No. S226645

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS *et al.*,
Petitioners,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

ACLU OF SOUTHERN CALIFORNIA *et al.*,
Real Parties in Interest.

Review after Order Denying CPRA Request
Second Appellate District, Division Three, Case No. B257230
Los Angeles County Superior Court, Case No. BS145753
(Hon. Luis A. Lavin)

PROPOSED AMICUS BRIEF
IN SUPPORT OF REAL PARTIES IN INTEREST

SUBMITTED BY LEANE LEE AND COALITION OF ANAHEIM TAXPAYERS FOR ECONOMIC RESPONSIBILITY

LAW OFFICE OF CHAD D. MORGAN
Chad D. Morgan (SBN 291282)
1101 California Ave., Ste. 100
Corona, CA 92881
Tel: (951) 667-1927 Fax: (866) 495-9985
chad@chadmorgan.com

Attorney for Amici Curiae
Leane Lee and CATER

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PROPOSED AMICUS BRIEF

Amici Curiae Leane Lee and Coalition of Anaheim Taxpayers for Economic Responsibility (CATER), submit this Amicus Brief in support of Real Parties in Interest ACLU of Southern California and Eric Preven (together, ACLU). Amici Curiae are community watchdogs that rely on the California Public Records Act (CPRA or Act) [1] to obtain information necessary to monitor government activities in their respective communities. They anticipate that the outcome of this case will have an effect on their cases currently pending in the Superior Court as well as on their future ability to obtain public records pursuant to the Act.

Public access to government records is an essential component of Amici's ability to monitor local government. They are concerned that the expansive holding of the Appeals Court decision below will result in such broad application of the attorney-client privilege as an exemption to the CPRA that the exception will become so vast that it will swallow the general rule requiring disclosure. Amici request that this Court reverse the Appeals Court below and hold that attorney invoices for services provided to a public agency are not categorically subject to the attorney-client privilege exemption under the CPRA.

[1] The CPRA is located in Government Code section 6250, et seq.

ARGUMENT

The undisputed general rule is that unless an express exemption applies, the CPRA requires disclosure of all public records. (See e.g. *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.3d 319, 329 (*International Federation*).) California's Constitution requires that the CPRA be interpreted broadly when granting access to public records and narrowly when restricting access. (Cal. Const. Art. I, Sec. 3, subd. (b)(2).)

The constitutional provision requiring broad construction was enacted by California voters in 2004. (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 68 (*Long Beach POA*).) However, starting approximately 30 years earlier, courts had already recognized the danger that broad construction of exemptions could allow exceptions to swallow the general rule requiring disclosure. (See e.g. *Uribe v. Howie* (1971) 19 Cal.App.3d 194 (*Uribe*).)

In the Appellate Opinion below, the Court held that attorney invoices are "confidential communications within the meaning of Evidence Code section 952." (Opn. p. 2.) This broad construction of the attorney-client privilege expands the CPRA exemption such that the exception will swallow the rule. When construed with Evidence Code section 915,[2] the exception creates a scheme that can be abused

[2] Evidence Code section 915 provides, in pertinent part, "the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product [under citation] in order to rule on the claim of privilege." (Evid. Code § 915, subd. (a).)

to manufacture complete secrecy with respect to many government records. If the broad exemption adopted by the court below stands, the precedent may eviscerate "the right of the public and the press to review the government's conduct of its business." (See generally *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 654 [describing public's right to government records].)

I. WHEN CPRA EXEMPTIONS ARE CONSTRUED BROADLY, EXCEPTIONS SWALLOW THE RULE.

The requirement that the CPRA be interpreted broadly to grant access and narrowly to limit access to public records may have been added to the constitution in 2004, but it was not a new rule. The CPRA "was enacted against a 'background of legislative impatience with secrecy in government ….'" (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440 , 457 (*ACLU v. Deukmejian*) quoting 53 Ops.Cal.Atty.Gen. 136, 143 (1970).) There was, at the time the CPRA was enacted, "an attitude of reluctance on the part of various administrative officials to make records in their custody available for public inspection." (*Ibid*.) As such, it was recognized from the outset that the Legislature intended for the CPRA "to be construed liberally in order to further the goal of maximum disclosure." (*ACLU v. Deukmejian, supra*, at p. 461 quoting 53 Ops.Atty.Gen, *supra*, p. 143.) Liberal construction of the CPRA compels *strict construction of exemptions* "so as not to interfere with the basic policy of the act." (*Ibid*.)

The attitude of reluctance has setup an almost 50-year-long game of cat and mouse between the various government officials seeking secrecy in the conduct of the people's business and the public exercising its right to information. This goes back to the earliest CPRA cases, including *Uribe v. Howie* (1971) 19 Cal.App.3d 194.

Uribe involved a request for pest control operator reports in the possession of the Riverside County Agricultural Commissioner. (*Uribe, supra,* 19 Cal.App.3d 198.) The reports contained information concerning the application of agricultural pesticides and were created as a matter of course pursuant to then Agricultural Code section 11733. (*Id.* p. 200.) The court considered, *inter alia*, the claim that the reports were exempt because they were the contents of an "investigatory file" and recognized that agencies accumulate numerous records, virtually any of which could be used in the course of a disciplinary proceeding. (*Id.* p. 213.) Broad construction of the investigatory file exemption would have given the government *carte blanche* authority to withhold documents merely by asserting that the records might be used in a then-unknown and uncertain investigation – the exception would swallow the rule. (*Uribe, supra*, 19 Cal.App.3d 213.)

This Court faced a similar issue in 1991 with respect to the Governor's correspondence exemption, which exempts "correspondence of and to the Governor or employees of the Governor's office." (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325 (*Times Mirror*), 1336-1337; see also Gov. Code § 6254,

subd. (l).) In *Times Mirror*, the Governor's calendar was at issue; the Governor claimed, *inter alia*, that the exemption should be interpreted as applying to all "written communication," which would include not only his correspondence but also his calendars and virtually every other document he possessed.[3] (*Id.* p. 1347) While the Governor was willing to limit his proposed definition to "communications 'directed to an identifiable person or person[s] for the purpose of establishing contact with the recipient,'" this Court recognized that even with the Governor's proposed limitation, the proposed exception would still swallow the rule."[4] (*Id*. p. 1337.)

As explained by the ACLU, the Appellate Opinion below was the first time a court held that attorney invoices were categorically subject to the attorney-client privilege. (See e.g. Opening Brief on the Merits (OBM), pp. 36-42.) With this holding, the Appeals Court has opened the door to the possibility that government agencies might contract with outside vendors using their lawyers as intermediaries thereby shielding expenditures from public inspection because the expenditures would appear only on the lawyers' now-exempt invoices.

If attorney invoices are categorically subject to the attorney-client privilege, then the possibility that non-legal expenses would be

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[3] As a matter of statutory construction, a prior version of the exemption did in fact apply to all of the Governor's records. (*Times Mirror, supra*, 53 Cal.3d 1337.) However, a 1975 amendment limited the exemption only to the Governor's "correspondence." (*Ibid*.)

[4] Even though this Court rejected the Governor's argument that his calendars were "correspondence," it ultimately agreed that the calendars were exempt from disclosure on other grounds. (*Times Mirror, supra*, 53 Cal.3d 1347.)

included on attorney invoices is the functional equivalent of the government's attempt to classify the reports at issue in *Uribe* as part of an investigatory file. While the possibility that an agency might attempt to shield *all* of its expenditures in this manner is, hopefully, an exercise in ridiculousness, an agency's careful use of this rule would provide *carte blanche* ability to shield the most controversial of its expenditures from public review, allowing the exception to swallow the rule.

II. THE DANGER AMICI CURIAE DESCRIBE IS MORE THAN HYPOTHETICAL.

At first blush, Amici Curiae's concerns might seem speculative. They are not. Amicus Curiae Leane Lee has raised this very issue in her case against the Town of Apple Valley, now pending in the San Bernardino County Superior Court. (See generally Amici Curiae's Motion for Judicial Notice, concurrently filed (Amici MJN), 1 [Exh. A: Petition for Writ of Mandate].)

In Lee's verified petition, she alleges that John Brown, the Town Attorney and a partner with the law firm of Best Best & Krieger (BB&K), executed a contract between BB&K and 20/20 Network, a public relations firm, for the purpose of shielding the expenditure from the public based on a claim of attorney-client privilege. (Amici MJN, pp. 7-8 [Exh A: Pet., pp. 6:12-7:18, ¶¶ 39-46].) Lee alleges a similar arrangement between BB&K, the Town, and True North Research, a firm she alleges BB&K contracted on the Town's behalf to conduct a

public opinion survey. (Amici MJN, pp. 8-9 [Exh A: Pet., pp. 7:20-9:6, ¶¶ 47-58].)

Lee's case against the Town of Apple Valley is still pending and the merits of her allegations are obviously well outside the scope of this proceeding. However, it is almost certain that a trial court will be considering the issues raised by Amici Curiae in the very near future. Moreover, the outcome of the instant case will likely determine whether Lee's case, as well as other cases like it, can be resolved relatively quickly, fulfilling the CPRA's intent of quick resolution, or whether parties will face more difficult and protracted litigation, which will increase costs and reduce transparency.

III. LIMITS AT BOTH ENDS OF THE SPECTRUM PRESERVE BOTH THE GENERAL RULE AND EXCEPTIONS.

Over the CPRA's nearly 50-year history, CPRA jurisprudence has developed limits at both ends of the spectrum in order to balance the people's fundamental right to information against the various privacy interests at stake. (See e.g. *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282.) *Uribe* and *Times Mirror*, discussed above, help illustrate the government's role in this cat and mouse game between government and the public – the government generally seeks to limit disclosure and the public seeks to expand it.

To prevent the exceptions at issue in *Uribe* and *Times Mirror* from swallowing the rule, the respective courts narrowly construed the exemptions. Since *Uribe* was the first case to consider the scope of the "investigatory files" exemption, the court looked to the federal

Freedom of Information Act for guidance. (*Uribe, supra*, 19 Cal.App.3d 212-213.) The *Uribe* Court held that the exemption only applies "when the prospect of enforcement proceedings is concrete and definite." (*Id*. accord. *Bristol-Meyers Company v. F.T.C.* (D.C. Cir. 1970) 424 F.2d 935, 939.) In *Times Mirror*, this Court held that the Governor's correspondence exemption applies only to "letters." (*Times Mirror, supra*, 53 Cal.3d 1337 ["we conclude … the correspondence exemption must be confined to communications by letter"].) These holdings prevented the exceptions from swallowing the rule.

After *Uribe* and *Times Mirror*, it was the public's turn to see how narrow the exceptions could be drawn. In *Haynie v. Superior Court* (2001) 26 Cal.4th 1061 (*Haynie*), this Court considered the "investigatory files" exemption with respect to a request for records related to a traffic stop and detention and held that the "concrete and definite" test only applies to records that are not inherently investigatory. (*Id*. at p. 1069.) Records that are necessarily part of an investigatory file, whether related to an active investigation or not, are always exempt; but non-investigatory records asserted to be part of an investigatory file are only exempt when related to an actual investigation. (*Id.* at pp. 1069-1070; see also *Williams v. Superior Court* (1993) 5 Cal.4th 337, 361-362 [investigatory files exemption survives the investigation].)

In *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159 (*CFAC*), an appeals court considered this Court's

limitation of the governor's correspondence exemption, previously held applicable only to "letters." (See, *supra*.) In *CFAC*, the requestor sought from the Governor "any document containing the names of those who have applied for [a vacancy on the Plumas County Board of Supervisors]." (*CFAC, supra*, 67 Cal.App.4th 164.) While the applications in question were not expressly "letters," the court rejected the notion that "letters" were limited only to documents containing a formal salutation and closing – a limitation that would "emasculate the exception." (*Id*. at p. 168.)

IV. THERE IS NO REASONABLE LIMIT THAT CAN RECONCILE THE LOWER COURT'S OPINION WITH THE CPRA.

Both the CPRA and the attorney-client privilege have important places in our legal system. (See e.g. *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 288 (*Peace Officer Standards*) ["access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state]; *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732 (*Costco Wholesale*) [attorney-client privilege "has been a hallmark of Anglo-American jurisprudence for almost 400 years"].) In the instant case, these two interests, and potentially, the statutes they're based on, conflict. As such, this Court's "policy has long been to favor the construction that leads to the more reasonable result." (*Peace Officer Standards, supra*, at p. 290.)

In this case, the CPRA requires balancing the public's right to information against the County's right to privacy. (See *International*

Federation, supra, at p. 329-330 [CPRA requires balancing of interests].) This balancing act preserves exemptions, prevents exceptions from swallowing the rule, and as it does here, effectuates the purpose of the attorney-client privilege (see e.g. *Costco Wholesale, supra*, at p. 732 [purpose of privilege "is to safeguard the confidential relationship between clients and their attorneys".]).

While balancing these interests, courts tend to step into the role of "referee" in the cat and mouse game between government agencies and people who request information. Each side presumptively believes that its interests are more important than the other's. As such it stands to reason that in the instant case, the government would assert dominance of the attorney-client privilege over the CPRA and the ACLU would claim that the CPRA trumps privilege.

This did not happen. Indeed, even though Amici Curiae would support an expansive reading of the CPRA that supersedes some of the attorney-client privilege (at least with respect to government records), they also support the ACLU's more reasonable approach: Information on invoices that relates to an attorney's opinion or legal advice can be redacted; everything else must be disclosed.

However, the County takes the opposite tack. Their position unreasonably disregards the CPRA in the same manner that an aggressive requestor might disregard the attorney-client privilege by demanding unredacted invoices, regardless of whether the invoices contained an attorney's opinions or legal advice.

To balance these interests and determine which result is most reasonable, it would be helpful to consider the cascading impacts of each option.

A. If the opinion below is upheld, it will be virtually impossible to craft limits that will prevent the exception from swallowing the rule.

If invoices are categorically privileged and the attorney-client privilege is absolute (see e.g. *Costco Wholesale, supra*, 47 Cal.4th 732), then neither courts nor the public will be able scrutinize a large class of public expenditures. Today the issue is invoices, but tomorrow it will be every other public record because there will be virtually nothing to stop public employees from copying their attorneys on every communication in order to create the basis of a privilege claim.[5] Courts will not able to address challenges to the privilege claim because Evidence Code section 915[6] will prevent review of any document that the government claims is privileged. The CPRA would have form but no substance.

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[5] In *Costco Wholesale*, this court recognized that a person cannot create privilege with respect to information merely by transmitting information to an attorney because the person can be questioned about the information orally at deposition or trial. Implicit in this recognition is the possibility that documents containing the transmissions might not be discoverable. (*Costco Wholesale, supra*, 47 Cal.4th 735.) Even if this is the rule with respect to Civil Discovery, this cannot be the rule with respect to the CPRA because oral testimony cannot be a substitute for the production of documents required by the CPRA. In discovery, oral testimony might be a suitable remedy for abuses of the attorney-client privilege, but oral testimony is not a suitable replacement for documents requested under the CPRA.

[6] See note 2, supra, for the text of this section.

Of course, "[o]penness in government is essential to the functioning of a democracy" (*International Federation, supra*, 42 Cal.4th 328; see also *Times Mirror, supra*, 55 Cal.3d 1328 ["An informed and enlightened electorate is essential to a representative democracy."]), so requestors will not give up and go away. This will result in increased litigation to (A) establish more reasonable limits or (B) defeat privilege claims in cases of abuse or both.

While the privilege claims can be defeated if the attorney was not acting as an attorney (see e.g. *Costco Wholesale, supra*, 47 Cal.4th 735 [privilege does not apply when attorney retained for purpose other than legal advice]), doing so, even in the most obvious cases will be difficult, costly, and time consuming. Even if abuse is superficially obvious, the evidence necessary to actually prove the abuse will likely be subject to additional privilege claims and discovery disputes. This will unnecessary extend and drag-out litigation on these ancillary subjects, unnecessarily delaying a decision on the merits of CPRA claims.

Moreover, few cases will be obvious. In Amicus Curiae Leane Lee's pending case, she alleges that the law firm which employs the Town Attorney (Amici MJN, p. 8 [Pet. ¶ 44]) also contracted with a public relations consultant (*id*., p. 7 [Pet. ¶ 43]) and hired a public opinion researcher (*id*., p. 9 [Pet. ¶ 54]) on the Town's behalf. That firm is now defending the Town against Lee's lawsuit. (See *id*. p. 21 [caption of Town's Demurrer].) If Ms. Lee's allegations are true, then some of the services are not legal services, while other services

obviously are. If the opinion below stands, answers to her privilege question will not come quickly, easily, or inexpensively, if they come at all.

Even if a requestor can overcome all of these obstacles, the imposition of these burdens will have undermined the Legislature's intent to expeditiously determine an agency's duty to disclose documents. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 427.) There is no reasonable limit that can avoid these problems. The County asked for, and the appeals court below provided, an all-or-nothing resolution that is contrary to a wide body of CPRA jurisprudence requiring a more balanced approach to determining the applicability of CPRA exemptions.

B. Balancing the CPRA and the attorney-client privilege will prevent protracted litigation and fulfill the purpose of both the CPRA and the privilege by disclosing non-exempt public records and preserving attorney-client confidences.

Balancing the public right to information and the government's right to secrecy leads to the most reasonable result and is most consistent with promoting the general purpose of both statutes and "avoid[ing] a construction that would lead to unreasonable, impractical, or arbitrary results." (*Peace Officer Standards, supra*, 42 Cal.4th 290.) A reasonable result can be obtained by following the plain language of the statutes, interpreting the statutes as ambiguous, harmonizing the conflict between the CPRA and the attorney-client privilege, or, if necessary, declaring the two statutes to be in an irreconcilable conflict.

1. *The plain language of the attorney-client privilege does not extend to attorney invoices.*

The easiest solution is recognition that the plain language of the privilege shows that it does not extend to invoices. There is no risk that this would expose confidential information because government agencies could still request an *in camera* review (see Gov. Code § 6259, subd. (a)) in order to redact confidential information.[7] However, this will prevent government agencies from using Evidence Code section 915 as a shield to eviscerate the CPRA, which would be an absurd consequence of the plain meaning that the County suggests.

2. *Ambiguities in the attorney-client privilege should be resolved in favor of disclosure pursuant to the CPRA, which also harmonizes the two statutes.*

To the extent that the County's interpretation of the plain language of the privilege might be reasonable, it conflicts with former Chief Justice Ronald George's interpretation. In reaching their respective conclusions, the County and Chief Justice George focused on the meaning of "over the course of [the attorney-client] relationship." (See Evid. Code § 952.) According to the County, this phrase means "during" (Answer Brief on the Merits (ABM), 21 fn. 5), but the Chief Justice interpreted it as "for the purpose of" (*Costco Wholesale, supra*, 47 Cal.4th 742 conc. opn. of George, C.J.). While the *Costco Wholesale* majority did not define the phrase, these differing viewpoints suggest that the statute is ambiguous.

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[7] In *Concepcion v. Superior Court* (2014) 223 Cal.App.4th 1309, 1326-1327, the court doubted that all–or even most–of the information on attorney invoices would be privileged.

Both the attorney-client privilege and the CPRA are construed broadly. (See e.g. ABM 19 citing *Musser v. Provencher* (2002) 28 Cal.4th 274, 283 [attorney-client privilege is construed liberally]; *Long Beach POA, supra*, 59 Cal.4th 68 [broad construction of CPRA; narrow construction of CPRA exemptions]; *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 959 [records exempt only by "express provisions of law"].)

Since records are only excluded from disclosure under the CPRA pursuant to express terms of a statute, records purportedly exempt under an ambiguous statute are not exempt. This interpretation allows for public disclosure of attorney invoices submitted to a government agency in response to a CPRA request. As described above, the government can still request an *in camera* review to determine whether some information should be redacted, preserving, if applicable, the confidences of any privileged information that might have been included on the invoices.

This interpretation will not emasculate the attorney-client privilege the way the opinion below emasculates the CPRA and serves to harmonize the CPRA and attorney-client privilege. It is also the approached used in *Uribe,* and affirmed by this court in *Haynie*, whereby one category of records is expressly exempt and another category might be exempt on a case-by-case basis. Examples of records that are always exempt include records related to a traffic stop (see *Haynie, supra*, 26 Cal.4th 1069-1070) or an attorney's opinion letter (see *Costco Wholesale, supra*, 47 Cal.4th 730). At the other end of the

spectrum, records that might be exempt include pest control operator reports, if used in a concrete and definite investigation (see *Uribe, supra*, 19 Cal.App.3d 213) or an attorney's invoices, if they contain the attorney's opinions or legal advice (see *Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.* (2015) 61 Cal.4th 988, 1005-1006 [attorney billing records not privileged but could be redacted to protected privileged information]; see also *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1327 [requiring disclosure of billing records because most, if not all of the information would not be privileged].).

While Amici Curiae agree with the ACLU and other amici that invoices are not exempt, the construction described above allows, if necessary, for a harmonious construction that applies the privilege to attorney invoices in all instances outside the CPRA. It bears repeating here, that this holding would not permit disclosure of confidential information if the responding government agency requests an *in camera* review. This will strike balance between the interests in disclosing public records and maintaining attorney-client confidences.

3. Otherwise, there is an irreconcilable conflict between the CPRA and the attorney-client privilege and the CPRA must prevail.

When conflict between two statutes is irreconcilable, then later statutes supersede earlier ones and specific provisions take precedent over general ones. (*State Dept. of Health, supra*, 60 Cal.4th 960.) The attorney-client privilege was enacted in 1965 and most recently amended in 1994 (Derring's Ann. Evid. Code. § 954 (2016 supp.)), and the CPRA was enacted in 1968 and most recently amended in

2001 (Derring's Ann. Gov. Code § 6253 (2016 supp.); see also *id.* § 6254 [exemption provisions amended in 2012]) – the CPRA is the later, superseding statute. Moreover, by the express terms of each statute, the CPRA – with it's clear mandate (Gov. Code § 6253) and compelling legislative purpose (Gov. Code § 6250) – is more specific than the attorney-client privilege, which as addressed above is likely ambiguous (Cf. *Costco Wholesale, supra*, 47 Cal.4th 742 conc. opn. of George, C.J. [debate over extent of privilege].)

CONCLUSION

The California Public Records Act and the attorney-client privilege are not mutually exclusive – the two doctrines advance very important interests and can coexist. Excluding attorney invoices from the definition of the attorney-client privilege will not force disclosure of the confidential information because the court may redact confidential information even if the invoices themselves are not categorically privileged. The opinion below should be reversed.

Dated: February 12, 2016

Respectfully submitted,
LAW OFFICE OF CHAD D. MORGAN

By: 

Chad D. Morgan, Esq.
Attorney for Amici Curiae
Leane Lee and CATER

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this proposed brief contains 4,091 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: 

Chad D. Morgan