Case No. S165765

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RICHARD SANDER, JOE HICKS, and the CALIFORNIA FIRST AMENDMENT COALITION,

Petitioners,

v.

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

Respondents.

Original Proceeding in the Supreme Court of the State of California

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RESPONDENTS' PRELIMINARY OPPOSITION

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court, Rule 8.208, Respondents, to the best of their knowledge, are unaware of any entities or persons who have a financial or other interest in the outcome of this proceeding that would be relevant to the question of disqualification under Canon 3E of the Code of Judicial Ethics.

DATED: August 18, 2008 **KERR & WAGSTAFFE LLP**

By ____/s_____
MICHAEL VON LOEWENFELDT
Attorneys for Respondents
The State Bar of California, and
the Board of Governors of the
State Bar of California

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I. SUMMARY OF ARGUMENT

The State Bar of California collects personal documents and information from applicants for the California Bar Examination under a promise that the information collected will be confidential and will only be used for Bar-related purposes. Seeking data for use in his own work (and not that of the State Bar), Petitioner Richard Sander, a professor at the University of California, Los Angeles law school is demanding that the State Bar provide him with detailed personal data of bar applicants without their consent. Sander believes data can be retrieved from personal bar applicant records that would further and support his theory on ethnicity, affirmative-action and law school admissions, and academic performance.

There is no existing "document" – public or otherwise – to which Sander seeks access; instead, his request would require the State Bar to create a new compilation of data for his use from the raw data maintained in its admissions computer files and database, all of which data is confidential and not contained in any public record. The State Bar's Committee of Bar Examiners and the Board of Governors have considered Sander's request, the comments of his supporters, and the opposing comments of numerous persons – including many of the people whose information is at issue – and made the reasoned decision that this data compilation for third-party use and purposes should not be created and disclosed without consent of the applicants. Half a year later, Sander has

repeated his previously rejected request and has now, with two supporters – Joe Hicks and the California First Amendment Coalition (CFAC) – filed the instant petition to compel creation and production of the data he wants to study.

As discussed below, Sander's petition to this Court to force creation and release of the requested data for his own use should be denied. The State Bar agrees with Petitioners that this matter is within this Court's exclusive jurisdiction. However, this petition is untimely, and, more importantly, baseless. The public right of access to court records recognized by this State's common law and bolstered by Proposition 59 protects the public's right to attend open court proceedings and to review documents that reflect those proceedings and adjudications made therein. It does not extend to all information, of any kind, that happens to be in the possession of a judicial branch entity. The individual academic records, self-identified racial data, Law School Admissions Test (LSAT) scores, and Bar Exam scores of applicants to the State Bar of California are *not* public documents. They are confidential matters collected as part of the admissions process that reflect *nothing* about the work of the courts, and to which the public has no right of access.

Petitioners have also presented no viable argument as to why this Court should overrule the State Bar's reasoned decision not to produce this data voluntarily. The data was collected under a promise of confidentiality

and limited use that is inconsistent with disclosure of the information to Sander and his fellow researchers. Nor, in general, should the State Bar be compelled to work for and at the direction of any researcher or other third party and to suffer the administrative expense and burden of a requirement to collect records and create data that the third party believes may be reflected in the State Bar's confidential records.

Moreover, the individual privacy concerns raised by applicants cannot simply be shrugged off as Petitioners do; even Petitioners admit the possibility of individual identification from the released records, and applicants should not be required to take the risk that someone will be motivated to utilize a level of skill, luck or effort that Petitioners find "extraordinary" to do so. When weighing the rights of the affected individuals to privacy and their expectation that the representations of the State Bar in collecting the data will be honored against the mere academic curiosity and convenience presented by Sander's request, the Committee of Bar Examiners and Board of Governors struck the correct balance by denying the request.[1]

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[1] The State Bar understands that the Court is handling this matter under the procedures set forth in California Rule of Court 8.490, and is therefore filing this preliminary opposition rather than the opposition required in proceedings under California Rule of Court 9.13. The State Bar requests the Court to advise it if a Rule 9.13(d) answer and brief is required, and, in that event, to provide the State Bar with adequate time to prepare and file such a brief.

II. ADDITIONAL MATERIAL FACTS NOT PRESENTED IN THE PETITION

The procedural history set forth in the Petition is generally accurate, but omits some important details. We will repeat only as much of the history in the Petition as necessary to make this section comprehensible. Although the Rules of Court do not appear to contemplate opposition declarations at this stage, the State Bar is prepared to submit declarations setting forth the facts stated herein if directed to do so.

A. EXISTING COMPUTERIZED STATE BAR RECORDS AND THE STATE BAR'S COLLECTION OF DATA ON APPLICANTS

The State Bar[2] does not currently possess any electronic or paper document that contains the information in the manner in which Petitioners seek it. Instead, granting the Petition would require the State Bar to expend staff time and resources to cull through and manipulate raw data in its admission database, compile information going back as far as 1972, and create a report (which does not currently exist) in order to generate the "records" that Petitioners request. Moreover, Petitioners are asking for certain data from the State Bar that does not exist in computerized format

[2] Except where the distinction is relevant, this brief will refer to both Respondents the State Bar and the Board of Governors as "the State Bar." In this regard, it should be noted that the administration of bar admissions is delegated to the State Bar's Committee of Bar Examiners. (Bus. & Prof. Code § 6046.) The Board of Governors appoints 10 of the 19 members of the Committee and the remaining nine are chosen by gubernatorial or legislative appointment.

or is not maintained by the State Bar in any form. For example, the State Bar does not maintain, nor has it ever maintained, the undergraduate GPAs of applicants.

With the exception of the number of times an applicant takes the Bar Examination and the scores generated through the grading process, the data in question that the State Bar does maintain electronically consists of information that is gathered either directly from the applicant or, with the applicant's permission, from law schools and the Law School Admission Council (LSAC), which administers the LSAT. When registering with the State Bar, an applicant signs an authorization for collection of this data to be used "in connection with the processing of this registration":

> I hereby authorize educational or other institutions or agencies to release to the Committee of Bar Examiners and the Office of Admissions of the State Bar of California any information, files or records requested **in connection with the processing of this registration.**

(Appendix of Exhibits in Support of Respondents' Preliminary Opposition, Exhibit 19 p. 2 (emphasis added).)[3] The examination application requires a similar release:

> I hereby authorize educational or other institutions or agencies to release to the Committee of Bar Examiners (Committee) any information, files, transcripts or

[3] Hereinafter, exhibits submitted by the Petitioners will be referred to as "Pet. Exs. 1-15" and exhibits submitted by the Respondents will be referred to as "Resp. Exs. 16-34."

> records requested by the Committee **in connection with the processing of this application**.
>
> I further authorize the Committee to release information regarding my application to take the bar examination and my bar examination scores and pass/fail status **to the law school to which I have been or will be allocated** for purposes of qualifying to take the California Bar Examination.

(Resp. Ex. 20 p. 9 (emphasis added).)

Each applicant also submits a moral character application pursuant to Rule X of the Rules Regulating Admission to Practice Law in California. The moral character application also requires an authorization, which provides, in relevant part:

> I further authorize all educational institutions and testing organizations to release to the Committee any information, files or records pertaining to me requested by the Committee **in connection with any studies conducted by the Committee regarding the admission process.**

(Resp. Ex. 21 p. 30 (emphasis added).)

Finally, applicants are requested, but not required, to fill out a confidential survey which contains a representation regarding the limited purpose for collecting ethnic information:

> The following information is to be furnished by each applicant as part of the application process. **The Committee of Bar Examiners is gathering this data to assist in the continuing evaluation of the examination. This information will be treated in a confidential manner and will be used only for research purposes**. It will not be retained by the Committee as part of your application.

(Resp. Ex. 19 p. 3 (emphasis added); see also Resp. Ex. 20 p. 10.)

With respect to the information specifically sought by Petitioners, therefore, ethnicity and law school name and graduating year are provided directly by applicants, with ethnicity being optional. Pursuant to the applicant's releases, law school GPAs are provided directly by the law schools[4] and LSAT scores are provided directly by the LSAC.[5]

B. SANDER'S[6] REQUESTS AND THE REACTION THERETO BY INTERESTED PARTIES

Sander's September 5, 2006 research proposal sought data concerning the LSAT scores, race, gender, law school attended, repeater status and bar exam scores for all test takers from 1997-2003. (Pet. Ex. 3 p.

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[4] Student academic records are confidential under the Federal Education and Privacy Rights Act (FERPA), 20 U.S.C. § 1232(a)(4)(A)(i). FERPA regulations provide that schools can disclose information "only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student." (34 C.F.R. § 99.33.)

[5] The LSAC has not authorized the State Bar to re-disclose this information to third parties like Sander. To the contrary, the LSAC provides the LSAT scores to the California Committee of Bar Examiners/State Bar's Office of Admissions with the understanding that the scores will be used for our internal purposes only, such as research studies and providing general information to law schools. The LSAC has informed Respondents that it objects to the release of the LSAT scores it provides to others, such as Sander's group, as they were not provided to the State Bar with the intention that they would be released to third parties.

[6] The requests submitted by Joe Hicks and the CFAC are entirely duplicative of Sander's requests, and expressly presented for the purpose of obtaining the requested information *for* Sander. (Pet. Exs. 11-12.) Accordingly, this opposition refers to all Petitioners as "Sander" or "Petitioners" except where separate identification is relevant.

4.) The proposal was presented to the Subcommittee on Examinations in September 2006 (Resp. Ex. 22), with further consideration to be given in December 2006. (Resp. Ex. 23.) That consideration was deferred to February 2007 (Resp. Ex. 24), in anticipation of which staff prepared a memorandum to the Subcommittee reporting on public comments received from various parties for and against the proposal. (Resp. Ex. 25.) As described in the Petition, further testimony, a memorandum (Pet. Ex. 6), and analysis was provided for the June 2007 meeting. On June 30, 2007, following the recommendation of the Subcommittee on Examinations, the Committee of Bar Examiners voted to deny the request (Resp. Ex. 26), and communicated that decision to Sander in writing. (Pet. Ex. 7.)

The Board of Governors then considered the matter at its November 8, 2007 meeting. The Board's consideration was preceded by a detailed public staff report discussing the issue. (Resp. Ex. 27.) The State Bar also published a "Notice Re Opportunity to Comment" informing interested parties, constituents, and members of the public of the request and their right to comment. (Resp. Ex. 28.) The State Bar received substantial public comment opposed to the release of this data, largely from applicants who did not want their information provided. Forty-seven (47) individuals provided written comments opposed to the request, most of whom are lawyers or law students objecting to the provision of their data. (Resp. Ex. 29.) The State Bar also received formal written objections from 12

organizations including four law schools. (Resp. Ex. 30.) Seven individuals wrote to support the study. (Resp. Ex. 31.) The Bar also received 29 official requests for time to speak at the meeting of the Board Committee on Regulation, Admission and Discipline (RAD) for and against the proposal. (Resp. Ex. 32.) The gist of the commentary against Sander's proposal was: (1) concern that releasing the information would make it possible to identify applicants; (2) concern that the data was provided for a specific and limited purpose; (3) concern that release of the data was inconsistent with the representations made in order to obtain applicant's release of the data in the first place; and (4) concerns about the safeguards and legitimacy of the proposed use of the data. After considering the public comment and the recommendation of the RAD Committee, the Board of Governors voted unanimously to affirm the decision of the Committee of Bar Examiners to deny Sander's request. (Resp. Ex. 33.)

Following the Board's decision, as recited in the petition, Sander simply re-asserted the same request as a "Public Records Act" request. (Pet. Ex. 8.) His supporters, Mr. Hicks and the CFAC, soon followed suit with duplicative requests. (Pet. Exs. 11-12.) Each subsequent request modified slightly the exact data sought, and the format it was requested in, but they all are essentially the same thing: a request for raw statistical data in the admissions database of the State Bar, manipulated to provide new records tailored to Sander's request.

The latest request asks that the State Bar provide data on all test takers from 1972-2007, including their race, law school, whether they were a transfer student, year of law school graduation, total raw score on first bar exam, total scaled score of first bar exam, MBE score (raw and scaled), essay scores (raw and scaled), performance test score (raw and scaled), bar passage (never, after 1 attempt, after more than 1 attempt), law school GPA, LSAT score, and undergraduate GPA data. (Pet. Ex. 11 p. 59.)[7] Petitioners recognize that they cannot receive this private data as it is stored by the State Bar, and ask for it to be substantially manipulated into "clusters" that they contend will protect privacy before it is provided to them (as well as the requirement that several logical steps be taken to infer transfer student and bar passage status in the form demanded by Petitioners). (Pet. Ex. 11 pp. 60-66.)

As discussed above, this latest request would still require extensive preparation by the State Bar to create a "record" that does not currently exist. The Committee of Bar Examiners set this most recent request for

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[7] Although the type of requested information is substantially similar to Sander's initial request of September 5, 2006, notably, the current request does not include gender data and expands the date range to include information on test takers from 1972-2007, whereas he previously only sought information on test takers from 1997-2003. (Compare Pet . Ex. 11 p. 59 (May 29, 2008 request) with Pet. Ex. 3 p. 4 (September 5, 2006 request).)

consideration on August 22, 2008. Petitioners, however, filed this Petition in advance of that meeting.

III. POINTS AND AUTHORITIES IN OPPOSITION TO THE PETITION

A. JURISDICTION AND DUE PROCESS

The State Bar agrees that this Court has original and exclusive jurisdiction over claims against the State Bar that involve the admissions process or admissions policies. (See *In Re Attorney Discipline System* (1998) 19 Cal.4th 582, 602 [79 Cal.Rptr. 2d 836, 976 P.2d 49] [reaffirming the Court's "primary policy-making role and its responsibility" in matters concerning admissions and lawyer discipline]; *Smith v. State Bar* (1989) 212 Cal.App.3d 971, 978 [261 Cal.Rptr. 24] [challenges to admissions policies must be made to the Supreme Court in the first instance].) This claim, which seeks release of raw data collected by the State Bar as part of the admissions process falls within this Court's original and exclusive jurisdiction.

The State Bar disagrees, however, with Petitioners' assertion that this Court has no power to summarily deny their writ. It is well settled that a summary denial is still an adjudication on the merits that is fully consistent with due process. (*In re Rose* (2000) 22 Cal.4th 430, 456-58 [93 Cal.Rptr.2d 298, 993 P.2d 956].) This writ can, and should, be summarily denied because, as discussed below, it is untimely and lacks merit.

B. THIS PETITION IS UNTIMELY

California Rule of Court 9.13(d) requires writs challenging the decisions of the State Bar to be "filed within 60 days after written notice of the action complained of is mailed to the petitioner ..." (Cal. Rules of Court, rule 9.13(d).) Nonstatutory writs are also generally subject to a 60 day deadline. (*Cal West Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170, 1173 [29 Cal.Rptr.3d 170] ["As a general rule, a writ petition should be filed within the 60-day period that applies to appeals."].)

The Committee of Bar Examiners formally rejected Sander's request for the information he now seeks during its June 30, 2007 meeting, at which Sander was in attendance. That decision was also later communicated to him in writing in a letter dated July 31, 2007. (Pet. Ex. 7.) Sixty days from the date of the letter was September 29, 2007. Sander did not, however, bring this writ at that time; instead, he sought to convince the Board of Governors to reverse the Committee. He was unsuccessful, and on November 8, 2007, the Board of Governors also denied his request. Sixty days from that date was January 7, 2008, but again Sander did not seek review from this Court.

Instead, on November 16, 2007, Sander simply requested the same information *again*, this time claiming to be making a Public Records Act

request,[8] as well as a request under Proposition 59 and the common law. (Pet. Ex. 8.) On November 26, 2007, his request was denied (having just been rejected by the Board of Governors). (Pet. Ex. 9.) Sander did not bring this writ 60 days from that date either.

Instead, on May 29, 2008 – 302 days after the Committee's letter denying his request –Sander sent another demand letter with a purportedly "narrower" request asking the State Bar to do even more data preparation work for him covering an even broader period of time. (Pet. Ex. 11.) Joe Hicks "joined" in this request, as did the CFAC (all represented by the same counsel, and all seeking to have the requested information provided to Sander). (Pet. Ex. 11-12.)

The State Bar should not be subject to continual requests for the same material; if Sander or his allies wanted to challenge the State Bar's decision, they should have done so in 2007 in a timely fashion. They should not be allowed to avoid that deadline by "starting over again" with duplicative requests.[9] Thus, the Court would be well within its authority to

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[8] Petitioners' written demands to the State Bar repeatedly insisted that they had a right to the requested data under the Public Records Act. (Pet. Exs. 8, 11, 12, 14.) As Petitioners now concede, the Public Records Act does not apply to judicial branch agencies like the State Bar. (Gov. Code § 6252, subd. (f); *Mack v. State Bar of California* (2002) 92 Cal.App.4th 957, 962-63 [112 Cal.Rptr.2d 341].)

[9] To the extent the May 29, 2008 request actually is different (and the differences appear minor to us), the Committee agreed to consider the

find the instant petition barred by the failure to bring it within 60 days of either the Committee's or Board of Governors' decisions the first time Sander made this request.

C. THE COMMON LAW RIGHT OF ACCESS TO THE COURTS DOES NOT COMPEL DISCLOSURE OF THE DATA SOUGHT BY PETITIONERS

Petitioners grossly distort the common law right of access to court proceedings and records, relying on inapposite dicta while ignoring the result and reasoning of the cases they cite. Petitioners make no effort to explain the genesis or scope of the right of access; nor do they provide any analysis of why the new compilation of private data they seek falls within it. Their ipse dixit insistence that they have a right to any data in the possession of the State Bar in which they are interested is contrary to all pertinent case law.

1. The common law right to public access to "court records"

This country and state have a long history of recognizing the public's right to attend open court proceedings. Code of Civil Procedure 124 provides that, with limited exceptions, "the sittings of every court shall be public." (Code Civ. Proc., § 124.) "Substantive courtroom proceedings in ordinary civil cases, and the transcripts and records pertaining to those

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request at its August 22, 2008 meeting. Petitioners, however, filed this Petition before even waiting to hear the Committee's decision.

proceedings, are 'presumptively open.'" (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 597 [57 Cal.Rptr.3d 215].) In discussing the right of access, this Court has emphasized the important public function that open trials have in a democracy. (*NBC Subsidiary v. Superior Court* (1999) 20 Cal.4th 1178, 1197-1212 [86 Cal.Rptr.2d 778, 980 P.2d 337].) In addition to the right to physically attend a session of court, case law has long recognized a concomitant right "of access to civil litigation documents filed in court as a basis for adjudication." (*Id.* at p. 1208, fn. 25 (citing cases); *Savaglio v. Wal-Mart Stores, Inc.*, *supra*, 149 Cal.App.4th at p. 596 ["The public has a First Amendment right of access to civil litigation documents filed in court and used at trial or submitted as a basis for adjudication."].) It is this second right that frames the "right of access" Petitioners attempt to rely on here.

"A trial is a public event. What transpires in the court room is public property...." (*Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 373 [74 Cal.Rptr.2d 69] (hereinafter *Copley Press II*), citation omitted.) As explained in *In re: Matter of Hearst's Estate* (1977) 67 Cal.App.3d 777, 784 [136 Cal.Rptr. 621], "[i]f public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice and favoritism. For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings

and records of judicial tribunals." That does not mean, however, that any document that happens to be in the possession of judicial personnel is a public record open for general inspection. (*Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 113 [7 Cal.Rptr.2d 841] (hereinafter *Copley Press I*).) As the Court of Appeal explained in *Copley Press I*, public "court records" are "documentation which accurately and officially reflects the work of the court, such as its orders and judgments, its scheduling and administration of cases, its assignment of judicial officers and administrators." (*Ibid.*) Such documents "represent and reflect the official work of the court, in which the public and press have a justifiable interest." (*Ibid*.) On the other hand, other documents created or simply maintained by court personnel are internal documents to which the public has no right of inspection. (*Id.* at p. 114.)

Every case cited by Petitioners to invoke a right of public access to "court records" involved the official record of civil or criminal adjudicative proceedings or something directly analogous to such a record. Thus, *Estate of Hearst* allowed media access to the probate court file concerning the probate proceedings of William Randolph Hearst. (*Estate of Hearst*, *supra*, 67 Cal.App.3d at pp. 783-85.) *Mack v. State Bar* (2001) 92 Cal.App.4th 957, involved the publication of an attorney's public record of discipline by the State Bar Court. In *Copley Press I*, the court held that a clerk's rough minutes of court proceedings, which were ministerial in nature and

intended to "prepare a record of the events of the court's sessions," are sufficiently analogous to formal minutes to constitute court records subject to public inspection. (*Copley Press I, supra*, 6 Cal.App.4th at p. 115.) The records found to be public in each of these cases were thus either the report of an actual decision of a court, the documents submitted to the court to make its decision, or records of the events that occurred in open court. Nor are *all* records submitted in court proceedings open to public inspection; case law plainly recognizes that discovery related documents – even if filed in connection with a discovery motion – are not subject to public review, while documents submitted as the basis for merits adjudication are presumptively public. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 96-100 [70 Cal.Rptr.3d 88].)

Pantos v. City and County of San Francisco (1984) 151 Cal.App.3d 258 [198 Cal.Rptr. 489], sets forth this distinction even more clearly. Two types of documents were at issue: a master list of potential qualified jurors developed by the court, and jury questionnaires filled out by individual prospective jurors. (*Id.* at pp. 260-61.) As to the first, the court held that master lists of potential jurors, as well as any sub-lists used to summon people to jury duty, are "judicial records, available to the public in general." (*Id.* at p. 262.) The jury questionnaires, however, are *not* public records. As the court explained, these preliminary questionnaires were gathered

under a promise of confidentiality, and are only used as sources of information for the jury commissioner:

> Juror questionnaires ... are used to assist the jury commissioner to determine the qualifications of a citizen for possible inclusion on the master jury list. The jury commissioner represents to prospective jurors that all information provided is confidential. These questionnaires are not judicial records open to the public, but are informational sources gathered to determine qualification for prospective jury service.

(*Id.* at p. 263.)

Thus, the case law draws a sharp contrast between records that reflect open court proceedings and adjudicative decisions of courts, and other documents that happen to be within the possession of judicial officers or their staff. Only the first category is encompassed by the public right of access to court records.

2. The requested raw statistical data is not a "court record" within the meaning of the common law

The data sought by Petitioners on all Bar Exam applicants since 1972 is patently *not* a court record subject to public inspection. First, there is no existing record – Petitioners are asking for a new record to be created for them. Second, the requested data does not reflect any court proceedings, and did not form the basis for any decision by this Court or any officer of the State Bar. There is simply no basis to argue that the requested data is a matter of public record.

a) There is no existing "record" containing the requested data

Petitioners are not seeking production of some pre-existing study by the State Bar. This is not a matter of "reviewing" something that already exists. Instead, Petitioners claim that, just because they want the information, the State Bar is required to go through its database, manipulate the raw data therein, and create a new compilation of data for Petitioners' use.

The State Bar is unaware of any case under the common law, the California Public Records Act, the federal Freedom of Information Act (FOIA), or any other legislation or common law principle that would require the government to create a presently non-existent record so that the public can review it. What case law does exist holds that "open government" laws do not require the creation of new records. (See *N.L.R.B. v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 161-62 [95 S.Ct. 1504, 44 L.E.2d 29] [FOIA provides access to existing documents, but does not require an agency to create documents].)

b) The requested data does not reflect open court proceedings, any court decision, or any other public work by a judicial officer

The requested data also simply does not fall within the category of judicial "records" subject to public review under the case law discussed above. The requested data obviously does not reflect any public court

proceedings. Nor does the vast majority of it reflect or reveal the work of the State Bar.

Petitioners seek basically three categories of data for *every* bar applicant since 1972. First, they want Bar Exam scores. Those scores are *not* public information. Individual Bar Exam scores are highly confidential, non-public information; indeed, pursuant to the Rules Regulating Admission to Practice Law in California, successful applicants do not even have the right to see *their own* scores.[10] Nor are the scores themselves evidence of this Court's admissions decisions. Instead, the State Bar publishes a pass list for each examination, and the identity of members of the Bar is a matter of public record.

Second, Petitioners want the self-reported ethnic demographic data from each applicant. That data is collected from applicants under a promise of confidentiality and limited use. (Resp. Ex. 19 & 20.) The data is provided voluntarily and is not verified to ensure its accuracy. Moreover, the data is not used by the State Bar to do anything with respect to any applicant. The *only* manner in which that information is used by the State Bar is to compile it into "pass rate" statistics that are publicly available and

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[10] "No applicant who passes an examination given by the Committee ... shall be entitled to inspect his or her examination books, nor the grades assigned thereto." (Rules Regulating Admission to Practice Law in California, rule I, § 10.) It makes little sense to argue that Bar Exam scores are public records – as Petitioners do – when successful applicants are specifically prohibited from seeing their own scores.

to prepare research studies that are directly related to the Bar Examination, which are also authorized for public release. Just like the jury questionnaires in *Pantos*, while the published statistics are a matter of public record (and available on the Internet), the underlying informational data used to derive those statistics, which was collected on a promise of confidentiality, is not. (*See Pantos*, *supra*, 151 Cal.App.3d at pp. 263-65.)

Third, and finally, Petitioners seek information about each applicant's academic record. This information was provided to the State Bar by the law schools to ensure applicants are qualified to take the Bar Exam (just as the non-public jury questionnaires in *Pantos* were provided to show whether a person was qualified to be a juror). Like the self-reported racial data, this is confidentially gathered information, not a public record.[11] Indeed, federal law strictly limits the law school's ability to release this data, including a requirement that the recipient not re-disclose it to third parties without consent. (34 C.F.R. § 99.33.)

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[11] Rule XI of the Rules Regulating Admission to Practice Law in California provides generally that "The files, records, and writings ... of all investigations and formal proceedings are the property of the Committee. This information is confidential and may not be released to any person or entity except by order of the Committee or as provided by California Evidence Code section 1040." (Rules Regulating Admission to Practice Law in California, rule XI.) Although this provision is typically triggered by a moral character investigation, the Rule reflects the broader confidentiality applicable to all admissions records.

None of the cases cited by Petitioners involves anything even remotely analogous to the raw data they seek. As discussed above, *Copley Press I* and *Pantos* involved access to clerk's minutes of open court proceedings and the master jury list used by the court to summon prospective jurors. (*Copley Press I*, *supra*, 6 Cal.App.4th at p. 115; *Pantos*, *supra*, 151 Cal.App.3d at p. 262.) *Mushet v. Dept. of Public Service* (1917) 35 Cal.App. 640 rejected an attempt to view the records of a municipal utility. (*Id.* at p. 634 ["we are convinced that the books and papers in question are not public documents..."].) *Coldwell v. Board of Public Works* (1921) 187 Cal. 510 involved public access to preliminary estimates and plans concerning the public Hetch Hetchy project. (*Id.* at pp. 520-21.) *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216 involved transcripts of grand jury proceedings, and recognized that only "[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" are "public writings." (*Id.* at p. 220.) *Washington Legal Foundation v. United States Sentencing Commission* (D.C. Cir. 1996) 89 F.3d 897 held that advisory documents used to formulate federal sentencing guidelines are <u>not</u> public records. (*Id.* at p. 905.)[12] *County of Placer v. Superior Court* (2005)

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[12] The D.C. Circuit Court also explained the limited nature of "public records" to which there is a common light right of access: "a record to which the public has a right of access .... is a government document created and kept for the purpose of memorializing or recording an official action,

130 Cal.App.4th 807 [30 Cal.Rptr.3d 617] held that a court can permit a probationer to review *his own probation file*, which is a court record *and* evidence used against him in revocation proceedings. (*Id.* at pp. 812-13.)

California (and federal) law clearly recognizes a distinction between official records of court proceedings, which are subject to public inspection, and other types of documents or information that happen to be within the possession of the judicial branch, which are not. The raw information sought by Petitioners concerning the academic record, race, and bar exam scores of successful and unsuccessful applicants to the California Bar Exam bears no relationship whatsoever to the type of adjudicative records open to public access. There simply is no public right of access to the raw data maintained on the State Bar's internal admissions database.

3. The privacy guarantees provided by the State Bar to applicants outweigh any limited public interest in raw data collected by the State Bar

Even if there was some residual public interest in reviewing the raw data located in the State Bar's records on the academic history, race, and bar examination scores of all applicants since 1972, the applicants have a countervailing privacy interest that weighs against production.

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decision, statement, or other matter of legal significance, broadly conceived, ... [not] documents that are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken." (*Washington Legal Foundation*, *supra*, 89 F.3d at p. 905.)

The California Constitution guarantees a right of privacy to every citizen which is "fundamental to any free society." (Cal. Const., art. I, § 1; *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829 [134 Cal.Rptr. 839].) The right to privacy prevents a number of government "mischiefs" – the ones most relevant here are "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party." (*Id.* at p. 830 [quoting *White v. Davis* (1975) 13 Cal.3d 757, 775 [120 Cal.Rptr. 94, 533 P.2d 222]]; *Hill v. N.C.A.A.* (1994) 7 Cal.4th 1, 36 [26 Cal.Rptr.2d 834, 865 P.2d 633]; *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1138-39 [227 Cal.Rptr. 354].) Petitioners' demand implicates both of these harms.

As discussed in detail above, applicants provide information on their academic history and ethnic demographics for the purpose of the Bar Exam and studies by the Bar, and are promised that the information will otherwise be kept confidential. (Resp. Exs. 19-21.) The State Bar cannot release this information collected for one purpose (eligibility for bar admission) to a third party for an unrelated unauthorized purpose (Sander's private research study on affirmative action programs). This would not only violate the right to privacy, but the guarantee of limited use that is protected under *Porten*.

Petitioners claim that the privacy rights of the individuals in question are irrelevant because, if their names are redacted, there "is no" privacy violation.[13] Petitioners' cavalier attitude is unjustified.

First, whether or not any individual applicant's identity could be garnered if the data requested by Petitioners was created and provided to them is not dispositive. Even if no one's identity were "traceable," *Porten* still recognizes a violation of privacy where "information properly obtained for a specific purpose ... [is] ... use[d] ... for another purpose." (*Porten v. University of San Francisco, supra*, 64 Cal.App.3d at pp. 830, 832; *Urbaniak v. Newton, supra*, 226 Cal.App.3d at pp. 1138-39.) The State Bar did *not* collect the information in question so that it could compile it and

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[13] The cases cited by Petitioners for the proposition that "a serious invasion of privacy occurs only when the identity of the subject is known" (Pet. p. 55) say nothing of the sort. *Poway Unified School District v. Superior Court* (1998) 62 Cal.App.4th 1496 [73 Cal.Rptr.2d 777] involved press access to government tort claims filed by an injured student. The court held that the minor had no reasonable expectation of privacy under the circumstances, but that whatever residual privacy interest existed could be addressed by redacting the tort claim. (*Id.* at pp. 1505-06.) *Bible v. Rio Properties, Inc.* (C.D. Cal. 2007) 246 F.R.D. 614 concerned a civil lawsuit against a motel chain where the motel was refusing to provide information on prior guests' complaints. The court held that, in balancing the right of third party privacy against the right to discovery in the litigation, the court could order production with the names and other identifying information redacted. (*Id.* at 620.) *Younger v. Superior Court* (1978) 21 Cal.3d 102 [145 Cal.Rptr. 674, 577 P.2d 1014] merely stated the obvious proposition that an individual could not be stigmatized by "an arrest or conviction statistic that does not identify the individual concerned." (*Id.* at p. 114.) None of this "authority" supports the proposition that an individual's right to privacy cannot be violated, no matter what is done with his or her private data, so long as his or her name is not stated.

provide that compilation to university researchers interested in law school admissions practices (or any other non-Bar study).[14] Potentially affected applicants have already informed the State Bar that any disclosure of their information to Petitioners would constitute a violation of privacy under this theory. (Resp. Exs. 29-30.) Petitioners simply ignore this issue.

Second, Petitioners' confidence that the information they seek will probably remain anonymous is not shared by many of the people whose information is sought. Numerous persons warned the State Bar that their information *would* be identifiable under Sander's plan. (Resp. Exs. 29-30.) Petitioners themselves admit that some individuals could be identified through what they claim would be "extraordinary effort, skill or luck." (Clements Decl. ¶ 2.) No applicant should be subjected – without warning and contrary to the representations made when he or she applied – to *any* risk that his or her private academic record and bar exam results will become publicly known.

The only countervailing "interest" cited by Petitioners is academic curiosity, and the difficulty in either obtaining releases from the persons

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[14] Indeed, under Petitioner's theory the State Bar would be unable to agree to keep information confidential and to use it only for certain purposes no matter how clearly that agreement was expressed before the data in question was provided to the State Bar. No law prohibits the State Bar from obtaining data from applicants, law schools, or other entities subject to the agreement that such data will not be passed along to third persons or otherwise misused.

involved or obtaining the information directly from those persons. In other words, it is "too hard" for Sander to develop this data himself, so he wants the State Bar to do it for him irrespective of the promises made to applicants when the State Bar collected this information.[15] The same "interest" could be asserted by any member of the public who was curious about how certain groups of people do on the Bar Examination. For example, if the information sought by Petitioners is found to be public information, there is nothing to stop someone else from demanding the State Bar provide statistics on the Bar Exam scores and academic history of judges, political candidates, prosecutors, or any other "group" whose academic and legal "success" is allegedly a matter of public interest. The State Bar does not exist to function as a data library for people who want to study the legal education system or the academic qualifications of lawyers or prospective lawyers. No applicant has ever been advised that his or her data is being collected for general public consumption; to the contrary, each has been advised that the data is collected for purposes limited to

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[15] The State Bar is not the only holder of the requested data; the information is available from other various other sources. Petitioners have the option of contacting the LSAC, the law schools, or the individual applicants themselves and enlisting their assistance in gathering the data they desire. Furthermore, the State Bar has indicated to Sander that it would provide the data requested if he got permission and individual releases from the applicants whose data he is seeking. (Pet. Ex. 15 p. 2.) Sander and his team however are not interested in pursuing this option because they find it "impractical."

qualification for the Bar Examination and Bar studies concerning the Examination.

Control over the admissions process necessarily includes the power to protect the privacy of persons who apply for the California Bar Examination and to enforce the promises of confidentiality given by the State Bar, as this Court's administrative arm, when those applications were made. The inherent authority to control admissions "must of necessity, and as a protective measure to maintain [this Court's] independence, include the right to determine when and under what circumstances sensitive material under our exclusive superintendency and control should be shielded from disclosure." (*Bester v. Louisiana Supreme Court Committee on Bar Admissions* (La. 2001) 779 So.2d 715, 721 ["We now hold that an additional, limited exception to public disclosure exists for documents we determine should remain confidential, in situations where we are exercising our inherent authority as the head of a separate and independent branch of state government."].) Even if the data sought by Petitioners was otherwise a matter of public record, which it plainly is not, this Court should still exercise its discretion to prevent public disclosure of this confidential applicant information.

D. PROPOSITION 59 DID NOT ALTER THE COMMON LAW DISTINCTIONS BETWEEN PUBLIC AND NON-PUBLIC JUDICIAL RECORDS

Unable to support its position with any case law, Petitioners rely heavily on the generalities set forth in Proposition 59 (codified at Cal. Const., art. I, § 3) and the ad hominem insistence that the State Bar "is not above the law." Of course the State Bar is not "above the law" and Proposition 59 applies to "all branches of government." *How* it applies is the critical question.

Setting aside the relevant case law for a moment, the new compilation of data requested by Petitioners simply does not fall within the plain language or intent of Proposition 59. The requested database is not a "writing of a public official," and Petitioners make no attempt to explain why it is. Petitioners incorrectly contend that this point is conceded by the State Bar. (Pet. p. 38.) No public official wrote the raw data at issue – it was reported by applicants, the LSAC and the law schools or (in the case of Bar Exam scores) generated by the testing process. Indeed, the demanded compilation of data does not presently exist. The raw data itself does not reflect any work by any official of the State Bar (except insofar as any individual's test score could be considered the "work" of a State Bar grader). Aside from Petitioners' own insistence, Petitioners provide no explanation for why Proposition 59 would grant them the right to demand that the State Bar (or any state agency for that matter) comb through its raw

records to create a new, custom statistical report for independent and private research use.

Nor does production of this raw data further Proposition 59's stated purpose of providing "information concerning the conduct of the people's business." None of the data requested by Petitioners sheds any light on what the State Bar does. Indeed, as Petitioners themselves admit, they do not even want it for that purpose. They want it to study the purported "effect" of "affirmative action" admissions policies in law schools (only some of which are California public schools).[16] Production of this data thus has nothing to do with the "open government" philosophy behind Proposition 59.

Petitioners insist that because the State Bar is a "public agency," all information in its possession must be subject to presumptive access under Proposition 59. No court has ever interpreted Proposition 59 in such a manner. Proposition 59 did not radically revoke the pre-existing rules for public access to court records as Petitioners claim; indeed, those rules were *already* constitutional. (*Copley Press I, supra*, 6 Cal.App.4th at p. 111.) Proposition 59 merely states that *existing* rules governing access to public

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[16] Although less important than the fact that the requested data is not a matter of public record, it seems clear that Sander's entire purported use for this data – to study law school admissions policies – is substantially impeded, if not entirely prevented, by the non-existence of undergraduate GPA, limited LSAT data and no law school GPA data for a great deal of the requested sample.

records must be interpreted in favor of access – which was *already the law* – and that new rules must have clear findings supporting them. (Cal. Const., art. I, § 3, subd. (b), par. (1) .) Nothing in Proposition 59 purports to create any rules governing access to public documents; indeed, the provision contains no definitions whatsoever concerning what are, or are not, "meetings of public bodies and the writings of public officials and agencies."

Thus, in *Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370 [75 Cal.Rptr.3d 9] the Court of Appeal surveyed Proposition 59 case law and concluded that "Proposition 59 is simply a constitutionalization of the [California Public Records Act]." (*Id.* at p. 1382 [finding that Proposition 59 did not alter the pre-existing mental processes privilege prohibiting examination of the motives of legislatures].) In *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60 [70 Cal.Rptr.3d 88] the Court of Appeal held that Proposition 59 did not alter the pre-existing common and statutory sealing rules distinguishing public adjudicatory documents from discovery documents not subject to public disclosure. (*Id.* at p. 101 ["Absent a clear directive from the Judicial Council that the rules are intended to create a presumption of access to a larger class of court-filed documents than the class enunciated in *NBC Subsidiary* and in the rules themselves, we will not so construe them."].) Petitioners do not cite a single case where Proposition 59 has been held to require disclosure of any

documents that were not already subject to disclosure before its enactment.[17]

Proposition 59 did not eliminate decades of case law governing which judicial branch documents are public "court records" and which are not. It simply codified the principles underlying that longstanding law. Because the raw data sought by Petitioners is not a court record within the meaning of the right of public access to court records, Proposition 59 does not require its production any more than the First Amendment or common law did.

E. VOLUNTARILY CREATION AND PRODUCTION OF THE REQUESTED DATA IS NOT WARRANTED

Petitioners also ask this Court, alternatively, to order creation and production of the records they want notwithstanding their lack of a legal right to the data. The State Bar agrees that, as between it and this Court,

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[17] See also *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 657 [64 Cal.Rptr.3d 854] [Proposition 59 did not alter rules for access to grand jury transcripts]; *Savaglio v. Wal-Mart Stores, Inc.*, *supra*, 149 Cal.App.4th at p. 597 [applying pre-existing rules for sealed documents in light of Proposition 59]; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750-51 [49 Cal.Rptr.3d 519] [recognizing that Proposition 59's requirement to broadly construe the right of access "was the law prior to the amendment's enactment."]; *Shapiro v. Board of Directors of Centre City Development Corp.* (2005) 134 Cal.App.4th 170, 181, fn. 14 [35 Cal.Rptr.3d 826]["even if the language added by Proposition 59 did apply, it would merely be duplicative of the already-established principle that exceptions to the Brown Act are to be narrowly construed ... and thus it would not substantively add to the principles guiding our analysis."] (citations omitted).

this Court has the power to direct the State Bar to create and produce the requested information.[18] The State Bar is this Court's administrative adjunct as its duties relate to admissions, and the raw data is located in the files of the State Bar's Office of Admissions, which are, in effect, the files of this Court.

However, the State Bar notes that both the Committee of Bar Examiners and Board of Governors have reviewed this matter in detail, and considered the comments of numerous constituents and members of the public, many of whom had provided the data at issue to the State Bar under the understanding it was confidential. (Resp. Exs. 27-33.) That process was a thorough one, and the Committee and the Board each decided, in light of the representations made by the State Bar and the manner in which the information was collected, as well as the objections by those whose privacy was potentially implicated, that the better policy is not to produce these records. The Petition does not, in the State Bar's view, present any compelling reason to revisit that decision, and the State Bar suggests that this Court simply deny the request summarily.

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[18] Whether or not doing so would affirmatively violate the privacy rights of applicants is perhaps not a subject the State Bar is in the best position to advocate for or against. As discussed above, there are certainly privacy interests at issue, and at least the risk of litigation if the requested information is disclosed.

In the event that the Court is interested in reconsidering the underlying policy decision of whether or not to create and disclose the requested data (and whether that would create a precedent entitling future "interested persons" to similar data sets), the State Bar suggests that a more complete briefing schedule would be appropriate to consider the policy question, and that all members of the public who have an interest (including the 59 former applicants and organizations that submitted oppositions during the State Bar proceedings – see Resp. Exs. 29-30) be invited to provide comment as amicus curiae. It is, after all, their personal information that is at issue as well as the administrative cost and time of the State Bar.

IV. CONCLUSION

Petitioners have no legal right to the relief they seek, and have failed to provide any compelling basis for reconsidering the policy decisions already made by the Committee of Bar Examiners and Board of Governors. For the foregoing reasons, the State Bar and its Board of Governors request that this Court summarily deny the Petition.

DATED: August 18, 2008 **KERR & WAGSTAFFE LLP**

By _/s_____
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State Bar of California

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court 8.204(c)(1), I certify that this Respondents' Preliminary Opposition contains 8,572 words, not counting the tables, and this attachment, as determined by the word count function of Microsoft Word 2002.

DATED: August 18, 2008 **KERR & WAGSTAFFE LLP**

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