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In the Supreme Court of the State of California

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

v.

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
after a Decision of the State Bar of California

_____

VERIFIED PETITION FOR MANDAMUS, CERTIORARI, PROHIBITION OR OTHER EXTRAORDINARY RELIEF

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Certificate of Interested Entities or Persons

The California First Amendment Coalition is a California non-profit, public benefit corporation. No other entity holds any ownership interest in the California First Amendment Coalition.

Dated: August ___, 2008

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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SUMMARY OF QUESTIONS PRESENTED

This is an original proceeding in the Supreme Court of the State of California, after a decision of the State Bar of California and the Board of Governors of the State Bar of California (collectively "Respondents"), denying Petitioners' requests for records maintained by the State Bar of California. Petitioners ask that the Court direct Respondents to provide the requested records to Petitioners, subject to redaction procedures specified in Petitioners' requests to protect personal privacy.

In summary, this Petition for Mandamus, Certiorari, or Prohibition or other Extraordinary Relief ("Petition") presents the following questions:

1. Is this action properly commenced in the Supreme Court of the State of California, or should it be commenced in the Superior Court?

2. Do Petitioners have a right to copies of records maintained by the State Bar under Article I, Section 3(b) of the California Constitution or under California common law?

3. Does the Court have inherent authority to make the requested records available to Petitioners, irrespective of any other legal basis for obtaining the records?

4. Does federal or state law prohibit disclosure of the requested records?

Petitioners respectfully submit that they are entitled to copies of the records they have requested under the California Constitution, common law, and the Court's inherent authority, that neither federal nor state law prohibit disclosure of the requested records, and that Respondents should be ordered to provide the records forthwith.

VERIFIED PETITION

Petitioners Richard Sander, Joe Hicks, and the California First Amendment Coalition ("Petitioners") petition this Court, pursuant to Section 3 of Article I of the California Constitution, Section 10 of Article VI of the California Constitution, and rules 8.490 and 9.13 of the California Rules of Court, for a writ of mandate or other order directed to Respondents State Bar of California and the Board of Governors of the State Bar of California, commanding Respondents to comply with Subdivision (b) of Section 3 of Article I of the California Constitution and California common law, by making available information concerning the conduct of the people's business.

In order to evaluate the impact of law school admissions policies, Petitioners seek records collected and maintained by the State Bar of California regarding law school graduates who have taken the California bar exam. Petitioners do not seek any identifying information regarding examinees, and have specifically requested that the requested records be redacted and provided in a manner that protects against the disclosure of individual identities. However, Respondents have refused to provide any of the information requested by Petitioners.

Petitioners aver as follows:

PARTIES

1. Dr. Richard Sander ("Sander") is an economist and professor of law at the University of California Los Angeles. He is a leading national authority on legal education issues. He heads the team pursuing a project created to study the scale and effects of admissions preferences in higher

education ("Project SEAPHE"). On behalf of the Project SEAPHE, he asked Respondents to provide certain data regarding persons who took the Bar exam between February 1972 and July 2007. Respondents have rejected his requests. Sander is beneficially interested in Respondents' faithful performance of their legal duties under Section 3 of Article I of the California Constitution and California common law.

2. Joe Hicks ("Hicks") is a former governor of the State Bar and currently Vice President of Community Advocates, Inc., a nonprofit organization that advocates innovative approaches to human relations and race relations in Los Angeles City and County. He is also a participant in the Project SEAPHE. He requested Respondents to provide certain data regarding persons who took the Bar exam between February 1972 and July 2007. Respondents rejected his request. Hicks is beneficially interested in Respondents' faithful performance of their legal duties under Section 3 of Article I of the California Constitution and California common law.

3. The California First Amendment Coalition ("CFAC") is a nonprofit public benefit corporation organized under the laws of California. Since CFAC was established in April 1988, and at all times relevant to this petition, one of CFAC's primary purposes has been the advancement of the public's right to participate in government and to have access to information regarding the conduct of the people's business. CFAC has advanced this purpose by working to improve governmental compliance with state and federal open government laws. On behalf of the public and in order to make such information available to all interested researchers, CFAC has requested Respondents to provide certain data regarding persons who took the Bar exam between February 1972 and July 2007. Respondents rejected its requests. CFAC is beneficially interested in Respondents' faithful

performance of their legal duties under Section 3 of Article I of the California Constitution and California common law.

4. The State Bar of California ("State Bar") is a public corporation within the judicial branch of the California state government. The State Bar develops and administers the California bar exam, and oversees admission to the practice of law in California. The State Bar is a public agency of the State of California, and its records are writings of a public agency of the State of California.

5. The Board of Governors of the State Bar of California ("Board of Governors") is the governing body of the State Bar. The Board of Governors has 23 members, most of whom are lawyers elected by members of the State Bar. Six public, non-lawyer members also serve on the Board of Governors. Four are appointed by the Governor of the State of California, one is appointed by the Senate Rules Committee, and one is appointed by the Speaker of the Assembly. The twenty-third member is the President of the State Bar, who is elected by the other members of the Board of Governors. The Board of Governors is a public body and its records are writings of a public agency of the State of California. The Board of Governors is ultimately responsible for the rejection of Petitioners' requests for records.

JURISDICTION AND VENUE

6. The Court has jurisdiction of this matter under Article I, Section 3 of the California Constitution, Section 10 of Article VI of the California Constitution, rules 8.490 and 9.13 of the California Rules of Court, and California common law.

FACTS APPLICABLE TO ALL CLAIMS

Article I, Section 3 of the California Constitution, Enacted into Law by the Passage of Proposition 59

7. Proposition 59 was placed on the November 2004 ballot by the Legislature as Senate Constitutional Amendment 1, which was unanimously passed by the State Senate in June 2003 on a 34-0 vote, and by the State Assembly in January 2004 on a 78-0 vote.

8. On November 2, 2004, the voters of the state of California overwhelmingly passed Proposition 59, with 83.4% of voters voting for the proposition. A true and correct copy of relevant portions of the Statement of the Vote for the 2004 General Election as published by the California Secretary of State's Office is attached as **Exhibit 1**. The Amendment became effective the next day, November 3, 2004. (Cal. Const., art. II, § 10, subd. (a).)

9. Proposition 59 amended the California Constitution to create a constitutional right of access to "information concerning the conduct of the people's business." (Cal. Const., art. I, § 3, subd. (b).) In furtherance of this right, the amended Constitution states that "the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3 subd. (b).) The constitutional amendment and the Voter Information Guide explaining it to the electorate show that the judiciary and the State Bar are subject to this constitutional right of access. True and correct copies of the text of Proposition 59 and the ballot argument in support of it, from the Voter Information Guide published by the California Secretary of State's Office, are attached as **Exhibit 2**.

10. Article I, section 3(b) of the California Constitution is self-executing, and therefore provides an independent constitutional basis for the

relief sought by this Petition. This Petition is brought pursuant to Article I, section 3(b) of the California Constitution.

California Common Law

11. There is a recognized common law right to information held by California state and local government agencies and bodies. Such information is presumptively subject to public access. If information is not expressly exempt from disclosure by statute, and no countervailing public policy outweighs the public interest in disclosure, information held by public agencies and bodies must be made public. The State Bar is subject to this common law right of access. This Petition is also brought pursuant to the common law.

The Court's Inherent Authority

12. California courts have inherent authority over their records. This authority extends to records that are created by entities that serve as instrumentalities of the courts, including the State Bar. The Court's inherent authority over the records sought by Petitioners gives the Court discretion to make the records available, independent of any other legal basis for obtaining the records.

The Project SEAPHE

13. Project SEAPHE conducts empirical research on the effects that preferential admissions programs in higher education (including college, law school, and other graduate programs) have on their intended beneficiaries. Project SEAPHE's purpose in pursuing State Bar records—including the bar exam scores, race, law school, graduate and undergraduate grades, and LSAT scores of examinees—is to conduct empirical analyses to

test whether individuals who benefit from admissions preferences perform worse on the bar exam than they would have if they had attended a less elite law school. Another purpose for pursuing State Bar records is to complete the first stage of building a multi-state dataset that will facilitate more comprehensive and generally applicable analysis of issues related to low minority bar passage rates and the effects of law school educational strategies upon learning.

14. Since the inception of the project, the Project SEAPHE team has recognized the need to protect the privacy of students and bar examinees. It has consulted with legal and data analysis experts to ensure that the records it obtains are and will remain anonymous. It has always sought to ensure that the research it proposes to conduct will protect individual privacy.

15. Sander first approached the State Bar in 2006 to discuss the possibility of collaborating with the State Bar on research regarding the large and persistent gap in bar passage rates among racial and ethnic groups. The California Bar (as well as other states) had already verified that the exam itself was not discriminatory in design, as the racial disparity in bar outcomes disappeared when LSAT scores, college grades, and, most especially, law school grades were taken into account. The key problem is that certain ethnic groups (African-Americans and Hispanics in particular) are much more likely to receive low law school grades. Sander and others hypothesized that the disparity in law school grades is caused, or at least exacerbated, by racial preferences in law school admissions. Upper-and-middle tier law schools tend to admit students belonging to these ethnic groups whose LSAT scores and undergraduate grades are significantly lower than those of their white classmates. Because the credentials of students admitted without preferences are so similar and tightly bounded, the gaps in

entering credentials might cause what social scientists call a "mismatch effect," meaning that students with significantly lower entering credentials will get lower grades, learn less, and pass the bar exam at lower rates than they would if they attended law schools where their admissions credentials matched the rest of their class. Sander theorized that the benefit a student normally gets from attending a higher-tiered school is overcome by the negative effects of mismatch, and that these mismatch effects accompany any aggressive law school preference program, whether racially-based or tied to other types of student characteristics (*e.g.*, significant preferences for older students or students with disabilities).

16. The so-called "mismatch hypothesis" has been controversial. There has been considerable debate regarding the hypothesis in academic communities and in the press. Some studies have argued that the mismatch effect is small or even nonexistent while other studies have supported it. A common problem with all of the studies conducted to date, however, is the imperfect nature of the currently available data.

17. In order to fully test the mismatch hypothesis, a large and comprehensive data set is required. Sander determined that California was the best jurisdiction for an analysis of these racial disparities. The State Bar of California is surpassed only by New York in the number of applicants sitting for the bar annually. It has exceptionally great racial diversity among bar applicants. Furthermore, California is one of only a few states that collects detailed data on bar takers, which makes it one of the few places where a careful evaluation of the mismatch hypothesis is possible.

18. Petitioners are informed and believe that the State Bar collects and maintains individual-level records regarding those who take the California bar exam. Petitioners are informed and believe that the

information collected regarding each individual includes some or all of the following data: race, gender, undergraduate grade point average ("GPA"), Law School Admissions Test ("LSAT") score, graduating law school, matriculating law school, year of law school graduation, law school GPA, date of Bar exam, total raw and scaled Bar exam scores, raw and scaled scores for the essay portion of the Bar exam, raw and scaled scores for the performance test portion of the Bar exam, whether the individual passed the Bar exam, and raw and scaled scores for the Multi-State Bar Examination ("MBE").

19. In May of 2006, Sander met with Gayle Murphy, the State Bar's Director of Admissions ("Murphy") to discuss his interest in using records of the State Bar to conduct research regarding the impact of law school admissions policies. Murphy suggested that Sander submit a research proposal, which could be presented to the Committee of Bar Examiners (the "Committee") for consideration. Sander agreed to do so.

20. Before submitting a proposal, Sander consulted with Dr. Stephen Klein ("Klein"), a psychometrician affiliated with the RAND Corporation and a nationally-recognized scholar of bar studies, who has served as a consultant to the State Bar for many years. Klein has had access to the bar examination records collected and maintained by the State Bar, and has conducted numerous studies and prepared numerous reports based on those records over the years. Klien agreed to join Sander and the Project SEAPHE team in the proposed study.

21. In early September 2006, Sander and a team of researchers prepared a summary of their research proposal, which was submitted to Murphy. A true and correct copy of the September 2006 proposal is attached hereto as **Exhibit 3**. Murphy distributed the proposal to the Committee. At

the end of September 2006, Sander and Klein met with the Committee to discuss the proposal. The Committee voted unanimously to advance the proposal for full consideration. Doing so entailed distributing the proposal to various constituencies of the State Bar, and conducting further discussions of the proposed research.

22. In October 2006, the Committee met with representatives of several California law schools. Following that meeting, Murphy informed Sander that the law school representatives had raised a number of concerns regarding the study. Sander's team then prepared a memorandum addressing each of the concerns identified by Murphy, which was submitted to the State Bar in November 2006. A true and correct copy of the November 2006 memo is attached hereto as **Exhibit 4.**

23. Later in November 2006, Sander's team spoke to Murphy and other representatives of the State Bar regarding the research proposal. The State Bar emphasized the need to demonstrate "support" for the proposal. Sander's team asked the State Bar to delay a determination on the proposal until February, to permit it to obtain confirmation of the support for the project. The State Bar agreed to do so.

24. Sander's team sought and obtained broad-based support for its proposed research, including letters of support from the majority of the Commissioners of the United States Commission on Civil Rights; from seven leading legal empiricists at eminent institutions around the country; from Vik Amar ("Amar"), a professor of constitutional law at the University of California at Davis and Hastings College of the Law who was an early critic of the mismatch theory and who agreed to join Sander's team; and from more than two dozen other scholars, including many law professors and law school

deans. True and correct copies of these letters are attached hereto as **Exhibit 5**. The State Bar also received two letters opposing the project.

25. At its February 2007 meeting, the Committee heard testimony from members of Sander's team. Although Sander had been told that the Committee would make a decision on the proposed study at this meeting, it did not do so. Murphy subsequently informed Sander that the Committee had decided to get additional testimony from psychometric experts and others who had done research with the State Bar in the past, at the Committee's meeting in May 2007. At the May 2007 meeting, the Committee heard from four experts, including Klein. During the discussion of the proposed study, not a single criticism of the study was advanced; all of the comments on the proposed study were supportive.

26. At the May 2007 meeting, Murphy agreed to meet with members of Sander's team again in June 2007 to discuss the proposal. However, Murphy subsequently cancelled the meeting. On Wednesday, June 27, 2007, Murphy sent Sander a message informing him that the State Bar staff would recommend that the proposed study be rejected, and that the Committee would meet on June 29, 2007 to make a decision on the proposal. On the same day, Sander received by facsimile a copy of a memorandum from State Bar staff to the Subcommittee on Examinations (the "Subcommittee"), recommending that research proposal by Sander's team be rejected. A true and correct copy of the June 2007 staff memo is attached hereto as **Exhibit 6**.

27. On June 29, 2007, the Subcommittee that was dealing with the proposal voted to accept the staff recommendation and to reject the research proposal. On June 30, 2007, the Committee as a whole voted to accept the staff recommendation and reject the proposal.

28. Sander's team, now officially designated Project SEAPHE, was not informed of the Committee's decision until the end of July 2007, when it received a letter from Murphy confirming the Committee's rejection of the proposal. A true and correct copy of the July 2007 letter from Murphy is attached hereto as **Exhibit 7**.

29. After receiving the State Bar's rejection of the Project SEAPHE proposal, Amar contacted the incoming President of the Board of Governors, Jeff Bleich ("Bleich"). He asked Bleich to consider having the Board of Governors address the proposal. At its next meeting, in September 2007, the Board of Governors agreed to consider the Project SEAPHE research proposal at its November 2007 meeting.

30. From late September of 2007 until the meeting of the Board of Governors in early November 2007, the proposal was the subject of considerable media attention, including an article in the National Law Journal criticizing Sander's prior research and the proposed study. During the same period, criticisms of the proposed study were widely circulated by attorneys and interest groups opposed to the proposal, particularly to minority attorneys and law schools.

31. At its meeting on November 8, 2007, the Board of Governors addressed the Project SEAPHE proposal. Petitioners are informed and believe that prior to the admission of the public to that meeting, the Board of Governors received a briefing from State Bar staff regarding the proposal. Thereafter, representatives of the Project SEAPHE and others spoke in support of the project, and others in attendance spoke in opposition to it. The Board of Governors voted to reject the proposal.

Richard Sander's Requests Under Article I, Section 3(b) of the California Constitution and California Common Law

32. On November 16, 2007, after his attempt to collaborate with the State Bar proved unsuccessful, Sander filed a written request to inspect and receive copies of individual-level data pertaining to persons who took the State Bar exam between February 1973 and July 2007. Sander's request specified that he was not seeking identifying information regarding examinees, and included a mechanism to cluster the requested information so that it could not be used to trace the individual identities of any examinees. A true and correct copy of Sander's request is attached as **Exhibit 8**.

33. On November 26, 2007, Respondents answered Petitioner Sander's request for public records by noting that his new request was for the same information he had sought in his original proposal to conduct collaborative research with the State Bar. Respondents expressed concern over privacy issues and refused to consider Petitioner Sander's current request. However, Respondents also indicated that Sander could submit further correspondence addressing legal and privacy concerns that they had previously raised. A true and correct copy of Respondents' letter of November 26, 2007 is attached as **Exhibit 9**.

34. On November 28, 2007, Sander sent a letter and memorandum to Respondents, addressing the concerns that Respondents had raised regarding his request. The letter and memorandum detailed the legal justifications for his request for public records and explained the procedures he would use to ensure anonymity. On December 16, 2007, Petitioner Sander sent Respondents a supplemental letter outlining his understanding of the State Bar's legal obligation to comply with his request.

35. On January 4, 2008, Respondents sent a letter to Sander stating that "[s]ince both the Board of Governors and the Committee of Bar Examiners have already thoroughly considered your request, no further action is warranted." A true and correct copy of Respondent's letter denying Sander's request is attached as **Exhibit 10.**

36. On May 29, 2008, Sander sent the State Bar a new request that was significantly narrower than the prior requests and was specifically designed to eliminate any remaining privacy concerns. The new request again specified that unique identifiers such as name, social security number, birth date, and "other variables that might directly disclose an individual's identity" be redacted. It also excluded gender, added a variable related to transfer students, requested the redaction or clustering of other data to further ensure that the information would remain anonymous, and clarified the suggested procedures for protecting anonymity. A true and correct copy of Sander's new request is attached as **Exhibit 11.**

37. At all times relevant to this Petition, Sander has been ready to tender all reasonable costs incurred in the process of providing access to or copies of the aforementioned records. Sander's requests to Respondent State Bar confirmed his willingness to tender all reasonable costs incurred in complying with his requests.

Joe Hicks' Request Under Article I, Section 3(b) of the California Constitution and California Common Law

38. Hicks joined Sander's May 29, 2008 new request for State Bar records. Hicks joined the request because only legitimate research such as that being pursued by Project SEAPHE can determine whether racial or other identity-based preferences are beneficial or actually harm those they are intended to benefit. In addition, Hicks sought the records so that scholars,

researchers, government officials, and members of the public could evaluate the foundation for any interpretation of the data. At all times relevant to this Petition, Hicks has been ready to tender all reasonable costs incurred in the process of providing access to or copies of the requested records.

CFAC's Requests Under Article I, Section 3(b) of the California Constitution and California Common Law

39. On January 8, 2008, CFAC filed a written request to inspect or receive copies of the same data requested by Sander. A true and correct copy of Petitioner CFAC's request is attached as **Exhibit 12**.

40. CFAC sought the records both to facilitate the research being pursued by the Project SEAPHE, and to ensure that all interested scholars, researchers, government officials, and members of the public would have access to the information. In addition, CFAC sought the records so that scholars, researchers, government officials, and members of the public could evaluate the foundation for any interpretation of the data they contain.

41. On January 14, 2008, Respondents denied CFAC's request to inspect or receive copies of the subject records. Respondents claimed that, as an agency created under Article VI of the California Constitution, the State Bar is exempt from the requirements of the Public Records Act, and that the right to public records established in Article I, Section 3 of the California Constitution does not apply to any state agency exempted from the ambit of the Public Records Act. They asserted that the First Amendment right of access to court proceedings does not include a right of access to the requested records, although they admitted that that State Bar is "a public corporation in the judicial branch." A true and correct copy of Respondent's denial is attached as **Exhibit 13**.

42. On June 3, 2008, CFAC sent Respondents a new request, mirroring the May 29, 2008 request sent by Petitioners' Sander and Hicks. A true and correct copy of CFAC's new request is attached as **Exhibit 14.**

43. At all times relevant to this Petition, CFAC has been ready to tender all reasonable costs incurred in the process of providing access to or copies of the requested records.

Respondents' Rejection of Petitioners' Requests, in Contrast to the Prior Disclosure of Comparable Information by the State Bar and Other Agencies

44. The State Bar did not respond to Petitioners' most recent requests, so on June 11, 2008, counsel for Petitioners wrote to the State Bar, reiterating their request for records maintained by the State Bar, and asking for a response.

45. On June 12, 2008, the State Bar sent a letter to Sander and Hicks in response to their request of May 29, 2008. A true and correct copy of the June 12, 2008 letter from the State Bar is attached hereto as **Exhibit 15.** In its June 12, 2008 letter, the State Bar rejected Petitioners' request, stating that it would provide the requested information only upon being provided with an "individual waiver" signed by each affected law student, and even then would provide only "data the law student would be entitled to receive." The State Bar has thus taken the position that the requested records will not be provided in the absence of signed waiver from every law student affected by the request. However, the State Bar is aware that it is impossible for Petitioners to comply with that demand. In a letter from the State Bar to the Supreme Court dated June 5, 1992, addressing a request for records by the Law School Admission Council ("LSAC"), the State Bar stated: "[I]t is impractical, if not impossible, to contact all of the

applicants for the years 1988 through 1989 and secure their consent for this information." A true and correct copy of the State Bar's letter of June 5, 1992 is attached hereto as **Exhibit 16**. Moreover, the State Bar has indicated that even if consent were provided it would not necessarily provide all of the records requested by Petitioners, but would instead provide only that data that it believes each individual student would be entitled to receive.

46. On June 16, 2008, counsel for Respondents sent a letter asserting that Petitioners have no legal right of access to the records they request. A true and correct copy of that letter is attached hereto as **Exhibit 17.** The letter also stated that the Committee would "review the latest, revised request" and determine whether its rejection of Petitioners' prior requests "should be revisited." In subsequent communications, counsel for the State Bar stated that the Committee would take this question up at its meeting on August 22, 2008. Petitioners then sought to clarify whether the State Bar was withdrawing the rejection of Petitioners' requests. Counsel for the State Bar did not withdraw the State Bar's prior rejection of Petitioners' requests. California Rule of Court 9.13 imposes a 60-day deadline for commencing an action challenging a decision of the State Bar. Therefore, Petitioners were compelled to bring this action.

47. Respondents have not provided an answer to CFAC's request of June 3, 2008, but because that request seeks precisely the same records as those requested by Sander and Hicks, and subject to the same conditions, Respondents have effectively rejected CFAC's request as well.

48. As noted, in rejecting Petitioners' requests, the State Bar has relied primarily on concerns about the privacy of bar examinees and their lack of express consent to disclosure. However, the State Bar's rejection of

Petitioners' requests is inconsistent with its own prior disclosures of information regarding bar examinees.

49. After each semi-annual Bar exam, the State Bar releases a statistical report summarizing the outcomes of the most recent exam. The reports present passage rates by type of school and by school, with breakdowns of passage rates by race and gender, as well as information on first-time and repeat takers of the Bar exam. Petitioners are informed and believe that the information contained in these reports is disclosed without the express consent of the examinees. Copies of representative examples of these reports are attached hereto as **Exhibit 18**.

50. A principal method for ensuring the anonymity of statistical data obtained from educational records is to ensure that there is a minimum number of individuals who share any combination of characteristics or variables. Such groupings are referred to as "cells." Petitioners' requests ensure that the minimum cell size is five, thereby helping ensure that information in the redacted and statistical records they have requested cannot be linked to any individual. The reports provided by the State Bar consistently disclose information similar to that requested by Petitioners, and routinely involve cell sizes smaller than five. For example, the following chart, taken from the State Bar's report on the July 2007 Bar exam, is typical of the information provided by the State Bar:

JULY 2007 CALIFORNIA BAR EXAMINATION
NUMBER OF TAKERS AND PERCENT PASSING BY RACIAL/ETHNIC GROUP
GENERAL BAR EXAMINATION FIRST-TIME TAKERS ONLY*

	White		Black		Hispanic		Asian		Other Minority	
School Type	Took	% Pass	Took	% Pass	Took	% Pass	Took	% Pass	Took	% Pass
CA ABA Approved	2292	80.4	93	48.4	295	63.7	561	74.9	235	69.8
Out-of-State ABA	891	74.3	80	35.0	113	49.6	237	68.4	105	55.2
CA Accredited	179	36.9	16	0.0	45	26.7	28	25.0	18	27.8
CA Unaccredited	16	18.8	6	16.7	12	33.3	3	0.0	1	0.0

School Type	White		Black		Hispanic		Asian		Other Minority	
	Took	% Pass	Took	% Pass	Took	% Pass	Took	% Pass	Took	% Pass
Correspondence	48	27.1	3	33.3	4	25.0	6	66.7	2	50.0
Other	223	59.6	19	26.3	28	32.1	83	37.3	34	32.4
Total*	3649	74.5	217	36.9	497	54.3	918	68.0	395	60.5

See **Exhibit 18**. This chart shows bar passage rates by race and type of law school. For certain groups—Black and Hispanic takers from "Correspondence" schools, Asian takers from "CA Unaccredited" schools, and other minority takers from "CA Unaccredited" and "Correspondence" schools—cell sizes disclosed by the State Bar are less than five, and consist of as few as a single person.

51. In addition to giving passage rates by type of school, the Bar also reports passage rates individually for all California schools. The following chart is also taken from the State Bar's report on the February 2007 bar exam:

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION
GENERAL BAR EXAMINATION STATISTICS
CALIFORNIA ABA APPROVED LAW SCHOOLS

LAW SCHOOL	FIRST-TIMERS TOOK	FIRST-TIMERS PASS	FIRST-TIMERS %PASS	REPEATERS TOOK	REPEATERS PASS	REPEATERS %PASS
Stanford Law School	4	3	75	9	8	89
Thomas Jefferson School of Law	64	39	61	133	41	31
University of California – Berkeley	13	11	85	38	19	50
University of California - Davis	1	0	0	53	21	40
University of California – Hastings College of The Law	18	10	56	74	46	62

See **Exhibit 18**. In this example, there was only one student from the University of California, Davis who took the bar exam for the first time, and he or she failed. Similarly, only four students from Stanford University took the bar exam for the first time, and only three passed. This provides another

example of the State Bar's practice of disclosing information comparable to that requested by Petitioners, without adopting precautions that Petitioners have specifically proposed.

52. Based on a review by Sander's team, in the State Bar's last 22 bi-annual reports, there are thousands of examples of disclosures of information similar to that requested by Petitioners and involving cells smaller than the minimum cell size requirements that Petitioners have proposed be applied in providing the records they have requested.

53. Petitioners are informed and believe that in or about 1992, the State Bar sought and obtained authorization from the Supreme Court to provide information regarding law school graduates who took the California bar exam in July 1988 and February 1989 to LSAC. The information that was requested by LSAC included: pass/fail status, bar exam total score, MBE total scaled score, MBE part scores, and essay scores, as well as each applicant's name, social security number, date of birth, law school, and date of degree. See **Exhibit 16**. Counsel for the State Bar informed Petitioners that the Supreme Court authorized the State Bar to provide this information to LSAC.

54. Furthermore, in contrast to the position taken by the State Bar in this case, the Office of the President of the University of California ("UCOP") agreed in June 2008 to provide information that is more detailed than the records Petitioners have requested from the State Bar. UCOP has provided records on some 800,000 students who applied to enter the University of California system between 1992 and 2006, as well as data on nearly 400,000 students who actually enrolled. For each enrolled student, UCOP has disclosed twenty-one variables, fifteen concerning the background characteristics of the applicant and six concerning the student's outcomes in

the UC system. The records do not include identifying information regarding individuals, but do include six variables that implicate concerns about making students indirectly identifiable. UCOP and Project SEAPHE have taken measures similar to those that Petitioners asked the State Bar to take to ensure that individual privacy is protected. UCOP has determined that those measures are sufficient to ensure student privacy.

FIRST CAUSE OF ACTION

Mandate or Other Extraordinary Relief Compelling Respondents to Provide Access to the Requested Records Pursuant to Article I, Section 3 of the California Constitution and California Common Law

55. Petitioners reallege and incorporate by this reference each and every allegation contained in paragraphs 1 through 54 of this Petition as though fully set forth herein.

56. Petitioners are informed and believe, and on that basis allege that at all times relevant to this Petition Respondents stored and maintained and continue to store and maintain the requested records at the offices of the State Bar in San Francisco, California, as well as at the offices of data analyst Roger Bolus in San Diego County, California.

57. Petitioners have repeatedly requested the records that are the subject of this Petition. In doing so, Petitioners have addressed all legitimate concerns regarding disclosure of the requested records, and have carefully tailored their requests to ensure that no reasonable expectation of confidentiality or right to privacy will be compromised by compliance with their requests. Respondents have at all times refused, and continue to refuse, to provide Petitioners with access to or copies of the requested records.

58. Pursuant to Article I, Section 3(b) of the California Constitution, Respondents are required to provide access to the public

records requested by Petitioners. The right of access established by the California Constitution applies to all state agencies and bodies, including the State Bar. (See Cal. Const., art. I, § 3, subd. (b).) There is no constitutional provision, statute, or regulation that makes the requested records exempt from this right of access or prohibits their disclosure. Respondents' refusal to produce the required documents is therefore a violation of Petitioners' constitutional right of access.

59. Pursuant to California common law, Respondents are required to provide the records requested by Petitioners. There is no constitutional provision, statute, or regulation that makes the requested records exempt from this right of access or prohibits their disclosure. Because Petitioners' requests do not seek the disclosure of information in a manner that would identify or permit the identification of any individual, there is no countervailing public policy that outweighs the public interest in disclosure. Respondents' refusal to produce the required documents is a violation of California common law.

60. Section 10 of Article VI of the California Constitution provides that the Supreme Court and its judges have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. (See Cal. Const., art. VI, § 10.)

61. Therefore, pursuant to Article I, Section 3(b) and Article VI, Section 10 of the California Constitution, California common law, and rule 8.490 of the California Rules of Court, a writ of mandate or other order requiring the requested records to be made available to the Petitioners should be issued forthwith.

SECOND CAUSE OF ACTION

Review and Order Compelling Respondents to Provide Access to the Requested Records Pursuant to Article I, Section 3 of the California Constitution and California Common Law

62. Petitioners reallege and incorporate by this reference each and every allegation contained in paragraphs 1 through 61 of this Petition as though fully set forth herein.

63. Petitioners are informed and believe, and on that basis allege that Respondents stored and maintained and continue to store and maintain the requested records at the offices of the State Bar in San Francisco, California, as well as at the offices of data analyst Roger Bolus in San Diego County, California.

64. Petitioners have repeatedly requested the records that are the subject of this Petition. In doing so, Petitioners have addressed all legitimate concerns regarding disclosure of the requested records, and have carefully tailored their request to ensure that no reasonable expectation of confidentiality or right to privacy will be compromised by compliance with their request. Respondents have at all times refused, and continue to refuse, to provide Petitioners with access to or copies of the requested records.

65. Pursuant to Article I, Section 3(b) of the California Constitution, Respondent is required to provide access to the public records requested by Petitioners. The right of access established by the California Constitution applies to all state agencies and bodies, including the State Bar. (See Cal. Const., art. I, § 3, subd. (b).) There is no constitutional provision, statute, or regulation that makes the requested records exempt from this right of access or prohibits their disclosure. Respondents' refusal to produce the required documents is therefore a violation of Petitioners' constitutional right of access.

66. Pursuant to California common law, Respondents are required to provide the records requested by Petitioners. There is no constitutional provision, statute, or regulation that makes the requested records exempt from this right of access or prohibits their disclosure. Because Petitioners' requests do not seek the disclosure of information in a manner that would identify or permit the identification of any individual, there is no countervailing public policy that outweighs the public interest in disclosure. Respondents' refusal to produce the required documents is a violation of California common law.

67. Public policy favors disclosure of the records requested by Petitioners. The records will be invaluable for research on the effect of racial preferences on individuals and on group dynamics in an educational setting, which impact the admission practices of taxpayer-funded institutions of higher learning, the vitality and diversity of the California Bar, and the lives of thousands of law students.

68. Rule 9.13 of the California Rules of Court provide for a petition to the Supreme Court to review an action of the Board of Governors of the State Bar, or of any board or committee appointed by it and authorized to make a determination under the provisions of the State Bar Act, or of the chief executive officer of the State Bar or the designee of the chief executive officer authorized to make a determination under article 10 of the State Bar Act. (Cal. Rules of Court, rule 9.13.)

69. Therefore, pursuant to Article I, Section 3(b) and Article VI, Section 10 of the California Constitution, California common law, and rule 9.13 of the California Rules of Court, the Court should review and reverse the action of the State Bar rejecting Petitioners' requests for records, and order the requested records to be made available to the Petitioners forthwith.

THIRD CAUSE OF ACTION

Order Directing Respondents to Provide Access to the Requested Records Pursuant to the Court's Inherent Authority

70. Petitioners reallege and incorporate by this reference each and every allegation contained in paragraphs 1 through 69 of this Petition as though fully set forth herein.

71. Under Article VI of the California Constitution and California common law, the State Bar is an arm and instrumentality of this Court, and its records are records of this Court. This Court has inherent authority over its own records, and therefore has the authority to direct Respondents to make the requested records available to Petitioners.

72. Petitioners have demonstrated that there is a legitimate and profound public interest in disclosure of the requested records. Petitioners' requests do not seek the disclosure of information in a manner that would identify, or would permit the identification of, any individual, so there is no countervailing public policy that outweighs the public interest in disclosure. There is no constitutional provision, statute, or regulation that prohibits disclosure of the requested records.

73. Therefore, pursuant to Article VI of the California Constitution and California common law, Respondents should be ordered to make the requested records available to the Petitioners forthwith.

PRAYER

1. That a writ of mandate or other order issue under the seal of this Court, without a hearing or further notice, directing Respondents to immediately provide to Petitioners the public records they have requested (in Petitioners' request of May 29, 2008), pursuant to Article I, Section 3 of the California Constitution and California common law, or that an alternative

writ of mandate or order to show cause issue under the seal of this Court, directing Respondents to show cause at a time and date to be established by the Court why they should not provide the requested records, and that thereafter the Court order Respondents to provide to Petitioners the public records they have requested;

2. That the Court issue an order awarding Petitioners their costs and reasonable attorneys' fees incurred in bringing this action, pursuant to Code of Civil Procedure sections 1021.5, 1032, 1033.5, and any other applicable law, in addition to any other relief granted; and

3. That the Court award such other and further relief as is just and proper.

Dated: August ___, 2008

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By_____
JAMES M. CHADWICK
GUYLYN R. CUMMINS
EVGENIA N. FKIARAS
Attorneys for Petitioners

VERIFICATION

I, Richard Sander, am one of the individual petitioners in the above-entitled proceeding. I have read the foregoing Petition and know the contents thereof. They are true of my own knowledge, except as to those matters which are stated on information and belief, and, as to those matters, I believe them to be true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August ___, 2008

By _____

RICHARD SANDER

VERIFICATION

I, Joe Hicks, am one of the individual petitioners in the above-entitled proceeding. I have read the foregoing Petition and know the contents thereof. As to the portions addressing the request for documents by myself and the response of the State Bar, they are true of my own knowledge, except as to those matters which are stated on information and belief, and, as to those matters, I believe them to be true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August ___, 2008

By _____

JOE HICKS

VERIFICATION

I, Peter Scheer, am Executive Director of Petitioner California First Amendment Coalition ("CFAC") in this proceeding. I have read the foregoing Petition and know the contents thereof. As to the portions addressing the request for documents by CFAC and the response of the State Bar, they are true of my own knowledge, except as to those matters which are stated on information and belief, and, as to those matters, I believe them to be true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August ___, 2008

By _____

PETER SCHEER

POINTS AND AUTHORITIES IN SUPPORT OF PETITION

I. THE CALIFORNIA STATE BAR IS A PUBLIC AGENCY AND AN ARM OF THE CALIFORNIA JUDICIARY

The State Bar of California ("State Bar") is a corporation created under the judicial article of the California Constitution. (Cal. Const., art. VI, § 9; *In re Rose* (2000) 22 Cal.4th 430, 438.) It is a governmental association of members of the legal profession, the primary purpose of which is to regulate its profession and strive for the improvement of the administration of justice. (Bus. & Prof. Code § 6031, subd. (a); *Keller v. State Bar* (1990) 496 U.S. 1, 11; *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557 (*Saleeby*).)

Under California law, the State Bar is a public agency. (*Keller v. State Bar* (1989) 47 Cal.3d 1152, 1167 (*Keller I*); *Smith v. California State Bar* (1989) 212 Cal.App.3d 971, 975 (*Smith*).) Its agents are public officials. (*Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548, 563 (*Chronicle Publishing*); *Smith, supra,* 212 Cal.App.3d at p. 975.)

As a judicial agency, the State Bar acts as an arm of the Supreme Court, which has ultimate authority over attorney admission and discipline. The State Bar exercises a "judicial function," particularly in matters of attorney status. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 599 (*In re Attorney Discipline*); see *Canatella v. California* (9th Cir. 2002) 304 F.3d 843, 850-852.) In matters of admission and discipline, the State Bar acts as an advisor to the Supreme Court. (Bus. & Prof. Code §§ 6064, 6075, 6078; *In re Rose*, *supra*, 22 Cal.4th at p. 439; *Saleeby*, *supra,* 39 Cal.3d at p. 557-558; *Smith*, *supra*, 212 Cal.App.3d at p. 978.) The Court, nevertheless, retains ultimate authority over matters of attorney admission and discipline. (Bus. & Prof. Code §§ 6064, 6076, 6100; *Saleeby*, *supra,* 39 Cal.3d at p. 557.) Thus, the State Bar is an extension of the Supreme Court. (See, e.g., *In*

re Attorney Discipline, supra, 19 Cal.4th at p. 600 [in the areas of admissions and discipline "the bar's role has consistently been articulated as that of an administrative assistant to or adjunct of this court . . . ."]; *Saleeby, supra,* 39 Cal.3d at p. 557 [same]; *Jacobs v. State Bar* (1977) 20 Cal. 3d 191, 196 [the State Bar is "the court's administrative arm" in disciplinary matters].)

Although the status of the State Bar is typically addressed in the context of attorney admission and discipline, the Supreme Court has recognized more generally that "***the power to regulate the practice of law***, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts." (*In re Attorney Discipline*, *supra*, 19 Cal.4th at p. 592, emphasis added and citation omitted; see also *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300, emphasis added ["[i]n disciplinary matters (***and in many of its other functions***)" the State Bar functions as "an arm of this court"].) In other words, the State Bar's role as an arm of the Supreme Court is not limited to admission and disciplinary matters.

The State Bar itself emphasizes its status as an instrumentality of the Supreme Court. (*The State Bar of California: What Does it Do? How Does it Work?* ["[T]he State Bar is a public corporation within the judicial branch of government, serving as an arm of the California Supreme Court."];[1] Petition,

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[1] *The State Bar of California: What Does it Do? How Does it Work?* is a publication of the State Bar, available on the State Bar website at the following Internet address:

http://www.calbar.ca.gov/calbar/pdfs/whowhat1.pdf.

Pursuant to Evidence Code sections 452, subdivision (c), and 453, Petitioners request that the Court take judicial notice of this publication.

Ex. 13 [Letter from Richard J. Zanassi, Chief Assistant General Counsel, State Bar of California, to Peter F. Scheer, Executive Director, First Amendment Coalition, dated Jan. 14, 2008, referring to the State Bar as a "judicial branch agenc[y]"].).

In any event, Petitioners' request is for data gathered in and pertaining to the admissions process. In discharging its duties in matters relating to the admissions process, the State Bar acts as an arm of the Supreme Court and as a part of the judicial branch of California government.

II. THE CALIFORNIA SUPREME COURT HAS AUTHORITY TO CONSIDER THE PETITION AND TO DETERMINE WHETHER THE REQUESTED RECORDS SHOULD BE MADE PUBLIC

A. The Supreme Court Has Exclusive Jurisdiction Over Matters Implicating Its Inherent Powers

The question of whether this action is appropriately brought in the Supreme Court depends upon whether the State Bar's determination of Petitioner's request for records falls within the Supreme Court's inherent authority. When an administrative action of the State Bar implicates the Court's inherent powers, the Court has original and exclusive jurisdiction over review of that action. (See *Saleeby, supra,* 39 Cal.3d at p. 559; *Smith, supra,* 212 Cal.App.3d at pp. 977-978.)

When a matter involves the State Bar's administrative role in attorney admissions and discipline, the action is properly commenced in the Supreme Court because of the Court's ultimate authority in these matters. (*Saleeby, supra,* 39 Cal.3d at p. 559.) Matters that should commence in the Supreme Court include those incidental to the admissions process or an admission decision. (*Smith, supra,* 212 Cal.App.3d at p. 978 [admission fee challenges]; see also Cal. Rules of Court, rule 9.13(d) [the Supreme Court

has jurisdiction to review actions of the Board of Governors of the State Bar or any committee appointed by it].)

Petitioners concede that it is not clear whether their request for access to records of the State Bar falls within the inherent authority of the Supreme Court.[2] However, the authority cited above suggests that a petition seeking access to State Bar records gathered during the admissions process may fall within the Supreme Court's exclusive jurisdiction. The State Bar takes the position that the Supreme Court has exclusive jurisdiction over proceedings seeking access to its records. Under the California Rules of Court, rule 9.13(d), an action must be brought within 60 days, and failure to do so might be deemed to preclude an action by Petitioners challenging the State Bar's refusal to provide the requested records.

Petitioners therefore submit that the Supreme Court has exclusive jurisdiction over the Petition. Petitioners request that the Court hear and resolve the issues presented by the Petition, or at a minimum resolve the question of whether this action is appropriately brought in the first instance in this Court or in the Superior Court.

B. The Supreme Court Has Original Jurisdiction Over the Petition

Original jurisdiction in this Court is proper because the Supreme Court may exercise original jurisdiction in cases seeking mandamus, prohibition, certiorari, or other extraordinary relief. (Cal. Const., art. VI, § 10; *Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 750 (*Wenke*); *Mooney v. Pickett* (1971)

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[2] See *Saleeby*, *supra*, 39 Cal.3d at p. 575 (decisions of the State Bar regarding entitlement to payment from the Client Security Fund administered by the State Bar were subject to review by mandamus in the Superior Courts because such decisions are not an integral part of the Supreme Court's regulatory jurisdiction over the State Bar).

4 Cal.3d 669, 674-675.) Even if the petition could have been made in a lower court, this Court should exercise its jurisdiction because of the importance of citizens' involvement in government processes and the unresolved constitutional questions presented by the Petition. (See *Wenke, supra,* 6 Cal.3d at p. 750 [method of conducting elections]; *Aden v. Younger* (1976) 57 Cal.App.3d 662, 670 [constitutional question].)

C. Review by the Supreme Court is Mandatory

Assuming the Supreme Court has original and exclusive jurisdiction over decisions of the State Bar rejecting requests for access to records pertaining to the admissions process, then it does not have the discretion to deny review of petitions challenging those decisions. If the Court fails to address the merits of the Petition, it would deny Petitioners any meaningful opportunity to be heard, in violation of their due process rights under the California and United States constitutions.

The basic precepts of due process pursuant to the federal and state constitutions demand that, at a minimum, an interested party be afforded a meaningful opportunity to be heard. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7; *Saleeby, supra,* 39 Cal.3d at p. 565 ["The opportunity to be heard is 'a fundamental requirement of due process.' [Citation.]"]; *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1072 (*Ryan*); *People v. Swink* (1984) 150 Cal.App.3d 1076, 1079-1080.) While a formal hearing, with full rights of confrontation and cross-examination, is not necessarily required, a "reasonable" opportunity to be heard must be provided. (*Saleeby, supra,* 39 Cal.3d at p. 565).

"It is settled that the guaranty of due process extends to rights created under the Constitution or state law." (*People v. Sutton* (1993) 19 Cal.App.4th 795, 804) The right of access to government records is created

under state law, so the denial of such access triggers the right to procedural due process. (See *Ibid.*)[3]

The State Bar rules pertaining to records do not apparently encompass the requested records, and provide for no hearing in any event. (Rules of the State Bar, rule 6.54; Rules Governing Open Meetings, Closed Sessions and Records of Regulatory and Special Committees, §§ 5, 8, 10.)[4] The State Bar did not provide any meaningful hearing on the requests at issue. The Committee of Bar Examiners considered the original request by Sander's team to collaborate with the State Bar on research at regular committee meetings. However, the requests for public access to records of the State Bar that are the subject of this Petition were rejected out of hand, without a hearing of any kind. (Petition, ¶¶ 45, 47.) Where, as here, the State Bar is not required to provide an opportunity to respond and to "raise objections to

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[3] To trigger the right to federal due process, a person must have a property or liberty interest, defined as "a legally enforceable right to receive a government benefit." (*Schultz v. Regents of the U. of California* (1984) 160 Cal.App.3d 768, 775.) California due process does not require the claimant to establish a protected property or liberty interest; rather, the analysis begins with "an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake." (*Ryan, supra,* 94 Cal.App.4th at p. 1069.) Thus, procedural due process under the California Constitution protects a broader range of interests than the federal Constitution. (*San Jose Police Officers Assn. v. City of San Jose* (1988) 199 Cal.App.3d 1471, 1478.)

[4] The rules of the State Bar are available on the State Bar's website at the following Internet address:

http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=14051&id=33566

Pursuant to Evidence Code sections 452, subdivision (c), and 453, Petitioners request that the Court take judicial notice of these publications.

the particular action the bar desires to take," due process is not satisfied. (*Saleeby*, *supra*, 39 Cal.3d at p. 566).[5]

Therefore, if the Supreme Court has exclusive jurisdiction, the Petition represents the only meaningful opportunity for Petitioners to be heard with respect to their right of access to records of the State Bar. Denial of the petition without consideration of its merits, on the basis that review is discretionary, would thus constitute a denial of due process.

III. PETITIONERS HAVE A RIGHT OF ACCESS TO THE RECORDS OF THE STATE BAR THEY HAVE REQUESTED

A. Petitioners Have a Right of Access to Records of the State Bar under Article I, section 3(b) of the California Constitution

Proposition 59 was placed on the ballot by unanimous votes of both houses of the California Legislature, and passed in November 2004 by more than 83 percent of California voters. (Petition, ¶¶ 7-8.) It amended the California Constitution to add Article I, section 3(b), which provides in part as follows: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies

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[5] Even if the meetings at which the earlier, collaborative proposal was discussed could somehow be deemed to be a hearing on Project SEAPHE's later requests for public access to State Bar records, non-adversarial meetings of the Committee of Bar Examiners without any resolution of contested issues do not provide an opportunity to be heard that is sufficiently meaningful to satisfy the requirements of due process. (See *Vann v. Shilleh* (1975) 54 Cal.App.3d 192, 199-200 [the right to a hearing includes, at a minimum, the right to appear with counsel in an adversarial proceeding]; *Estate of Buchman* (1954) 123 Cal.App.2d 546, 560 [when due process requires a hearing, the hearing must be a fair one, a contested proceeding where evidence from both sides is considered and a determination of the law and facts is made].)

and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1) ("Proposition 59").)

Like other constitutional provisions, Proposition 59 is self-executing and therefore provides the basis for an action for declaratory and injunctive relief. (*Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300, 306-307 (*Katzberg*); *Degrassi v. Cook* (2002) 29 Cal.4th 333, 338 (*Degrassi*).) The claim for declaratory and injunctive relief provided by Proposition 59 exists independent of any effectuating legislation. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1045; *Katzberg*, *supra*, 29 Cal.4th at p. 307.) The constitutional mandates and prohibitions established by Proposition 59 apply to all branches of the California government, and all branches of government are required to comply with its terms. (*Katzberg*, *supra*, 29 Cal.4th at pp. 306-307; *Degrassi*, *supra*, 29 Cal.4th at p. 338.) Thus, like the right of access to records of the judiciary recognized under the free speech guarantee of the California Constitution, the mandate of public access to "the writings of public officials and agencies" applies regardless of the fact that records of the judicial branch are not subject to a statutory right of access under the California Public Records Act ("CPRA"). (See *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 111 (*Copley I*) [Article I, section 2 of the California Constitution provides a right of access to records of the judiciary, even though the CPRA does not.].)

By its own terms, Proposition 59 plainly applies to the California judiciary, including the State Bar. Proposition 59 creates a mandate of public access to "information concerning the conduct of the people's business" including "the writings of public officials and agencies." (Cal. Const., art. I, § 3, subd. (b)(1).) Because it "furthers the people's right of access,"

Proposition 59's mandate of public access to the records of public officials and agencies must be construed broadly. (Cal. Const., art. I, § 3, subd. (b)(2).) As discussed above, the State Bar is a public agency and its officials are public officials. (*Keller I, supra,* 47 Cal.3d at p. 1167; *Chronicle Publishing, supra,* 54 Cal.2d at p. 563; *Smith, supra,* 212 Cal.App.3d at p. 975.) Respondents cannot and do not contend that the records requested by Petitioners are not "writings" as that term is used in Proposition 59.

Nonetheless, Respondents contend that they are not subject to Proposition 59, or any other common law or statutory right of access. (Petition, ¶¶ 45-47.) Respondents rely upon the "savings clause" of Proposition 59, which provides that it "does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision . . . ." (Cal. Const., art. I, § 3, subd. (b)(5).) Respondents contend that the definition of what constitutes a "state agency" under the CPRA (Gov. Code § 6252, subd. (f)) is a "statutory exception to the right of access to public records" under Proposition 59. They claim that because the CPRA does not apply to the California judiciary, neither does Proposition 59. They are wrong.

First, the language and structure of Proposition 59 demonstrate that it applies to the judiciary, including the State Bar. Proposition 59 expressly governs the construction of any "statute, ***court rule***, or other authority." (Cal. Const., art. I, § 3, subd. (b)(2), emphasis added.) Similarly, it imposes specific requirements for the adoption of any new "statute, ***court rule***, or

other authority." (*Ibid.*, emphasis added.)[6] It further provides that it does not affect the construction of any "statute, ***court rule***, or other authority" that protects the constitutional right of privacy. (Cal. Const., art. I, § 3, subd. (b)(3), emphasis added.)[7]

Court rules are the province of the judicial branch. (Cal. Const., art. VI, § 6, subd. (d); *Barton v. State Bar* (1930) 209 Cal. 677, 680-681.) Proposition 59 explicitly applies to court rules, and hence to the judiciary. Furthermore, if the mandate of public access in Proposition 59 did not apply to the judiciary, it would not have been necessary to provide that Proposition 59 does not affect the construction of court rules that protect the constitutional right of privacy. "Significance should be given, if possible, to every word of an act. Conversely, a construction that renders a word surplusage should be avoided." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799 [construing California Constitution].) If Proposition 59 did not apply to the judiciary, these references to court rules would be meaningless.

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[6] Subdivision (b)(2) of Proposition 59 states in full as follows: "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (Cal. Const., art. I, § 3, subd. (b)(2).)

[7] Subdivision (b)(3) of Proposition 59 states in full as follows: "Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer." (Cal. Const., art. I, § 3, subd. (b)(3).)

In addition, Proposition 59 expressly preserves certain protections for proceedings and records of the Legislature.[8] However, the same provision of the CPRA upon which Respondents rely also provides that the California Legislature is not a "state agency," and hence is not subject to the CPRA. (Gov. Code § 6252, subd. (f).) If the application of the CPRA controlled the application of Proposition 59, it would not apply to the Legislature either, and the entire subdivision of Proposition 59 pertaining to the Legislature would be meaningless surplusage.

Had the Legislature or the voters intended to exclude entire branches of the government from the application of Proposition 59, they would have done so through means less obscure than the tacit incorporation of a limitation in a statutory definition not expressly referred to in Proposition 59 itself. Every California statutory scheme governing access to meetings and records expressly limits its application to certain parts of the government. (See Gov. Code §§ 6252 [CPRA], 54951-54952 [Brown Act], 11121.1 [Bagley-Keene Act], 9070-9080 [Legislative Open Records Act], and 9027-9029 [Grunsky-Burton Open Meeting Act].) Proposition 59 does not. In light of the well-established rule that constitutional provisions that are not expressly limited apply to all branches of the California government (see *Katzberg*, *supra,* 29 Cal.4th at p. 307; *Degrassi*, *supra,* 29 Cal.4th at p. 338),

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[8] Subdivision (b)(6) of Proposition 59 states as follows: "Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses." (Cal. Const., art. I, § 3, subd. (b)(6).)

the absence of any express limitation on the scope of Proposition 59 conclusively demonstrates that it is not so limited.

Second, the reading of Proposition 59 that is compelled by its plain language and structure is also supported by the evidence of its intent. The intent that determines the construction of a ballot initiative is the intent of the voters who approved it. (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 16 (1994) (*Hill*) [a constitutional amendment "is to be interpreted and applied in a manner consistent with the probable intent of the body enacting it: the voters of the State of California"].) Extrinsic aids that were before the voters, such as analyses and arguments contained in official ballot pamphlets, may be used to ascertain voters' intent. (*People v. Rizo* (2000) 22 Cal.4th 681, 685; *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 560.)

The official Voter Information Guide for the November 2, 2004 general election demonstrates the unmistakable intent of the voters in approving Proposition 59. (Petition, Ex. 2 ("Guide.") The ballot measure summary in the Guide states in part as follows: "A YES vote on this measure means: Californians would have a constitutional right of access to government information. A government entity would have to demonstrate to a somewhat greater extent why information requested by the public should be kept private." (Petition, Ex. 2, p. 3.) The summary of the argument in favor of Proposition 59 expressly states that under Proposition 59 "California's government—all three branches, statewide and local—should be as transparent as possible to the public it asks for funding, power, and trust. But too often officials and judges choose secrecy over disclosure. Proposition 59 would make transparency a constitutional duty owed to the people, to whom officials are accountable." (Petition, Ex. 2, p. 3.) The same broad

application is evident in the Analysis of the Legislative Analyst and the arguments in favor of Proposition 59. (Petition, Ex. 2, pp. 12-15.) Thus, voters were informed that Proposition 59 applied to every government entity, and would reach all three branches of government. In adopting Proposition 59, voters clearly manifested an intent to establish a right of access applicable to the entire government, including Respondents.

It is not surprising, therefore, that the only courts that have addressed the issue have recognized the application of Proposition 59 to the judiciary. In *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, the court addressed the sealing of court records, and expressly held that "[w]ith the passage of Proposition 59 . . . the people's right of access to information in public settings now has state constitutional stature . . . ." (*Id.* at p. 597.) Moreover, the court expressly applied the mandatory construction rules imposed by Proposition 59 to the Rules of Court governing the sealing of court records. (*Id.* at p. 600.) In *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 657, the court assumed that Proposition 59 was applicable to grand jury transcripts, finding that the statutory standard for sealing such transcripts was an exception to the constitutional right of access under subdivision (b)(5). Other decisions have touched on Proposition 59, but have not addressed its application to the judicial branch. Thus, the only pertinent judicial authority provides that Proposition 59 is applicable to the judicial branch.

Respondents are not above the law. Proposition 59 applies to them, as it does to all other government agencies and officials. It creates a self-executing right of access to the records of the State Bar, and therefore provides a basis for the relief sought by this Petition. Because the records sought by Petitioners are subject to the right of access established by

Proposition 59, and there is no legal justification for denying public access to those records in the manner requested, the Petition should be granted and Respondents should be ordered to make the records available.

B. Petitioners Have a Right of Access to the Requested Records of the State Bar Under California Common Law

As set forth in Section I, *supra*, the State Bar administers the attorney admissions process as an arm or instrumentality of the Supreme Court. The State Bar apparently concedes that its records are records of the Supreme Court and subject to its control. (See Petition, Ex. 16.) The common law right of access broadly attaches to judicial records. It also attaches to other government records that relate to functions of public interest. Under both rationales, public access should be afforded to the records sought here.

1. Common Law Access Rights Apply to Court and Other Government Records that Relate to Functions of Public Interest

The records sought by Petitioners are Supreme Court records relating to the impact of law school admissions policies on the diversity, qualifications and success of people seeking admission to the practice of law in California—matters of widespread public concern. Such records are subject to a common law right of public access. (See, e.g., *Copley I*, *supra*, 6 Cal.App.4th 106; *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258 (*Pantos*).)

In *Copley I*, the Court of Appeal ruled that informal notes prepared by court clerks as a precursor to creating the formal minutes of the court ("rough minutes") were public records to which common law public access rights attach. (*Copley I*, *supra*, 6 Cal.App.4th at p. 115.) In first noting the CPRA would clearly reach the rough minutes as "writing[s] containing information relating to the conduct of the public's business" if the CPRA applied to the

court system (which it does not), the Court emphasized that the absence of any "specific statutory requirement for access to court documents does not, of course, permit exclusion of the public from same." (*Id*. at p. 111.) Relying on the leading California case regarding the common law right of access to records of the judiciary, *Estate of Hearst* (1977) 67 Cal.App.3d 777, the Court noted the well-established rule that "court records are public records open to inspection," and found the rough minutes were created by court clerks for the court's use in effecting its judicial work and were the only accurate description of the continuous chronology of each court's daily activities. (*Copley I, supra,* 6 Cal.App.4th at pp. 112-113, 115, citing *Estate of Hearst*, 67 Cal.App.3d at p. 782.) Accordingly, the common law required that public access be afforded to these important records.

In so ruling, the Court underscored that even non-adjudicatory, factual records may contain information "in which the public and press have a justifiable interest." (*Copley I, supra,* 6 Cal.App.4th at p. 113-115.) The ruling reinforces the principle that access rights apply to court records even if they are ministerial, preliminary, not filed with a court, and unofficial, so long as they are created as part of a court function of interest to the public (subject only to redaction for compelling reasons, such as privilege, information identifying a confidential informant, etc.). (*Ibid*.) Recognizing the "ministerial" role of the court's clerk in creating the rough minutes, the Court applied the traditional rule that even incidental records held by public officials or employees who do not speak for the governmental body may be of interest to the public, and therefore subject to public access. (*Id.* at p. 115; *Recorder v. Commission on Judicial Performance* (1999) 72 Cal.App.4th 258, 281, fn. 23, citing *Copley I, supra*, 6 Cal.App.4th at p. 114 ["Only [a court's opinion] 'speaks for' and constitutes the official 'action' of the

adjudicatory body."].) The Court confirmed that "[w]hile the courts have an inherent right to control their own records, preclusion from public inspection should be permitted only upon a showing that revelation would 'tend to undermine individual security, personal liberty, or private property, or . . . injure the public or the public good.'" (*Copley I*, *supra,* 6 Cal.App.4th at p. 112, citing *Estate of Hearst*, 67 Cal.App.3d at p. 783.)[9]

Likewise, in *Pantos,* the Court applied common law access principles to allow public disclosure of the master qualified jury list and panels from the jury commissioner. (*Pantos, supra,* 151 Cal.App.3d at pp. 262-263.) In so ruling, the Court found the commissioner is an executive officer appointed by the Superior Court, is part of the judicial system, and the "master list of qualified jurors has the status of a judicial record, available to the public in general." (*Ibid*.) The Court underscored:

> There are no exemptions and no compelling reasons for nondisclosure. . . . The law favors maximum public access to judicial proceedings and court records. Judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons.

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[9] The Court distinguished the rough minutes from a "judicial record," defined in Code of Civil Procedure section 1904 as "the record or official entry of the proceedings in a Court of justice, or of the official act of a judicial officer, in an action or special proceeding[,]" but nonetheless found the common law right of access attaches to non-adjudicatory, administrative court records of such as rough minutes. (*Copley I*, *supra*, 6 Cal.App.4th at pp. 113-115.) Moreover, such records are subject to the common law right of access even though the Public Records Act does not apply to the judiciary. (*Estate of Hearst*, *supra*, 67 Cal.App.3d at pp. 782-784.)

(*Ibid*.; accord, *Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 374 (*Copley II*).) Thus, under California common law there is a right of access to records created and maintained by agents or instrumentalities of the judiciary, even when those records do not directly relate to adjudicatory operations of the courts.

California courts have consistently recognized and applied this common law right of access. The Court has long recognized that "it is a first principle that the people have the right to know what is done in their courts." (*In re Matter of Shortridge* (1893) 99 Cal. 526, 530.) In other words:

> [C]ourt records are public records, available to the public in general, including news reporters, unless a specific exception makes specific records nonpublic. . . . To prevent secrecy in public affairs public policy makes public records and documents available for public inspection . . . . [T]raditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals.

(*Estate of Hearst, supra*, 67 Cal.App.3d at pp. 782-784.) Thus, "[a]bsent strong countervailing reasons, the public has a legitimate interest and right of general access to court records. . . ." (*Id.* at p. 784.)

The California courts have also applied the common law right of access to non-judicial entities and records, at least if the records implicate matters of public interest and were generated as part of the public's business at public expense. (See, e.g., *Mushet v. Dept. of Public Service* (1917) 35 Cal. App. 630, 636 [recognizing a right of access to important data concerning a city's municipal electric system even though a statutory right of public access did not exist]; *Coldwell v. Bd. of Public Works* (1921) 187 Cal. 510, 520-521 [construing California law as providing a right of public access to records created by public employees at public expense, even in the absence

of any requiring the creation or retention of such records]; *Craemer v. Superior Court* (1968), 265 Cal.App.2d 216, 220, fn. 3 [noting the common law right of an interested citizen to inspect public writings].) Other state courts are in accord. (See, e.g., *Higg-a-Rella, Inc. v. County of Essex* (1995) 141 N.J. 35, 46 ["any 'records' made by public officers in the exercise of public functions" should be subject to the right of access, including "almost every document recorded, generated, or produced by public officials whether or not 'required by law to be made, maintained or kept on file.'"]; *Fox v. Bock* (1989) 149 Wis.2d 403, 411 ["It is the [common law rule] that public records include not only papers specifically required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or customary method of discharging the duties of the office."].)

In particular, common law access principles have been applied to records of agencies within the judiciary performing non-adjudicatory tasks, such as the State Bar. (See, e.g., *Washington Legal Foundation v. United States Sentencing Com.* (D.C. Cir. 1996) 89 F.3d 897, 903 [recognizing a common law right of access to records held by the United States Sentencing Commission, and noting the United States Sentencing Commission is "within the judicial branch but is not a court"]; *County of Placer v. Superior Court* (2005) 130 Cal.App.4th 807, 814 (*County of Placer*) [relying in part on the common law right of access in upholding access to a probation department file where the department was acting as "an arm of the court."].)

The common law right of access has been held to apply to records of the State Bar itself. In *Mack v. State Bar* (2001) 92 Cal.App.4th 957, an attorney who had been the subject of a private reproval sued the State Bar to prevent it from making the record of his discipline available on the Internet.

In affirming the dismissal of the attorney's claims, the Court of Appeal recognized that the records of the State Bar are not subject to disclosure under the CPRA, but are nonetheless subject to a right of public access: "Even if we were to treat State Bar disciplinary records as ordinary court records, both decisional law and state and federal constitutional principles have established a powerful public right of access to those records." (*Id.* at p. 963, citing *Copley I, supra*, 6 Cal.App.4th at pp. 111-112.)

The Court need not determine the outer boundaries of the common law right of access under California law. It is clear that it encompasses agencies and instrumentalities of the judicial branch, even when they are not performing any adjudicatory function and their records do not directly relate to any such function. Thus, it embraces the State Bar and the records sought by Petitioners.

2. The Anonymous, Statistical Records Sought by Petitioners Are Valuable to the Public and There Is No Justification for Secrecy

The State Bar records sought by Petitioners were compiled in the conduct of important public business at public expense and therefore are court records to which the common law presumption of public access applies. The public's interest in these records is manifest: applicants' history and its effect on their bar passage implicate the efficacy of admission practices of taxpayer-funded institutions of higher learning and the constitution of the California bar. Therefore, the requested records implicate the public interest no less than records regarding a public improvement or a judicial proceeding.

The fact that the State Bar is within the judiciary but is not a court does not place it beyond the reaches of the common law right of access. The State Bar facilitates the operations of the Supreme Court in much the same way as a commissioner or court clerk. (See *In re Rose, supra*, 22 Cal. 4th at

p. 448 [analogizing the role of court commissioners with the State Bar].) All of them are "assistant[s]" of the court. (*In re Attorney Discipline*, *supra*, 19 Cal. 4th at p. 600 [the State Bar is an "assistant" to the Supreme Court]; *Peoples Ditch Co. v. Foothill Irrigation Dist.* (1932) 123 Cal.App. 257, 261 [a clerk is an "assistant" to the court].) Ultimately, the records of the State Bar are the records of this Court, and like other judicial records they are subject to the common law right of access. Therefore, only a compelling countervailing interest can justify nondisclosure of the requested records. (*Copley II*, *supra*, 63 Cal.App.4th at p. 374; *Pantos*, *supra*, 151 Cal.App.3d at pp. 262-263; *Estate of Hearst*, *supra*, 67 Cal.App.3d at p.785, fn. 3.) The State Bar has not established and cannot establish such an interest.

Individual privacy, the only countervailing interest clearly identified by the State Bar, is not at risk given the protections for anonymity incorporated into Petitioners' requests. As explained below (*infra*, Section V), the redactions and procedures proposed by Petitioners will prevent any meaningful risk that the identities of individual examinees can be traced, and thereby ensure compliance with state and federal law. Indeed, the protections for individual privacy afforded by Petitioners' requests are greater than those applied by the State Bar itself in making public statistical information obtained from the same records. Therefore, there is no countervailing interest opposed to the profound public interest in disclosure, and the State Bar has a common law obligation to honor Petitioners' requests.

IV. THE SUPREME COURT'S INHERENT AUTHORITY OVER ITS RECORDS GIVES IT THE POWER TO REQUIRE DISCLOSURE OF THE REQUESTED RECORDS

Irrespective of whether the California Constitution or common law entitle Petitioners to obtain the requested records, the Court may grant

Petitioners access. Courts have inherent power over their records. (*Halpern v. Superior Court* (1923) 190 Cal. 384, 387; *Estate of Hearst*, *supra*, 67 Cal.App.3d at p. 783.) This means that the Court has the discretion to order disclosure of court records even when such records were not generated in a court proceeding. (See *County of Placer*, *supra*, 130 Cal.App.4th at p. 814 [affirming access to a probation file maintained by the Placer County Probation Department].) As records created by a judicial branch agency functioning as an arm of the Court, the records of the State Bar are within the Court's purview and subject to access at its discretion. (*Ibid.*; see also, *supra*, Sections I, III.)

The Court has previously exercised this discretion in directing the State Bar to provide records to an external entity seeking them for the purposes of educational research. (Petition, ¶ 53.) It did so even though the records provided apparently included unique personal identifiers regarding law school graduates who had taken the California bar exam. In the present case, no such information is sought or will be disclosed. Thus, the exercise of the Court's discretion to make the requested records available is appropriate, regardless of whether there is any other basis for disclosure.

V. DISCLOSURE OF THE REQUESTED RECORDS DOES NOT VIOLATE FEDERAL OR STATE PRIVACY PROTECTIONS

The only justification that the State Bar has offered for refusing to provide the records requested by Petitioners is the concern that disclosure of the records would violate the privacy of bar examinees. There are two potential sources of legal privacy protections that bear on Respondents' ability to provide the requested records. First, the Family Educational Rights and Privacy Act ("FERPA") conditions federal funding to educational agencies and institutions on their compliance with federal requirements for

protecting the privacy of student records. (20 U.S.C. § 1232g, subd. (b)(1).)[10] Second, the California Constitution protects personal privacy. (Cal. Const., art. I, § 1.)[11] Disclosure in accordance with Petitioners' requests would be entirely consistent with these protections, and would not violate federal or state law.

A. Disclosure of the Requested Records Is Permitted by FERPA

FERPA strikes a balance between the important public policy and academic interests served by educational research on one hand and the legitimate privacy rights of students on the other. As noted by the Family Policy Compliance Office of the United States Department of Education ("FPCO"), the agency charged with administering FERPA:

> In addition to FERPA, Congress has also recognized that scientifically valid educational research . . . can provide parents, educators, students, researchers, policymakers, and the general public with reliable information about educational practices that improve academic achievement. Such research can also provide important information about the effectiveness of Federal and other education programs.

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[10] FERPA provides, in pertinent part, as follows: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization . . . ." (20 U.S.C. § 1232g, subd. (b)(1).)

[11] California statutory law imposes no constraints on the disclosure of educational records beyond those imposed by FERPA. Current statutory law is limited to student records retained by community colleges, and was explicitly drafted to be consistent with FERPA. (Educ. Code §§ 76210, 76200.)

(*FPCO Guidance Letter to Tennessee Department of Education re: Disclosure of Anonymous Data Under FERPA*, dated Nov. 18, 2004.)[12]

FERPA does not directly prohibit the disclosure of educational records. Rather, it may result in depriving educational agencies or institutions of funds if educational records containing personally identifiable information are disclosed without consent. (20 U.S.C. § 1232g, subd. (b)(1).) Under federal regulations, educational institutions are required to ensure that other entities to which they provide educational records also do not disclose them in violation of FERPA. (34 C.F.R. § 99.33.) However, given the important role that federal funding plays in higher education, avoiding the loss of such funding may justify the nondisclosure of educational records. Assuming, *arguendo*, that it does, concerns about loss of funding do not justify nondisclosure in this case, because disclosure of the requested records in the manner proposed by Petitioners would not violate FERPA.

FERPA does not prohibit the disclosure of all information contained in an educational record. Rather, as explained in a decision of the Wisconsin Supreme Court, addressing remarkably similar circumstances, FERPA "prohibits non-consensual disclosure of personally identifiable information contained within educational records." (*Osborn v. Bd. of Regents of the U. of Wis. System* (2002) 254 Wis.2d 266, 286 [647 N.W.2d 158, 168] (*Osborn*).) Once personally identifiable information is redacted, a record is no longer an

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[12] The FPCO's November 18, 2004 letter is available on the Department of Education's website at the following Internet address:

http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville_tn2004.html

Pursuant to Evidence Code sections 452, subdivision (c), and 453, Petitioners request that the Court take judicial notice of this publication.

educational record under FERPA, and therefore its disclosure does not violate FERPA. (*Osborn*, 254 Wis.2d at p. 286, fn. 11 [647 N.W.2d at p. 168, fn. 11].) Other courts addressing requests for educational records redacted to eliminate personally identifiable information have consistently held the same. (See, e.g., *Bd. of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press* (2007) 337 Mont. 229, 237 [160 P.3d 482, 487] (*Cut Bank*); *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trustees of Ind. U.* (Ind.App. 2003) 787 N.E.2d 893, 907-908; *Hardin County Schools v. Foster* (Ken. 2001) 40 S.W.3d 865, 868-869.) The United States Department of Education has also reached the same conclusion:

> [D]ata that cannot be linked to a student by those reviewing and analyzing the data are not 'personally identifiable.' As such, the data are not 'directly related' to any students. Accordingly, a document containing only non-personally identifiable data, even when originally taken from a student's education record, is not a part of the student's education records for purposes of FERPA.

(*FPCO Guidance Letter to Tennessee Department of Education re: Disclosure of Anonymous Data Under FERPA*, dated Nov. 18, 2004.)

FERPA itself does not define the term "personally identifiable information." (See 20 U.S.C. § 1232g, subd. (b)(1).) However, the regulations implementing FERPA define it as follows:

> Personally identifiable information includes, but is not limited to:
> (a) The student's name;
> (b) The name of the student's parent or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable.

(34 C.F.R. § 99.3.) Thus, only if the disclosure of records would make a student's identity "easily traceable" may a public agency rely on FERPA to deny a request for educational records on the basis that it seeks personally identifiable information. (*Osborn, supra*, 254 Wis.2d at p. 291 [647 N.W.2d at p. 170] ["We, therefore, must determine whether the requested information is a list of personal characteristics that would make the student's identity easily traceable."]; see also *Cut Bank, supra*, 337 Mont. at p. 238, [160 P.3d at p. 488] ["Pioneer is not seeking any information that would personally identify any of the students involved. . . . [so] there is no basis under FERPA for the Board's refusal to release the public documents to Pioneer."].)

As the Wisconsin Supreme Court recognized in *Osborn*, the disclosure of information such as grade point average, test scores, race, gender and ethnicity "is not sufficient, by itself, to trace the identity of an applicant." (*Osborn*, *supra*, 254 Wis.2d at p. 292 [647 N.W.2d at p. 171])

Petitioners have expressly requested that all unique identifiers, such as name, social security number, birth date, and "other variables that might directly disclose an individual's identity" be redacted. (Petition, ¶ 36 and Ex. 11.) They have proposed specific procedures for redacting and providing other information to ensure that individual identities will not be traceable. (Petition, ¶ 36 and Ex. 11.) These measures are consistent with generally accepted statistical principles and methods for protecting anonymity, and are sufficient to ensure that there is no meaningful possibility that individual identities can be traced. (Declaration of Barbara S. Clements, Ph.D., ¶¶ 2, 3, 33, and Ex. 1.) They are more stringent and protective of individual privacy than the State Bar's own practices. (Petition, ¶¶ 48-53 and Exs. 16, 18.) They are, in short, more than adequate to ensure that any disclosure of

records by the State Bar pursuant to Petitioners' requests will not violate FERPA.

B. Disclosure of the Requested Records Is Not Contrary to California Law

The California Constitution affords a right to privacy that guards against the dissemination or misuse of sensitive and confidential information. (Cal. Const., art. I, § 1; *Hill, supra*, 7 Cal.4th at p. 35; *Porten v. Univ. of San Francisco* (1976) 64 Cal.App.3d 825, 830 (*Porten*)). To establish a violation of the constitutional right to privacy, a plaintiff must establish a legally protected privacy interest, a reasonable expectation of privacy under the circumstances, and a serious invasion of that privacy. (*Hill, supra*, 7 Cal.4th at p. 39-40.) Respondents cannot demonstrate a violation of the constitutional right of privacy because the requested records do not implicate the identities of any individuals.

California recognizes a constitutional privacy interest in educational records as defined by FERPA. (*Porten, supra*, 64 Cal.App.3d at p. 832.) However, as explained above (*supra*, Section V, subd. A), the requested records are not "educational records" under FERPA because they do not include any personally identifiable information.

Furthermore, a serious invasion of privacy occurs only when the identity of the subject is known. (See, e.g., *Poway Unified School Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496, 1505-1506 [redaction of released records satisfied the constitutional right of privacy]; *Bible v. Rio Properties, Inc.* (C.D. Cal. 2007) 246 F.R.D. 614, 620 [constitutional informational privacy would be protected if personal information, "such as address, date of birth, telephone number" were redacted from released records].) Thus, addressing a claim that records of a criminal conviction for

possession of marijuana were required by law to be destroyed, the Court held that a statute authorizing destruction of criminal records did not reach "anonymous statistical data . . . even though such data may have been derived from records subject to [the statute]" because a "statistic that does not identify the individual concerned can obviously have no stigmatizing effect on his public or private life." (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 114.)

The same is true here. Disclosure of the requested records will not result in public access to stigmatizing or embarrassing information linked to individual identities. Therefore, no constitutional privacy interest is implicated, and there is no serious invasion of any privacy interest that may be implicated. Because it will not result in the invasion of any protected privacy interest, disclosure of the records requested by Petitioners should be required.

VI. CONCLUSION

This Petition is based upon a simple proposition: the State Bar of California is not above the law, and its records should be and are subject to public access when there is no explicit constitutional or statutory prohibition on disclosure, and no meaningful possibility that disclosure will impair any countervailing public interest.

Although it is not clear that this Court has exclusive jurisdiction, it appears that this action is properly commenced in the Supreme Court, if only because this Court has original jurisdiction over the Petition and inherent authority over the records it seeks. Petitioners have a right to copies of those records under Article I, Section 3(b) of the California Constitution and California common law. Moreover, the Court has inherent authority to make

the requested records available. No state or federal statutory or constitutional provision prohibits their disclosure. There is a manifest public interest in the records. The privacy rights of bar examinees—the only legitimate concern identified by the State Bar—are not implicated, and therefore do not create any public interest in nondisclosure. The State Bar's implacable resistance to public scrutiny does not justify its refusal to provide the requested records. Therefore, Petitioners respectfully request that the Petition be granted, and that Respondents be order to provide the requested records forthwith.

Dated: August ___, 2008

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By_____
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CERTIFICATE OF WORD COUNT

The text of this petition consists of 14,448 words, including all footnotes but excluding the table of contents and table of authorities, signatures, and verifications, as counted by the computer program used to generate this petition.

Dated: August ___, 2008

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