S194951

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RICHARD SANDER, JOE HICKS,
CALIFORNIA FIRST AMENDMENT COALITION

Plaintiffs and Appellants

v.

THE STATE BAR OF CALIFORNIA and the BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,

Defendants and Respondents.

After a Published Decision by the Court of Appeal First Appellate District, Division Three Case No. A128647, Reversing a Judgment Entered by the Superior Court for the County of San Francisco, Case No. CPF-08-508880, The Honorable Curtis E.A. Karnow presiding

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REPLY BRIEF OF DEFENDANTS AND RESPONDENTS (The Petitioners in this Court)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Secondary Authorities

I. INTRODUCTION

As with their briefing below, Plaintiffs fail to present any specific analysis on the precise issue before the Court, and instead rely on platitudes and generalizations for their argument that the public is entitled to review the confidential data stored in the State Bar's admissions database containing the academic history, race, LSAT scores, and bar examination scores of everyone who applied to take the California Bar Examination between 1972 and 2007. The common law right of access does not, as Plaintiffs insist, extend as broadly as the access created by the California Public Records Act ("CPRA") to cover presumptively all documents in the possession of the government that have anything to do with the government's work. The common law only provides access to the limited body of official government records that document and constitute the actual actions of the government agency in question. With respect to judicial branch agencies, that means "documentation which accurately and officially reflects the work of the court, such as its orders and judgments, its scheduling and administration of cases, its assignments of judicial officers and administrators." (*Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 113 [7 Cal.Rptr.2d 841] (hereinafter *Copley Press I*).)

There simply is no common law presumption that the public can access all data collected by the government. Nor did Proposition 59 wipe out all pre-existing common law limits on disclosure, or subject the

judiciary to the same standards that apply under the CPRA, from which the judicial branch (including the State Bar) is expressly exempt.

As this Court has made clear, "the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues..." (*NBC Subsidiary (NBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178, 1201 [86 Cal.Rptr.2d 778] (hereinafter *NBC Subsidiary*) [quoting *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 589 [100 S.Ct. 2814] (conc. opn. of Brennan, J.)].) Plaintiffs provide no such specifics, and their broad rhetorical statements do not justify the radical departure from pre-existing law and practice that they urge here. This Court should affirm the trial court's judgment that the State Bar's admissions database is not subject to public disclosure.

II. PLAINTIFFS CONTINUE TO MISAPPREHEND THE STATE BAR'S *SUI GENERIS* ADMISSIONS ROLE AS AN ARM OF THIS COURT

Plaintiffs continue to ignore that the State Bar is unquestionably part of the judicial branch of state government. (See Cal. Const. art., VI, § 9.) They further disregard the State Bar's unique role in the admissions process as an administrative arm of this Court, as well as the fact that the admissions database is essentially a confidential record of this Court. (See *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 590, 593, 599-600 [79 Cal.Rptr.2d 836].) Instead, Plaintiffs speak generically about the State

Bar in all of its aspects, insisting that the State Bar is somehow trying to hold itself out as "exempt from public scrutiny." This case, however, is not about whether the State Bar as a whole is "subject to scrutiny" or any of the other inflated rhetorical positions Plaintiffs take in their brief. Plaintiffs' insistence that the State Bar performs "a wide variety of functions" which require public scrutiny has nothing whatsoever to do with the actual limited issue before the Court: whether the raw data in the State Bar's admissions database is a public record open to presumptive public access.[1]

The admissions database is not collected pursuant to a "wide variety of functions." It is collected pursuant to the State Bar's *sui generis* role as an administrative arm of this Court. (*In re Attorney Discipline System*,

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[1] Plaintiffs continue to laud their own research goals, ignoring the fact that their intentions in seeking this data are irrelevant. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1018 [88 Cal.Rptr.2d 552].) The Court is not analyzing whether these Plaintiffs can use this data for the purposes for which they seek it, but rather whether the data is a public record open to anyone who wants it. Nor has the alleged need for access to data by private researchers ever been considered to be a valid reason for public access to government records. (*Ibid.*) Indeed, Plaintiffs' continued insistence that their desire to study "the effect of admissions preferences" is somehow a question of "nationwide significance" highlights that this case actually has nothing whatsoever to do with the public's understanding of the way the State Bar performs its public duties. (*Cf. NBC Subsidiary, supra,* 20 Cal.4th at p. 1201 ["what is crucial in individual cases is whether access to a particular government process is important in terms of that very process."].) Instead, Plaintiffs merely consider the State Bar's admissions database to be a repository of data they believe is more convenient for them to use to study the practices of law schools (not the State Bar) than if they had to collect the data themselves. (See Answering Brief of Respondents ["AB"] pp. 7-8.)

supra, 19 Cal.4th at p. 590; *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557 [216 Cal.Rptr.3d 367].) In performing that role, the State Bar acts as part of this Court, and its actions are as much the acts of the Court as those of the court clerk. The State Bar does *not* "regulate admission to the practice of law" as Plaintiffs claim (AB p. 3); this Court does that as part of its judicial function. (*In re Attorney Discipline System*, *supra*, 19 Cal.4th at 593, 599-600.) The State Bar does not decide anything about admissions; it merely makes recommendations to this Court. (*Preston v. State Bar of Cal.* (1946) 28 Cal.2d 643, 650 [171 P.2d 435].) The fact that the State Bar also performs other duties that are separate from its role as this Court's administrative arm – none of which are pertinent to this case – is utterly irrelevant to the question of whether the admissions database is the type of judicial branch record to which the public has a right of access.

III. PLAINTIFFS' ASSERTION THAT THIS DATA HAS BEEN DISCLOSED BEFORE IS FALSE

Plaintiffs repeatedly assert that the State Bar has already provided the data in question to some private parties, attempting to make it appear that Plaintiffs are being singled out based on "political motivations." They argue that "Defendants have regularly disclosed the information at issue to others" (AB p. 1), "Defendants routinely disclose de-identified data" (AB p. 1), and "they have previously disclosed much of the requested information" (AB p. 2). These assertions are gross misrepresentations.

Plaintiffs are demanding access to sixteen fields of data for every person to take the Bar Examination from 1972-2007 (over 246,000 people). Those fields are: race, law school, transfer student, year of law school graduation, total raw score on first exam, total scaled score on first exam, raw MBE score, scaled MBE score, raw essay score, scaled essay score, raw performance test score, scaled performance test score, bar passage, law school GPA, LSAT score, and undergraduate GPA. (Appendix of Exhibits of Appellants ["AA"] tab 53.) The requested data has never been produced to any person or entity at any time in the past.

Plaintiffs' false claims of prior productions are based on two distortions of the record. First, Plaintiffs point to the State Bar's regular public release of summary statistics concerning each administration of the Bar Examination as well as various reports concerning the Bar Examination authorized by the Committee of Bar Examiners. None of those *public* summaries or reports contains any of the detailed raw data Plaintiffs seek. Indeed, Plaintiffs themselves have full access to these public reports and can use any information from them they want for any purpose.

Second, Plaintiffs mischaracterize a very small production of limited score data to the Law School Admissions Council ("LSAC"), made at the direction of the Chief Justice of this Court, nearly 20 years ago. Plaintiffs

ignore several important aspects of this "prior disclosure."[2] One principal difference is that neither the LSAC nor anyone else suggested that the data was public or that the State Bar was *required* to create and share this data with the LSAC. Instead, the Chief Justice of the California Supreme Court requested the State Bar to do so.[3] (AA tabs 81 & 83.) Then, rather than the State Bar providing records on all bar applicants, the *LSAC* provided the State Bar with a list of schools and names, including social security numbers, for applicants it was studying[4] (presumably based on the LSAC's prior relationship with these students when they took the LSAT). (AA tab 82.) The State Bar created a matching dataset for the LSAC's use. The initial production only involved score data for the 5,639 individuals

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2 Plaintiffs' incorrect argument that any prior disclosure of any data means that Plaintiffs are forever thereafter entitled to whatever data they want is rebutted at pages 17-21 *infra*.

3 As the State Bar is an administrative arm of this Court, and the records in question are fundamentally the records of this Court, a request from the Chief Justice is far different than a request from a random member of the public.

4 Plaintiffs incorrectly assert that the State Bar provided applicants' names and social security numbers to the LSAC – that identifying data came *from* the LSAC. The State Bar merely matched it with score data. (AA tab 82 #7; AA tab 88 p. SB|LSAC 0087; AA tab 89.)

identified by the LSAC, and did not include *any* ethnic, racial or gender information.[5] (*Id.*)

Thus, there simply is no basis for Plaintiffs' insistence that the State Bar discloses the data in question to others, or regularly provides "de-identified" data to anyone. The prior "disclosures" Plaintiffs refer to are wholly irrelevant to Plaintiffs' insistence that the entire State Bar database is subject to general public disclosure.

IV. PLAINTIFFS FAIL TO SHOW ANY GROUND FOR FINDING THAT THE INFORMATION THEY SEEK IS SUBJECT TO PUBLIC DISCLOSURE

A. PLAINTIFFS CONCEDE THERE IS NO STATUTORY RIGHT OF PUBLIC ACCESS YET IGNORE THE CLEAR REASONS THAT THE LEGISLATURE CHOSE NOT TO PROVIDE FOR THIS RIGHT OF ACCESS

Plaintiffs make no attempt to argue that the Legislature has enacted any right to disclosure of the State Bar's admissions database. They do not even attempt to defend the Court of Appeal's erroneous Evidence Code section 1040 analysis. Plaintiffs ignore, however, the historical reasons why public records statutes were enacted, and the repeated legislative decisions *not* to extend the same rights of access to the records of the State Bar and other judicial branch entities.

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[5] The subsequent prospective study conducted by the LSAC was based on written individual consents from each participant. (AA tab 82 #9.)

As discussed in the Opening Brief, modern "freedom of information" statutes were enacted because the common law provides only a narrow right to access particular government records. The legislative history of the CPRA expressly notes the limited scope of the common law right. (See Opening Brief ("OB") p. 19.) Yet in extending *statutory* rights of public access generally to documents held by the executive and legislative branches of government, the Legislature has consistently excluded the judicial branch from those new rights. That legislative choice, and the policy reasons for it, cannot simply be ignored as Plaintiffs urge.[6] Adopting Plaintiffs' view would, as the court held in *Copley Press I*, "make the exclusion of court records set forth in subdivision (a) of section 6252 [of the Public Records Act] inoperative" (*Copley Press I*, *supra*, 6 Cal.App.4th at p. 113), as well as do the same for the exclusion of the judiciary from all other public access statutes.

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[6] Plaintiffs also ignore the substantial differences between the political branches and the judicial branch in terms of access to the deliberative meetings of public bodies. Unable to refute that almost all of the deliberative work of the judiciary occurs in private, in a manner totally antithetical to the process of the legislative and executive branches, Plaintiffs merely call this important distinction "novel" and then decline to discuss it. The undeniable fact is that the public's right of access to both the records and proceedings of the judicial branch is fundamentally different than the right of access to the legislative or executive branches.

B. PLAINTIFFS FUNDAMENTALLY MISREPRESENT THE COMMON LAW AS BEING EQUIVALENT TO THE BROAD STATUTORY RIGHT CREATED BY THE CPRA

1. Plaintiffs ignore the established common law test and instead invent several of their own

Plaintiffs make no mention of the well-accepted two part common law test for access to public records discussed in the Opening Brief. They fail to discuss, much less rebut, the clear standards set forth in *Mushet v. Department of Public Service of City of Los Angeles* (1917) 35 Cal.App. 630, 634 [170 P. 653] (hereinafter *Mushet*), *Copley Press I, supra*, 6 Cal.App.4th at p. 113, and *Washington Legal Foundation v. U.S. Sentencing Commission* (D.C. Cir. 1996) 89 F.3d 897, 905.

Instead, Plaintiffs continue to invent their own test, which they claim is as broad as that under the CPRA (or maybe even broader). They make a number of assertions about their self-invented test, none of which are supported by the case law.

First, Plaintiffs insist that the common law covers all "records of government agencies and officials relating to official government functions that are of a public interest..." (AB p. 24.) That is plainly incorrect. (*See Copley Press I*, 6 Cal.App.4th at p. 113; *Mushet, supra*, 35 Cal.App. at pp. 634-35.) Plaintiffs' cite *Copley Press I* but fail to accurately state its test or admit that the court expressly rejected the broad test they advocate. Their citation to *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216 [71

Cal.Rptr. 193] is equally unavailing. The cited provisions discuss the right to inspect "public records" without describing what constitutes such records.[7] Finally, Plaintiffs cite *Estate of Hearst* (1977) 67 Cal.App.3d 777 [136 Cal.Rptr. 821], which involved the adjudicatory records of a probate proceeding. (*Id.* at p. 781.) None of this authority supports the broad rule Plaintiffs advocate.

Next, Plaintiffs argue the common law extends to records "kept by" the government without regard to whether they officially memorialize or record government action. (AB p. 24.) No citation is given for this proposition, which was rejected in *Copley Press I.* (*Copley Press I, supra,* 6 Cal.App.4th at p. 113 ["Petitioner contends that all writings created within the court premises by court personnel in connection with court business must be public records available for inspection by the press. ... We do not accept petitioner's broad argument."].) No case extends the *common law* test to all records "kept by" government agencies.[8]

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[7] In fact, *Craemer* notes that public records are defined as "[t]he written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive..." (*Craemer v. Superior Court, supra,* 265 Cal.App.2d at p. 220.)

[8] As discussed in detail in the Opening Brief, one of the ways the CPRA expanded upon the common law was to provide access to records "prepared, owned, used, or retained by" executive agencies (Gov. Code § 6252, subd. (e)), whereas the common law only applies to official records of government action. (See OB pp. 14-15, 19-20.)

Plaintiffs attempt to "prove" their broad test by citing to a series of cases having no relationship to this one. *County of Placer v. Superior Court* (2005) 130 Cal.App.4th 807 [30 Cal.Rptr.3d 617], merely held that during discovery a court can permit a probationer subject to revocation to review non-confidential portions of *his own* probation file, which is a court record and evidence used against him in revocation proceedings.[9] (*Id.* at pp. 812-13.) *Coldwell v. Board of Public Works* (1921) 187 Cal. 510 [202 P. 879] is not a common law case – it concerned the predecessor of the CPRA (Political Code section 1032).[10] (*Id.* at pp. 520-21.) As for *Mushet*, it limits common law public documents to writings that are both "official records" *and* "written acts or records of the acts" of the government – the very test that Plaintiffs insist "has not been imposed by the California courts" (AB pp. 24-25.) (*Mushet, supra*, 35 Cal.App. at p. 634; State Bar

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[9] "A probationer facing a probation revocation hearing has the right to the disclosure of evidence. . . . By its inherent power over its records, and by Penal Code section 1203.10, the trial court has the authority to permit a probationer to inspect nonconfidential portions of his probation file." (*County of Placer v. Superior Court, supra*, 130 Cal.App.4th at pp. 812-13.)

[10] Plaintiffs bizarrely argue that the interpretation of Political Code section 1032 in *Coldwell* was made under common law principles, citing *not* to the *Coldwell* case but to a California Attorney General Opinion from 49 years after *Coldwell*. (AB p. 25 fn. 12.) *Coldwell* itself clearly explains that it is interpreting the language of Political Code section 1032 pursuant to the dictionary definition of "public." *Coldwell v. Board of Public Works, supra*, 187 Cal. at p. 520. The Court did not reference the common law in any way. (*Ibid.*) *Coldwell* is thus clearly *not* an interpretation of the common law right of access.

Request for Judicial Notice, Ex. A.) Contrary to the description in Plaintiffs' brief, *Mushet* held that the records in question were *not* public documents. (*Id.* at p. 635.) Instead, *Mushet* held that the records of the public utility were open to public inspection because the public was analogous to a shareholder in the utility. (*Id.* at pp. 637-38.) That part of *Mushet* is unique to public utility law and has no bearing on this case.[11]

Plaintiffs also continue to mischaracterize *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258 [198 Cal.Rptr. 489] (hereinafter *Pantos*). The jury commissioner's master list of qualified jurors is an official record of the jury commissioner's work, thus satisfying the common law test. The underlying questionnaires themselves, however, are not publicly available because they are collected with a representation that the information would be confidential, and are "informational sources gathered to determine qualification for prospective jury service." (*Id.* at p. 263.) Plaintiffs' repeated insistence that subsequent case law has recognized a public right to access jury questionnaires (AB p. 25 fn 11) is deliberately misleading. Both *Lesher Communications, Inc. v. Superior Court* (1990) 224 Cal.App.3d 774 [274 Cal.Rptr. 154] and *Zamudio v.*

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[11] As for *Copley Press I*, the reason why the rough court minutes were found to be public records was because they were a presumptively correct ministerial record of what occurred in open court, and thus closely analogous to an official record of court action. (*Copley Press I, supra*, 6 Cal.App.4th at p. 115.)

Superior Court (1998) 64 Cal.App.4th 24 [74 Cal.Rptr.2d 765] concerned voir dire questionnaires filled out by jurors empanelled in individual cases, *not* the questionnaires provided to the jury commissioner at issue in *Pantos*.[12] (*Lesher Communications v. Superior Court*, *supra*, 224 Cal.App.3d at p. 777; *Zamudio v. Superior Court*, *supra*, 64 Cal.App.4th at p. 26.) *Lesher Communications* specifically distinguishes *Pantos* on this ground, holds that the voir dire questionnaires are public records *because* they are part of the adjudicative process in a specific case, *and* holds that questionnaires submitted by persons who were *not* called to the jury box for voir dire are *not* public records. (*Lesher Communications v. Superior Court*, *supra*, 224 Cal.App.3d at pp. 778-79.) Thus *Lesher Communications* expressly follows the adjudicative/non-adjudicative distinction that Plaintiffs wishfully insist does not exist. (*Id.* at p. 779.)

Finally, Plaintiffs attempt to limit the scope of their purported test by insisting that it can be "overcome by express statutory exemptions or countervailing public interests" so long as they are "compelling." (AB p. 26.) Once again, Plaintiffs blur the first and second prongs of the common law test. That second prong – whether a right of access can be overcome – is not reached unless the document is a common law public

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[12] The jury commissioner's questionnaires are authorized by Code of Civil Procedure sections 196 and 198 subdivision (c), and are *not* used for voir dire in individual cases. (Civ. Proc. Code, § 196; Civ. Proc. Code, § 198, subd. (c); Civ. Proc. Code, § 205.)

record in the first place. (*Washington Legal Foundation v. U.S. Sentencing Comm'n, supra*, 89 F.3d at p. 902.) Plaintiffs' arguments clearly insist that essentially *all* documents in the hands of the government are *presumptively* public. That is not, and has never been, the common law. (*Id.* at p. 905.)

2. As applied to the judicial branch, the common law right of access is plainly limited to adjudicatory records and official records of judicial acts

Plaintiffs claim that there is no authority limiting the common law right of access to judicial branch records to adjudicatory records. Plaintiffs are flatly wrong and simply ignore cases that do not support their position. (*E.g.*, *United States v. El-Sayegh* (D.C. Cir. 1997) 131 F.3d 158, 163; *Lugosch v. Pyramid Co. of Onondaga* (2d Cir. 2006) 435 F.3d 110, 119; *In re Providence Journal Co., Inc.* (1st Cir. 2002) 293 F.3d 1, 9-10.) The only other judicial branch documents that are common law public records are those which "accurately and officially reflect[] the work of the court...." (*Copley Press, Inc., supra*, 6 Cal.App.4th at p. 113; *see also Washington Legal Foundation v. U.S. Sentencing Comm'n, supra*, 89 F.3d at p. 905.)

Plaintiffs attempt to confuse the issue by insisting that the adjudicatory/non-adjudicatory distinction only applies to a First Amendment right of access. Yet, again, that is not a distinction the case law draws. Plaintiffs also insist that the lack of a historical right of access is somehow not a common law issue. That argument represents a complete misunderstanding of what the common law is. A "common law" test is not

an invitation for each court to make up whatever rule it wants. It is a historically recognized test developed through centuries of case law. Indeed, Civil Code section 22.2 directly ties the common law of this state to the common law of England. (Civ. Code, § 22.2.) Historical practices are a critical aspect of any common law analysis. (*E.g.*, *Lesher Communications*, *supra*, 224 Cal.App.3d at p. 779 ["A review of the history and tradition of open criminal proceedings in English and American courts led to the conclusion that an open trial included an open voir dire. However, venirepersons who are never called to the jury box do not play any part in the voir dire or the trial."]).

There simply is no common law right for the public to review any document or piece of data in the hands of the government that someone believes is of public interest. As discussed in the Opening Brief, the common law right of access to public records is far narrower. That is why numerous modern statutes have been enacted to provide rights of access that do not exist at common law, but such statutes do *not* apply to records of the judicial branch.

3. The data in the admissions database is not open to public disclosure under any common law test

Plaintiffs then propose yet another boundless test: they say the database is a public record because it was "created by public officials," "maintained by a government agency," and "related to matters of legitimate

interest to the public." (AB p. 29.)[13] Again, this is not, and has never been, the common law standard for what constitutes a public record. (*See Copley Press I, supra*, 6 Cal.App.4th at 113.)

In the alternative, Plaintiffs then try to shoehorn their arguments into the actual common law test, but they just don't fit. The raw data in the State Bar's admissions database in no way officially constitutes or records the State Bar's official actions. The only part of that data that even arguably shows the State Bar's actions are the bar scores themselves. Those scores are highly confidential, and even successful applicants cannot see their own scores. (Rules of the State Bar, rule 4.62, subd. (B).) They do not form the kind of records that the common law requires every member of the public be granted access to see.

Plaintiffs also insist that these records have been historically made available, but their argument is just a shell game. The data in question has *never* been disclosed to anyone. The State Bar's public reports concerning summary bar passage statistics are not the same as the raw data that Plaintiffs seek, and therefore it is wholly illogical to insist that because the

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[13] In both this and their Proposition 59 argument, Plaintiffs contend that the database is a writing of a public official simply because someone at the State Bar performed the ministerial task of entering the data provided to the State Bar into a computer. By that logic, a document written by a third party would become the writing of a public official simply because a government employee photocopied the document. This is just another way of asserting that anything in the possession of a government agency is a public document.

State Bar has a well established practice of reporting summary statistics and other studies, its underlying confidential raw data is available to anyone who wants it. Nor does the disclosure at the urging of this Court of a tiny amount of score data (*without* ethnicity or the other private matters Plaintiffs seek) to the LSAC in 1993 mean that the entire State Bar admissions database is now open to the public.

Plaintiffs wholly ignore the fact that all of this information is designated confidential by the Rules of the State Bar, and that score information is so confidential not even successful applicants are allowed to see it. (Rules of the State Bar, rules 4.4 & 4.62, subd. (B).) Plaintiffs' *ipse dixit* assertion that the public has an interest in this data simply cannot overcome these clear rules and establish that the State Bar's admissions database is a presumptive public record under the common law.

C. PLAINTIFFS' RESURRECTED FIRST AMENDMENT ARGUMENT IS PATENTLY OFF BASE

Plaintiffs resort to "jumping the shark" by arguing that under the United States Supreme Court's recent *Sorrell v. IMS Health Inc.* (2011) 131 S.Ct. 2653 decision, the First Amendment and equal protection clause require the State Bar to provide Plaintiffs with any data they want from the admissions database because the State Bar uses the data itself for research and because the State Bar made a small disclosure of some score data to the

LSAC nearly twenty years ago.[14] *Sorrell*, of course, has nothing whatsoever to do with this case.

Sorrell is not a public records case of any kind. It involved a Vermont law prohibiting pharmacies from selling data to marketers, but not prohibiting the sale of that same data to others (including researchers). The Supreme Court held that this "restriction on access to information in private hands" was an invalid, content and speaker-based, prior restraint on speech. (*Sorrell v. IMS Health Inc., supra*, 131 S.Ct. at pp. 2663-72.) Nothing in *Sorrell* has any application to a government entity's decision whether or not to make certain data available to the public.

Plaintiffs claim that the State Bar "disseminate[s] information in a discriminatory fashion" because it uses the confidential data it possesses "for research." (AB p. 33.) The State Bar does not disseminate (i.e. distribute or provide) the raw data in question to anyone, researchers or otherwise. The State Bar's own use of its data is not a dissemination of that data, much less a general provision of the data to some members of the public but not others based on their viewpoints.

Plaintiffs also badly distort several inapposite cases where the government tried to limit access to admittedly public records or public fora to certain members of the public. *Legi-Tech, Inc. v. Keiper* (2d Cir. 1985)

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[14] Plaintiffs did not bring either an equal protection or First Amendment claim in their Complaint. (AA tab 3.)

766 F.2d 728 involved the State of New York's creation of an electronic database of public legislative records, including the text of pending legislation, votes on bills, and similar public information. (*Id.* at p. 731.) A New York statute allowed members of the public to access this electronic information via a subscription service, but prohibited "entities which offer for sale the services of an electronic information retrieval system which contains data relating to the proceedings of the legislature" from purchasing the information. (*Ibid.*) In other words, New York was trying to prohibit potential competitors to its own subscription database services from mining the admittedly public data contained therein. (*Id.* at p. 733.) The court, not surprisingly, held that "[t]he evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion." (*Ibid.*)

In *Donrey Media Group v. Ikeda* (D. Haw. 1996) 959 F.Supp. 1280, a federal district court invalidated a Hawaii law that limited press access to voter registration records while allowing access to the same records to a wide variety of people. The records had been available to anyone in the public prior to the challenged law's enactment. (*Id.* at pp. 1284-87.) Again, Plaintiffs' cited authority involves allowing access by some people, but not others, to the *same admittedly public* records.

The other cases cited by Plaintiffs are similarly inapposite. *Stanson v. Mott* (1976) 17 Cal.3d 206 [130 Cal.Rptr. 697] held that the State

Department of Parks and Recreation was not authorized to spend $5,000 to promote a bond measure on the June 1974 ballot because there was no legislative authorization "to spend public funds to campaign for the passage of the bond issue." (*Id.* at p. 220.) The language cited by Plaintiffs in their brief is simply generic dicta. *Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434 [26 Cal.Rptr.2d 305] involved a journalist's claim that executives at PG&E had gotten her fired by, among other things, excluding her from "the ranks of journalists with whom [PG&E] cooperate[d]." (*Id.* at pp. 439, 451-53.)[15]

None of these cases support Plaintiffs' insistence that because summary statistical reports and some internal State Bar research reports are made available by the State Bar to everyone in the public (including Plaintiffs), the public is also entitled to access all raw data in the State Bar's admissions database. Nor do they support Plaintiffs' claim that the specific, limited production of some score data to the LSAC nearly 20 years ago (at this Court's direction) rendered the entire admissions database a public record. The State Bar has never provided the data requested by

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[15] The cases in footnote 15 of Plaintiffs' brief are all equally inapposite. *Citizens for Responsible Gov't v. City of Albany* (1997) 56 Cal.App.4th 1199 [66 Cal.Rptr.2d 102] held, in relevant part, that a ballot form was insufficiently impartial. (*Id.* at pp. 1224-28.) The remaining cases in that footnote all merely hold that a public entity cannot provide access to records or press conferences to some reporters but not others.

Plaintiffs to anyone else; thus, there is no equal protection or First Amendment obligation to provide it to the Plaintiffs.

D. PROPOSITION 59 DID NOT CREATE AN ALL ENCOMPASSING DUTY TO DISCLOSE THAT WIPED OUT THE COMMON LAW

As below, Plaintiffs attempt to discuss Proposition 59 out of context in the hope that this Court will conclude that Proposition 59 wiped out all pre-existing legal rules and imposed a blanket presumptive right of disclosure on all records kept by the government. Plaintiffs' arguments find no support in the language of Proposition 59 or the cases analyzing it.

1. Plaintiffs' untenable interpretation of Proposition 59

Plaintiffs provide a shifting and scattered analysis of Proposition 59 so that the ultimately boundless interpretation they urge for it is difficult to discern. Yet when Plaintiffs' arguments are read together, it is clear that they are asking the Court to interpret Proposition 59 as radically changing the rules for public access to judicial branch documents, wiping out decades, if not centuries, of prior law.

Plaintiffs insist that Proposition 59 creates a right of access to "writings in the possession or control of public officials or agencies, regardless of whether they are created by public officials or agencies" (AB p. 21) and that all such records are presumed to relate to the people's business. (AB p. 22.) Thus, they argue that Proposition 59 creates a right of access to "every conceivable kind of record that is involved in the

governmental process" and "'[o]nly purely personal information unrelated to 'the conduct of the people's business'" is not covered. (AB p. 23.)

Essentially, Plaintiffs insist that Proposition 59 creates a free standing right of access as broad as the right of access under the CPRA, but applicable to all aspects of government, including those not governed by the CPRA. Plaintiffs also insist that Proposition 59 eliminated all common law limits on the right of access. (AB p. 16 fn. 3.) This reading would make every document in the possession of the judicial branch subject to presumptive public access,[16] with none of the detailed limitations and protections provided to the other branches of government in the CPRA and other statutory access schemes (none of which apply to the judiciary).[17]

Indeed, Plaintiffs' interpretation of Proposition 59 cannot logically be limited to access to records, but would also necessarily have a dramatic impact on the right of the public to attend meetings of judges (again with

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16 Plaintiffs continually insist they are not advocating an absolute standard because the presumptive right of access can be overcome by "a compelling interest in non-disclosure." (AB p. 15.) As with their misanalysis of the common law, the rule proposed by Plaintiffs would create a presumption of access to everything, forcing the government to demonstrate a compelling reason for any document that is not made public. This would be a radical departure from the common law (and even from the statutory rules applicable to the other branches).

17 Plaintiffs consistently take the position that under Proposition 59 the statutory exemptions in the CPRA and similar laws (which Proposition 59 expressly does not overrule) only apply to those agencies subject to those laws; thus, they argue that the State Bar is not "protected" by the limitations on the right of access created by Rules of Court, rule 10.500. (AB p. 39.)

none of the closed session limits established for the other branches by statute). Proposition 59's generalized language relates to the "meetings of public bodies" as well as to the "writings of public officials." Yet, as discussed in the Opening Brief, the entire history of both common law and statutory access to the meetings and documents of judicial branch agencies shows that the public has *less* access to the judicial branch, not more. (OB pp. 12-17.)

Moreover, if Proposition 59 meant what Plaintiffs say it means, then all of the common law rules, and all statutory rights of access, would be, at best, superfluous.[18] Under Plaintiffs' theory, there simply is no need for a CRPA, LORA, or any other statutory access rules because Proposition 59 directly creates an "independent" right of access. Plaintiffs insist that their interpretation would not make the existing rules irrelevant, but provides no cogent explanation for what purpose any of those public access statutes (or the common law test for that matter) would serve if there was an independent constitutional right of even broader access to all government records.

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[18] On this point and others, Plaintiffs erroneously claim that the State Bar "waived" its ability to counter Plaintiffs' arguments by not anticipating those arguments and responding before they were made (and, indeed, where the State Bar prevailed on the issue below). No rule requires the State Bar to anticipate Plaintiffs' arguments. Moreover, as Plaintiffs discussed each supposedly "waived" issue in their Answering Brief, the State Bar is entitled fully to reply. (*Fratessa v. Roffy* (1919) 40 Cal.App. 179, 188 [180 P. 830] (cited in 9 Witkin, Cal. Proc. 5th (2008) Appeal, § 723, p. 790).)

2. *The case law plainly shows Proposition 59 did not wipe away all pre-existing rules*

This is not an issue of first impression as Plaintiffs insist. Plaintiffs' radical view of Proposition 59 has been squarely rejected; indeed, no case substantively analyzing Proposition 59 has interpreted it as changing the applicable legal standards. While this Court has not addressed Proposition 59, many Court of Appeal decisions have. Each of them has held that Proposition 59 simply codified prior law by "enshrining" it in the Constitution. As discussed in the Opening Brief, none of the existing Proposition 59 cases have found it to create any new standard for access, or to provide access to records not previously available under the common law or applicable statutes. (See Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability* (2005) 32 J.C. & U.L. 149, 203-04 [Proposition 59 "is largely a policy statement and a positioning of the newly declared access right relative to other constitutional rights, rather than a guarantee of particular rights and responsibilities."].)

Plaintiffs insist that the language in *Sutter's Place* that Proposition 59 "is simply a constitutionalization of the CPRA" is dicta. Far from dicta, that is a central holding of the case drawn from five other Court of Appeal decisions:

> As suggested by *Savaglio, Commission, International Federation, BRV*, and *Los Angeles Unified,* Proposition 59 is simply a constitutionalization of the CPRA. As such, the proposition did not change existing law except as can be gleaned from its language. ... Moreover, subdivision (b)(5) and (6) of the proposition demonstrate a clear intent to maintain existing law ...
>
> ... Proposition 59 manifests an intent to affirm rather than change existing law.

(*Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370, 1382 [75 Cal.Rptr.3d 9].)

Plaintiffs are also simply wrong when they insist that no case has been called on to determine if Proposition 59 extends access to records not subject to an existing statutory right of access. *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60 [70 Cal.Rptr.3d 88] involved an attempt to obtain sealed court records, and the court held that Proposition 59 did not change the underlying rules for what can, and cannot, be sealed. (*Id.* at p. 101; *see also Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 597 [57 Cal.Rptr.3d 215].) Those rules, of course, turn on whether the document was introduced as part of the adjudicative record of a case. (*See NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1208 fn. 25.)

3. The text of Proposition 59 does not eliminate the common law

Plaintiffs also present a cursory textual argument, insisting that the undefined term "writings of public officials and agencies" must have the same broadest possible meaning set forth in the Public Records Act. In

other words, Plaintiffs insist that Proposition 59 wiped out all limits on the common law right of access. Indeed, Plaintiffs directly argue that Proposition 59 "does ***not*** preserve common law limitations" on access to public records. (AB p. 16 n.3.) Because the judicial branch is not subject to statutory rights of access, that would mean that Proposition 59 imposed a unique set of broad disclosure obligations on the judiciary with no definition or restriction on what those were. Such a result is completely contrary to the clear and repeated legislative intent to subject the judiciary to *less* disclosure obligations than the other branches, not the same or greater disclosure obligations. (*See Copley Press I, supra*, 6 Cal.App.4th at p. 113.)

Nothing in Proposition 59's language suggests such a dramatic reversal of pre-existing law. Nor does the text of the voter guides, which says nothing about overturning prior law or providing access to any particular type of document (much less purport to describe the broad legal test Plaintiffs advocate).

Perhaps Plaintiffs' most overblown argument is their insistence that unless Proposition 59 is interpreted as radically changing the common law rules, "then all the other fundamental rights [of free expression, petition, and privacy] protected by the California Constitution would be meaningless." (AB pp. 18-19.) This displays a deep misunderstanding of how generally expressed constitutional rights are interpreted. To use

Plaintiffs' three examples, the initiative adding an undefined right to privacy to the California Constitution did not create a new rule from whole cloth, unrelated to pre-existing law. Indeed, in construing the constitutional right to privacy, this Court looks to the "pre-initiative judicial construction" of historical common law standards. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 23-31 [26 Cal.Rptr.2d 834].)

The same is true for the rights of petition and speech. The right to petition is drawn from ancient "common law" or "natural law" tracing back to 1669, later embodied in the federal constitution. (*See Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 50-52 [61 Cal.Rptr.2d 694] [providing a detailed historical overview of the right to petition].) As for the right to free speech, its general meaning has a broad historical context that is well established in the case law. (*Dailey v. Superior Court of City and County of San Francisco* (1896) 112 Cal. 94, 97 [44 P. 458] ["The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed."].) Thus, far from supporting Plaintiffs' arguments, the supposedly analogous Constitutional provisions they point to are all interpreted based on the long standing historical practices and common law rights involved. None has been interpreted as creating brand new rules without regard to history or the common law as Plaintiffs claim Proposition 59 does. To the contrary, as with other generally stated rights, Proposition 59 is merely a codification of the pre-existing rights to access

public records. As discussed above, those pre-existing rights did not include a right of public access to the State Bar's admissions database.

V. PLAINTIFFS REFUSE TO ACKNOWLEDGE THE FACT THIS DATA WAS COLLECTED UNDER A PROMISE OF CONFIDENTIALITY

A. THIS ISSUE IS PROPERLY BEFORE THE COURT

The Court of Appeal decision and the Petition for Review both discussed the bifurcated nature of the trial court proceedings. Despite that, this Court specifically asked the parties to brief the effect of representations of confidentiality made when the data was collected on whether the public has a right to view the data. Plaintiffs' assertion that it was somehow improper for the State Bar to answer the Court's *sua sponte* question is meritless.

First, the stipulation and order to bifurcate below expressly did *not* affect any appeal: "The parties reserve all rights of appeal, and nothing in this stipulation shall be construed as affecting those rights." (AA tab 42, p. 371 ¶ 6.) More fundamentally, this Court obviously has the right to ask any questions it likes, and to have those questions answered. No trial court order could prevent the parties from answering this Court's questions (and the one here does not even purport to do so).

B. PLAINTIFFS SIMPLY PRETEND NO PROMISE OF CONFIDENTIALITY WAS MADE

Plaintiffs first insist that no confidentiality was promised. This argument is baseless. The forms speak for themselves. All provide for limited disclosure of information for certain purposes only. The ethnicity survey expressly states that the data will be confidential and not maintained with the applicants' application. (AA tab 47 p. 408.) Especially in combination with the public State Bar rules designating all of this material as confidential, Rules of the State Bar, rule 4.4, there were clearly representations of confidentiality and limited use made to applicants.

C. PLAINTIFFS IGNORE ENTIRELY THE WHITE/PORTEN RIGHT TO PRIVACY

Plaintiffs then entirely ignore the constitutional right to control the use of one's private data under *White v. Davis* (1975) 13 Cal.3d 757, 775 [120 Cal.Rptr. 94] and *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 830 [134 Cal.Rptr. 839]. They do not even mention either case or respond in any way to this argument. Their failure to respond is a clear admission that they have no response.

D. PLAINTIFFS FAIL TO REBUT THE OTHER IMPORTANT POLICY ARGUMENTS AGAINST PUBLIC DISCLOSURE

Plaintiffs finally unpersuasively discount or ignore the other arguments made by the State Bar. They ignore the fact that confidential collection of data makes it less likely to be a public record. They actually

go so far as to argue that government agencies have no right to keep their promises of confidentiality – bootstrapping their insistence that the information is public into an attempt to ignore its confidential collection. Finally, they insist that their efforts to anonymize data will be sufficient because other agencies make similar disclosures. "Everyone else does it" is hardly a convincing response to the specific problem at issue.

Plaintiffs are correct that the factual record is insufficiently developed to show whether or not the extensive data manipulation they propose will avoid the risk of reidentification. But that is precisely the reason why this data should not be deemed a public record in the first place. This highly sensitive data should not be subject to the risk of disclosure in particular cases based on lengthy and expensive trial court proceedings challenging every request. Indeed, even if the data were not *presently* capable of reidentification, there is no assurance that advances in computer technology would not allow it to be reidentified in the future. Yet once the data is public, no limit can be placed on its dissemination or use. The risk of reidentification of this highly confidential information, and the cost of analyzing that issue for each request, highlights the need to tread cautiously in designating confidential raw data to be a public record in the first place.

Finally, Plaintiffs ignore the fact that even the threat of having to make this data public has already affected the State Bar's ability to gather data. Although for decades the LSAC provided the State Bar with

applicants' LSAT scores, it now refuses to do so because of the concern caused by Plaintiffs' lawsuit that the State Bar may have to disclose the data to others. (AA tab 44 pp. 387-88 ¶ 35.) Adoption of the rule urged by Plaintiffs – whereby the State Bar would have no ability to collect data confidentially from or about applicants – could severely hamper the State Bar's future performance of its duties if other groups or applicants follow the LSAC's lead.

VI. PLAINTIFFS' DEMAND REQUIRES THE CREATION OF A NEW DOCUMENT

While this issue need never be reached as it is clear the State Bar's admissions database is not a public record, Plaintiffs' lawsuit also fails because their request asks the State Bar to take its raw data and create a new, supposedly anonymized version for public disclosure. As discussed in the Opening Brief, no public records law requires that. (OB pp. 41-46.)

Plaintiffs begin with a straw man – there is no suggestion in this case that information needs to be on paper to be a public record.

Plaintiffs then insist that the Court should find a right unique to California law for the public to demand the creation of new records in response to a public records request. (AB pp. 37-38.) Plaintiffs misstate the CPRA requirement on this point. Government Code section 6253.9 merely allows an administrative agency to pass along the cost of data compilation, extraction, or programming necessary in order to produce a

copy of an existing record. (Gov. Code, § 6253.9, subd. (b)(2).) Nothing in the CPRA requires an agency covered by that statute (which the State Bar is not) to change data or create new records.[19]

Nor do Plaintiffs provide any convincing reason why the State Bar would be subject to broader disclosure obligations than those imposed on the rest of the judiciary by Rule of Court 10.500. Plaintiffs' insistence that the State Bar is not "protected" by Rule 10.500 amply demonstrates the risk in finding some ill defined common law or Proposition 59 right to data instead of leaving expansion of the right to access to legislation or formal rulemaking where both access and limits on access can be analyzed and balanced in any new rule.

Plaintiffs then again distort the issue before the Court as merely one of redaction or scrambling. Plaintiffs' protocols speak for themselves and plainly require far more than mere redaction of data or "scrambling." (AA tab 53.) Both the interim masking steps, as well as the final clustering step, require actual changes in the data that go far beyond what any court has required for production of data from a public database (and, of course, this is not a public database in the first place). Plaintiffs' repeated citation to cases where the data was simply scrambled or redacted does not in any way

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[19] Plaintiffs' insistence that there is no need to read the common law as more limited than the CPRA is baffling. The whole point of the CPRA was to expand the limited common law right of access. (See OB pp. 19-20.)

refute the clear rule that data cannot be required to be modified as Plaintiffs' protocols insist.

Finally, Plaintiffs continue to insist that if their request is invalid then the Court should simply invent a valid one for them. Plaintiffs cannot sue the State Bar for not disclosing the records they sought, and then when it is demonstrated that the request was invalid, maintain their suit by inventing a new request. None of the cases cited by Plaintiffs provide for such a remedy in a public records or writ of mandate case. Plaintiffs asked the State Bar to create a custom set of highly modified and clustered data for their research use. The State Bar had no obligation to do that.

VII. CONCLUSION

Try as they might to make their research sound important, and to distort this case into some type of watershed for open government laws, the simple fact is that Plaintiffs seek raw data from the State Bar's admissions database so that they can use it to study the admissions practices of mostly private law schools. Plaintiffs merely consider the State Bar the most convenient source for the data they want to analyze. As discussed in the Opening Brief and above, the confidentially collected data in the State Bar's admissions database fall well outside the type of judicial branch documents open to public inspection. The State Bar respectfully requests that this Court hold that the State Bar's admissions database is not subject

to public disclosure, and affirm the judgment in favor of the State Bar previously entered by the Superior Court.

DATED: January 19, 2012

Respectfully submitted,

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By 

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rules of Court, rules 8.204 and 8.520(c)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 8,396 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 brief.

DATED: January 19, 2012

KERR & WAGSTAFFE LLP

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CERTIFICATE OF SERVICE

I, Andrew Hanna, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 100 Spear Street, Suite 1800, San Francisco, California 94105.

On January 19, 2012, I served the following document(s):

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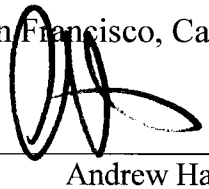
By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

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

Executed on January 19, 2012, at San Francisco, California.



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