S194951

In the Supreme Court of the State of California

RICHARD SANDER, JOE HICKS, and the
CALIFORNIA FIRST AMENDMENT COALITION,
Plaintiffs and Appellants (Respondents Herein),

v.

STATE BAR OF CALIFORNIA and the
BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,
Defendants and Respondents (Petitioners Herein).

After a Decision of the Court of Appeal, First Appellate District, Division Three, Appeal No. A128647, on Appeal from the Superior Court in and for the County of San Francisco, Case No. CPF-08-508880, Hon. Curtis E. A. Karnow

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I. INTRODUCTION

Public scrutiny of the conduct of government officials and institutions is a fundamental prerequisite of democracy. The unstated but central premise of Defendants/Respondents (Petitioners in this Court), the State Bar of California and its Board of Governors ("Defendants"), is that there is no justification for public scrutiny of their conduct. Defendants' position is diametrically opposed to the fundamental principle that underlies the public's right of access: "A popular government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." (*Richard Sander, et al. v. State Bar of California, et al.* (2011) 196 Cal.App.4th 614, 622 (*Sander v. State Bar*).)

Addressing the issues framed by the Court:

1. There is a public right of access to the records contained in Defendants' admissions database under the California Constitution and California common law. In addition, because Defendants have regularly disclosed the information at issue to others, the First Amendment to the United States Constitution prohibits them from denying access to Plaintiffs and Petitioners (Respondents in this Court), Richard Sander, Joe Hicks, and the California First Amendment Coalition (collectively the "Coalition").

2. Defendants' statements to applicants for admission to the practice of law in California do not preclude disclosure of the requested records. They either constitute authorizations for disclosure, rather than promises of confidentiality, or expressly permit disclosure for purposes of research. Defendants routinely disclose de-identified data despite these representations, belying the notion that their statements prohibit disclosure. In any event, the disclosure of de-identified data does not violate any assurances of confidentiality, and Defendants cannot defeat the public's rights of access by offering specious assurances of confidentiality.

Defendants are precluded by stipulation and court order from asserting at this stage of the litigation that applicants' privacy rights, if any, justify nondisclosure.

3. The form in which the requested records are maintained does not affect whether they are subject to the public's right of access. The protocols for anonymizing the records proposed by Respondents are not mandates that require the creation of a new record. Moreover, when information subject to a right of public access can be separated from any exempt information though redaction, as it can be in this case, disclosure is required.

This case presents an issue of nationwide significance. Across the country, researchers, academics, and advocates are involved in an ongoing effort to examine the effect of admissions preferences on the scholastic performance and professional success of those who receive them. That effort depends on access to information held by government institutions, such as the State Bar of California. Furthermore, the effort to study the effect of admissions preferences is but one aspect of the vast realm of scientific and academic research, much if not most of which is dependent upon access to de-identified information about individuals held, and routinely disclosed, by government agencies. Without access to such information, meaningful research in innumerable fields would be irreparably impaired.

This case presents stark conflicts: transparency versus unnecessary secrecy, informed debate versus uninformed speculation, and the principle of law versus the principle of political expediency. Defendants' objections to disclosure are based on an institutional desire for secrecy and political motivations, not on concern for the privacy rights of applicants. They rejected a collaborative research proposal that would have entailed no disclosure of individual records at all. They rejected the Coalition's requests, despite the fact that they have previously disclosed much of the requested information.

However, the position advocated by Defendants will serve no one's interests, including their own. Embracing the secrecy they advocate will fuel suspicion and mistrust of the State Bar, the legal profession, and the academic institutions upon which they rely to provide qualified applicants. On the other hand, transparency can be accomplished in accordance with the mandates of the law without sacrificing the interests of applicants.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The State Bar Is a Public Agency that Regulates Admission to the Practice of Law

The State Bar of California ("State Bar") is an agency within the judicial branch of the State of California, established by Article VI, section 9 of the California Constitution. The Board of Governors of the State Bar ("Board of Governors") is the governing body of the State Bar, and is responsible for its actions and decisions. The Committee of Bar Examiners is the administrative body within the State Bar that administers the bar examination; it examines all applications for admission to the bar, and certifies the admission of applicants that fulfill the necessary requirements. (Appellants' Appendix of Exhibits ["AA"], Ex. 44, p. 0381.)

Under California law, the State Bar is a public agency. (*Smith v. California State Bar* (1989) 212 Cal.App.3d 971, 975 (*Smith*).) Its agents are public officials. (*Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548, 563 (*Chronicle Publishing*); *Smith*, *supra*, 212 Cal.App.3d at p. 975.)

B. Defendants' Collection of the Records Contained in the Admissions Database

In applying for admission to practice law in California, bar applicants are required to provide information about their background and legal education to the State Bar, and authorize the State Bar to collect additional information from "educational and other institutions." (AA Ex. 44, p. 0381, and pp. 0394-406.) Applicants are also asked to provide their gender and ethnicity. (*Id.*)

Defendants created and maintain an admissions database containing electronic records regarding bar applicants (the "admissions database"). (AA Ex. 3, pp. 0009-10; Ex. 44, p. 0385.) It contains all of the following information for at least a substantial number of applicants: Raw and scaled bar examination scores; race or ethnicity; law schools attended; year of law school graduation; whether applicants applied to take, took, and passed or failed the bar examination; law school GPA; and LSAT scores. (AA Ex. 3, p. 0009; Ex. 44, pp. 0386-88.) In addition, the Coalition believes that Defendants have or have access to undergraduate grade point averages for at least a portion of the applicants. (AA Ex. 3, p. 0009; Ex. 44, p. 0388.)

The purpose for which information on gender and ethnicity is collected and maintained by Defendants is explained in a report prepared by Director of Admissions Gayle Murphy ("Murphy"):

> The Committee of Bar Examiners. . . began to collect this information approximately 30 years ago in response to concerns that were raised by minority groups (particularly African-Americans and Hispanics) that minority candidates were not passing the bar examination at the same rate as non-Hispanic Caucasians or Asians, and if that was true, they wanted to know the source of the difference.

(AA Ex. 51, p. 0467.) The large gap in bar passage rates among racial and ethnic groups has persisted. (AA Ex. 3, p. 0008.) A principle reason that the Coalition seeks the requested records is to enable the research necessary to understand why.

C. Defendants' Disclosure and Use of the Records in the Admissions Database

Defendants regularly publish reports and studies based on the information in the admissions database. They publish statistical reports regarding every bar examination. (AA Ex. 3, pp. 0019-21, Ex. 44, p. 0388.) Among other things, these reports present passage rates by type of school and by school, with breakdowns of passage rates by race and gender, as well as information on first-time and repeat takers of the bar exam. (AA Ex. 3, pp. 0019-21, Ex. 44, p. 0388.)

In addition, since 1976, the State Bar has published more than 90 substantive analyses and studies using information from the admissions database. (AA Ex. 3, pp. 0021-22; Ex. 44, pp. 0388-89.) These studies go well beyond the scope of simple test validation to analyze systemic issues regarding bar membership. (AA Ex. 5, pp. 0388-89; Ex. 58, pp. 0612-18.)

Most notably, in 1988 the State Bar performed and published a study entitled "*Are Bar Exam Scores Affected by Law School Admissions Practices*?" (AA Ex. 64, pp. 0669-686.) "The research described in this report examined whether minority students would have a higher bar exam passing rate if they went to law schools where their LSAT scores were more similar to those of their Anglo classmates." (AA Ex. 64, p. 0671.) This is the very research for which Sander seeks the requested records.

Moreover, Defendants cooperated with a request for the release of data from the admissions database in the past. In the early 1990s, the Law School Admissions Council ("LSAC"), a private entity not affiliated with Defendants, conducted a national research project called the LSAC Bar Passage Study ("Bar Passage Study"). (AA Ex. 81, pp. 0995-98.) Defendants disclosed to LSAC the names, social security numbers, date of birth, law school, and bar examination scores for at least 7,785 bar applicants over the course of at least three disclosures. (AA Ex. 82, p. 1015.) For the largest of these disclosures—covering 5,639 individual applicants—neither Defendants nor LSAC received explicit consent from the bar applicants to release the data. (AA Ex. 82, pp. 1013-1015, 1017.)

Before releasing the records, the State Bar solicited advice from California Supreme Court Chief Justice Malcolm Lucas:

> We have tried, without success, to negotiate with LSAC to allow the State Bar to provide information on bar passage without tying it to specific applicant identification. An additional way to avoid violating applicants' privacy rights would be to obtain releases from all of them. However, we believe that it is impractical, if not impossible, to contact all of the applicants for the years 1988 through 1989 and secure their consent for this information.

(AA Ex. 81, p. 0991.) Chief Justice Lucas instructed the State Bar to comply with LSAC's request in a manner consistent with what the State Bar determined to be the privacy rights of individual bar applicants. (AA Ex. 83, p. 1023.) On November 8, 1993, the State Bar provided data to LSAC. (AA Ex. 89, pp. 1062-63.)

The Chief Justice recognized the importance and appropriateness of the release of accurate data regarding bar applicants and admissions, sponsoring a resolution before the Conference of Chief that stated, in part:

> WHEREAS, the only source of accurate bar examination scores and information regarding pass/fail status are Boards of Law Examiners within the various states; and, . . .
>
> WHEREAS, the expectation is that the Bar Passage Study data will greatly assist Supreme Courts, Boards of Law Examiners, legal educators and bar associations to better understand bar examination performance nationally, and to develop effective methods for increasing the success rates of students—particularly minority students—in legal education and bar admissions;
>
> NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices endorses the Law School Admission Council Bar Passage Study.
>
> BE IT FURTHER RESOLVED that the Conference of Chief Justices urges the Supreme Courts and Boards of Law Examiners within the several states to support the Bar Passage Study and cooperate actively with the Law School Admission Council by providing all data necessary for successful conduct of the Bar Study.

(AA Ex. 88, pp. 1044-45.) Defendants also recognized the importance of making information available for research purposes: "In the event that the State Bar faces a legal challenge in connection with its release of data," it would defend itself by showing that "the release of information is pursuant to (1) a matter of important interest to the public; and (2) that the State Bar is taking reasonable steps to preserve confidentiality." (AA Ex. 87, p. 1032.)

D. Sander's Original Proposal to Collaborate with the State Bar and its Rejection by Defendants

Professor Richard Sander ("Sander") is an economist and professor of law, and a national authority on legal education, the legal profession, and affirmative action. (AA Ex. 44, p. 0382-83; Ex. 79, p. 0976.) Sander approached the State Bar in 2006 about collaborating on research regarding the large and persistent gap in bar passage rates among racial and ethnic groups. (AA Ex. 44, p. 0383.) Racial disparities in bar passage rates have long been a source of concern for the legal profession and the State Bar. (AA Ex. 48, p. 0410; Ex. 51, pp. 0467-68; Ex. 79, p. 0976.) The first-time bar passage rate for black bar applicants tends to lag behind the white passage rate by thirty percentage points. (*Ibid.*) Similar but less severe disparities exist for Hispanic/Latino bar applicants. (AA Ex. 23, p. 0225.)

The gap is not explained by lack of access to better law schools. (AA Ex. 67, p. 0706.) The disparity is explained in part by differing levels of preparation prior to entering law school, but a large gap remains even after controlling for entering credentials. However, the State Bar has found that the disparity disappears when law school performance is taken into account. (AA Ex. 67, p. 0718.) The critical problem is that minority law students are much more likely to receive low law school grades than their white peers. (AA Ex. 67, pp. 0707, 0731.)

Sander hypothesizes that this disparity in law school grades and bar passage is exacerbated by racial preferences in law school admissions. (AA Ex. 79, pp. 0976-77.) Sander theorizes that the benefits of attending a higher-tiered law school are overshadowed by the negative effects of mismatch, and that these mismatch effects accompany any aggressive law school preference program—whether racially-based or tied to other types of student characteristics (e.g., preferences for older students, students with disabilities, or students who are children of alumni). (AA Ex. 79, pp. 0976-77.)

In order to fully test the mismatch hypothesis, a large and comprehensive data set is required. Sander determined that California was

the best jurisdiction for an analysis of these racial disparities. The State Bar of California is surpassed only by New York in the number of applicants sitting for the bar annually; it has exceptionally great racial diversity among bar applicants; and California is one of only a few states that collects detailed data on bar takers, making it one of the few places where a careful evaluation of the mismatch hypothesis is possible. (AA Ex. 3, p. 0009.)

In early 2006, Sander consulted with Dr. Stephen Klein ("Klein"), the State Bar's psychometrician and author of Defendants' statistical studies and analyses. (AA Ex. 79, p. 0979; Ex. 57, pp. 0593-611; Ex. 58, pp. 0612-18.) Klein, Sander and other scholars developed a collaborative research proposal, which was presented to the Committee of Bar Examiners. (AA Ex. 44, pp. 0383-84; Ex. 48, pp. 0409-14; Ex. 79, p. 0979.) The proposal specified that all data analysis would be conducted by Klein and another consultant under contract with the State Bar, using the same reporting standards as Defendants' other studies, but with methodological input from Sander and others. (AA Ex. 48, p. 0414.) The proposal expressly provided that "individual applicant data will not be revealed to anyone." (*Id.*)

The Committee voted unanimously to advance the proposal for full consideration. (AA Ex. 44, pp. 0383-84; Ex. 79, p. 0979.) But support for the proposal began to erode after the Committee of Bar Examiners met with representatives of several California law schools who serve on the "Law School Council" of the State Bar. (AA Ex. 3, pp. 0011-12.) Ultimately, State Bar staff sent a memo to the Subcommittee on Examinations recommending that the research proposal be rejected. (AA Ex. 44, p. 0384; Ex. 50, pp. 0420-464; Ex 51, pp. 0466-526.) The Committee of Bar Examiners and the Board of Governors rejected the proposal. (AA Ex. 44, p. 0384.)

The decisions, and some public opposition, may have been the result of mischaracterizations of the proposal by State Bar staff. In its notice soliciting public comment, staff characterized the proposal as a request for the "release of confidential bar examination applicant data." (AA Ex. 52,

p. 0528,) Its memo to the Board of Governors used similar terms. (AA Ex. 51, p. 0466 [describing proposal as "a request" for a "release" of "confidential" data regarding bar examination applicants].) Staff failed to explain that the study would not involve the disclosure of any individual data, let alone the disclosure of identifiable data. (AA Ex. 51, pp. 0466-526; Ex. 52, pp. 0528.) However, as noted above, the proposal was explicit that the data would be accessed only by the State Bar's own data analysts. (AA Ex. 48, p. 0414.) In its memorandum, staff also asserted that the proposal had been rejected by the Committee of Bar Examiners because it "would be a significant departure from past research practices." (AA Ex. 51, p. 0471.) In fact, as discussed, the proposal was entirely consistent with prior research studies conducted by the State Bar, except that Sander and other researchers would have input on the methodology for the data analysis. (AA Ex. 48, p. 0414.)

E. The Coalition's Requests for Records and Defendants' Rejection of Those Requests

After the State Bar rejected the collaborative research proposal, Sander submitted a request for the release of an anonymized version of the records in the admissions database. (AA Ex. 13, pp. 0148-151.) Defendants initially asserted that Sander's request failed to address putative privacy concerns previously raised, but when Sander addressed those concerns they rejected his request anyway. (AA Ex. 3, p. 0014-15; Ex. 14, p. 0153; Ex. 15, pp. 0162-63.)

On May 29, 2008, Sander sent a new, narrower request, designed to eliminate any remaining privacy concerns. (AA Ex. 44, p. 0384; Ex. 53, pp. 530-65.) Respondent Joe Hicks ("Hicks") joined Sander's May 29, 2008 request. (AA Ex. 44, pp. 0383-84; Ex. 53, pp. 0530-65.) The new request sought de-identified information from the admissions database, specifically applicant ethnicity, law school, year of law school graduation, whether the applicant was a transfer student (if feasible), bar examination

scores, whether the applicant passed, law school GPA, LSAT score, and undergraduate GPA. (AA Ex. 53, pp. 0534-35.)

On January 8, 2008, the California First Amendment Coalition ("FAC") submitted a request to inspect or receive copies of the same data requested by Sander in his first request. (AA Ex. 3, p. 0016; Ex. 17, pp. 0201-02.) Defendants denied FAC's request. (AA Ex. 3, pp. 0016-17.) On June 3, 2008, FAC submitted a new request seeking the same records sought by Sander and Hicks in their revised request dated May 29, 2008. (AA Ex. 44, p. 0384; Ex. 54, pp. 0566-68.)

The requests asked that the records be redacted and organized to protect the privacy of applicants whose information is contained in the records, and included a proposed mechanism to cluster certain types of information so the records could not be used to identify individual applicants. (AA Ex. 44; p. 0385; Ex. 53, pp. 0529-65.) They explained how the suggested privacy protocols would work, allowed flexibility in the approach to providing the requested records, and included an offer to pay for a third-party data confidentiality expert of the Bar's choosing. (AA Ex. 53, pp. 0529-65.) They also included offers to pay all reasonable costs incurred in complying with the requests. (AA Ex. 44, p. 0385; Ex. 53, p. 0532; Ex. 3, p. 0016.) Although the requests suggested how to de-identify the records, they did not ***require*** the Defendants to take any specific approach to de-identification. (AA Ex. 53, pp. 0530-33; Ex. 54, p. 0567.)

On June 12, 2008, Defendants sent a letter to Sander and Hicks denying their request for the release of a redacted version of the Admissions Database. (AA Ex. 44, p. 0385; Ex. 55, pp. 0569-71.) Defendants never formally responded to FAC's request, resulting in a de facto denial. (AA Ex. 44, p. 0385.)

F. Public Agencies Routinely Disclose De-Identified Data About Individuals

In the course of conducting research on a broad range of higher education issues, Sander's research team has obtained de-identified individual-level student records from more than one hundred educational institutions around the country, including the University of California. (AA Ex. 3, p. 0022-23; Ex. 26, pp. 0279-84.)

Federal and state governments release individual-level data from birth certificates, death certificates, health records, criminal arrests, tax returns, social security payments, home mortgages, and juvenile criminal defendants, among other things. (AA Ex. 93, pp. 1147-49.) California state agencies routinely release individual-level data derived from hospital records, criminal arrest records, domestic violence complaints, and drug and alcohol rehabilitation programs. (AA Ex. 93, pp. 1145-47, 1149.)

The public benefits, indirectly but profoundly, from the release and analysis of administrative agency data. (AA Ex. 93, pp. 1146-47.) Among other benefits, scientific research using public data from such sources often leads to effective public policy. (*Id.*)

G. The Litigation and the Decisions of the Superior Court and the Court of Appeal

Case law indicated that the Supreme Court might have exclusive jurisdiction in this matter, and Defendants took the position that it did. (AA Ex. 3, p. 0023.) The Coalition therefore originally brought this action as a petition for writ of mandamus or other extraordinary relief in the Supreme Court. The Court denied the petition without prejudice in an order filed on September 17, 2008. The Court indicated that it did not have exclusive jurisdiction in this matter, stating that the petition was "denied without prejudice to re-filing in an appropriate court."

The Coalition then filed in the Superior Court its Verified Petition for Writ of Mandate, or in the Alternative, Complaint for Declaratory and Injunctive Relief. (AA Ex. 3, pp. 0003-32.) The proceedings in the

Superior Court were bifurcated into two phases by a stipulation of the parties that was adopted as an order of the Superior Court. (AA Ex. 38, pp. 0334-39.) Phase One addressed whether the State Bar is subject to a right of public access that applies to the requested records, and hence "has a legal duty to provide the records that have been requested." (*Id.*) The stipulation and order provided that "[f]or the purposes of analyzing this duty at the Phase One stage only, the parties will not raise any issues concerning the personal privacy of any person." (*Id.*) Phase Two would address whether disclosure of the records violates the privacy of bar applicants or imposes an undue burden that would justify denying or limiting disclosure. (*Id.*) The Superior Court found that the State Bar is not subject to any public access right, and therefore did not reach Phase Two. (AA Ex. 124, pp. 1630-35, Ex. 125, pp. 1651-54.)

The Court of Appeal reversed. It recognized the common law right of access, distinct from the right of access to records of adjudicatory proceedings under the First Amendment, and held that it was applicable to the records in the admissions database. (*Sander v. State Bar, supra*, 196 Cal.App.4th at pp. 614-629.) It did not reach the questions of whether Proposition 59 provides a right of access, nor did it resolve whether the Coalition's requests would entail the creation of a "new record" or whether the need to do so would relieve Defendants of their obligation to comply with the right of access. (*Id.*, at p. 628.) Defendants' petition for rehearing was denied.

III. THE PUBLIC HAS A RIGHT OF ACCESS TO DE-IDENTIFIED RECORDS FROM THE ADMISSIONS DATABASE

A. The Public Has a Right of Access to the Requested Records under the California Constitution

Defendants' argument that they are exempt from public scrutiny proceeds from the premise that "no statutory right of public access applies to the State Bar." (OB 12.) In fact, Article I, section 3(b) of the California Constitution ("Proposition 59") provides a right of access applicable to

Defendants, and there is no statutory prohibition against access to the requested records. Defendants assert that Proposition 59 is a meaningless "constitutionalization" of existing rights of access. (OB 31-35.) Their interpretation is contradicted by the plain language of Proposition 59, by all evidence of the intent of the voters who enacted it, and by the decisions interpreting it.

1. The Plain Language of Proposition 59 Creates a Right of Access Applicable to the State Bar

The language of Proposition 59 could not be clearer: "The people ***have the right of access*** to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and ***the writings of public officials and agencies shall be open to public scrutiny***." (Cal. Const., art. I, § 3, subd. (b)(1), emphasis added.) The plain language of Proposition 59 indisputably establishes a public right of access to the writings of public officials and agencies—including Defendants'.

Defendants avoid addressing the actual language of Proposition 59, ignoring the first principle of constitutional construction: "In interpreting a constitution's provisions, our paramount task is to ascertain the intent of those who enacted it. To determine that intent, we look first to the language of the constitutional text, giving the words their ordinary meaning. If the language is clear, there is no need for construction." (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 (*Professional Engineers*), citation and internal quotations omitted.)

Proposition 59 provides that "the people have a right of access." (Cal. Const., art. I, § 3, subd. (b)(1).) "Access" is "a means of approaching . . . communicating with, or making use of . . . ." (American Heritage Dictionary of the English Language, 4th ed. (2000).) Courts have historically denominated constitutional, statutory, and common law rights to obtain public records as "access rights" or "rights of access." (See, e.g., *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th

1178, 1210 (*NBC Subsidiary*); *KNSD Channels 7/39 v. Superior Court* (1998) 63 Cal.App.4th 1200, 1202-1203.)

Proposition 59 applies that right of access to "the writings of public officials and agencies." (Cal. Const., art. I, § 3, subd. (b)(1).) As used in Proposition 59, the term "writing" means recorded data, *i.e.*, "[s]omething written, especially: Meaningful letters or characters that constitute readable matter . . . ." (American Heritage Dictionary of the English Language, 4th ed. (2000).) Furthermore, different provisions of the law that relate to the same subject matter are *in pari materia*, and must be construed consistently with one another to the extent possible. (*City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468; *People v. La Barre* (1924) 193 Cal. 388, 391.) The Public Records Act, which also addresses access to public records, provides a broad definition of the term "writings" that clearly embraces the requested records. (Gov't Code § 6252, subd. (f). See also Gov't Code § 9072, subd. (d); Evid. Code § 250.)

Thus, the plain language of Proposition 59 establishes an independent right of access to the records to which it applies.

2. The Right of Access Created by Proposition 59 Is Consistent with Its Other Provisions

Defendants have argued, and the Superior Court concluded, that "if Proposition 59 truly expanded the universe of documents to be disclosed to all papers in the possession of the government, parts of the Proposition which govern the construction of extant law would be at best surplusage." (AA Ex. 124, p. 1638.) The asserted inconsistency does not exist.[1]

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[1] Defendants also previously argued that if the California Constitution creates a right of access then "there would be no point in continuing more limited independent rights of access." (RB 31, fn. 16.) However, they do not raise this issue in their opening brief, and hence have abandoned it. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761 fn. 4; *People v. Lewis* (2008) 43 Cal.4th 415, 536 fn. 30.)

First, Proposition 59 does not create an unfettered right of access to every paper in the possession of a government agency. On the contrary, Proposition 59 establishes a carefully-crafted right of access applicable to "writings" of public officials and public agencies "concerning the conduct of the public's business." (Cal. Const., art. I, § 3, subd. (b)(1).) It is subject to existing constitutional and statutory limitations on disclosure. (Cal. Const., art. I, § 3, subd. (b)(5).) Like other constitutional rights, it is not absolute: it does not require disclosure if there is a compelling interest in non-disclosure. (See *In re Juan C.* (1994) 28 Cal.App.4th 1093, 1100-1101 ["It cannot be gainsaid that the government must make every effort to avoid trammeling its citizens' constitutional rights. By the same token, those rights are not absolute."].) Like any other constitutional right, its specific application depends on judicial construction.[2] (*Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 565.)

Separately, Proposition 59 creates a mandate for broad construction of the public's access rights and for narrow construction of restrictions on public access. (Art. I, § 3(b)(2).) In addition, it permits the adoption of new restrictions on access, but requires an express finding of the need for their adoption. (*Id.*) Because Proposition 59 creates ***an independent right of access***, and does not displace existing access rights or limitations, it does not make meaningless the rules it establishes for the construction of existing access rights and limits.

Furthermore, Proposition 59 includes provisions that would be unnecessary if it did not create an enforceable right of access. If Proposition 59 did not create a constitutional right of access, its provisions preserving constitutional and statutory limitations on access would be unnecessary. (*See* Cal. Const., art. I, § 3, subds. (b)(3)-(5).) In the absence of a constitutional access right, there would be no possible compromise of

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[2] This is the principle recognized by FAC in the discussion of Proposition 59 on its website.

these limitations on the public's access to information, and hence no need for provisions preserving them. Defendants' interpretation of Proposition 59 makes meaningless not only the right of access it creates, but these "savings clauses" as well. Therefore, Respondents' interpretation must be rejected. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715-716.)[3]

3. The Evidence of Voters' Intent in Enacting Proposition 59 Demonstrates That It Was Intended to Create a New and Independent Right of Access

The intent that determines the construction of a ballot initiative is that of the voters who approved it. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 16 (*Hill*).) Analyses and arguments contained in official ballot pamphlets are used to ascertain voters' intent. (*People v. Rizo* (2000) 22 Cal.4th 681, 685; *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 560.) The evidence of the voters' purpose in enacting Proposition 59 demonstrates that it was intended to establish a new and independent right of access, broadly applicable to all state and local government agencies.

Addressing "What Your Vote Means," the Voter's Guide for the November 2004 election stated that a "yes" vote on Proposition 59 means "***Californians would have a constitutional right of access to government information***." (AA Ex. 5, p. 0036, emphasis added.) The Official Title and Summary of Proposition 59 succinctly described its purpose and structure. It amended the California Constitution to:

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[3] Defendants may be contending that Proposition 59 incorporates limitations on access recognized by the common law. (OB 34-35.) If so, that assertion is contrary to the plain language of Proposition 59. While it preserves constitutional and statutory exceptions to the right of access, it does ***not*** preserve common law limitations. (Cal. Const., art I, § 3, subd. (b)(5).)

- ***Provide [a] right of access to meetings of government bodies and writings of government officials.***
- Provide that statutes and rules furthering public access shall be broadly construed, or narrowly construed if limiting access.
- Require future statutes and rules limiting access to contain findings justifying necessity of those limitations.
- Preserve constitutional rights including rights of privacy, due process, equal protection; expressly preserves existing constitutional and statutory limitations restricting access to certain meetings and records of government bodies and officials, including law enforcement and prosecution records.

(AA Ex. 5, p. 0037, emphasis added.) The analysis of Proposition 59 by the Legislative Analyst stated that it "***create[s] a constitutional right for the public to access government information.***" (AA Ex. 5, p. 0037, emphasis added.) The ballot argument in favor of Proposition 59 stated that it will "create a new civil right: a constitutional right to know what the government is doing, why it is doing it, and how." (AA Ex. 5, p. 0039.)

Defendants ignore this evidence, asserting that Proposition 59 merely "constitutionalized" ***existing*** access rights. (OB 32-33.) Nothing in the record supports that conclusion. On the contrary, the Voters Guide consistently stated that Proposition 59 "creates" or "provides" a "new" right of access. (AA Ex. 5, pp. 0036-39.) The ballot argument in support of Proposition 59 also indicates that it was intended to change the law by providing a right of access independent of existing access laws. (AA Ex. 5, p. 0039.) Defendants' interpretation of Proposition 59 cannot be reconciled with its manifest purpose.

4. The Right of Access Created by Proposition 59 Is Self-Executing and Hence Independently Viable As a Matter of Law

Defendants contend that Proposition 59 is a mere statement of "policy" that creates no enforceable right. (OB 33-34.) In doing so, they disregard the fact that amendments to the California Constitution are self-executing and establish enforceable rights.

Constitutional provisions are self-executing, and therefore provide the basis for an action for declaratory and injunctive relief. (*Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300, 306-307 (*Katzberg*); *Degrassi v. Cook* (2002) 29 Cal.4th 333, 338 (*Degrassi*).) The ability to enforce such constitutional rights exists independently of any effectuating legislation. (*Professional Engineers, supra,* 40 Cal.4th at p. 1045; *Katzberg, supra*, 29 Cal.4th at p. 307.) Constitutional mandates and prohibitions apply to all branches of the California government, and all branches of government are required to comply with their terms. (*Katzberg, supra*, 29 Cal.4th at pp. 306-307; *Degrassi, supra*, 29 Cal.4th at p. 338.)

The California Constitution establishes, for example, rights of free expression, petition, and privacy. These constitutional rights are expressed in concise terms.[4] Nonetheless, they create self-executing and independently enforceable rights.[5] Thus, like the right of access to court records recognized under California's free speech guarantee, Proposition 59 creates a right of access independent of any right conferred by statute or the California Rules of Court. (See *Copley Press, Inc. v. Superior Court* (1992) 63 Cal.App.4th 367, 373, citations omitted ["Although there is no specific statutory right of access to court documents, both the federal and state Constitutions provide broad access rights to judicial records . . . ."].)

If Defendants' position is correct and Proposition 59 is an empty promise, then the other fundamental rights protected by the California

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[4] Cal. Const., art. I, § 2, subd. (a); Cal. Const., art. I, § 3, subd. (a); Cal. Const., art. I, § 1.

[5] Free expression: Cal. Const., art. I, § 2(a); *Degrassi, supra*, 29 Cal.4th at p. 338, quoting *Katzberg, supra,* 29 Cal.4th at p. 307. Petition: Cal. Const., art. I, § 3(a); *City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 532, 536, judgment vacated and remanded 459 U.S. 1095 (1983), reiterated in *City of Long Beach v. Bozek* (1983) 33 Cal.3d 727. Privacy: Cal. Const., art. I, § 1; *Hill, supra*, 7 Cal.4th at p. 18; *White v. Davis* (1975) 13 Cal.3d 757, 775.

Constitution would also be meaningless. They are not, nor is Proposition 59. Rather, it establishes an independent and self-executing constitutional right of access to information about the public's business, including the records sought by the Coalition.

5. The Decisions Relied Upon by Defendants Do Not Support their Claim that Proposition 59 Is Meaningless

The authority primarily relied upon by Defendants contradicts their assertion that Proposition 59 is meaningless. *Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370 (*Sutter's Place*) held exactly the opposite. It expressly recognized that Proposition 59 creates a constitutional right of access: "Sutter's Place states that Proposition 59 establishes a constitutional right of access concerning the conduct of the people's business. ***This is an indisputable statement given the language of subdivision [(b)](1)***." (*Id.* at p. 1380, emphasis added.)[6]

Mercury Interactive Corp. v. Klein (2007) 158 Cal.App.4th 60 (*Mercury Interactive*) also recognized that "[u]nder subdivision (b)(1) of article I, section 3, '[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.'" (*Id.* at p. 101.) However, it did not apply or construe that provision of Proposition 59. Instead, it addressed only the mandate of broad construction in subdivision (b)(2), which it applied to a California Rule of Court in holding that the public's right of access to court records did not extend to discovery materials. (*Ibid.*) Nor

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[6] The statement in *Sutter's Place* that Proposition 59 "is simply a constitutionalization of the CPRA" is *dicta*. The question presented in that case was not whether Proposition 59 created a right of access independent of the CPRA, but whether it repealed by implication the constitutionally-based "mental process privilege" limiting inquiry into legislator's internal reasoning. (*Id.* at pp. 1380-1383.)

does any other decision hold that Proposition 59 merely "constitutionalized . . . pre-existing law" and creates no right of access.[7] (OB 32.)

In fact, this Court and the lower courts have consistently recognized that Proposition 59 "enshrined" a constitutional right of access. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 288 (*POST*) ["As the result of an initiative measure adopted by the voters in 2004, this principle [of "access to information concerning the conduct of the people's business"] now is enshrined in the state Constitution. . . .]); *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329 [same]; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1320 (*Santa Clara County*); *BRV, supra*, 143 Cal.App.4th at p. 750; *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 765.)

The truth is that no court has yet been called upon to determine whether the right of access created by Proposition 59 applies to records not subject to an existing statutory right of access. As a result, none of these decisions supports the proposition that it does not. (*Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal.App.4th 1796, 1806; *Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985.) However, the plain language of the California Constitution, the evidence of the voters' intent, and the

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[7] The other cases cited by Defendants recognize the Proposition 59 creates a right of access but do not apply it (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 597; *State Office of Inspector General v. Superior Court* (2010) 189 Cal.App.4th 695, 703-704), or simply note either or both its preservation of existing constitutional and statutory limitations on access or its mandate for broad construction of existing access rights. (*Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 454; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750-751 (*BRV*); *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 656-657; *Shapiro v. Board of Directors of Centre City Dev. Corp.* (2005) 134 Cal.App.4th 170, 181 fn. 14.)

principles of constitutional construction all compel the conclusion that Proposition 59 creates an independent and enforceable right of access.

6. The Right of Access Created by Proposition 59 Applies to the Requested Records

In the lower courts, Defendants asserted that the requested records are not writings of any public official or agency. (AA, Ex. 95, p. 1185.) Defendants argued that in order to fall within this definition, a record must be "written ***by*** a public official or agency." (AA, Ex. 95, p. 1185.) They asserted that "[n]o public official wrote the raw data at issue." (AA, Ex. 95, p. 1186.) The Superior Court apparently accepted Respondents' contentions. (AA, Ex. 124, p. 1638; Cal. Const., art. I, sec. 3, subd. (b)(1).) Defendants have apparently abandoned this contention as well.[8] (See OB 31-15.) In any event, their contention is wrong.

As explained above (*supra*, Section III.A.1), the requested records clearly fall within the plain meaning of the term "writing." Proposition 59 applies to all writings "of" public officials and agencies, not just writings "by" public officials and agencies. Hence, it applies to writings in the possession or control of public officials or agencies, regardless of whether they are created by public officials or agencies.[9]

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[8] *Supra,* footnote 2.

[9] The word "of" has several meanings, depending on context. As used in Proposition 59, it is clearly connotes possession or association. The word "of" is consistently defined to include this meaning. (See, e.g., The American Heritage Dictionary of the English Language, 4th ed., available at http://www.yourdictionary.com/of.) This meaning is reinforced by the use of the word "of" in just this fashion in numerous California laws. (See, e.g., Gov't Code §§ 6254, subd. (ad) ["records ***of*** the State Compensation Insurance Fund . . . to the extent that . . . individually identifiable information would be disclosed"], 6268 [equating "Public records . . . in the custody or control of the Governor when he or she leaves office" with "the public records and other writings ***of*** any Governor"]; Bus. & Prof. Code § 6069 ["A member of the State Bar shall maintain all of the following on the official membership records ***of*** the State Bar"].) Thus, the plain language of Proposition 59 applies the right

The Superior Court apparently believed Respondents' claim that "[n]o public official wrote the raw data at issue." (AA, Ex 95, p. 1186.) That conclusion is incorrect. State Bar officials solicited the information they contain from applicants (e.g., applicant gender, ethnicity, and law school data) or generated it themselves (e.g., raw and scaled Bar exam scores) and input it into the admissions database. (AA, Ex. 44, pp. 0385-88.) Thus, Defendants created the records in the admissions database. The fact that some of the data they include is obtained from applicants is irrelevant. The admissions database was "written" by public officials, and is subject to Proposition 59.[10]

It is also apparent that the requested records relate to the conduct of the people's business. First, the language of Proposition 59 implies a presumption that government records relate to the people's business. (Cal. Const., Art. I, § 3, subd. (b)(1).) In any event, the records requested by the Coalition indisputably relate to the conduct of the people's business. When a statute uses language of an earlier enactment on an analogous subject, and the earlier enactment has been judicially construed, the Legislature is presumed to have adopted that construction. (*Union Oil Associates v. Johnson* (1935) 2 Cal.2d 727, 734-735; *People v. Harrison* (1989) 48 Cal.3d 321, 329.) The Court has held that the definition of records subject to the Public Records Act—which incorporates the phrase "relating to the conduct of the public's business"—"'is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain

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of access to all nonexempt records relating to the conduct of the public's business in the possession of a public agency or official.

[10] Freedom of information laws are consistently applied to records and information obtained by the government from third parties. (*See, e.g., Poway Unified School Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496 [claim form submitted by minor]; *KUTV, Inc. v. Utah State Bd. of Education* (Utah 1984) 689 P.2d 1357 (*KUTV*) [student questionnaires containing information including students' grades, sex, religion, and number of years a person's family lived in the area].)

to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to 'the conduct of the public's business' could be considered exempt from this definition. . . .'" (*POST*, *supra*, 42 Cal.4th at p. 288, fn. 3.) Proposition 59 must be construed consistently with that definition.

The requested records fall well within this broad scope. Defendants have admitted that the requested information relates to "a matter of important interest to the public." (AA Ex. 87, p. 1032.) Furthermore, the legal profession involves a public trust, and the public has a right to understand the mechanisms that affect and influence the admission and status of members of that profession. (See *State Bar v. Superior Court* (1929) 207 Cal. 323, 330-331.) The requested records bear directly on the public interest in the regulation of the California bar.

Thus, the requested records constitute writings of a public agency that pertain to the conduct of the public's business. There is no constitutional or statutory exception that permits Defendants to keep them secret. Therefore, the right of access established by Proposition 59 applies to the requested records.

B. The Public Has a Right of Access to the Requested Records Under California Common Law

1. There Is a Well Established and Long Standing Common Law Right of Access

The common law creates a right of access applicable to all branches and agencies of the government. The common law right of access is long-standing and is rooted in the fundamental requirements of democratic government. "The concept that access to information is a fundamental right is not foreign to our jurisprudence." (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 772 (*San Gabriel Tribune*); accord *Atlantic City Convention Center Authority v. South Jersey Publishing Co.,*

Inc. (1994) 135 N.J. 53, 67.) In order to create a "government of the people," the people must have access to information. (*Polillo v. Deane* (1977) 74 N.J. 562, 570 (*Polillo*).) Because of the historical public policy favoring transparency in government, "[t]he citizen's right to know is the rule and secrecy is the exception." (*State ex rel. Newsome v. Alarid* (1977) 90 N.M. 790, 797; accord *Beckon v. Emery* (1967) 36 Wis.2d 510.)

California courts have long recognized and applied this common law right of access, including to the judicial branch. (See, e.g., *Mushet v. Dept. of Public Service* (1917) 35 Cal.App. 630, 636-638 (*Mushet*); *In re Matter of Shortridge* (1893) 99 Cal. 526, 530.) Defendants are an agency of the California judiciary. (Cal. Const. art. VI, sec. 9; *In re Rose* (2000) 22 Cal.4th 430, 438.) Defendants are therefore subject to the common law right of access.

2. The Common Law Right of Access Applies to Records that Relate to the Official Work of the Government in Which There Is a Public Interest

The common law right of access applies to records of government agencies and officials relating to official government functions that are of a public interest, and the disclosure of which is not protected by an express statutory prohibition on disclosure or a sufficient countervailing public interest in nondisclosure. (See, e.g., *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 220 fn. 3, 222 (*Craemer*); *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 113-114 (*Copley I*) [records that "reflect the official work of the court, in which the public and press have a justifiable interest" are subject to access]; *Estate of Hearst* (1977) 67 Cal.App.3d 777, 782-784 (*Estate of Hearst*) [recognizing and applying common law right of access because "no statute exempts probate files from the status of public records" and "the public has a legitimate interest in access"].)

The common law requires, as a threshold matter, that the records be kept by government officials. Defendants contend that the common law right of access is further "restricted to records that officially memorialize or

record government action." (OB 20-22.) That limitation has not been imposed by the California courts. For example, the common law right of access has been held to require public disclosure of a master list of qualified jurors, prepared based on information from questionnaires provided by prospective jurors (*Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, 260-261, 262-263),[11] and to a probation department file created based on information obtained from a defendant and third parties and recording no official action of the court. (*County of Placer v. Superior Court* (2005) 130 Cal.App.4th 807, 814 (*Placer*).) Other California cases have also applied the common law right of access to records not constituting an official memorialization of any government action. (*Coldwell v. Board of Public Works* (1921) 187 Cal. 510, 520-521 (*Coldwell*) [compelling disclosure of "preliminary" records]; *Mushet*, *supra*, 35 Cal.App. at pp. 636-638 [requiring disclosure of records concerning a city's municipal electric system]; *Copley I*, *supra*, 6 Cal.App.4th at p. 113-14 [compelling disclosure of a clerk's "rough minutes"].)[12]

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[11] Defendants stress that *Pantos* also held that the questionnaires themselves were not subject to disclosure. However, the court implicitly recognized that the questionnaires ***were subject*** to the common law right of access, and denied access only because the "[p]ublic interest in withholding such questionnaires outweighs the public's interest in disclosure." (*Pantos, supra,* 151 Cal.App.3d at p. 265.) It did so based on concerns about the effect on jurors' privacy of disclosing questionnaires that, unlike the records sought by the Coalition, contained identifying information. (*Id.*) In any event, subsequent decisions have consistently recognized the public's right of access to such questionnaires. (See, e.g., *Lesher Communications, Inc. v. Superior Court* (1990) 224 Cal.App.3d 774, 777-778; *Zamudio v. Superior Court* (1998) 64 Cal.App.4th 24, 30.)

[12] Defendants have argued that *Coldwell* did not involve the common law but rather former section 1032 of the Political Code, which provided access to "other matters in the office of any officer." The Attorney General explained that the definition of "other matters" was "subject to further enlargement by resort to common law principles." (53 Cal. Op. Att'y Gen.

The Coalition has never asserted that the common law creates a "presumption that all records in the hands of the government are open to public inspection . . . ." (OB, 20.) The common law right of access is not absolute. It may be overcome by express statutory exemptions or countervailing public interests. (*Craemer*, *supra*, 265 Cal.App.2d at p. 222.) However, in order to defeat the common law right of access, countervailing interests must be compelling. (*Pantos, supra*, 151 Cal.App.3d at pp. 262-263; see also *Estate of Hearst, supra*, 67 Cal.App.3d. at pp. 782, 784.)

3. The Common Law Right of Access is Not Limited to Adjudicatory or Quasi-Adjudicatory Records

The common law right of access indisputably applies to records of adjudicatory proceedings. (See, e.g., *Estate of Hearst, supra*, 67 Cal.App.3d 777.) However, it is not ***confined*** to such records. For example, relying in part on the common law right of access, the Court of Appeals has granted access to a probation department file, where "in compiling and keeping the required records, the probation department acted as an arm of the court." (*Placer, supra,* 130 Cal.App.4th at p. 814.) Defendants cite no common law authority confining the right of access to adjudicatory records.[13]

Even if the common law right of access as applied to the ***courts*** were limited principally to records of adjudicatory proceedings (which it is not), such a limitation would not exempt ***Defendants*** from public scrutiny. As

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136, 1970 Cal. AG LEXIS 36, at *15 (1970).) In other words, *Coldwell's* analysis of this provision is an expression of the common law.

[13] *Copley I* makes no distinction between adjudicatory and non-adjudicatory records, nor does it suggest that the right of access it recognizes does not apply to non-adjudicatory records. (*Copley I, supra*, 6 Cal. App. 4th 106.) *People v. Lewis* (2006) 39 Cal. 4th 970, 1065, holds only that a judge's personal bench notes, which clearly are adjudicatory records, should not be disclosed.

the Court of Appeal recognized, the State Bar is not a court. Rather, it performs a wide variety of functions, many of them non-adjudicatory. (*Sander v. State Bar*, *supra*, 196 Cal.App.4th at p. 626, citing Rules of the State Bar, Titles III and IV.) The need for public scrutiny of those functions is just as substantial as the need for public scrutiny of other non-adjudicatory functions of the government, and common law right of access applies.

As Defendants recognize, in deciding the scope and application of the common law right of access, California courts look to the manner in which the common law has been applied by other courts. (See, e.g., *Coldwell*, *supra*, 187 Cal. at p. 518; *Mushet*, *supra*, 35 Cal.App. at pp. 636-638.) Although the common law criteria vary somewhat, nowhere has the common law right of access been limited to adjudicatory records. In its survey of the common law of access, the federal Court of Appeals found that even "the most restrictive" expression of the common law right of access does not limit access to adjudicatory materials. (*Washington Legal Foundation v. United States Sentencing Com.* (D.C. Cir. 1996) 89 F.3d 897, 904-905 (*Washington Legal Foundation*).) Furthermore, the common law right of access applies to all branches of government. (*Id.*, 89 F.3d at p. 903; *Schwartz v. U.S. Department of Justice* (D.D.C. 1977) 435 F.Supp. 1203.) The United States Supreme Court and a majority of the states have recognized and applied common law rights of access embracing a wide variety of records. (See, e.g., *Nixon v. Warner Communications* (1978) 435 U.S. 589, 597; *Washington Legal Foundation,* 89 F.3d at pp. 904-905 [collecting examples].) See also cases collected in the Coalition's reply brief in the Court of Appeal, filed Oct. 27, 2010, at pp. 25-26.) The common law right of access applies to non-adjudicatory records of the other branches of government. There is no basis for applying the common law right of access more narrowly to the judiciary.

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4. The Common Law Right of Access is Distinct from the First Amendment Right of Access

Defendants claim that the application of the common law right of access is determined by the same test applied to the First Amendment right of access to adjudicatory records, and hence is limited to records to which there is a tradition of access. (OB 22-23, 26-29.) In fact, the common law and the First Amendment rights of access have different origins, and the scope of the common law right of access is not determined by the "history and function" analysis applicable under the First Amendment.

The First Amendment right of access has generally been limited to the records of adjudicatory proceedings. (See, e.g., *NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1178.) This limitation is a consequence of the fact that cases recognizing the First Amendment right of access to court records are based on the United States Supreme Court's recognition of a First Amendment right of access to court proceedings. (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 592; *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 611, O'Connor, J. concurring.)

The common law right of access, on the other hand, predates and did not arise from First Amendment precedents. (*Polillo, supra,* 74 N.J. at p. 570 ["[T]he common law origins of this important policy [of public access] may be traced to English law dating back to the first half of the 18th century."].) The courts have made it clear that the First Amendment right of access has an independent basis, considering and applying it separately from the common law. (See, e.g., *Valley Broadcasting Co. v. United States District Court* (9th Cir. 1986) 798 F.2d 1289, 1293 ["The common-law right [of access] is separate and distinct from rights guaranteed by the first amendment . . . ."]; *Stone v. University of Maryland Medical System Corp.* (4th Cir. 1988) 855 F.2d 178, 180.)

The cases on which Defendants rely do not hold to the contrary. Indeed, they distinguish the First Amendment analysis from the common law analysis. (See, e.g., *Lugosch v. Pyramid Co.* (2d Cir. 2006) 435 F.3d 110, 126 (*Lugosch*); *In re Providence Journal Co.* (1st Cir. 2002) 293 F.3d

1, 10.) To the extent they hold that the common law access to records of court proceedings is based on the role they play in the adjudicatory process, it is because they address and analyze the common law only in context of the courts and not in context of an agency of the judicial branch whose function is primarily non-adjudicatory. (*United States v. El-Sayegh* (D.C. Cir. 1997) 131 F.3d 158, 159 (*El-Sayegh*); *United States v. Wecht* (3rd Cir. 2007) 484 F.3d 194, 207-208; *Lugosch, supra*, 435 F.3d at p. 112; *Providence Journal, supra*, 293 F.3d at p. 4.) In fact, they expressly recognize the importance of disclosing all government agency records of public interest: "The right to inspect judicial records is a species of the right to inspect public records, and we have recently examined the question of what constitutes a 'public record.' As to both sets, we grounded the concept in 'the public's interest in keeping 'a watchful eye on the workings of public agencies.'" (*El-Sayegh, supra*, 131 F.3d at p. 161, citations omitted.)

5. The Common Law Right of Access Applies to the Requested Records

The common law right of access applies to the records in the admissions database. Those records are created by government officials and maintained by a government agency. (AA Ex. 3, pp. 0009-10; Ex. 44, pp. 0381, 0385; *Chronicle Publishing, supra*, 54 Cal.2d at p 563; *Smith, supra*, 212 Cal.App.3d at p. 975 .) As records regarding the admission of candidates for the legal profession, they relate to matters of legitimate interest to the public. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 48.) There is no statutory prohibition against disclosure of the requested records. The question of whether or not there is any countervailing public interest in nondisclosure has not yet been fully litigated. The Coalition submits that there is not, but the resolution of that question has been reserved for the next phase of this litigation.

As explained above, the common law right of access is not limited to records that record "an official action, decision, statement, or other matter

of legal significance, broadly conceived." (OB 21.) Even if it were, however, it would still apply to the requested records. They reflect the official work of an agency and arm of the courts, including Defendants' exercise of their duty to regulate the bar exam and admission to the practice of law. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557; *Greene v. Zank* (1984) 158 Cal.App.3d 497; Rules of the State Bar, tit. IV, div. 1.) The admissions database includes Defendants' official evaluations of the performance of bar applicants, in the form of raw and scaled scores, and their decision as to whether an applicant has passed the bar examination and hence will be admitted to the practice of law. (AA Ex. 3, p. 0009; Ex. 44, pp. 0386-88.) Defendants have collected and maintained the requested records for more than thirty years in order to study and understand, among other things, why minority candidates are not passing the bar examination at the same rate as non-minority candidates. (AA Ex. 44, p. 0384; Ex. 51, p. 0467.) Defendants use the records to publish official regular reports and studies, many of which have analyzed the records at issue in this case in order to identify systemic issues in bar passage and hence bar membership. (AA Ex. 3, pp. 0019-22; Ex. 23, pp. 0223-252; Ex. 44, pp. 0388-390; Ex. 58, pp. 0613-18; Ex. 64, pp. 0669-686.) The admissions database thus records and reflects Defendants' official actions.

Defendants make two additional arguments for nondisclosure, neither of which is supportable. First, Defendants assert that the records in the admissions database are not public records because they have not previously been made public. (OB 26-30.) That assertion is based on the "historical tradition" prong of the First Amendment right of access, which, as noted above, is not applicable to the common law. Moreover, it is false. Defendants themselves have routinely disclosed de-identified data from the admissions database, and they have provided records from the admissions database to a private party. (AA Ex. 3, pp. 0019-21; Ex. 44, p. 0388; Ex. 81, pp. 0995-98; Ex. 82, p. 1015; Ex. 89, pp. 1062-63.) Finally, it is circular. The common law right of access is not limited to information that

has previously been made public, or there would be no need for it and no case law considering or applying it. (See, e.g., *Kirstowsky v. Superior Court* (1956) 143 Cal.App.2d 745, 751.)

Second, Defendants apparently assert that there is no legitimate public interest in their conduct, because they are part of the judicial branch which is not "political." (OB 12-16.) Defendants offer no authority for this novel proposition. Indeed, they contradict themselves by later acknowledging that public policy ***does*** support public access to adjudicatory proceedings and records of the courts—even though such proceedings are not—according to Defendants—"political." (OB 22-23.) In any event, they are simply wrong, as evinced by the courts' recognition of the public interest in access to non-adjudicatory records of the judicial branch. (See, e.g., *Pantos, supra*, 151 Cal.App.3d at pp. 260-261, 262-263.)

The requested records are subject to the common law right of access, however articulated. They are therefore subject to public access in the absence of compelling countervailing interests in nondisclosure.

C. Defendants' Discriminatory Disclosure of Records from the Admissions Database Violates the First Amendment

Defendants have a long history of using and disclosing data from the admissions database. Defendants' selective pattern of disclosing those records while refusing to provide them to the Coalition violates the First and Fourteenth Amendments to the United States Constitution.[14]

The United States Supreme Court recently held unconstitutional a state law with strong parallels to Defendants' policy in this case. (*Sorrell v. IMS Health Inc.* (2011) ___ U.S. ___, 131 S. Ct. 2653 (*Sorrell*).) In *Sorrell*, a Vermont law restricted the use of prescriber identifying information that was generated in compliance with a legal mandate, barring its use for

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[14] This constitutional challenge was raised in the trial court (AA Ex. 78, pp. 0971-72). It may be considered by this Court. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal. 4th 1, 6.)

marketing purposes without the prescriber's consent, but permitting dissemination of the information for "research." (*Id.* at pp. 2656-2657, 2660.)

Sorrell held that, "[o]n its face, Vermont's law enacts content-and-speaker based restrictions on the sale, disclosure, and use of prescriber-identifying information." (*Sorrell, supra*, 131 S. Ct. at p. 2663.) The law permitted disclosure to "those who wish to engage in certain 'educational communications,'" but denied others any "means of purchasing, acquiring, or using prescriber-identifying information." (*Id.*) The Court held that the Vermont law could not survive heightened scrutiny. (*Id.* at pp. 2667-2668, 2672.)

Vermont argued, in pertinent part, that its law regulated "not speech but simply access to information . . . generated in compliance with a legal mandate." (*Sorrell, supra*, 131 S. Ct. at p. 2665.) The Court rejected Vermont's argument, and held that "restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment." (*Id.* at p. 2666.) Quoting Justice Scalia's concurring opinion in *Los Angeles Police Dep't v. United Reporting Publ'g Corp.* (1999) 528 U.S. 32 (*United Reporting*), the *Sorrell* court held that "'a restriction upon access that ***allows*** access to the press . . . but at the same time ***denies*** access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech.'" (*Id.* at p. 42, emphasis in original [Scalia, J., concurring].) The *Sorrell* court also quoted Justice Ginsburg's concurring opinion in *United Reporting,* which stated that "'the provision of [government] information is a kind of subsidy to people who wish to speak' about certain subjects, 'and once a State decides to make such a benefit available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed.'" (*Sorrell, supra*, 131 S. Ct. at p. 2666, quoting *United Reporting*, 528 U.S. at p. 43 [Ginsburg, J., concurring)].)

The constitutional principles recognized in *Sorrell* and the concurring opinions of Justices Scalia and Ginsburg in *United Reporting*

have been applied in other cases where the government has selectively disclosed or disseminated information. For example, in *Legi-Tech, Inc. v. Keiper* (2d Cir. 1985) 766 F.2d 728, 733, the federal Court of Appeals held that the State of New York could not provide access to a computerized database of legislative information to a state organ of communication while denying access to the press, nor could it discriminate among members of the public and the press in granting access. In *Donrey Media Group v. Ikeda* (D. Haw. 1996) 959 F. Supp. 1280, 1286-1287, the court held that a statute granting access to voter registration records to some individuals and not others was unconstitutional "on its face."

California courts have long recognized these principles. In *Stanson v. Mott* (1976) 17 Cal. 3d 206, 219, this Court held that "once a public forum is opened, equal access must be provided to all competing factions." Thus, a public agency may not constitutionally provide information to some and deny it to others: "While public officials need not furnish information, other than public records, to any news agency, a public official may not constitutionally deny to one media access that is enjoyed by other media, because one media is entitled to the same right of access as any other." (*Savage v. Pacific Gas and Electric Co.* (1994) 21 Cal. App. 4th 434, 453.)[15]

Here, as in *Sorrell*, Defendants disseminate information in a discriminatory fashion. As in *Sorrell*, Defendants purport to maintain the confidentiality of the data they acquire, but have an exception for "research." (AA Ex. 47, p. 0408.) Defendants' selective dissemination of requested information violates the First and Fourteenth Amendments.

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[15] (See also *Citizens for Responsible Gov't v. City of Albany* (1997) 56 Cal.App.4th 1199, 1228; *accord Telemundo of Los Angeles v. City of Los Angeles* (C.D. Cal. 2003) 283 F.Supp.2d 1095, 1104.) Decisions of other courts are in accord. (See, e.g., *Anderson v. Cryovac, Inc.* (1st Cir. 1986) 805 F.2d 1, 9; *Westinghouse Broadcasting Co., Inc. v. Dukakis* (D. Mass. 1976) 409 F.Supp. 895; *Quad-City Community News Svc., Inc. v. Jebens* (S.D. Iowa 1971) 334 F.Supp. 8, 15; *Southwestern Newspapers Corp. v. Curtis* (Tex. Ct. App. 1979) 584 S.W.2d 362, 364-365.)

IV. DEFENDANTS' STATEMENTS TO BAR APPLICANTS DO NOT PRECLUDE DISCLOSURE OF THE REQUESTED RECORDS

A. Defendants Cannot at This Stage of the Litigation Assert the Privacy Rights of Bar Applicants as a Bar to Disclosure

Defendants' arguments concerning the "privacy rights" of Bar applicants should be disregarded. (OB at 35-41.) In the trial court, the Defendants stipulated that the privacy interests, if any, of Bar applicants in the Ethnic Survey data would be reserved for the second phase of the bifurcated trial litigation. (AA Ex. 42, pp. 0367-73.) The Superior Court entered an order based upon that stipulation. (*Id.*) As a result, there has been no discovery regarding the subjects relevant to that issue.

Nonetheless, Defendants raise the issue of Bar applicants' privacy interests in their Opening Brief—without informing this Court of the stipulation and order to the contrary. However, Defendants may not disregard that stipulation and order. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 766; *Estate of Schmelz* (1968) 259 Cal.App.2d 440, 446.) Their arguments concerning Bar applicants' privacy interests should be disregarded. Prudence also dictates that those arguments should not be addressed because, as a direct result of Defendants' stipulation, the record is not adequate to support their resolution.

B. Defendants' Statements Do Not, As a Matter of Law, Preclude Public Access to De-Identified Records from the Admissions Database

Even if they are considered at this time, Defendants' argument that "promises of confidentiality" and the "privacy rights" of bar applicants purportedly arising therefrom justify withholding data is contradicted by the actual language of their forms and applicable California law. (OB at 35-41.)

First, the language of the Ethnic Survey does not restrict disclosure of the records requested in this case. To the contrary, the form provides: "The following information is to be furnished by each applicant as part of

the application process. The Committee of Bar Examiners is gathering this data to assist in the continuing evaluation of the examination. This information will be treated in a confidential manner and ***will be used*** only for ***research*** purposes. It will not be retained as part of your application." (AA, Ex. 44, p. 0382; Ex. 47.) (emphasis added)

Thus, the Ethnic Survey form unambiguously tells Bar applicants that the information they provide "will be used" for research purposes—precisely the purpose of the Coalition. (*Id.*) The form does not specify who will be conducting such research and, although it provides an example of the type of research for which this information could be used ("the continuing evaluation of the examination"), it does not limit its terms to that research. (*Id.*) The other statements referenced by Defendants all grant authorization for disclosure, and do not state or imply that information provided will be kept confidential. (OB 7.) Compliance with the Coalition's request would not violate any "promises of confidentiality" made by Defendants. (OB at 35.)

Second, Defendants' claims that they made "promises of confidentiality" and that disclosure of the data would infringe upon applicants' "privacy rights" are belied by their history of publicly disclosing data obtained from Bar applicants. They regularly publish de-identified data obtained from applicants in their reports and studies. (AA, Ex. 44, p. 0388; Ex. 56, 57, 79.) They have also has made data regarding bar applicants available to the LSAC, without notice to or consent of the applicants. (AA, Ex. 80, 81, 82, 89.) This conduct precludes Defendants' claim that their statements to applicants bar disclosure. (See also *Sorrell*, *supra*, 131 S. Ct. at p. 2668 [claim that confidentiality interests justified non-disclosure of data to respondents was belied by the fact the State had shared the data with other parties]).

Third, even if Defendants' statements to Bar applicants had been unequivocal promises of confidentiality, the disclosure of de-identified data to the Coalition would not violate such promises. Under California law the release of anonymous data does not violate any promises of confidentiality

or restrictions on the data's use.[16] (See, e.g., *London v. New Albertson's* (S.D. Cal. 2008) 2008 WL 4492642 [disclosure of anonymous individual-level pharmacy patient data to a marketing firm did not contravene assurances of confidentiality].) By definition and design, the disclosure of de-identified data pursuant to appropriate protocols will not result in the disclosure of any personally identifiable information. (AA Ex. 13, pp. 0165-200.) Accordingly, such disclosure would not violate any promises of confidentiality and would not implicate Bar applicants' privacy rights.

Disclosure of de-identified information regarding individuals obtained from government databases is commonplace, and much, if not most, of scientific and academic research in the social sciences could not be conducted without it. (AA Ex. 93, pp. 1144-1149.) The routine release of such data refutes the claim that such information cannot be disclosed without undue risk of 're-identification' of those individuals. (OB 37-38.) Moreover, the only pertinent evidence in the record demonstrates that there is no meaningful risk of re-identification. (Respondents' Request for Judicial Notice, filed herewith, Ex. 1.)

Finally, neither statutory nor common law rights of access may be defeated by the promise of a public entity to keep information confidential. "[A]ssurances of confidentiality are insufficient in themselves to justify withholding pertinent public information from the public." (*San Gabriel Tribune*, *supra*, 143 Cal.App.3d at p. 775; *KUTV, supra,* 689 P.2d 1357.) Otherwise, government entities would have *carte blanche* to suppress information simply by including promises of confidentiality whenever they collect data. Defendants' conduct in this case—disclosing data publicly

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[16] Indeed, California law ***expressly permits*** disclosure of information collected from private individuals for the purposes of educational research, even if it includes personal identifiers. (Cal. Civ. Code § 1798.24, subd. (t).)

and to the LSAC, and then objecting to disclosure to the Coalition—highlights the danger of abuse that such an approach would allow.

V. THE FORM IN WHICH RECORDS ARE KEPT DOES NOT AFFECT THE PUBLIC'S RIGHT OF ACCESS, AND THE NEED TO ELIMINATE IDENTIFYING INFORMATION DOES NOT PERMIT DEFENDANTS TO KEEP RECORDS SECRET

A. Public Access Rights Apply Regardless of the Form in Which Information is Maintained By the Government

The format in which the State Bar maintains the records sought here has no effect on the Defendants' obligation to produce them. The common-law right of access does not distinguish between one format and another. (See, e.g., *In re Application of National Broadcasting Co.*, (2d Cir. 1980) 635 F.2d 945, 950 ["We agree with the District of Columbia Circuit and other courts that have faced the issue that the non-documentary nature of the evidence sought to be copied does not remove the common law right."]; *Pantos*, *supra*, 151 Cal.App.3d at pp. 260-261 [common law required disclosure of master list of qualified jurors "whether on tape or in other document form"]; *Menge v. City of Manchester* (1973) 113 N.H. 533, 311 [magnetic computer tapes]; *Ortiz v. Jaramillo*, 82 N.M. 445, 446-447 (1971) [same].)

This substantial body of law is consistent with public policy. The mere fact that a record is kept in digital format should not subject it to less public scrutiny that it would receive if it were kept on paper.

B. California Law Does Not Bar Access Simply Because a Response Entails Data Compilation or Extraction, and in Any Event Disclosure Is Possible Through Segregation of Identifying Information Alone

As Defendants acknowledge, no California court has ever held that the government is exempt from the requirements of public access laws if releasing public records would require the production of a "new record." (OB 41.) In fact, under California law, a public agency is required to respond to a request for records in electronic form even though the response

requires "data compilation, extraction, or programming to produce the record." (Gov't Code § 6259.3, subd. (b)(2); *Santa Clara County, supra*, 170 Cal.App.4th at p. 1336.) There is no reason that Proposition 59, the common law, or the First Amendment should be applied more narrowly than the statutory right of access in this regard.

However, even if such a rule were imposed, it would not bar the records sought here because the Coalition's request does not require the creation of any new records. As noted above, the Coalition asked that the records be redacted and organized so as to protect the privacy of applicants whose information is contained in the records, and included a proposed mechanism to cluster the requested information so that it could not be used to link information to specific applicants. (AA Ex. 53, pp. 530-65; Ex. 44, p. 385.) However, the Coalition has also explained that redaction alone is sufficient to protect the privacy of applicants. (AA, Ex. 108, pp. 1336-1342.) It is well established that the redaction of existing data, including electronic data, does not amount to the creation of a "new record." (See, e.g., *Osborn v. Bd. of Regents of the University of Wisconsin* (2002) 254 Wis.2d 266, 299-301 [extensive redaction of personally identifiable information from student education records does not amount to the creation of a new record]; *Stephan v. Harder* (1982) 230 Kan. 573, 583.)

Indeed, even manipulation more substantial than that suggested by the Coalition does not constitute the creation of a "new record." (*Bowie v. Evanston Community Consol. School Dist. No. 65* (1989) 128 Ill.2d 373, 382 [disclosing student test scores in a "masked and scrambled format" does not "create a 'new' record]; *Kryston v. Board of Education* (1980) 77 A.D.2d 896, 897 ["scrambling" student test scores by manipulating data to take results out of alphabetical order does not "constitute the preparation of a 'record not possessed or maintained' by a government body"].)

Defendants assert that the Coalition's requests would require them to "change the data." (OB 46.) As explained above, this is not true. The Coalition has demonstrated that the redaction requested does not require

changes to existing data or the creation of any new data. (AA Ex. 79, pp. 0975-84; Ex. 93, pp. 1142-49; Ex. 108. pp. 1336-43.)

However, even if the Coalition's requests required some computer programming, ample authority supports the power of the courts to require it. Courts have required the government to create a new computer program to facilitate access public records in circumstances where "available programs do not access all of the public records stored in the computer's data bank." (*Seigle v. Barry* (Fla. Ct.App. 1982) 422 So.2d 63, 65. See also *Hamer v. Lentz*, (1989) 132 Ill.2d 49, 52-56 [rejecting the claim that extraction of data entailed the creation of a new record and holding that, if necessary, defendant would be required to create a computer program to generate the requested information]; *Family Life League v. Department of Pub. Aid*, (1986) 112 Ill.2d 449 [defendant ordered to create a computer program to remove exempt information]; *Maher v. Freedom of Info. Comm'n* (1984) 192 Conn. 310, 325 ["Where, as here, the information sought is presently stored in the agency's data base, and the cost of the new program is to be borne by the person seeking the information, an order compelling production of computer tapes is within the powers statutorily conferred."].)

Defendants rely on California Rule of Court 10.500 in asserting that the creation of "new records" is not required under California law. (OB 45.) As Defendants concede, the State Bar is not protected by Rule 10.500. (OB 45; AA Ex. 118, p. 1497.) Moreover, the Coalition's requests can be met by "selecting data from extractable fields in a single database using software owned or licensed" by Defendants, which, under Rule 10.500, does not entail "creating a record." (Rule 10.500(e)(1)(B).)

The cases relied upon by Defendants in arguing that the "new records" exception applies here are inapposite. In *Yeager v. Drug Enforcement Administration* (D.C. Cir. 1982) 678 F.2d 315 (*Yeager*), the requesters demanded elaborate "disclosure-avoidance techniques" far more complex than anything the Coalition has proposed, and also demanded that the government replace certain data fields with entirely different fields the

government itself would have to select. (*Yeager, supra*, 678 F.2d at p. 319.) In *Center for Public Integrity v. Federal Communication Comm'n* (D.D.C. 2007) 505 F.Supp.2d 106, the requesters demanded that certain fields of exempt information be replaced with data that the government itself would select. (*Id.* at p. 114.) The Coalition does not require the replacement of any data, and does not require Defendants to select anything. In *Kerner v. State Teachers Retirement Bd.* (Ohio 1998) 695 N.E.2d 256, 274, the records sought were exempt from disclosure so any discussion of the requirements for disclosure was *dicta*. (*Id.* at p. 275.) Moreover, in order to respond to the request, the agency in *Kerner* "would have had to reprogram its computer system." (*Id.*) The Coalition asks for no such thing.

C. The Protocols for Disclosure Proposed by the Coalition Are Not Rigid Mandates, as Defendants Have Admitted

Defendants assert that the Coalition's requests "***require***" the State Bar to engage in "substantial manipulation and recoding." (OB 9.) That contention is false. Nothing in the Coalition's requests requires Defendants to adopt any particular procedures for disclosing these records. (AA Ex. 53 at pp. 0530-33; Ex. 54, p. 0567.) Defendants are free to produce the requested records in any manner they choose, so long as they do so in compliance with the law.

Defendants have stipulated as much: "Petitioners have asked that the records be redacted and organized in a manner they believe is designed to protect the privacy of applicants. ***Petitioners have indicated their willingness to adjust the protocols for redaction and organization of the records if necessary*** to protect privacy." (AA, Ex. 44, p. 0385, emphasis added.) In any event, ample authority supports the power of courts to refine the disclosure process to avoid obstacles to disclosure. (See, e.g., *Pioneer Electric v. Superior Court* (2007) 40 Cal.4th 360; *Bible v. Rio Properties Inc.* (C.D. Cal. Sep. 21, 2007) 246 F.R.D. 614, 620; *United States v. Kaczynski* (9th Cir. 1990) 154 F.3d 930.)

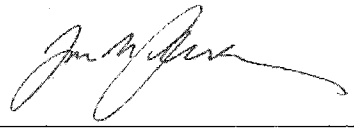
The form in which the requested records are kept does not determine whether they are subject to the public's right of disclosure; they are subject to that right regardless of their form. Neither does the proposed process for providing the requested records mandate the creation of a new record or provide any basis for denying disclosure of the records requested. Disclosure is required; the means by which disclosure is accomplished does not alter that fact.

VI. CONCLUSION

The requested records are subject to public disclosure under Proposition 59, the common law, and the First Amendment. Defendants' statements to bar applicants do not relieve them of the obligation to comply with the public's right of access. The form in which the admissions database is maintained does not affect Defendants' duty to provide the requested records. The Coalition respectfully requests that the Court recognize and hold that the State Bar is subject to the same public scrutiny that already applies to every other branch of California government. Furthermore, the Court should reject Defendants' claim that de-identified information cannot be disclosed without unduly prejudicing privacy rights, which would severely curtail scientific and academic research of the greatest importance.

Dated: November 30, 2011

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By 

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CERTIFICATE OF WORD COUNT

The text of this answering brief consists of 13,427 words, including all footnotes but excluding the table of contents, table of authorities, and signatures, as counted by the computer program used to generate this petition.

Dated: November 30, 2011

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PROOF OF SERVICE

Sander v. State Bar, Supreme Court Case No. S194951

I declare I am over eighteen years old, not a party to the within action, and am employed by Sheppard, Mullin, Richter & Hampton LLP, Four Embarcadero Center, 17th Floor, San Francisco, CA 94111. I am readily familiar with the practice at my place of business for collection and processing of mail. All such mail is deposited with the United States Postal Service on the same day it is collected in the ordinary course of business.

On November 30, 2011, I served the following document:

ANSWERING BRIEF OF RESPONDENTS

by enclosing true and correct copies in envelopes addressed as shown below, then sealing and placing in the designated location at my place of business for prepaying first class postage and depositing in the U.S. Mail in San Francisco, California, on today's date, in accordance with ordinary business practices.

James M. Wagstaffe, Esq. Michael von Loewenfeldt, Esq. Kerr & Wagstaffe LLP 100 Spear Street, Suite 1800 San Francisco, CA 94105-1528	Counsel for Defendant and Respondent *State Bar of California*
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 30, 2011, at San Francisco, California.

Karen Hollenbeck