SUPREME COURT
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SUPREME COURT OF THE STATE OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent.	Case No. S243855 Second Appellate District, Division 8 No. B280676 Los Angeles County Superior Court No. BS166063
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, et al., Real Parties in Interest.	

SUPPLEMENTAL BRIEF OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, BY AND THROUGH THE SAN FRANCISCO POLICE DEPARTMENT, REGARDING SB 1421

The Honorable Judge James C. Chalfant

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POLICE DEPARTMENT

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The City and County of San Francisco, by and through the San Francisco Police Department ("Police Department"), respectfully submits this supplemental amicus curiae brief pursuant to this Court's order dated January 2, 2019.

ARGUMENT

This supplemental brief is limited to two points.

First, given ALADS's reliance on this Court's CPRA cases to argue that *Brady* notifications are unlawful, the brief explains how the enactment of SB 1421 further supports the Police Department's argument that such reliance is misplaced because it conflates disclosures that serve the public interest in openness and those that protect the right to a fair trial.

Second, it explains why the new disclosures authorized by SB 1421 do not obviate the need for the *Pitchess* process, leaving otherwise unchanged the legal issue to be decided in this case.

I. BECAUSE SB 1421 CONFIRMS THAT SECTION 832.7 PERFORMS TWO DISTINCT FUNCTIONS, IT SUPPORTS THE POLICE DEPARTMENT'S ARGUMENT THAT CPRA CASES DO NOT SHOW THAT *BRADY* NOTIFICATIONS ARE UNLAWFUL

In its previous amicus curiae brief ("SFPD Br."), the Police Department argued that the three California Public Records Act cases on which ALADS and the court below rely—*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272; *Commission On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278; and *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59—do not support a conclusion that Section 832.7 prohibits a law enforcement agency from providing a *Brady* notification to the prosecution. (See generally SFPD Br. at 20-25.) That is because Section 832.7 reflects the Legislature's judgment that different disclosures are justified by the right to

a fair trial (which is protected by the *Pitchess* process) than are justified by the public's interest in openness (which is protected by the CPRA). (SFPD Br. at 22 [citing *Copley Press* at p. 1299 and *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1427-1428, fns. 17 & 18].)

To recapitulate the argument: When the Legislature amended Section 832.7 in 1989 to add former subdivision (c)—now relabeled subdivision (d) by SB 1421[1]—its purpose was to authorize a class of disclosures to promote the value of governmental transparency, rather than to protect the right to due process, in response to an opinion of the California Attorney General concluding that subdivision (a) of Section 832.7 prohibited the dissemination of summary and statistical information regarding complaints against police officers. (SFPD Br. at 22-24.) Because the new subdivision provided that agencies could disclose such information publicly so long as it did not identify the individuals involved, in *Copley Press* this Court drew the mirror negative inference that information that *did* identify individuals could not be obtained by a request under the CPRA. (*Id.* at 23-24.) However, because the rationale for that subdivision lies in the value of open government, it does not support a similar negative inference about restrictions on disclosures that protect the right to a fair trial—a value that the Legislature, in accordance with the federal and state constitutions, weighted more heavily by authorizing disclosures (pursuant to subdivision (a) and the sections of the Evidence Code to which it refers) that would be impermissible in response to a request under the CPRA. (*Id.* at 22, 24.)

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[1] This is the third relabeling of that subdivision; when originally enacted in 1989, it appeared as subdivision (b). (Stats. 1989, ch. 615, § 1, p. 2061.)

Like the amendment that added now-subdivision (d) in 1989, SB 1421 again adjusts the balance between the values of confidentiality and open government, moving the needle further in the direction of the latter by authorizing additional disclosures in the new subdivision (b) of Section 832.7. That these disclosures are founded in the value of openness rather than due process is explicitly stated in its text: "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." (SB 1421, § 1, subd. (b).) SB 1421 makes clear that the new disclosures it allows are not connected, functionally or logically, to disclosures that are authorized for the purpose of protecting the right to a fair trial: It adds two additional subdivisions to Section 832.7 stating that the "section does not affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code" or "supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with Section 1054) of Title 6 of Part 2, or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in Pitchess v. Superior Court (1974) 11 Cal.3d 531." (Pen. Code, § 832.7, subds. (g), (h).)[2]

Thus, while Section 832.7 as originally enacted authorized the disclosure of information from peace officer personnel records only to safeguard the right to a fair trial (SFPD Br. at 14-15), SB 1421 is the second instance of the statute's subsequent expansion to authorize some disclosures in the service of a different value, that of governmental

[2] Although subdivisions (g) and (h) refer to "this section," in context that phrase can meaningfully refer only to the subdivisions of Section 832.7 that authorize disclosures outside of the *Pitchess* or criminal discovery process; namely, subdivisions (b) and (d).

transparency. But that expansion underlines why it is necessary to keep the statute's two functions analytically distinct when construing its provisions—as subdivisions (g) and (h) indicate—and thus why ALADS is mistaken to argue that *Copley Press* or other CPRA cases drawing a negative inference from now-subdivision (d) support a conclusion that *Brady* notifications violate Section 832.7(a). Because the Legislature authorized different disclosures for different purposes, an approach based on the premise that context does not matter (see *Assoc. of Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 434, review granted Oct. 11, 2017) overlooks the statute's structure and the underlying legislative intent.

II. SB 1421 DOES NOT ELIMINATE THE NEED FOR *PITCHESS* PROCEDURES TO PROTECT THE RIGHT TO A FAIR TRIAL

That the various disclosures authorized by Section 832.7 protect different values—and that they should not be conflated for the purposes of statutory construction—does not mean that there is no practical interaction between them. Just as civil litigants have used the CPRA to obtain documents for litigation even when doing so would circumvent limits placed on civil discovery (see *County of Los Angeles v. Superior Court (Axelrad)* (2000) 82 Cal.App.4th 819, 826), defense counsel and/or prosecutors could use the CPRA to request records that fall within the categories specified in subdivision (b) of Section 832.7, potentially obviating the need to resort to the *Pitchess* process in order to obtain them.[3]

[3] According to the analysis prepared for the Assembly Committee on Public Safety, "[t]he purpose of the bill is to give the general public, not a criminal defendant, access to otherwise confidential police personnel records relating to serious police misconduct in an effort to increase transparency." (Assem. Comm. Pub. Safety, Rep. on Sen. Bill No. 1421 (2017-2018 Reg. Sess.) as amended June 19, 2018, at p. 8.) But in context, this observation likely does not mean that a criminal defendant may not

Nonetheless there is an imperfect overlap between the categories of documents reachable by the two methods. While the new disclosures authorized by subdivision (b) of Section 832.7 could include some information that meets the standards for *Brady* disclosure, the only way the prosecution or defense could be sure to receive the entirety of such information is by filing a *Pitchess* motion. For example, records showing dishonesty about matters *other* than those specified in subdivision (b)(1)(C), or indicating that an officer harbors animus toward members of a particular racial or ethnic group, would be subject to disclosure under *Brady* if they were material, but would not fall within the definition of a public record provided in subdivision (b)—and there may be nothing in the records that *are* subject to disclosure under subdivision (b) that would point to the existence of *Brady* material elsewhere in the officer's personnel file. Moreover, subdivisions (b)(5) and (6) require or authorize the agency to redact certain information from the records when producing them in response to a public records request, but those subdivisions do not apply when records are produced through the *Pitchess* process.[4]

This imperfect overlap also means that subdivision (b) does not so completely vitiate the confidentiality interest in personnel records that it leaves the protections of the *Pitchess* scheme without purpose or rationale. It may be that those protections accomplish little with respect to records

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request documents under the CPRA, but only that the purpose of subdivision (b) is to grant public access to certain records for the purpose of greater transparency, rather than to alter the scope of criminal discovery.

[4] In addition, as the Court is undoubtedly aware, there are lawsuits now pending in multiple jurisdictions throughout the State that contend that SB 1421 does not authorize the disclosure of any records created prior to the statute's effective date of January 1, 2019. The Police Department does not address the merits of that issue here, and simply points out that such a view would leave the *Pitchess* process as the only procedural mechanism for obtaining those extant records.

that subdivision (b) now makes public. (Cf. *Copley Press, supra*, 39 Cal.4th at p. 1286 [reasoning that it would be inconsistent to place conditions on the disclosure of personnel records in civil and criminal proceedings if any member of the public could obtain them simply by submitting a request under the CPRA].)[5] But since subdivision (b) creates only enumerated exceptions to the general rule of confidentiality, and since potential *Brady* material may fall outside those exceptions, the *Pitchess* process will continue to play a necessary role in protecting both the right to a fair trial and peace officers' privacy interests, and it remains important for this Court to establish that *Brady* notifications do not violate Section 832.7(a).

CONCLUSION

For the foregoing reasons, the Police Department again requests that this Court overturn the decision of the lower court and hold that law enforcement may, consistently with the *Pitchess* statutes, notify the prosecution that a peace officer witness may have information in his or personnel file that is subject to disclosure under *Brady*.

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[5] Nonetheless, the rule has long been that a public record, if obtained through discovery in litigation, remains subject to whatever protective orders the court may enter. (*Coalition Against Police Abuse v. Superior Court* (1985) 170 Cal.App.3d 888, 905 ["The availability of the two statutory avenues of access to public records is an advantage to petitioners which does not nullify the court's discretion in regulating its own processes."]; cf. *Pasadena Police Officers Assn. v. Superior Court* (2015) 240 Cal.App.4th 268, 294 [officers retain *Pitchess* protections even as to information that is the same as or similar to information available elsewhere in the public domain].)

Dated: February 21, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 1,855 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on February 21, 2019.

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PROOF OF SERVICE

I, HOLLY CHIN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On February 22, 2019, I served the following document(s):

SUPPLEMENTAL BRIEF OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, BY AND THROUGH THE SAN FRANCISCO POLICE DEPARTMENT, REGARDING SB 1421

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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service.

☒ **BY ELECTRONIC MAIL:** Pursuant to California Rules of Court 2.253(b)(2), I caused the documents to be served electronically through TrueFiling in portable document format ("PDF") Adobe Acrobat.

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

Executed February 22, 2019, at San Francisco, California.

HOLLY CHIN