-all exemption, § 6255, justified withholding records. *Id*. The court therefore ordered the Attorney General to produce all responsive records other than those that it could show were exempt from disclosure. *Id*.
41. The State then filed a petition in this Court, again asserting that it did not have to provide records that it had obtained from other departments and that if it did, § 6255 allowed it to withhold them. The Attorney General did not argue that pre-existing records are exempt from disclosure, an issue that had by then been resolved by this Court. *See Walnut Creek Police Officers' Ass'n*, 33 Cal. App. 5th at 941-42 (holding that SB 1421 applies to existing records).
42. This Court rejected both of the State's arguments.
43. It first held that the Attorney General had to release all responsive records in its possession, regardless of who had created them. *See* 44 Cal. App. 5th at 917-23.
44. It then held that, although the State could assert the CPRA's catchall exception, it had failed to meet its

burden to show that the exception justified withholding any records. *See id.* at 924-33.

2. Stage Two: Litigating the Attorney General's withholding of records.

45. On remand, the parties agreed to limit the scope of the request to reduce the burden of production. Specifically, they agreed to focus on paper documents so that the State would not have to spend time reviewing photographs, videos and audio recordings. The State then began producing records.

46. On March 26, 2021, in response to a motion by the Plaintiffs requesting further production, the superior court ordered the State to produce logs of the records it was withholding so that the parties would better be able to inform the court of exactly what disputes about production they had. 2 PA 247-248.

47. The State eventually produced more than 3,000 discrete records. During this production, counsel for the parties repeatedly met and conferred and were able to resolve many disputes about the scope of production and redaction.

48. The Attorney General also produced most of the withholding logs that the court had required, although it refused to log some of the withheld records here at issue, as discussed below. *See* 2 PA 295.

49. Plaintiffs then filed a motion for judgment, arguing that the State had improperly withheld certain records. 2 PA 262-284.

50. In withholding these records, the State did not invoke any of SB 1421's provisions for withholding and redacting. Instead, it invoked confidentiality provisions of law found elsewhere in the Penal, Government, Unemployment Insurance, and other Codes under § 6254(k).

51. Plaintiffs argued that SB 1421 does not allow agencies to withhold records whenever some provision of state law makes them confidential, and that even if it did, the State could not do so here under the confidentiality provisions it asserted.

H. The Superior Court's Order at Issue.

52. On July 8, the superior court granted in part and denied in part Plaintiffs' motion. 4 PA 791-804.

53. The court concluded that SB 1421 allows the government to withhold records based on § 6254(k). 4 PA 793-796.

54. However, it also concluded that the Attorney General was improperly withholding some of the records at issue, either because its legal arguments were faulty or because it had failed to meet its factual burden. 4 PA 796-804.

55. But it did allow the State to withhold some other records. *Id.* Plaintiffs challenge the following parts of that order:

1. Subpoenaed records

56. Government Code § 11183 prevents State agencies from disclosing "subpoenaed *private* books, documents, papers … *in respect to the confidential or private transactions, property or business of any person*." (emphasis added).

57. The Attorney General argued that this provision allowed it to withhold potentially thousands of pages of public records it had obtained from the Bakersfield Police Department, even though Bakersfield itself would have to release those records to the public under SB 1421. 3 PA 337-340.

58. Specifically, in its log of records from its Civil Rights Enforcement Section, the Attorney General noted that there "are a total of 53,539 potentially responsive Bakersfield records … that are subject to section 11183." 2 PA 295 & n.1. Because the State takes the "position that all records obtained from [this department] pursuant to subpoena cannot be disclosed under Government Code section 11183," it did not review, inventory, or log those records. *See id*. The State describes them as "Records obtained by administrative subpoena." *Id*. at 295. The only justification that Defendants give for withholding these documents is § 11183. *See id*.

59. The Attorney General later explained that these records relate to a civil investigation it made "in response to complaints and media reports alleging

excessive force and other serious misconduct" by the Bakersfield Police Department (BPD). 3 PA 446. "At the conclusion of the investigation, [Defendants] determined that BPD engaged in a pattern or practice" of unlawful conduct, including "using unreasonable force" and "unreasonably deploying canines." *Id.*

60. In August 2021, the Attorney General and Bakersfield entered into a stipulated judgment, requiring BPD to implement reform measures. *Id.*

61. The State does not argue — much less present any evidence — that any of the records it is withholding are exempt from disclosure under any provision other than § 11183, or that Bakersfield would not have to release them. *See generally id.* To the contrary, as the superior court put it at the hearing when discussing these records, "if somebody walked into the Bakersfield Police Department … they would be disclosed." 4 PA 765-766.

62. The State's sole argument is thus that § 11183 transforms public, non-confidential records into secret ones.

63. As Plaintiffs argued, even if § 11183 could be used to withhold records subject to SB 1421, it is here inapplicable because these particular records are open to public inspection in Bakersfield, they are not "private" records, and they do not concern "confidential or private transactions."

64. The superior court agreed with the Attorney General and allowed Defendants to withhold these records. 4 PA 798-799.

2. Records relating to unemployment insurance

65. Unemployment Insurance Code § 1094(a) states that "information obtained in the administration of this code is confidential, not open to the public."

66. Defendants argue that this allows them to categorically withhold certain records covered by SB 1421 that in some way relate to an application by an unidentified person (presumably a peace or correctional officer) for unemployment benefits. *See* 3 PA 318-320.

67. From the logs, it appears that the Attorney General was representing an agency opposing the granting of benefits. *See e.g.*, *id.* at 318 (UIC_004 (referring to "client personnel.")).

68. Several of these records include a "report: incident/investigative." The author of one of them is listed as the Employment Development Department; the other has no listed author. *See* 3 PA 318 (UIC_001); *id.* at 319 (UIC_006).

69. The Attorney General has never otherwise described the contents of these documents outside of this unsworn log.

70. The superior court nevertheless allowed the State to withhold these records, without any further showing. 4 PA 799-800.

3. Records of the Inspector General

71. The California "Inspector General shall be responsible for contemporaneous oversight of internal affairs investigations and the disciplinary process of the Department of Corrections and Rehabilitation." Penal Code § 6126(a).

72. A variety of materials relating to the Inspector General's oversight are confidential. *See* Penal Code §§ 6126(c)(1), 6126.3(c). This includes any records that are exempt from disclosure under the "confidentiality" provisions of the CPRA and § 832.7. *See* Penal Code § 6126.3(c)(1).

73. The Attorney General argued that this allows him to withhold "materials that were part of the Office of the Inspector General's investigation of an incident involving the [CDCR] that is responsive to SB 1421." 3 PA 340.

74. After reviewing these materials *in camera*, the superior court described them as a 160-page "IG Report, including an incident summary, information from the person or persons requesting the IG's review, communications…, summary of facts, progress of the investigation, materials from the IG's intake review committee, timeline of events and other communications…." 4 PA 800.

75. It appears that these records relate to an incident in which prison guards inflicted great bodily injury upon a prisoner (a CDCR prisoner alleged that guards broke

four of his teeth, and the fact that the State has logged these records as responsive means that it agrees that a peace or correctional officer injured a person). 4 PA 805.

76. The superior court allowed the government to withhold all these records under Penal Code "§ 6123(c)(2), (3), and (4)" (probably meaning § 6126.3(c)(2), (3), and (4)). 4 PA 800.

I. Request for Relief

77. For these reasons, and as discussed below, this Court should issue a writ of mandate directing the superior court to order the following:

    a. That the Attorney General disclose the disputed records;

    b. that Real Parties pay costs and attorney's fees associated with this petition under § 6259(d);

    c. such other relief as the court deems appropriate.

Dated: August 17, 2022

Law Office of Michael T. Risher

/s/ Michael T. Risher
Michael T. Risher

Attorney for First Amendment Coalition

Davis Wright Tremaine LLP

/s/ Thomas R. Burke
Thomas R. Burke
Sarah E. Burns

Attorneys for KQED Inc.

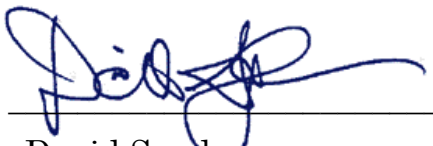
J. Verifications

1. Petitioner FAC's verification

I, David Snyder, Executive Director of Plaintiff/Petitioner First Amendment Coalition in this matter, have read this Verified Petition for Writ of Mandate in *First Amendment Coalition v. Superior Court*. I have personal knowledge that the facts stated in paragraph 2 of the Petition are true. I am informed, and do believe, that the matters stated in the remainder of the Petition/Complaint are true. On these grounds I allege that the matters stated herein are true.

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

DATED: 8/17/22 in the City of San Rafael, County of Marin, California.



David Snyder

1. Petitioner KQED's verification

I, William Lowery, General Counsel and Corporate Secretary of Plaintiff/Petitioner KQED Inc. in this matter, have read this Verified Petition for Writ of Mandate in *First Amendment Coalition v. Superior Court*. I have personal knowledge that the facts stated in paragraph 3 of the Petition are true. On these grounds I allege that the matters stated in paragraph 3 are true.

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

DATED: 8/16/22 in the City of Berkeley, County of Alameda, California.

William Lowery

2. Counsel's verification

I, Michael T. Risher, counsel in this matter, have read this Verified Petition for Writ of Mandate in *First Amendment Coalition v. Superior Court*. I have personal knowledge that the facts stated in paragraphs 10-11, 18, and 33-76 of the Petition are true.

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

DATED: August 17, 2022, in the City of Berkeley, County of Alameda, California.

Michael T. Risher

MEMORANDUM IN SUPPORT OF PETITION

A. The government cannot withhold records subject to SB 1421 whenever any other state law makes them confidential.

The Legislature enacted SB 1421 to ensure that the "public has a right to know *all about* serious police misconduct, as well as about officer-involved shootings and other serious uses of force." *Becerra v. Superior Ct.*, 44 Cal. App. 5th 897, 921 (quoting Stats. 2018, ch. 988, § 1) (emphasis added). Departing from decades of secrecy, in implementing this new right, the law uses broad language mandating disclosure of records relating to covered incidents:

> Notwithstanding [832.7](a), [Gov. Code § 6254(f)], *or any other law*, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act….
>
> § 832.7(b)(1) (emphasis added).

The statute goes on to list several specific grounds for withholding and redaction. *See* § 832.7(b)(2)-(8). Importantly, the statute includes a provision that allows agencies to redact when required by federal law, but no corresponding provision allowing agencies to redact when required by state law. *See* § 832.7(b)(6)(C); *Spicer v. City of Camarillo*, 195 Cal. App. 4th

1423, 1427 (2011) ("the expression of some things in a statute necessarily means the exclusion of other things that are not expressed"). SB 1421 does not itself include procedures for requesting and releasing records or for enforcing the statute. Instead, it mandates that these procedures shall occur "pursuant" to the CPRA, which contains detailed procedures. *See* § 832.7(b)(1); *see also* §§ 6253, 6253.1, 6258, 6259 (CPRA procedures and agency duties).

1. The statutory language prohibits agencies from withholding records simply because some other provision of State law makes them confidential.

The first step in interpreting a statute is to examine its text. *Becerra*, 44 Cal. App. 5th at 917. "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." *Id*.

In cases like this one, this "usual approach to statutory construction is supplemented by a rule of interpretation that is specific" to California's open-government laws. *Sierra Club v. Superior Ct.*, 57 Cal. 4th 157, 166 (2013). The California Constitution requires that "[a] statute, court rule, or other

authority… shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." *Id*. (quoting Cal. Const. Art. I § (3)(b)(2)). This "constitutional canon requires [courts] to interpret [the law] in a way that maximizes the public's access to information." *Id*. at 175.

Although this rule does not affect the construction of a statute "to the extent that it protects th[e] right to privacy," Cal. Const. Art. I § (3)(b)(3), that exception does not apply to records of investigations or to many of the other types of records covered by SB 1421. *See Am. Civil Liberties Union Found. v. Superior Ct.*, 3 Cal. 5th 1032, 1042 (2017) ("Our Constitution requires that CPRA exemptions be narrowly construed, including the exemption for '[r]ecords of … investigations.'") (citation omitted). This means that the constitutional requirement that statutes be interpreted in favor of disclosure applies to the overarching provisions of SB 1421 here at issue. *See id*.; *see also Becerra*, 44 Cal. App. 5th at 912, 913.

The critical statutory language is the requirement that "[n]otwithstanding [832.7](a), [Gov. Code § 6254(f)], or any other law," records subject to SB 1421 "shall not be confidential" and

"shall be made available for public inspection pursuant to" the CPRA. § 832.7(b). "'Notwithstanding' means 'without prevention or obstruction from or by' or '*in spite of*.'" *Klajic v. Castaic Lake Water Agency*, 121 Cal. App. 4th 5, 13 (2004) (citation omitted). The phrase "notwithstanding any other law" thus "declares the legislative intent to override all *contrary* law." *Becerra*, 44 Cal. App. 5th at 925 (quoting *Arias v. Superior Ct.*, 46 Cal. 4th 969, 983 (2009), in turn quoting *Klajic*, 121 Cal. App. 4th at 13)); *see also People v. Palacios*, 41 Cal. 4th 720, 728 (2007) (The "phrase 'notwithstanding any other provision of law' means what it says.").[2] In other words, the Legislature uses the phrase "notwithstanding any other law" "to have the specific statute control despite the existence of other law which might otherwise govern." *Klajic*, 121 Cal. App. 4th at 13 (citations omitted). Thus, "'provisions of law that conflict with' section 832.7(b) … are inapplicable" to records covered by the transparency statute. *Becerra*, 44 Cal. App. 5th at 925.

A confidentiality statute conflicts with an open-government statute when it allows withholding or "prohibits disclosure of

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[2] Superseded by statute on other grounds.

information that the [open-government law] deems public." *See State Dep't of Pub. Health v. Superior Ct.*, 60 Cal. 4th 940, 958 (2015); *id*. at 956-60. In that case, as here, one statute made certain records "open to public inspection pursuant to the provisions of [the Public Records Act]." *Id*. at 957. Another statute made much of the information contained in these records "confidential and therefore not subject to disclosure." *Id*. at 957–58. The "primary question" in the case was whether the two statutes could "be harmonized, or whether one must prevail over the other" because they conflicted. *Id*. at 955.

The government argued that the statutes did not conflict because release was to be "'pursuant to the provision of' the Public Records Act," which, as discussed above, allows agencies to withhold "records exempt from disclosure by express provisions of law." *Id*. at 959. But the Supreme Court rejected this argument and held "that the statutes are in conflict and thus one must be interpreted as providing an exception to the other." *Id*. at 956. It then went on to hold that the disclosure statute must prevail. *See id*. at 964.

This case demands the same result. SB 1421 states that records within its scope "shall not be confidential"

"notwithstanding … any other law," except federal law. § 832.7(b)(1); (b)(6)(C). In contrast, 6254(k) exempts from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." It thus allows withholding based on any other state law. This is precisely what § 832.7(b) prohibits. Using the "notwithstanding any other law" language, SB 1421 was written to allow transparency into records of police misconduct – not to have records still withheld under the usual rubric of state confidentiality provisions. Allowing agencies to withhold records under 6254(k) whenever they are protected by some other State law would render "notwithstanding … any other law" completely meaningless, because it would refer to nothing at all. Indeed, the government has been unable to point to *any* application of § 6254(k) that would not pose this conflict. Reading the statute in a way that fails to give "any other law" its full meaning is exactly what the Supreme Court has forbidden. *See People v. Duff*, 50 Cal. 4th 787, 799 (2010). The two statutes therefore conflict. *See State Dep't of Pub. Health*, 60 Cal. 4th at 958-59. Section 6254(k)

therefore cannot apply to records covered by SB 1421. *See Becerra*, 44 Cal. App. 5th at 925.

That the "notwithstanding" clause references two particular statutes that SB 1421 supersedes alongside its comprehensive "any other law" language does not affect this analysis. The California Supreme Court has squarely held that where the Legislature lists specific laws that are superseded and also includes more-general language making a provision applicable notwithstanding any other law, the statute must be read so as to give meaning to the phrase "any other law." *See People v. Romanowski*, 2 Cal. 5th 903, 908–09 (2017). As that unanimous decision explains, courts "deny a phrase like 'any other provision of law' its proper impact if [they] expect a … statute … to further enumerate every provision of the … Code to which it is relevant." *Id*. This means that the term "notwithstanding any other law" must refer "to a broader category of 'other' law" than those specifically listed." *Duff*, 50 Cal. 4th at 799. Thus, courts have consistently refused to narrow the scope of statutes where the language indicates that they generally apply "notwithstanding" other laws, even when those statutes also list specific statutes that are superseded. *See Romanowski*, 2 Cal. 5th at 908-09; *see*

also Duff, 50 Cal. 4th at 799 (statute that applied "'notwithstanding [Penal Code] Section 4019 … or any *other* provision of law'" superseded other statutes not listed); *Cross v. Superior Ct.*, 11 Cal. App. 5th 305, 320-22 (2017) (Code section that makes certain records available "[n]otwithstanding Business and Professions Code Section 2263 and any other law" overrides privileges found in Evidence Code).

The rule against surplusage does not suggest a different result. As the Supreme Court explained in another open-records case involving § 6254(k), when the Legislature includes general language requiring disclosure, it may also include references to specific statutes that are particularly pertinent without in any way narrowing the scope of the more general language. *See State Farm Mut. Auto. Ins. Co. v. Garamendi*, 32 Cal. 4th 1029, 1044 (2004). The Legislature includes these specific references simply to emphasize that it is superseding certain provisions that are particularly likely to be raised as a reason to withhold records, not to narrow the scope of disclosure. *See id*.

For example, Insurance Code § 1861.07 states that "[a]ll information provided to the commissioner pursuant to this article shall be available for public inspection, and the provisions of

Section 6254(d) of the Government Code and Section 1857.9 of the Insurance Code shall not apply thereto." *See Garamendi*, 32 Cal. 4th at 1044. That the statute expressly supersedes one provision of the CPRA and a separate Insurance Code provision — both of which allow withholding of certain records relating to insurance — does not mean that other provisions of the CPRA like § 6254(k) can apply to allow withholding:

> Because the application of these [listed] exemptions would nullify the broad disclosure mandate of Insurance Code section 1861.07, the drafters … presumably added the second clause to make clear that these exemptions do not apply. As such, this clause does not establish that the other statutory exemptions from disclosure found in Government Code section 6254—such as section 6254, subdivision (k)—do apply.
>
> *Id*.

In these circumstances, the listed provisions "are meant to be examples rather than an exhaustive listing of all those statutory exemptions that are inapplicable." *Id*. at 1045 (citation omitted). They are thus not surplusage. *See id*. The *Garamendi* court thus unanimously held that the statute does not permit the government to rely upon § 6254(k) to withhold records that are covered by Insurance Code § 1861.07. *Id*. at 1044.

These cases establish that when the Legislature wishes to broadly supersede other law, it may include references to specific

statutes that it considers most likely to be relevant without worrying that courts will take this to limit the broader language. The Legislature presumably knew of this principle when it enacted SB 1421. *See People v. Sims*, 59 Cal. App. 5th 943, 962 (2021). Here, too, "application of [the listed] exemptions would nullify the broad disclosure mandate of" SB 1421. *See Garamendi*, 32 Cal. 4th 1044. In fact, Legislative Counsel had specifically explained that despite the State's broad public-records provisions, "both police personnel records and police investigatory records are generally protected" by the *Pitchess* statutes and § 6254(f). July 27, 2018, Assembly Committee on Public Safety analysis of SB 1421 at 5.[3] The Legislature therefore expressly listed these two confidentiality provisions that had historically been used to shield these records from disclosure. But it also included broader "any other law" language to ensure that agencies would not devise new ways to deny public access to these records once they were prohibited from simply relying upon the broad protections of § 6254(f) and the *Pitchess* statutes. This

[3] Available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1421#.

broad language "means what it says." *Palacios*, 41 Cal. 4th at 728. And the specific reference to the § 6254(f) and the *Pitchess* statute does not change this. *See Romanowski*, 2 Cal. 5th 903, 908–09; *Duff*, 50 Cal. 4th at 799; *Cross*, 11 Cal. App. 5th at 320-22.

In short, to allow agencies to withhold records covered by SB 1421 whenever any other state law makes them confidential would "deny [the] phrase … 'any other provision of law' its proper impact." *See Romanowski*, 2 Cal. 5th at 908–09. In fact, it would effectively write that provision out of the law, because there would be no "other law" to which it could refer. It would provide only symbolic transparency into records of police misconduct. SB 1421 does not permit the government to withhold records whenever any provision of state law makes them confidential or exempt from disclosure under the CPRA.

To the extent there is any doubt about this, the constitutional requirement that the statute be read broadly in favor of disclosure would eliminate it. *See Sierra Club*, 57 Cal. 4th at 167. Even if the phrase "notwithstanding … any other law" could be read so as to allow the government to withhold records based on any other provision of State law, it certainly can also be read to

supersede state laws that would otherwise make information or records confidential. This Court must adopt this broad reading in favor of the public's right to know.

2. The *Becerra* decision does not hold otherwise.

This Court's decision in *Becerra* is not to the contrary because it did not involve a confidentiality statute. The question there was whether the government could rely on the CPRA's catchall balancing test (§ 6255) based on its claim that the burden of locating and providing records would clearly outweigh the public interest in their release. *Becerra*, 44 Cal. App. 5th at 923-25. This Court held that this single CPRA provision – used to balance burdens on a case-by-case basis, rather than allowing the government to categorically withhold information based on a need for confidentiality – did not conflict with SB 1421's disclosure provisions. *See id*. at 925. It therefore held that this particular provision can apply to records covered by SB 1421. *See id*. at 934 ("we hold that … as a matter of statutory interpretation, the CPRA catchall exemption may apply to officer-related records subject to disclosure under section 832.7").

Becerra does not support the government's position that *every confidentiality* provision found anywhere in California law

shields these records from disclosure under the police-transparency statute. In holding that the catchall exception and SB 1421 could be harmonized, this Court reasoned that § 6255's catchall balancing test "is not directly contrary to the disclosure or redaction provisions" of SB 1421 because § 832.7(b)(7) in the new transparency law expressly allows redaction under the same balancing test set forth in § 6255. *Id*. at 927-28. It also concluded that allowing the government to rely upon the catchall exception would not "frustrate section 832.7's aim to provide greater transparency around officer misconduct issues." *Id*. at 929. Finally, it expressed concern that if the government could not withhold records when the burden of production clearly outweighs the public interest in disclosure, SB 1421 "would make it possible for any person requesting information, for any reason or for no particular reason, to impose upon a governmental agency a limitless obligation," a result that "would not be in the public interest" and that the Legislature could not have intended. *Id*. at 927.

This reasoning does not support the Attorney General's claim that he can withhold records that SB 1421 states are "not …

confidential" whenever any other provision of State law would otherwise make them confidential, for several reasons.

First, unlike the statutes here at issue, § 6255 is not a confidentiality statute. SB 1421 affects records within its scope in two ways: first, it states that they "shall not be confidential." § 832.7(b). Second, it states that they "shall be made available for public inspection pursuant to the" CPRA. *Becerra* held that this second provision indicates that § 6255's balancing test can apply to allow the government to withhold records covered by the new transparency statute based on the burden of production, regardless of whether they are confidential. 44 Cal. App. 5th at 926. But that does not affect the unqualified mandate of the first clause: that these records "shall not be confidential." Because the provisions the Attorney General here invokes are confidentiality statutes, this first clause supersedes them.

Second, although SB 1421's redaction provisions allow the government to withhold information that is protected by *federal* law, they do not permit withholding based on other *state* laws. *See* § 832.7(b)(6). "Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there

is a clear legislative intent to the contrary." *Sierra Club v. State Bd. of Forestry*, 7 Cal. 4th 1215, 1230 (1994). Moreover, agencies cannot redact records for purposes other than those listed in the statute. *Collondrez v. City of Rio Vista*, 61 Cal. App. 5th 1039, 1054 (2021) ("Section 832.7, subdivision (b)([6]) permits a responding agency to redact qualifying records *only* for specified purposes" listed in the statute.). The statute therefore does not allow withholding under § 6254(k). In contrast, it does expressly allow the government to redact information under the same catchall balancing test set forth in § 6255(a). *See* § 832.7(b)(7). Unlike withholding under § 6255, allowing withholding based on State confidentiality statutes found outside of the new transparency law would thus be "directly contrary to the disclosure or redaction provisions" of SB 1421, because it would mean that the government can withhold records for reasons that § 832.7 never even mentions. *See State Dep't of Pub. Health*, 60 Cal. 4th at 956-60.

Moreover, allowing this withholding would directly frustrate the explicit legislative intent that the public has a right to know "all about" incidents requiring disclosure, a right qualified only by the express exemptions listed in the new statute. *See Becerra*,

44 Cal. App. 5th at 921. For example, as further discussed below, a primary purposes of SB 1421 is to allow "public access to officer-related records maintained … by any state or local agency with independent law enforcement oversight authority." *Id*. Many of these records are confidential. *See* Penal Code § 6126.3(c) (records of the Inspector General); § 11183 (records obtained by State agency subpoena). If State oversight agencies can rely upon them to prevent access to records covered by SB 1421, this would frustrate the Legislature's goal of allowing access to these very records.

Finally, this Court's concerns that prohibiting the government from invoking § 6255's catchall provision "would not be in the public interest" and that the Legislature could not have intended to impose "limitless" burdens on responding agencies is not an issue here. *Becerra*, 44 Cal. App. 5th at 927. SB 1421 contains numerous grounds for withholding and redacting records to protect the government's legitimate confidentiality interests. *See* § 832.7(b)(4)-(8). These expressly require withholding to protect privacy, safety, and the integrity of pending investigations. *See* § 832.7(b)(6)(A)-(C) (privacy), (b)(6)(D) (safety), (b)(8) (pending investigations). The statute exempts material covered by the

attorney-client privilege, other than factual material and some billing records. § 832.7(b)(12). If any of these specific exemptions are insufficient to protect sensitive information, the government can rely on the catchall balancing test to withhold it when the public interest so merits. *See* § 832.7(b)(7). The public interest does not require that the State also be able to rely on every other provision of state law, and there is no reason to think that the Legislature intended to allow it to do so.

The State will doubtless argue that language in the *Becerra* decision indicates that SB 1421 preserves CPRA exemptions other than the one specifically mentioned, § 6254(f). *See* 44 Cal. App. 5th at 924-25. But a "decision is not authority for what is *said* in the opinion but only for the points *actually involved* and actually decided." *PacifiCare Life & Health Ins. Co. v. Jones*, 27 Cal. App. 5th 391, 410 (2018) (citation omitted). In the earlier writ proceeding, this Court was addressing only the applicability of § 6255's balancing test, not of any exemptions based on confidentiality. And, as discussed above, it expressly recognized that SB 141 supersedes withholding provisions that conflict with it. It held that § 6255 could apply only because it did not conflict

with SB 1421's disclosure requirements. It did not address any other withholding provisions.

3. The particular statutes that the State invokes conflict with SB 1421.

The statutes that the State invokes here illustrate this conflict.

First, "the legislative intent behind Senate Bill 1421 was to provide transparency regarding instances of an officer's use of significant force and sustained findings of officer misconduct by allowing public access to officer-related records maintained either by law enforcement employers or by any state or local agency with independent law enforcement oversight authority." *Becerra* 44 Cal. App. 5th at 921; *see id.* at 920-22 (discussing legislative history and intent). The Office of the Inspector General is just this type of agency: it is "responsible for contemporaneous oversight of internal affairs investigations and the disciplinary process of the Department of Corrections and Rehabilitation." Penal Code § 6126. But if the Attorney General were correct that the provisions making the Inspector General's records confidential apply to records covered by SB 1421, then many of

that Office's records would be exempt from disclosure. *See* Penal Code § 6126.3(c).

Here, for example, the State is withholding 160 pages of records that apparently document the use of force against a CDCR prisoner causing serious injury. 4 PA 800, 805. These are exactly the types of records of an independent oversight agency that the Legislature wanted to make public. *See Becerra* 44 Cal. App. 5th at 921. Allowing agencies to categorically withhold them thus conflicts with SB 1421's disclosure requirements.

The same is true for § 11183. As discussed below, that provision is part of a statute that allows the Attorney General to obtain records as part of investigations of government agencies, including law-enforcement agencies. *See* § 11180 *et. seq*. As the head of Defendants' Civil Rights Enforcement Section explained, the Attorney General has "oversight and investigative powers to ensure that local authorities do not engage in" patterns or practices of constitutional violations. 3 PA 440 ¶ 6. The Attorney General uses the subpoena power of § 11180 *et. seq*. to accomplish this. *See id*. at 441-442.

The Legislature enacted SB 1421 specifically to allow the public to have access to the records of "any state or local agency

with independent law enforcement oversight authority." *Becerra* 44 Cal. App. 5th at 921. But if Defendants were correct that they can use § 11183 to categorically withhold records covered by SB 1421 that they obtained from local agencies, the public would not have access to these records. Again, allowing this would directly conflict with the Legislature's intent to allow public access to information about State oversight.

In addition, allowing the government to permanently withhold investigatory records based on Penal Code § 6126.3(c) or § 11183 would conflict with SB 1421's detailed rules governing when and under what circumstances records can be withheld to protect the integrity or confidentiality of an investigation. *See* § 832.7(b)(8)(A)-(C). Unlike Penal Code § 6126.3(c) or § 11183, these provisions expressly require agencies to provide these records when the investigation has ended, the need for confidentiality has lessened, or after certain amounts of time. For example, during a criminal investigation of an officer, "[i]nformation withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner."

§ 832.7(b)(8)(A)(ii). This same rule applies during criminal investigations of somebody other than the officer accused of improper activities, except disclosure may be further delayed in "extraordinary circumstances." § 832.7(b)(8)(A)(iii). And during an administrative investigation of an officer, records or information must be released 180 days after the agency discovered the improper conduct. § 832.7(b)(8)(C). The Legislature has thus specified exactly when agencies may withhold records covered by SB 1421 in order to protect the confidentiality of investigations, and when they must release them. Allowing them to permanently and categorically withhold these same records under Penal Code § 6126.3(c) or § 11183 would conflict with this mandate.

Finally, although the Unemployment Insurance Code provision at issue is unlikely to implicate oversight or investigations, it poses a particularly stark conflict with SB 1421 for another reason: it exists only to make such records "confidential, not open to the public." *See* Unemp. Ins. Code § 1094(a). In contrast, § 832.7(b)(1) commands that records relating to the specified incidents "shall not be confidential" and "shall be made available for public inspection." The unambiguous

text of these two statutes poses an irreconcilable conflict. *See State Dep't of Pub. Health v. Superior Ct.*, 60 Cal. 4th 940, 957-58 (2015).

Thus, even if agencies may be able to invoke some provisions of State law to withhold records covered by SB 1421, they cannot use the three provisions here at issue to do so.

4. The statute itself provides agencies with ample authority to withhold records.

Finally, there is no need to allow agencies to withhold records based on "other law[s]". § 832.7(b)(1). The statute expressly allows agencies to redact sensitive information, including for the following reasons:

- "To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers." § 832.7(b)(6)(A).
- "To preserve the anonymity of whistleblowers, complainants, victims, and witnesses." § 832.7(b)(6)(B).
- "To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by

federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about possible misconduct and use of force by peace officers and custodial officers." § 832.7(b)(6)(C).

- "Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person." § 832.7(b)(6)(D).
- During active criminal and administrative investigations and proceedings, if the agencies can make certain showings. § 832.7(b)(8).

Even where none of these specific provisions apply, "an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information." § 832.7(b)(7); *see Becerra*, 44 Cal. App. 5th at 929.

These provisions provide agencies with ample authority to withhold information from the public when they have a real

reason to do so. There is no need to provide them even more authority than the Legislature has authorized by allowing them to categorically withhold records whenever some other provision of state law would otherwise make them confidential.

B. Even if § 11183 could apply to records covered by SB 1421, it would not allow the State to withhold the records at issue.

As discussed above, the Attorney General has more than 50,000 potentially responsive records it obtained from the Bakersfield Police Department during a now-concluded investigation of that department that resulted in a 2021 consent decree. The investigation involved allegations of excessive force, improper deployment of police dogs, and other "serious misconduct." *See supra* ¶ 59. The State does not argue that the records themselves are exempt from disclosure or that Bakersfield could withhold them from the public. Instead, it contends that its act of obtaining these records from Bakersfield has transformed them from public records into confidential ones, permanently protected from disclosure under § 11183. This is incorrect. By its plain language, this provision applies only to "private" records relating to "confidential or private transactions, property or business." § 11183. It does not apply to public records

that SB 1421 declares are not confidential and that the originating agency must disclose.

Preliminarily, some background. The Department of Justice, like all State departments, has the authority to investigate "[a]ll matters relating to the business activities and subjects under the jurisdiction of the department," "[v]iolations of any law or rule or order of the department," and "other matters as may be provided by law." § 11180(a)–(c). "In connection with any [such] investigation or action," the Attorney General may "[i]ssue subpoenas for … the production of papers, books, …, any writing … and testimony pertinent or material to any inquiry, investigation, hearing, proceeding, or action conducted in any part of the state." § 11181(a), (e). This allows the department to obtain records and information from private entities or persons, as well as from public entities. *See generally Arnett v. Dal Cielo*, 14 Cal. 4th 4, 8 (1996).

Defendants assert that they can withhold all the records they obtained from Bakersfield under this authority based on § 11183, which prohibits the release of certain types of "private" records obtained under § 11181:

> an officer shall not divulge any information or evidence acquired by the officer from the interrogatory answers or subpoenaed *private* books, documents, papers, or other items described in subdivision (e) of Section 11181 of any person while acting or claiming to act under any authorization pursuant to this article, *in respect to the confidential or private transactions, property or business of any person*. § 11183 (emphasis added).

Defendants' position is wrong for three reasons.

1. The plain language of § 11183 shows that it does not apply to records that are open to public inspection.

By its plain language, § 11183 applies only to "private" records relating to "confidential or private transactions, property or business." *Public* records that Bakersfield would have to disclose under SB 1421 are neither private nor confidential. In fact, SB 1421 expressly states that records within its scope "shall not be confidential." § 832.7(b)(1); *cf.* § 6252(e) (defining "public records"). This means that the information contained in these records is not confidential. *Ass'n for Los Angeles Deputy Sheriffs v. Superior Ct.*, 8 Cal. 5th 28, 44 (2019) ("Under [§ 832.7(b)]..., certain records related to officer misconduct are not confidential. Because such records are not confidential, information 'obtained from' those records is also not confidential.") (citations omitted). Section 11183 prohibits the government from leaking *private*

records relating to confidential matters, not the disclosure of *public* records that the Legislature has said "shall not be confidential." Because the statutory language is clear, there is no need for further analysis. And even if the language were ambiguous, the Court would have to construe it in favor of transparency. *See* Cal. Const. Art. I § (3)(b).

2. Expanding § 11183 to cover public records would violate the intent of SB 1421.

As discussed above, the Attorney General uses the subpoena power of § 11181 as part of its "oversight" responsibilities over local law-enforcement agencies. *See* 4 PA 441-442. And "the legislative intent behind SB 1421 was to provide transparency regarding instances of an officer's use of significant force and sustained findings of officer misconduct by allowing public access to officer-related records maintained *either* by law enforcement employers *or by any state or local agency with independent law enforcement oversight authority*." *Becerra*, 44 Cal. App. 5th at 921 (emphasis added). Allowing the Department of Justice to withhold records simply because it used its oversight authority to obtain them is directly contrary to this legislative intent.

Moreover, § 11183 prohibits not just the release of records obtained by subpoena, but also "information" in these records. Thus, if the statute applied to the records that Defendants have obtained from Bakersfield, they would be prohibited not just from releasing the actual records, but also from releasing anything they it had learned from these records. For example, if the subpoenaed records showed that a BPD officer had committed numerous sexual assaults but had never been disciplined, by Defendants' logic, the Department of Justice would be prohibited from releasing this information to the public.

This is nonsense and it would defeat the purpose of SB 1421, which was intended to make this information public. S*ee Ass'n for Los Angeles Deputy Sheriffs*, 8 Cal. 5th at 44. Moreover, it would provide a disincentive for agencies to voluntarily provide records to the Department of Justice.

3. The government's argument would violate the longstanding rule that a document's location does not determine public access to it.

It has long been the rule under the CPRA that "a document's status as public or confidential does not turn on the arbitrary circumstance of where the document is located." *City of San Jose v. Superior Ct.*, 2 Cal. 5th 608, 624 (2017); *see, e.g., Becerra*, 44

Cal. App. 5th at 923 ("Our construction also aligns with case law rejecting the notion that a record's location, rather than its content, determines its confidentiality"); *San Diego Cnty. Emps. Ret. Ass'n v. Superior Ct.*, 196 Cal. App. 4th 1228, 1240 (2011). In other words, "[r]ecords are either exempt or nonexempt," and the status of a record does not "depend[] on what entity maintains it." *Id.* at 1240. Because there is no indication that the Legislature intended to change this rule when it enacted SB 1421, this Court must presume that the Legislature intended to maintain it. *See Cnty. of Sonoma v. Quail*, 56 Cal. App. 5th 657, 680 (2020) ("We do not presume that the Legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied.") (citation omitted). Because the records at issue would be available from Bakersfield, they must be available from the Attorney General.

4. The superior court's policy concerns do not justify expanding the scope of § 11183.

The superior court disagreed, in part based on its concern that "investigations as such need to be confidential." 4 PA 798. Although this is true in a general sense, it does not support

Defendants' position here. The whole point of SB 1421 is to allow public access to investigations of officer misconduct and uses of force. The statute itself protects the government's interest in secrecy by expressly allowing agencies to withhold records while investigations are pending or where the public interest so requires.

As an initial matter, Plaintiffs agree that if the records here at issue were not covered by SB 1421, they would be exempt from disclosure. Under those circumstances, Bakersfield would have no duty to release them to the public, and they would be private and confidential for the purposes of § 11183. That section would therefore categorically protect them from disclosure. Nothing in Plaintiffs' argument suggests otherwise.[4]

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[4] Records that are not covered by SB 1421 would also be exempt from disclosure under § 6254(f), which exempts "[r]ecords of complaints to, or investigations conducted by… the Department of Justice, … and any state or local police agency." § 6254(f). *See Williams v. Superior Ct.*, 5 Cal. 4th 337, 341, 348-49, 354-62 (1993). Personnel records Defendants had obtained would additionally be protected by the *Pitchess* statutes. *See Fagan v. Superior Ct.*, 111 Cal. App. 4th 607, 617-18 (2003) (personnel records do not lose confidentiality when obtained by district attorney or prosecutor). SB 1421 expressly overrides § 6254(f) and the *Pitchess* protections by requiring agencies to release records within its scope "notwithstanding subdivision (a)

The question is thus whether any need for confidentiality in records within the scope of SB 1421 can justify expanding the scope of § 11183 to cover records that the originating agency would have to release. The answer is no, because SB 1421 itself contains a detailed scheme that protects this interest. As discussed above, the statute allows agencies to withhold records during a pending criminal or administrative investigation or while a prosecution is pending if they can make certain showings. § 832.7 (b)(8)(A)-(C). In addition, the catchall exception allows agencies to withhold or redact records when the public interest so requires. § 832.7(b)(7). There is no need to expand the scope of § 11183 beyond its plain meaning to accommodate any need for confidentiality.

C. The Court should award costs and fees.

A prevailing requestor is entitled to costs and attorney's fees under the CPRA; requestors may not be required to pay the government's costs or fees unless the case is "clearly frivolous." § 6259(d); *Filarsky v. Superior Ct.*, 28 Cal. 4th 419, 427-28 (2002).

[and] subdivision (f) of Section 6254." § 832.7 (b). *See Becerra*, 44 Cal. App. 5th at 925.

This provision applies in this Court as it does in the superior court. *See Los Angeles Times v. Alameda Corridor Transp. Auth.*, 88 Cal. App. 4th 1381, 1393 (2001); *San Gabriel Tribune v. Superior Ct.*, 143 Cal. App. 3d 762, 781–82 (1983); *see also Filarsky*, 28 Cal. 4th at 427-29 (§ 6259 prevails over generally applicable provisions relating to costs). This Court should therefore award fees and costs to Plaintiffs.

CONCLUSION

Allowing the government to withhold records whenever any State statute makes them confidential is directly contrary to SB 1421's mandate that records covered by the transparency statute "shall not be confidential" notwithstanding any other law. SB 1421 contains its own comprehensive protections for confidentiality; it does not need (or allow) supplementation from other code provisions. And even if some confidentiality statutes might apply to records covered by the new statutes, the ones here at issue cannot, particularly in light of SB 1421's specific provisions protecting the confidentiality of pending investigations and the legislative intent to allow public access to records of State oversight agencies such as the Department of Justice and the Office of the Inspector General. If there were any doubt about

any of this, the constitution would nevertheless require the statutes to be read in favor of transparency.

For these reasons, this Court should issue a writ of mandate requiring the superior court to order Defendants to release the records at issue.

Dated: August 17, 2022

Law Office of Michael T. Risher

/s/ Michael T. Risher
Michael T. Risher

Attorney for First Amendment Coalition

Davis Wright Tremaine LLP

/s/ Thomas R. Burke
Thomas R. Burke
Sarah E. Burns

Attorneys for KQED Inc.

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The text of this Petition for Writ of Mandate and Memorandum in Support comprises 10,623 words as counted by the Microsoft Word program used to generate it. This count includes footnotes but excludes the tables of contents and authorities, the cover information, any certificate of interested entities or persons, the signature blocks, the verifications, this certificate, any proof of service, and any attachment. *See* Rules of Court 8.204(c), 8.486(a)(6).

Dated: August 17, 2022

Law Office of Michael T. Risher

/s/ Michael T. Risher
Michael T. Risher

Attorney for First Amendment Coalition

Davis Wright Tremaine LLP

/s/ Thomas R. Burke
Thomas R. Burke
Sarah E. Burns

Attorneys for KQED Inc.

PROOF OF SERVICE

I declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in 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, California 94111.

I caused to be served the following document(s):

Petition for Writ of Mandate and Memorandum in Support — Gov. Code § 6259 (Public Records Act Review)

I caused the above document(s) to be served on the person(s) listed below by the following means and as indicated on the attached Service List:

☑ I caused a true and correct copy of said document to be placed in an envelope and placed for collection and mailing with the United States Post Office in San Francisco, California on August 17, 2022, following the ordinary business practice. *(Indicated on the attached address list by a* [M] *next to the address.)*

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Executed on August 17, 2022, at Oakland, California.

By: */s/ Aysha Lewis*
Aysha Lewis

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[E]	Mark R. Beckington, Esq. Supervising Deputy Attorney General California Department of Justice 300 S. Spring Street, Suite 1702 Los Angeles, CA 90013 Tel: (213) 269-6256 Email: mark.beckington@doj.ca.gov	*Real Parties in Interest*
[E]	John D. Echeverria Deputy Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004 Telephone: (415) 510-3479 Fax: (415) 703-1234 E-mail: john.echeverria@doj.ca.gov	*Real Parties in Interest*
[E]	Supreme Court of California Earl Warren Building 350 McAllister Street San Francisco, CA 94102	
[M]	Superior Court of California County of San Francisco Civic Center Courthouse 400 McAllister Street San Francisco, CA 94102	