No. S223876

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

ESTUARDO ARDON, ON BEHALF OF HIMSELF AND
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs and Respondents,

v.

CITY OF LOS ANGELES,

Defendant and Petitioner

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF; *AMICI CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

On Review of a Decision of
The Second District Court of Appeal
Case No. B252476

Affirming a Judgment of the Superior Court of
The State of California for the County of Los Angeles, Lead Case No. BC363959
Honorable Lee Smalley Edmon, Judge Presiding
[Related to Case Nos. BC406437; BC404694; and BC363735]

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

TO THE CHIEF JUSTICE:

This Application is submitted jointly by the League of California Cities (the "League") and the California State Association of Counties ("CSAC") (collectively "Amici"). Pursuant to Rule 8.520(f) of the California Rules of Court, Amici respectfully request leave to file the attached brief in support of Petitioner City of Los Angeles (the "City").

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

Counsel for Amici have reviewed the briefs on file in this case to date. Amici do not seek to duplicate arguments set forth in the briefs. Any overlap in the content of Amici's brief and others is minor. Amici's brief, as can be expected of statewide organizations whose members are California cities and counties, emphasizes a "big picture" view of this case.

Among other things, the brief discusses the serious adverse impact the Court of Appeal's decision, if upheld, would have on public entities throughout California, and explains that the adverse impact would not be limited to erosion of the privileges at issue in this case (attorney-client and attorney work product) but would extend to other privileges and confidentiality laws. Further, the brief asserts a different legal argument than the City has asserted, to reach the same ultimate conclusion – that the decision below should be reversed. We therefore believe the brief will aid this Court in its consideration of the case.

Dated: September 25, 2015

Respectfully Submitted,

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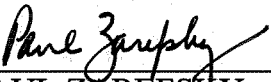
By: 
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AMICI CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

INTRODUCTION

At its core, this case tests whether there will be two attorney-client privileges in California – the normal privilege, and a watered-down privilege for records that are the subject of a public records request. Whether there will be two attorney work product privileges, one weaker than the other, is likewise in issue. The ultimate question is whether State law affords public entities a "lite" version of both privileges, in contrast to the full-bodied version afforded private entities and individuals.

The answer must be no. Except as specifically and clearly dictated by the Legislature, public entities have the same attorney-client and attorney work product privileges as private actors. The Court of Appeal erred in sanctioning a two-tiered privilege system based on its misguided reading and application of the Public Records Act. As petitioner has argued and as Amici discuss in Section III of this brief, the court construed Government Code Section 6254.5 too strictly in finding that an inadvertent disclosure of a privileged record constitutes a waiver. But that error was preceded by an even more fundamental error.

As Section I of this brief explains, the Court of Appeal entirely failed to grasp the significance of Government Code Section 6254(k). That provision is central to the structure of the Public Records Act and to the resolution of this case. It says that the Act does not change any protections from disclosure that State law affords to records covered by legal privileges – including but not limited to the attorney-client and attorney work product privileges – and by other confidentiality provisions. Because Section 6254(k) applies to the attorney-client and attorney work product privileges,

it encompasses the rules governing their waiver, including that inadvertent disclosure does not constitute a waiver. Section 6254.5's waiver rule, whatever its meaning, does not come into play at all.

This issue seems clear to Amici, but if this Court sees ambiguity in Section 6254.5, under accepted principles of statutory construction it may consider a host of factors to resolve the ambiguity. Those factors, also discussed in Section I of the brief, strongly support Amici's view. One factor that may be considered, which Section II discusses, is the damage that would be done if this Court upholds the decision below. Public entities would be left with substantially weakened attorney-client and attorney work product privileges, and other privileges and confidentiality laws would be put at risk. The public would be ill-served in ways the Legislature could not have intended.

The Court of Appeal mistakenly treated a cornerstone of the Public Records Act as a garden-variety exemption, in effect construing Section 6254.5 to trump the laws cross-referenced in Section 6254(k). This Court should reverse the decision below, and return Section 6254(k) to its rightful place in the structure of the Public Records Act.

RELEVANT BACKGROUND

The Court of Appeal's decision rests on Section 6254.5 of the Public Records Act, its "waiver" provision, which states in part:

> Notwithstanding any other provision of the law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law. For purposes of this section, "agency" includes a member, agent, officer, or employee of the agency acting within the scope of his or her membership, agency, office, or employment.

(Cal. Gov. Code § 6254.5.) The court held that this waiver rule applies to the laws encompassed within the Act's "safe harbor" provision, Section 6254(k), which states:

> [N]othing in this chapter shall be construed to require disclosure of records that are any of the following: .... (k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

(Cal. Gov. Code § 6254(k).)

The court then determined that the City of Los Angeles (the "City"), acting through an employee in the City Administrator's Office responsible for processing a public records request, had, without authorization, inadvertently disclosed privileged records to a "member of the public" (counsel adverse to the City in the litigation that was the impetus for the request). Finding no "inadvertence" exception in Section 6254.5, the court concluded that the disclosure constituted a waiver, with the records losing their privileged status.

ARGUMENT

I. SECTION 6254(k) OF THE PUBLIC RECORDS ACT IS A SAFE HARBOR FOR STATE PRIVILEGE AND CONFIDENTIALITY LAWS, INSULATING THOSE LAWS FROM SECTION 6254.5'S WAIVER RULE.

Section 6254(k) of the Public Records Act is fundamentally different from all other exemptions in the Act. It "is not an independent exemption at all. It simply incorporates other exemptions or prohibitions provided by law." (*Cook v. Craig* (1976) 55 Cal.App.3d 773, 783; *accord, CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656 (citing *Cook* with approval); *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1283; *Long Beach Police Officers Ass'n v. City of Long Beach* (2014) 59 Cal.4th 59, 67.) Section 6254(k) states that the Act does not override – and in fact preserves

– legal privileges under California law, including but not limited to the attorney-client and attorney work product privileges, and all other federal and State confidentiality laws.

With little analysis of the issue, the Court of Appeal wrongly held that the laws encompassed within Section 6254(k) are subject to Section 6254.5's waiver rule. Whatever the meaning of "disclosure" and "waiver" in Section 6254.5 – an issue that the City's briefs address – that provision applies only to "waiver of *the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law.*" (Emphasis added.) But the attorney-client privilege and attorney work product privilege are not specified in Sections 6254, 6254.7, or other similar provisions of law. Nor are the other privileges in the Evidence Code, or the many other confidentiality laws covered by Section 6254(k).

In construing statutory terms, courts often refer to dictionary definitions to ascertain the ordinary meaning of a word. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-22.) Black's Law Dictionary defines "specify" as follows: "To mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize, or to distinguish by words one thing from another." (*Black's Law Dictionary* (6th ed. 1990) 1399.) Webster's primary definition of "specify" is "[t]o name or state explicitly or in detail." (*Webster's Ninth New Collegiate Dictionary* (1983) 1132.) The primary definition of "specify" in the American Heritage Dictionary is the same. (*The American Heritage Dictionary of the English Language* (3d ed. 1992) 1730 ("[t]o state explicitly or in detail: *specified the amount needed*") (emphasis in original).) These definitions are consistent with the ordinary understanding of the term.

To characterize the privileges and other confidentiality laws covered by Section 6254(k) as being "specified" in Section 6254 would truly stretch the English language. Tracking Black's definition: Those privileges and other laws are not "mention[ed] specifically" or "state[d] in full and explicit terms" in Section 6254; they are not "point[ed] out" or "state[d] precisely or in detail" there; they are not "particularize[d]" there or "distinguished by words one thing from the other." The best one can say for specificity, and it is not much, is that Section 6254(k) makes a general reference to privileges in the Evidence Code. But this general reference is no more specific than saying certain unspecified provisions of the federal or State constitutions preclude disclosure of certain public records. Section 6254(k) does not specifically call out the attorney-client privilege, and its reference to the Evidence Code has no connection to the attorney work product privilege, which is in the Code of Civil Procedure. (Cal. Code Civ. Proc. § 2018.030.)

Where, then, are the privileges and other confidentiality laws covered by Section 6254(k) specified? They are extrinsic to the Public Records Act: created, defined, and described elsewhere in State law. They are scattered everywhere – in the Evidence Code, Business and Professions Code, Civil Code, Family Code, Health and Safety Code, Insurance Code, Labor Code, Revenue and Taxation Code, Welfare and Institutions Code – probably in every State code, and in binding State administrative regulations as well. Though the exact number of such laws is unknown, it is very large. For the public's convenience, the Public Records Act attempts to catalogue such laws, in alphabetical order. The list covers 20 pages and names approximately 500 such laws – and the list does not purport to be complete. (Cal. Gov. Code §§ 6275, 6276, *et seq.*)

To conclude that privileges and confidentiality laws extrinsic to the Public Records Act are "specified" in Section 6254 – which is not the source of those laws, and which does not even name them – requires a healthy lexicological imagination. Section 6254(k) is textually located in Section 6254, but it does not, in and of itself, exempt anything from disclosure. Rather, it is a cross-reference – a drafting shortcut – taking the reader to other places in State law where an exemption or prohibition is found. It is the functional equivalent of the nearly impossible task of combing through 500 or more State law provisions, to insert in each of them Section 6254(k)'s language to clarify that they safeguard specific types of information from disclosure despite the Act's disclosure regime. In other words, to consider Section 6254(k) an "exemption" for purposes of Section 6254.5's waiver rule would be to elevate form over substance, in derogation of the longstanding principle that "[t]he law respects form less than substance." (Cal. Civ. Code § 3528.)

In Amici's view, Section 6254.5 clearly says and means that its waiver rule does not apply to the privileges and other confidentiality laws cross-referenced in Section 6254(k). But if this Court considers Section 6254.5 ambiguous in this regard, it may go beyond the wording of that provision to consider other factors that indicate legislative intent. Several such factors reinforce our view of the text's meaning.

First: The structure of the Public Records Act must be considered. "It is well established that a specific provision should be construed with reference to the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme are harmonized." (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489 (citations omitted).) "[T]he task of interpreting the relevant statutory text plainly includes consideration

of the statute's structure and the light it sheds on the Legislature's intended purpose." (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, ----, 191 Cal.Rptr.3d 551, 561-62, 354 P.3d 346, 355 (Cuellar, J., concurring).)

Thus, any credible interpretation of Section 6254.5 must take into account Section 6254(k), which evinces a legislative intent to preserve laws exempting or prohibiting disclosure of certain types of information. But the Court of Appeal's decision essentially ignores this cornerstone of the Public Records Act, turning what was intended as a safe harbor into a trap that treats legal privileges and other confidentiality laws as subservient to an all-encompassing waiver rule under Section 6254.5. It is inconceivable that, in enacting Section 6254.5, the Legislature intended to transform into empty vessels a multitude of State laws protecting information from disclosure whenever a public employee lacking authority to disclose confidential information inadvertently does so. To find that Section 6254.5 weakens the very protections Section 6254(k) purports to preserve is to trifle with the basic structure of the Act.

Second: The stark contrast between the short, general statement of law in Section 6254.5 and the specific statutory schemes cross-referenced in Section 6254(k) is telling. "[W]here the same subject matter is covered by inconsistent provisions, one of which is special and the other general, the special one, whether or not enacted first, is an exception to the general statute and controls unless an intent to the contrary clearly appears." (*Warne v. Harkness* (1963) 60 Cal.2d 579, 588; accord, *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960-61, and cases cited therein.)

Section 6254(k) encompasses, and seeks to preserve, a large number of specific statutory schemes the Legislature has created. It must be presumed that the Legislature did not intend to disrupt all of these statutory schemes by imposing on them a general, one-size-fits-all waiver provision in the Public Records Act – unless, as *Warne, supra,* dictates, "an intent to the contrary clearly appears." And there is no such contrary intent evidenced here, much less one that "clearly appears" from the text of Section 6254.5 or its legislative history. In determining whether an unauthorized disclosure of a particular record that is privileged or otherwise confidential waives the privilege or negates the confidentiality of the record, a court should examine the policies the Legislature sought to serve in creating the specific privilege or other confidentiality provision, along with the text and purpose of those laws, and judicial interpretations of them. Section 6254.5 should not be interpreted to waive privileges or negate other specific confidentiality provisions contained in entirely different bodies of law that serve many different and diverse public policies, and whose provisions regarding disclosure or nondisclosure of information may vary considerably.

Third: Courts are extremely reluctant to find any diminution of the attorney-client privilege, absent a very clear expression of legislative intent. (*E.g., Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 913 (rejecting contention that provisions in California Environmental Quality Act defining the administrative record abrogate the attorney-client and attorney work product privileges); *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 204, 207 (declining to infer a limitation on trustee's attorney-client privilege based on trustee's duties to beneficiary); *Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 99 (declining to infer a

stockholder's exception to the attorney-client privilege between a corporate client and corporate counsel).) This Court and others have likewise rejected arguments that open government laws should be construed to restrict the attorney-client privilege, absent a clear legislative intent to do so. (*E.g., Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 (declining to infer that written communications between counsel and public bodies are unprivileged based on Brown Act provision limiting closed session meetings of such bodies with counsel); *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1967) 255 Cal.App.2d 51, 54 (declining to infer that absence of a closed session provision in earlier version of the Brown Act precluded a public body from having a closed session meeting with its attorney to receive confidential legal advice).)

As this Court stated, with reference to the attorney-client privilege, "[i]f the Legislature had intended to restrict a privilege of this importance, it would likely have declared that intention unmistakably, rather than leaving it to courts to find the restriction by inference and guesswork in the interstices of the Probate Code." (*Wells Fargo Bank, supra,* 22 Cal.4th at 207; see also *Citizens for Ceres, supra,* 217 Cal. App.4th at 913 (stating, with reference to the attorney-client and attorney work product privileges, "if the Legislature had intended to abrogate all privileges for purposes of compiling CEQA administrative records, it would have said so clearly").)

The *Wells Fargo* and *Citizens for Ceres* comments resonate in this case. This Court should not, by "inference and guesswork," in the words of *Wells Fargo,* imbue Section 6254.5 with a transformative quality that does not appear on its face and is not apparent from its legislative history. If the Legislature had intended to modify the rules governing waiver of the attorney-client privilege or the attorney work product privilege, it could and

would have done so clearly and with relative ease. When the Legislature wanted to limit the scope of closed session meetings that local legislative bodies may have with their counsel, it amended the Brown Act to clearly and significantly restrict the operation of the attorney-client privilege in that context. (Cal. Gov. Code § 54956.9 (closed session provision for pending litigation).) By contrast, Section 6254.5 evidences no clear intent to abrogate the waiver rules that otherwise would apply to the privileges and confidentiality laws cross-referenced in Section 6254(k).

A final factor is the introductory wording of Section 6254, which is connected to subsection (k). That section reads: "Nothing in *this chapter* shall be construed to require disclosure of records that are any of the following: ... (k) Records the disclosure of which is exempted or prohibited pursuant to federal or state law ...." (Emphasis added.) Section 6254(k) and Section 6254.5 are in the same chapter of the Government Code – Chapter 3.5, Title 1, Division 7. Hence, the Court of Appeal's decision conflicts with Section 6254(k), because it construes one provision in Chapter 3.5 – Section 6254.5 – to require disclosure of records that Section 6254(k) protects from disclosure.

We recognize that Section 6254.5 has similar introductory wording ("Notwithstanding any other provision of the law"), and do not contend that those words are meaningless. But they are not helpful in deciding this case, in light of the contradictory introductory language of Section 6254. Textual analysis is obviously important in determining the intended application of Section 6254.5, but this Court should eschew an incurious literalism in its reading of that section's "notwithstanding" clause. (See *Citizens for Ceres, supra,* 217 Cal.App.4th at 913 ["the Legislature did not likely intend to make CEQA administrative records a privilege-free zone by the indirect

means of placing the phrase '[n]otwithstanding any other provision of law' at the beginning of section 21167.6, four subdivisions away from the administrative record provisions in subdivision (e)"].)

The various factors discussed above reinforce our conclusion that the attorney-client and attorney work product privileges are not specified in Sections 6254 or 6254.7 of the Public Records Act. They are not specified in "similar" provisions of law, either – unless the term "similar" is interpreted so broadly as to have no bounds and hence no meaning. Many, if not most, of the 500 or more state laws to which Section 6254(k) refers are not even focused on governmental records per se, but provide a more all-inclusive protection for records based on the type of information they contain. Both the attorney-client and attorney work product privileges, for example, are not limited to records held by governmental entities. And the attorney-client privilege (as well as many other privileges) is not limited to records, but covers all forms of communication, including oral communication.

Thus, when Section 6254.5 references "waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law," it likely is referencing what courts have called the "independent exemption[s]" created in Section 6254 and some if not all other sections of the Public Records Act, rather than provisions of law extrinsic to the Act. This construction of Section 6254.5's waiver language best comports with the legislative purpose of Section 6254(k) and the structure of the Act, yet it does not render Section 6254.5 devoid of meaning. It avoids the possibility of a statutory conflict with any of the laws cross-referenced in Section 6254(k). And it fully honors the laws governing the attorney-client and attorney work product privileges, and all other privileges and

confidentiality laws within Section 6254(k)'s safe harbor – and thereby fully honors the legislative policies those laws serve. By contrast, the Court of Appeal's reading of Section 6254.5 simply does not.

This last point – honoring the privileges and other laws encompassed within the safe harbor, and the policies those laws serve – warrants further discussion. The most problematic part of the decision below is its real-world impact. If the decision is upheld by this Court, it would substantially weaken the attorney-client and attorney work product privileges and also undermine other privileges and confidentiality laws. The Legislature could not have intended this result.

II. THE DECISION BELOW ERODES THE ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES FOR PUBLIC ENTITIES, AND ENDANGERS OTHER PRIVILEGES AND CONFIDENTIALITY LAWS.

A. The decision weakens the attorney-client and attorney work product privileges.

The scope of a privilege is defined not solely by the elements of the privilege, but also by the rules that govern loss of the privilege. If the persons authorized to waive a privilege increase, the protections of the privilege potentially decrease; if the circumstances constituting waiver expand, the protections of the privilege potentially contract. A privilege is only as good as the waiver rules that circumscribe it.

For example, if an individual consults a lawyer for legal advice, their confidential communications are privileged. But the privilege would lose much of its value if the lawyer or the lawyer's assistant, or even the individual's assistant – i.e., anyone other than the person who consulted the lawyer – could waive the privilege by disclosing the communication.

As this example illustrates, to ensure that a privilege remains robust, courts must recognize the interdependence of the law defining the elements

of a privilege and the law defining its waiver. But in this case the Court of Appeal rejected this unified concept of the law of privilege, and treated waiver as a procedural formality distinct from the two privileges whose waiver is in issue. As a result, the decision below undermines both the attorney-client and attorney work product privileges, by discarding two principles that govern waiver of those privileges.[1]

First: Only the holder of a privilege, or a person authorized by the holder, may waive it. (Cal. Evid. Code § 912(a).) For the attorney-client privilege, where a public entity is the client, the holder is an official or body with sovereign authority at the top of the governmental structure. (*Roberts, supra,* 5 Cal.4th at 373; Cal. R. Prof. Conduct 3-600.) For the attorney work product privilege, the attorney who created or is responsible for the record is the holder. (*Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 271-72, 278.)

In this case, though, the City employee who disclosed privileged records was not at the top of the City's governmental structure, was not an attorney who created or was responsible for the attorney's work product, and had not been authorized by the holder of either privilege, expressly or by implication, to disclose privileged records. If the decision below is allowed to stand, it would establish that anyone employed by a city or county or any other public entity – at least anyone responding to a public

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[1]Ardon has argued that a record involved in this case, a memorandum from amicus League of California Cities, is not a privileged document and was not covered by the trial court's order recognizing the privileged nature of League communications. (Answer Brief, 27-28,) These contentions are incorrect, as explained in the City's briefs. (Opening Brief, 43 n.6; Reply Brief, 24-30.) The issue is of critical importance to the League because of the need to maintain the confidentiality of such communications among municipal attorneys and their clients. In any event, that issue is not before this Court.

records request – may, without authorization from the holder of the privilege, waive the attorney-client privilege and the attorney work product privilege. This result would radically change and erode the law of privilege as it relates to public entities.

Second: Inadvertent disclosure of privileged attorney-client materials does not waive the privilege. (*State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654; *Newark Unified School District v. Superior Court* (2015) 239 Cal.App.4th 33, 44.) The same principle holds for inadvertent disclosure of records that are privileged attorney work product. (*Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 679 (attorney work product privilege subject to same waiver principles as attorney-client privilege).) Courts reject a "gotcha" theory of waiver. (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 577.)

In this case, though, the disclosure of privileged records was inadvertent. If the decision below is allowed to stand, it would also establish that inadvertent disclosure of privileged records by a city or county or any other public entity constitutes a waiver of the privilege. As with the new rule dispensing with privilege holder requirements, this new rule would radically change the law of privilege as it relates to public entities. The "gotcha" theory of waiver would replace a narrower waiver rule that accords greater weight to the legislative policies underlying the attorney-client and attorney work product privileges.

The Court of Appeal's decision cannot be squared with a unified theory of the law of privilege that recognizes that the viability of a privilege depends on the waiver rules that circumscribe it. The decision is not merely wrong, in the abstract, as a matter of law. It is also damaging in

practice. If the decision stands, the real-world impact on public entities would be substantial and harmful.

B. The decision substantially harms public entities.

1. The decision will have a substantial impact on public entities.

There are 58 counties and nearly 500 cities in California, as well as many other types of governmental units, including school districts, water and utility districts, and State agencies. Some local governments have thousands of employees and dozens of departments, and even many of the smaller city and county governments are of a much greater size, scope, and complexity than when the Public Records Act was enacted nearly a half-century ago. Though precise figures are unavailable, Amici can in good faith represent that each year public entities in California receive several thousands of public records requests. A large city or county will annually receive at least hundreds of requests, and possibly more. In general, the number of requests seems to be ever-increasing, perhaps due in part to the ease with which requests can be made electronically (including, with a requester's push of the "send" button, to multiple addressees).

The volume of public records requests attests to the strength of our system of open government in California. The Public Records Act is designed to make the process of obtaining public records relatively easy. The Act defines "public records" broadly. (Cal. Gov. Code § 6252(e).) It does not restrict who may make a request, how many requests may be made, or the purpose for which a request is made. (Cal. Gov. Code § 6257.5.) And it severely limits fees that may be charged requesters. (Cal. Gov. Code § 6253(b).) Because the public records system itself is so accessible, and makes records so accessible, many individuals and institutions use the system. Businesses sometimes use the Public Records

Act to gain information that may give them a competitive advantage; lawyers sometimes use the Act to gain information that may assist them in litigation; and the media use the Act to inform the public about government operations. Ordinary citizens use the system for many reasons, ranging from gathering information that may assist them in monitoring government and sometimes exposing its foibles, to obtaining records that will help inform the requester about a specific problem, conflict, or transaction involving the requester and the governmental entity.

Public entities recognize that they must function under the pressures of today's public records system, and can always strive to do better in avoiding erroneous disclosure of privileged records. But the capacity for improvement is finite, given the volume and nature of records requests. Public entities face constant budgetary constraints, and resources that can be devoted to responding to public records requests – even if increased from present levels – are not inexhaustible. The logistical problems public entities face in reviewing requested records – in some cases, even thousands of pages of records responsive to a single request – can be daunting. The records review conducted by a public entity's attorneys or other employees when the entity is simultaneously defending a lawsuit brought by the requester presents added pressures. And time deadlines imposed by the Public Records Act for responding to requests and providing records to a requester also build pressures into the system. (Cal. Gov. Code §§ 6253(b), 6253(c).)

Further, the volume of records covered by even one request can be staggering, as evidenced by a recent case in which an attorney representing a potential litigant sought to use the Public Records Act rather than discovery tools to gather evidence for his case. Initially, the attorney

indicated 87 engineering department files for review. In the end, the attorney spent 20 days over three months reviewing 65,000 pages of documents from 400 files before designating 16,000 pages for scanning at his expense. (*Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 358.) In another recent case, a small newspaper publisher's public records request of a school district required the district to spend 198 hours in reviewing, printing, scanning, and turning over approximately 60,000 emails, after determining that 3,200 emails should be withheld as exempt from disclosure. (*Crews v. Willows Unified School District* (2013) 217 Cal.App.4th 1368, 1372.) These two cases may be extreme – though hardly unique – examples; but they illustrate the reality that public records requests place serious burdens on government. This Court's description of pretrial discovery could be said verbatim of public records requests: "[T]oday's reality [is] that document production may involve massive numbers of documents." (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818.)

For all these reasons, public employees will inevitably make mistakes in the processing of public records requests. Despite conscientious efforts by public entities to gather and review records that are responsive to a request, errors will happen. And no one can say with assurance that the decision below, if affirmed, would result in fewer errors. Among other things, such a decision might stimulate an upsurge in public records requests, by encouraging lawyers to use the Public Records Act even more as a de facto discovery device in litigation against public entities. The prospect of obtaining privileged records unobtainable in discovery may prove an irresistible lure to litigators. As one court explained:

> An attorney who receives inadvertently produced documents during discovery has an ethical duty to refrain from unnecessary review of the documents, notify opposing counsel, and return the documents upon request. If mere inadvertent release of privileged documents under the [Public Records Act] creates a waiver of the attorney-client and attorney work product privileges, however, counsel receiving such documents are presumably under no similar ethical duty ..., since the documents are no longer privileged by the time they come into the attorney's possession. These differing consequences encourage attorneys litigating against a public agency to accompany every discovery request with an identical [public records] request, merely on the chance that an inadvertent production of privileged documents should occur. This is just the type of "'gotcha' theory of waiver" decried by *O'Mary*[, *supra,* 59 Cal.App.4th at 577,] in concluding inadvertent disclosures do not result in a waiver under Evidence Code section 912.

(*Newark Unified School District, supra,* 239 Cal.App.4th at 49-50.)

In sum, this Court may reasonably assume that public entities in California will continue to receive a large number of public records requests, that the volume of records covered by requests will be large, and that privileged or other confidential records will continue to be inadvertently disclosed. Thus, if the Court upholds the decision below, the negative effect on public entities throughout the State would be substantial.

2. The decision will harm public entities by crippling their ability to rely on the attorney-client and attorney work product privileges.

The two arguments thus far advanced – that the Court of Appeal's decision weakens the attorney-client and attorney work product privileges, and that it substantially affects public entities – lead to the conclusion that, left standing, the decision would substantially harm public entities.

The attorney-client privilege serves the same important functions for public entities as for private actors. (See *St. Croix v. Superior Court* (2014) 228 Cal.App.4th 434, 443 ["the privilege's protections of the confidentiality of written attorney-client communications is fundamental to

the attorney-client relationship, in the public sector as well as the private sector"].) Developing and implementing public policy requires public officials and employees to frequently communicate with their legal counsel. Government bodies and officials need "freedom to confer with [their] lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel.... The public interest is served by the privilege because it permits local government agencies to seek advice that may prevent the agency from becoming embroiled in litigation, and it may permit the agency to avoid unnecessary controversy with various members of the public." (*Roberts, supra,* 5 Cal.4th at 380-81.)

Further, as parties in litigation, whether as defendant or plaintiff, "[p]ublic agencies face the same hard realities as other civil litigants." (*Sacramento Newspaper Guild, supra,* 255 Cal.App.2d at 54; *accord, Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 798.) The attorney-client privilege

> is just as meaningful, as financially important, to public as to private clients. Public agencies are constantly embroiled in contract and eminent domain litigation and, with the expansion of public tort liability, in personal injury and property damage suits. Large-scale public services and projects expose public entities to potential tort liabilities dwarfing those of most private clients. Money actions by and against the public are as contentious as those involving private litigants. The most casual and naive observer can sense the financial stakes wrapped up in the conventionalities of a condemnation trial. Government should have no advantage in legal strife; neither should it be a second-class citizen.

(*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.2d 41, 55-56.)

These principles apply as well to the attorney work product privilege. The policies behind that privilege are just as applicable to public

entities as to private entities and individuals. (*Citizens for Ceres, supra,* 217 Cal.App.4th at 913.)

There is a special reason for this Court not to relegate public entities to the status of "second-class citizens" with legal privileges inferior to the legal privileges held by others. Public entities exist not for their own sake, but to serve the public – the people who reside in California, the businesses and other institutions located here, and all those who have any contact with the State. It is the public that ultimately will suffer if their government agencies are denied the full range of confidentiality the law provides for communications with counsel and the full range of protection it provides for the work product of attorneys.

Amici recognize that procedures and timetables governing public records requests are distinct from the rules governing discovery, and that a litigant suing a public entity does not, by virtue of the suit, lose the right to obtain public records through the Public Records Act. A purist could say that public entities already are second-class citizens when in litigation mode, because, unlike their adversaries, they may not use the Act as an additional discovery device. Regardless, the Court of Appeal's decision in this case crosses a line never before crossed. Until now, it has been generally understood that legal privileges do not change on the basis of which disclosure regime is engaged by a litigant opposing a public entity. Courts have never before recognized a "privilege" regime for litigation and a "privilege lite" regime for public records requests. Yet that is precisely what the decision below does. Under the Court of Appeal's ruling, the attorney-client and attorney work product privileges would have less force in the public records context than in other contexts.

This novel, two-track privilege system puts public entities in uncharted and dangerous waters. It is bad enough to decrease the protections of the attorney-client and attorney work product privileges in the public records context. That step alone necessarily undermines the legislative policies those privileges serve. But, as a practical matter, there is no way to hermetically seal the two tracks from one another, and this ostensibly dual privilege system will almost certainly operate to degrade the attorney-client and attorney work product privileges on both tracks. As one court observed:

> It is technically possible to distinguish between section 6254.5 as waiving only the [Public Records Act] exemption from disclosure, rather than the underlying evidentiary privilege.... While this distinction might have some appeal in theory, ... it is a distinction without a difference. Once the exemption is lost, the harm against which the privilege protects – the disclosure of confidential information – occurs. Further, there is a significant risk that the public availability of the document would be found to work a loss of the privilege, precisely because confidentiality has been lost. We therefore find the theoretical distinction between waiver of an exemption based on privilege and waiver of the underlying privilege to be of no legal significance. For public agencies, loss of a Public Records Act exemption based on privilege is tantamount to loss of the privilege.

(*Newark Unified School District, supra,* 239 Cal.App.4th at 48 n.8.)

3. The decision will endanger other privileges and confidentiality laws.

The Public Records Act cannot be read to limit the Court of Appeal's decision to the attorney-client and attorney work product privileges. Damaging as it is to those privileges, the decision has broader ramifications. As previously discussed, Section 6254(k) covers "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Section 6254.5's waiver rule can reach the attorney-

client and attorney work product privileges only by treating Section 6254(k) as an exemption subject to that waiver rule. The decision below, therefore, brings not only those privileges, but all other privileges and State confidentiality laws that are extrinsic to the Public Records Act, within the rule.

It is virtually impossible to know the effect of extending Section 6254.5's waiver rule, across the board, without nuance, qualification, or exception, to all of the laws within the reach of Section 6254(k). Many of these laws implicate third party interests such as personal privacy or business necessity. Many serve important public or governmental policies. All manifest the Legislature's judgment that confidentiality serves the public interest. The very uncertainty of the outcome in sweeping all of these laws within the reach of Section 6254.5's waiver rule counsels hesitation, even if this Court were to interpret Section 6254.5 so as to temper the Court of Appeal's extremely broad interpretation.[2]

But there is no question that, if the decision below stands, Section 6254.5 will weaken more than just the attorney-client and attorney work product privileges. Consider two obvious examples of the decision's baneful effects:

- A city employee inadvertently discloses to one member of the public a record revealing the identity of a confidential informant, such as a whistleblower, who at great personal risk has reported illegal conduct. That record would lose

[2] Section 6254(k) also encompasses federal laws and the California Constitution, which at times will provide a legal basis to withhold a public record from a requester. This brief does not address those laws, on the assumption that they would supersede Section 6254.5 if in conflict with that provision.

the protection of the identity of informer privilege (Cal. Evid. Code § 1041), and likely have to be disclosed to any requester – perhaps with disastrous consequences, not just for the city but also for the informant.

- A county employee mistakenly discloses to one member of the public a record that was acquired in confidence and is part of an ongoing and highly sensitive investigation. That record would lose the protection of the official information privilege (Cal. Evid. Code § 1040), and likely have to be disclosed to any requester – no matter how much the disclosure would harm the investigation.

These two privileges safeguard information the confidentiality of which may be critical to investigations of building code violations, labor law violations, public nuisances, parking and traffic violations, and more. If inadvertent disclosure of a confidential public record will trigger its loss of confidentiality, the capacity of government to effectively investigate and take action against violations of law would be damaged.

III. SECTION 6254.5'S WAIVER RULE DOES NOT APPLY TO INADVERTENT DISCLOSURE OF PRIVILEGED OR OTHERWISE CONFIDENTIAL RECORDS.

As discussed above, because neither Section 6254(k) nor the laws cross-referenced therein should be considered "exemptions" subject to Section 6254.5, this Court need not further interpret that waiver provision to conclude that the customary waiver rules for the attorney-client and attorney work product privileges apply in this case. But should this Court address the meaning of "disclosure" and "waiver" in Section 6254.5, we emphasize our agreement with the City's position on that issue. We need

not reiterate the arguments made in the City's briefs and similarly discussed in *Newark Unified School District, supra.* Instead, we summarize our position below.

Section 6254.5 must be construed in furtherance of its animating purpose: to prevent public entities from selectively disclosing public records – deliberately favoring one requester over another, or one category of requesters over another, by intentionally giving records to one but not the other. Section 6254.5 underscores the principle that all requesters have equal status under the Act. It complements the statutory directive that a public entity cannot consider the requester's purpose in determining the response to a public records request. (Cal. Gov. Code § 6257.5.)

It is extremely unlikely that the Legislature intended that inadvertent disclosure of a privileged or otherwise confidential public record would trigger Section 6254.5's waiver rule. Such an intent is at odds with the commonplace notion that waiver is typically "the intentional relinquishment of a known right after knowledge of the facts." (*Waller v. Truck Insurance Exchange, Inc.* (1995) 11 Cal.4th 1, 31.) Further, the legislative history of Section 6254.5 gives no indication of an intent to bring inadvertent disclosure within its waiver rule, while clearly showing that selective disclosure is within the rule. Finally, the harsh, harmful, and potentially chaotic consequences of an expansive interpretation of Section 6254.5 counsel against ascribing such an intent to the Legislature. Section 6254.5 was intended to prevent government from playing favorites among requesters, not to favor requesters playing "gotcha" with the government. And it was never intended to create a crazy quilt of privileges accessible to private actors but not public entities, or available to public entities in some circumstances but not others.

But while Amici are in general agreement with the City on this issue, we add a caveat. There may be exceptions to the general rule that selective disclosure constitutes a waiver under Section 6254.5; circumstances where such disclosure will not be a waiver. Where third party rights are compromised by disclosure of a record – such as when a Social Security number is disclosed in response to a public records request (in violation of Government Code Section 6254.29), or a person's library circulation record is disclosed (in violation of Government Code Section 6254(j)) – it is doubtful that Section 6254.5 would authorize the public entity to compound the violation by disclosing the record again. The Legislature certainly did not intend for selective disclosure by a public entity to become a license to re-victimize a person or business whose interest in confidentiality the Public Records Act is clearly designed to protect.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed.

Dated: September 25, 2015

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 7,176 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 25, 2015.

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PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

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

On September 25, 2015, I served the attached:

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on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

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☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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

Executed September 25, 2015, at San Francisco, California.

Pamela Cheeseborough