IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

Joseph John Jelincic, Jr, Petitioner, Superior Court of California for the County of Alameda, Respondent, California Public Employees' Retirement System Board of Administration, Real Party in Interest.	Case No.

Alameda County Superior Court, Case No. RG21090970
Dept. 14, Hon. Michael Markman, Judge

Petition for Writ of Mandate and Memorandum in Support

(Gov. Code § 6259: Public Records Act Review)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with Rule 8.208 of the California Rules of Court, Plaintiff/Petitioner Jelincic, by and through the undersigned counsel, certifies that there are no interested entities or persons that must be listed in this Certificate under Rule 8.208.

Dated: May 4, 2022

By: /s/ Michael T. Risher
Michael T. Risher
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INTRODUCTION

The Bagley-Keen Open Meeting Act requires State bodies to conduct their discussions in public unless a statute expressly authorizes a closed session. *See* Government Code § 11123(a) (all undesignated section references are to this Code). The California Public Records Act (CPRA) in turn requires public access to records of discussions that are held in meeting that were open to the public or should have been open to the public. *See Register Div. of Freedom Newspapers, Inc. v. Cty. of Orange*, 158 Cal. App. 3d 893, 906-907 & n.6 (1984).

Plaintiff Jelincic brought this action to challenge the CalPERS Board of Administration's decision to hold a closed session to discuss the abrupt resignation of it's Chief Investment Officer following allegations of misconduct. He requested, among other things, release of those parts of the meeting transcript that related to matters that should have been discussed in open session. The superior court agreed that the meeting had been improperly closed in violation of Bagley-Keene, granted declaratory relief, and ordered CalPERS to disclose most of the transcript under the CPRA. *See* 2 PA 688-89 (Ex. 26) (Citations to the two-volume Petitioner's Appendix are abbreviated [volume] PA [page] [(Exhibit No.)]). But it allowed CalPERS to withhold approximately 20 segments of the closed-session transcript (some 27 pages in all) under the CPRA's catchall-balancing test, § 6255(b). 2 PA 967 (Ex. 39).

This was error. Section 6255 allows the government to withhold information only when the public interest in non-disclosure "clearly outweighs" the public interest in disclosure. § 6255(b). This "contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality." *ACLU of N. California v. Superior Ct.*, 202 Cal. App. 4th 55, 68 (2011) ("*ACLUNC*"). The government must meet this burden with evidence, not mere argument. *See id.* at 73-75.

CalPERS never claimed that these materials were exempt under § 6255 or submitted any evidence to support this exemption. Nor did it ask the court to review the materials in camera; to the contrary, it improperly redacted them from the transcript it provided for this review. CalPERS's failure to present evidence to support withholding under § 6255 requires reversal. *See ACLUNC*, 202 Cal.App.4th at 77.

The court excused this failure of proof by speculating that "[p]otential litigation [is] at least a theoretical possibility" "given various statutes of limitations." 2 PA 967 (Ex. 39). But the fact that litigation is a "theoretical possibility" is far too speculative to support withholding. *See ACLUNC*, 202 Cal.App.4th at 75 ("conjectural or speculative" threats to public interest cannot justify withholding under § 6255). Moreover, there is no indication that revealing some or all of the redacted material would in any way prejudice any litigation or harm the public interest.

Nor can withholding be justified on alterative grounds. Although CalPERS argued that the information is protected by Bagley-Keene's pending-litigation exception to the open-meeting requirement, § 11126(e), it failed to present any evidence to support this, and the court expressly and correctly found that the Board had failed to properly invoke this exception. *See* 2 PA 706 (Ex. 26) ("Nor was pending litigation a reason to hold a closed session."). This provision therefore cannot support withholding. And, although the court suggested that the redacted discussions included "the sort" of material that would be privileged, 2 PA 967 (Ex. 39), there is again no evidence to support this conclusion. To the contrary, the undisputed evidence is that "none of the redacted material related to pending litigation as that term is used in the Bagley-Keene Act." 2 PA 925 (Ex. 34). To the extent the court relied on the broader lawyer-client privilege set forth in the Evidence Code, it erred, because Bagley-Keene expressly abrogates that privilege as it applies to meetings. *See* § 11126(2) ("For purposed of this article, all expressions of the lawyer-client privilege other than those provided in this subdivision are hereby abrogated."). The court nevertheless allowed CalPERS to withhold essentially all of the Board's discussions involving its counsel.

Because the court's order is reviewable only by way of this petition, § 6259(a), this Court should issue an order to show cause and then, after briefing and argument, issue a peremptory writ of mandate reversing the superior court's order.

VERIFIED PETITION FOR WRIT OF MANDATE

1. This Petition seeks to enforce Jelincic's right to public records under the California Constitution and the California Public Records Act.

A. Parties

2. Plaintiff/Petitioner Joseph John (JJ) Jelincic, Jr., served as a member of the CalPERS Board of Administration from 2010-2018. 1 PA 8 (Ex. 1); 1 PA 97 (Ex. 5). He was a CalPERS investment officer from 1986 - 2019. 1 PA 8 (Ex. 1). Jelincic is a past president of the California State Employees Association, a labor group representing 140,000 active and retired state employees. *Id.* He continues to monitor the activities of CalPERS, regularly attends its Board meetings, and has a continuing interest in ensuring that the Board does not improperly close its discussions or otherwise violate California's transparency laws. *See id.*

3. Defendant/Real Party in Interest Board of Administration ("Board" or "CalPERS") is the governing body of the California Public Employees' Retirement System, which manages pension benefits for more than 2 million California public employees, retirees, and their families. *Id*. at 8-9. the Board is subject to the open-meeting requirements of the Bagley-Keene Open Meeting Act as well as the requirements of the California Public Records Act. *See* §§ 6253(f)(1), 6253(b),

11121(a), 11122.5(a). CalPERS created and possesses the records here at issue. 1 PA 10 (Ex. 1)

4. Respondent Superior Court of the State of California, County of Alameda issued the order here challenged.

B. Jurisdiction, Venue, and Mandatory Writ Review

5. The superior court had jurisdiction over this matter under Article VI § 10 of the California Constitution and §§ 6258, 6259.
6. Venue was uncontested below and is proper because the records at issue are located in Sacramento County. This means that suit may be brought in any county in which the Attorney General has an office. See 1 PA 10 (Ex. 1). The Attorney General has an office in Alameda County. *Id*.
7. This Court has jurisdiction under Article VI § 10 of the California Constitution and § 6259(c), which states that "an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ."
8. On April 12, 2022, the superior court issued an order that supported the decision of Defendants not to release

the parts of the records here at issue under the CPRA. *See* 2 PA 962-67 (Ex. 39).

9. This Petition is timely filed because it was filed within 25 days after April 13, 2022, when the superior court sent the order in question to the parties by U.S. mail, and within 20 days of service by any party. *See* § 6259(c); 2 PA 968 (Ex. 39). No party served the order or notice thereof before April 18.

10. Because "writ review is the exclusive means of appellate review of a final order or judgment [under § 6259(c)], an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters."[1] *Powers v. City of Richmond*, 10 Cal. 4th 85, 114 (1995) (lead opn. of Kennard, J.); *see id.* at 118 (George, J. concurring) (explaining that § 6259(c) "was enacted not to diminish the rights of individuals … who seek disclosure of governmental information under the Public Records Act" to obtain appellate review). The *Powers* dissent, which would have held that this provision violates the State constitutional right to appeal, explained that "even under the lead opinion's view," "a Court of Appeal

[1] Internal punctuation and footnotes are omitted from quotations unless otherwise indicated.

faced with a writ petition such as this would lack the authority to dispose of it summarily, *i.e.*, without a written opinion." *id.* at 142 (Lucas, C.J., dissenting). Thus, at least 5 — and likely all 7 — Justices in that decision agreed that appellate courts cannot summarily deny petitions for review such as this one without an opinion on the merits. *See also* Code of Civ. Pro. § 1086 ("The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.").

11. This Court should therefore issue an order to show cause and address the merits of the case.

C. Standard of Review

12. This Court applies *de novo* review to the superior court's determination that materials are exempt from disclosure under the CPRA or that a meeting was properly closed; it upholds factual findings if they are supported by substantial evidence. *See Travis v. Bd. of Trustees of California State Univ.*, 161 Cal. App. 4th 335, 340 (2008) (Bagley-Keene); *ACLUNC*, 202 Cal. App. 4th 55, 66 (2011) (CPRA); *Shapiro v. Bd. of Directors*, 134 Cal. App. 4th 170, 178–79 (2005) (Brown Act). (Because of the close relationship between the Brown Act and Bagley-Keen, the corresponding language in the two statutes is construed consistently. *See N. Pacifica LLC v. California Coastal Com.*, 166 Cal. App. 4th 1416, 1433-34 & n.14 (2008)).

13. More specifically, "this court must conduct an independent review of the trial court's statutory balancing analysis" under § 6255. *CBS, Inc. v. Block*, 42 Cal. 3d 646, 650–51 (1986). In doing so, it must "reexamine[] the records [and] balance[] the burdens and costs of disclosing the requested information." *id.*; *see ACLUNC*, 202 Cal. App. 4th at 66.

D. Burden of Proof

14. The government bears the burden to show that a record or part thereof is exempt from disclosure under the CPRA, or that a meeting or part thereof is was properly closed under Bagley-Keene.
15. The "CPRA establishes a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency, and the record must be disclosed unless a statutory exception is shown." *Sander v. State Bar of California*, 58 Cal. 4th 300, 323 (2013); *see* Cal. Const. art. I § 3(b)(1), (5) ("the writings of public officials and agencies shall be open to public scrutiny" except as excepted by statute); § 6253(a).
16. The government must meet this burden with a "detailed justification" for withholding each record. *ACLUNC*, 202 Cal. App. 4th 55, 85. This explanation must be "specific enough to give the requester a meaningful opportunity to contest the withholding of the documents and the court to determine to determine whether the exemption

applies." *Id.* at 83-85. The government must justify any redaction, just as it must justify withholding entire documents. *See id.* at 82-85.

17. Although there are no published cases discussing the burden of proof under Bagley-Keene (or the Brown Act), the statutory text, the longstanding rules regarding the allocation of the burden of proof, and numerous cases from other jurisdictions show that the government bears the burden to show that a meeting falls within one of the exceptions to the Act's general requirement that all meetings be open to the public.
18. Like the CPRA, Bagley-Keene creates a presumption of openness: "All meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body except as otherwise provided in this article." § 11123(a); *accord* Cal. Const. art. I § 3(b)(1), (5) ("the meetings of public bodies … shall be open to public scrutiny" absent a "constitutional or statutory exception to the right of access to … meetings of public bodies."); § 11123 ("Except as expressly authorized by this article, no closed session may be held by any state body."). Thus, as under the CPRA, the plain text of Bagley-Keene requires a public body that closes a meeting or otherwise denies public access to prove that an exception applies.
19. This allocation follows the longstanding rule that the party with access to information necessary to prove the

existence or non-existence of the facts relevant to an issue must bear both the burden of proof and the burden of production on that issue. *See* Evid. Code § 500; *In re Cipro Cases I & II*, 61 Cal. 4th 116, 153 (2015) ("Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim."); *Sanchez v. Unemployment Ins. Appeals Bd.*, 20 Cal. 3d 55, 71 (1977) (same for burden of proof); *ACLU-NC*, 202 Cal. App. 4th at 82, 84-87 (government bears burden to justify any action that withholds information from public in part because only "the agency knows [the records'] actual content") The government, which alone has access to what happened in a closed session, has far more access to the relevant evidence necessary to show whether or not closure was proper than does the member of the public who is trying to gain access to that information. The government must therefore shoulder the burdens of proof.

20. Numerous cases from other states have recognized this. *See, e.g., Hughes Bros. v. Town of Eddington*, 2016 ME 13, ¶ 20 (2016) ("A public body charged with violating the terms of the [open-meeting statute] during an executive session has the burden of proving that its actions during the executive session complied with an

exception to the open meeting requirement"); *Manning v. East Tawas,* 234 Mich.App. 244, 250, 593 N.W.2d 649 (1999) ("[T]he burden of proof rests with the party asserting an exemption" to the open-meeting act), *abrogated on unrelated grounds by Speicher v. Columbia Twp. Bd. of Trustees*, 497 Mich. 125 (2014); *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 486 n.4 (1990) ("[T]he public body has the burden of proving that its actions fall within an executive session exception to the open meeting law."). For the reasons discussed above, California law demands the same approach.

21. Under both statutes, the government has two ways to meet its burden. In general, it should submit public evidence as in any other case. *See* ACLUNC, 202 Cal.App.4th at 86-87. It may also ask the court to review the records or transcript at issue *in camera* to see whether they fall within an exemption. *See id.*; § 11126.1. But reliance on in-camera review to meet the burden to withhold records "is generally disfavored" and "is not a substitute for the government's obligation to justify its withholding in publicly available and debatable documents." *Id.* at 87.

E. Authenticity of Exhibits

22. The exhibits submitted in conjunction with this petition are true copies of the original documents on file with respondent court, the certified reporters' transcripts of

the indicated hearings in the respondent court, and the register of actions from the superior court's online case-records access system, with one exception: The copy of the August 17, 2020 closed-session transcript is the certified transcript that CalPERS produced in response to the court's December 20, 2021 order, meaning that it is the one submitted to the trial court for in-camera review with the four additional redactions authorized on page 2 ¶ 3 of that order (transcript pages 71:3-72:25, 73:1-74:18, 104:23-105-9, and 114:1-12).

F. Facts

1. CIO Meng's resignation and the leadup to the August 2020 closed session

23. On August 5, 2020, CalPERS Chief Investment Officer (CIO) Ben Meng resigned from that position in the wake of allegations that he had serious conflicts of interest and had failed to make required financial disclosures. *See* 1 PA 12-13 (Ex.1); 1 PA 141 (Ex. 5(E)). As the New York Times described it, "Mr. Meng resigned after compliance staff noticed that he had personal stakes in some of the investment firms that he was committing CalPERS's money to, most notably Blackstone. California state officials in that situation are supposed to recuse themselves, but Mr. Meng did not." 1 PA 12 ¶ 29 (Ex. 1); *see also, e.g.*, Heather Gillers and Dawn Lim, *State Panel to Investigate Complaints of Calpers Investment Conflict*, Wall St. Journal (Aug. 18, 2020),

available at https://www.wsj.com/articles/calpers-faces-questions-following-investing-veterans-abrupt-exit-11597656601?mod=article_inline. Meng had been on the job less than two years when he resigned. *See* 1 PA 139 (Ex. 5(D)).

24. This resignation was nationwide news because the CalPERS CIO controls how CalPERS will invest its more-than $400 billion in assets. 1 PA 139 (Ex. 5(D)). It was also newsworthy because the CalPERS CIO is one of the State's highest paid officials: the 2019 compensation for the position totaled $1,544,578, not including $215,912 in retirement and health-care benefits. 1 PA 99 ¶ 20 (Ex. 5).
25. CalPERS announced the following day in a press release that it already "ha[d] known about the questions regarding [Meng's] Fair Political Practices disclosure filings," but had considered them to be "private personnel matters" that it had "already addressed." 1 PA 141 (Ex. 5(E)). As discussed below, CalPERS management had failed to inform the Board of any of the issues surrounding the CIO, even though the Board is responsible for appointing the CIO. *See* § 20098.
26. This press release also stated that CalPERS had scheduled a Board meeting for August 17 "to discuss personnel matters." 1 PA 141 (Ex. 5(E)).
27. That same day, CalPERS published the agenda for the August 17 meeting, listing as its sole substantive item

the "Chief Executive Officer's Briefing on Performance, Employment, and Personnel Items," which was to be held by videoconference and closed to the public under § 11126(a)(1), (e), and (g)(1). 1 PA 143-43 (Ex. 5(F)).

28. Subdivision (a) (1) allows the Board to discuss certain topics relating to employee performance in closed session. Subdivision (g)(1) allows state boards to consider certain matters relating to the CIO or Chief Executive Officer (CEO) of state retirement boards. Most relevant here, subdivision (e) allows State bodies to discuss certain matters relating to litigation in closed session. This provision "is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings." § 11126(e)(2). It "abrogate[s]" the usual privilege rules. *Id.*

29. On August 10, California State Controller Betty Yee (who is an *ex officio* Board member) wrote to Board President Henry Jones, stating that Meng's conduct "appear[ed] to be a blatant disregard of conflict-of-interest laws and policies" and calling "for a swift and thorough inquiry into this matter." 1 PA 29 (Ex. 1(A)). Controller Yee requested an immediate Board meeting to hear about and discuss "potential violation of laws, adequacy of existing policies, safeguards that could prevent a recurrence of the situation, and the Chief Executive Officer's oversight and implementation of policies and safeguards." *Id.*

30. The Board did not meet until August 17.

2. The August 17, 2020 Board meeting

31. The Board began its August 17 meeting with a brief open session, at which the Board President stated that the "purpose the [upcoming closed] meeting is to hear briefing on performance, employment, and personnel items." 1 PA 151, 155 (Ex. 5(I)). Neither he nor anybody else mentioned potential litigation. *See id.* at 155-59.
32. After a dispute over whether public comment would be allowed (the Board refused to allow it, based on the advice of its counsel), the Board went into closed session. *See id.*
33. As the superior court explained following its review of the transcript, this closed session was not, in fact, a briefing by (or for) the CEO and had little to do with "performance, employment, and personnel items." Instead, "the primary purpose of the closed session appears to have been to have a wide-ranging discussion of existing CalPERS conflict of interest rules, procedures, and processes." 2 PA 712 (Ex. 26). In fact, the court found that less than six pages out of the 166-page transcript that the court reviewed were properly closed to discuss employment and personnel matters. *Id.*
34. The closed meeting included all 13 Board members, five member designees, and six managers and staff. *See* 2 PA 714, 716-21 (Ex. 28). It has held by teleconference. *Id.* at 713.

35. Board President Jones started the meeting by announcing that the Board would discuss "management and operational events leading up to and following the resignation" of the former CIO, an "overview of … internal compliance… and the education [staff members] provide to new employees," and management's purported efforts to "enhance oversight and accountability." 2 PA 723 (Ex. 28). He also stated that CEO Frost would discuss matters relating to recruiting a new CIO. *Id*. He did not mention potential litigation.
36. The Board then heard presentations on these policy topics from several CalPERS managers, including the general counsel. *See id.* at 724-45. CalPERS completely redacted its general counsel's briefing from the transcript it provided to the court for in camera review and from Jelincic. *See* PA at 724-28 (Ex. 28).
37. After these presentations, members debated whether a proposed new blind-trust policy should apply to all staff and the Board itself. *See id*. at 743:11-24; 761:2-8; 795:3-10; 810:10-20, 866:1-16; 868:13-17. They discussed a report that apparently related to the investigation of Meng. *Id*. at 755:9-12. One described Meng's history of promoting investment of private equity turned as "really problematic" in light of subsequent revelations that he "own[ed] a lot of shares in private equity." *Id.* at 774:15-59:22. Multiple members expressed concern that

CalPERS's policy failures had created "significant risks" to the retirement fund *See id.* at 760, 761, 766-68, 770-71, 857.

38. One Member stated that he was "angry that [the Board wasn't] notified about the problems with CIO Meng, even though it had ultimate responsibility for … CalPERS." *Id*. at 818. Several members complained that the CEO had informed only a few selected members of the 13-person Board about these problems, thus preventing the remaining Board members from exercising their oversight responsibilities. *See, e.g., id.* at 776-77, 794, 799, 809-12, 817-18, 835-36.
39. As the superior court found, the vast majority of this discussion should have occurred in open session. The court therefore ordered CalPERS to produce a copy of the transcript with only approximately 6 pages redacted because they related to personnel discussions, in addition to the redactions that CalPERS claimed were needed to protect attorney-client privilege. 2 PA 688 (Ex. 26).
40. As discussed below, the court also rejected CalPERS's claims that the meeting was properly closed to discuss pending litigation under § 11126(e). *See* 2 PA 706 (Ex. 27) ("Nor was pending litigation a reason to hold a closed session."). Because there was no actual litigation in progress, Board could invoke this exception to the open-meeting requirement only if it determined that

"based on existing facts and circumstances, there [was] a significant exposure to litigation against" CalPERS. § 11126(e)(2)(B)(i). The court expressly found that there was no evidence that the Board did this. 2 PA 706 (Ex. 26) ("[t]here is no indication that the Board or its counsel had formed an actual legal opinion that … there is a significant exposure to litigation against the state body.").

41. Moreover, there is no evidence in the record that indicates that the redacted discussions related to pending litigation. CalPERS never submitted an unredacted transcript to the court for in-camera review. The Court therefore never reviewed the redacted material.
42. The only evidence in the record about the contents of this discussions came from a Board member who was present at the meeting. 2 PA 925 (Ex. 34). This member submitted a declaration stating that "none of the redacted material related to pending litigation as that term is used in the Bagley-Keene Act."
43. The court nevertheless allowed CalPERS to withhold essentially every substantive discussion with counsel — some 27 pages in all. The only discussions involving counsel that are not redacted appear on pages 754-55, 824-25, and 873-84.
44. Other evidence also indicates that the Board never sought to invoke the pending-litigation exception.

45. For example, when State body discusses pending litigation in closed session, its "legal counsel … shall prepare and submit to it a memorandum stating the specific reasons and legal authority for the closed session." § 11126(e)(2)(C)(ii). "The legal counsel shall submit the memorandum to the state body prior to the closed session, if feasible, and in any case no later than one week after the closed session." *Id.*
46. CalPERS failed to comply with this requirement. Instead, as the court found, CalPERS did not draft any sort of litigation memorandum until "after Petitioner filed this case" more than "seven months after the August 17, 2020 closed session." 2 PA 966 (Ex. 39).
47. This memorandum was not "submitted" to the Board in the way that these memoranda usually are. Usually, these memoranda are simply emailed to the Board. 2 PA 925 (Ex. 34). But the March 21, 2021 document was instead simply placed in an electronic database, and a email was sent to the Board on April 1, 2021 stating that "an update has been posted to Updates and Report — Confidential and is available for your viewing." 2 PA 934, 937 (Ex. 36). The email stated that the "item is titled 'Attorney-Client Privileged (ACP) Memorandum – March 25, 2021." *Id.*
48. Nothing in this email indicated that the memorandum related to the August 2020 closed session (which had

taken place 7 months earlier) or was a litigation memorandum prepared under § 11126(e). *See id.*

49. At least one Board member never saw this memorandum or realized the she had received it. 2 PA 925 (Ex. 34). As far as she knows, no other Board member did, either. *id.*

3. Jelincic's requests for the transcripts and CalPERS's refusals

50. In September 2020, Plaintiff Jelincic requested records relating to the closed meeting under the CPRA, including "a copy of the closed session transcript of the August 17, 2020 meeting of the Board of Administration." 1 PA 306 (Ex. 9); *see* 1 PA 15 ¶ 50 (Ex. 1).

51. CalPERS refused to provide any records. 1 PA 307 (Ex. 9); *see* 1 PA 15 ¶ 51 (Ex. 1).

52. Jelincic then retained counsel. On December 16, 2020, counsel emailed a 5-page letter to CalPERS on behalf of Mr. Jelincic, explaining why the Board's closure of its August 17 meeting was improper and requesting "all records" relating to that meeting, including any recording or transcript. 1 PA 15 ¶ 52 (Ex. 1); *see* 1 PA 38-42 (Ex. 1(D)).

53. In its response to this request, CalPERS asserted that the meeting had been properly closed to discuss personnel matters under § 11126(a), (g). It did not claim that it had been closed to discuss potential litigation. 1 PA 15-16 ¶ 53 (Ex. 1); *see* 1 PA 44-45 (Ex. 1(E)).

54. CalPERS refused to provide any of the requested records. *See id.*

G. Proceedings below

55. On March 8, 2021, Jelincic filed this suit in Alameda County Superior Court. He requested, among other things, various declarations that CalPERS had violated the Bagley-Keene Act by holding the closed session, as well an order that CalPERS release all of the requested records relating to the August 2020 closed session, including those parts of the transcript that related to matters that should have been discussed in open session. *See generally* 1 PA 7-63 (Ex. 1) (Petition).
56. He also raised unrelated claims that are not here at issue, which explains the length of some of the declarations in the record.
57. Jelincic eventually moved for entry of judgment.
58. In the course of opposing this motion, CalPERS filed a copy of the August 2020 closed-session transcript for in-camera review under § 11126.1 and § 6259(a). *See* 1 PA 317-318 (Ex. 10). CalPERS redacted material from this document that it claims is protected by Bagley Keene's pending-litigation exception. *See* 2 PA 490-91, 494-97 (Ex. 17).
59. There are approximately 20 such redactions that together conceal about 27 pages of text from the public, not including the 6 pages of redactions that the superior court later authorized as relating to discussions of

personnel matters. *See generally* 2 PA 713-882 (Ex. 28) (transcript).

60. As discussed below, a body that discusses threatened litigation in closed session must prepare a litigation "memorandum stating the specific reasons and legal authority for the closed session." § 11126(e)(2)(C)(ii). This memorandum must be created and submitted to the body "prior to the closed session, if feasible, and in any case no later than one week after the closed session." *Id.*

61. CalPERS did not submit a litigation memorandum or evidence that one existed prior to the September 2021 hearing on Jelincic's motion for judgment.

62. For reasons that are not entirely clear, the superior court posted a copy of the transcript submitted for in-camera review on its online case-information system. A media outlet that regularly reports on CalPERS and other finance matters posted a copy of this transcript on its website, where it remains today. *See* 2 PA 439-40(Ex. 14); *see also* https://www.nakedcapitalism.com/2021/08/exposed-transcript-of-calpers-closed-session-on-ben-meng-departure-shows-clear-and-extensive-violations-of-transparency-laws-builds-case-for-contempt-ruling-by-judge-markman-presiding.html

63. The parties discussed and then briefed the effect of this disclosure on the litigation; during their discussions

they agreed that Jelincic's counsel could properly review the transcript posted on the Naked Capitalism website.

64. The superior court eventually held two hearings on Jelincic's motion for judgment and issued two separate orders.

65. The first hearing was on September 21, 2021. On December 20, the court issued an order in which it found "that the CalPERS Board of Administration Meeting held on August 17, 2020, was improperly closed" in violation of the Bagley Keene Act. 2 PA 688 2 ¶ 3 (Ex. 26); *see id.* at 704-07. Of the material it reviewed, it concluded that only 4 segments, totaling approximately 6 transcript pages, were properly discussed in closed session. *Id.* at 688 ¶¶ 3-4. It therefore ordered CalPERS to provide Jelincic with a copy of the meeting transcript it had provided for in camera review, redacting only these few pages. *Id.*

66. The contents of the 6 pages the court found to have been properly discussed in closed session were (and still are) available on the Naked Capitalism website referenced above. CalPERS nevertheless produced a copy of the transcript with these parts redacted. This transcript also contains the redactions that Jelincic challenges here. The Appendix contains this copy of the transcript that CalPERS provided to comply with the court's order. *See* 2 PA 713-882 (Ex. 28).

67. This first order did not resolve CalPERS's invocation of the pending-litigation exception or order CalPERS to disclose the materials it had redacted from the transcript provided for in camera review. 2 PA 707-08 (Ex. 26). Instead, the court gave CalPERS three options:
68. CalPERS could simply "produce an unredacted copy of the August 17, 2020 closed session transcript." 2 PA 688, 707-08 (Ex. 26).
69. Or, it could submit for in-camera review a copy of the litigation memorandum required by § 11126(e). *Id.*
70. If it did neither of these, it would have to show cause for its failure to comply with § 11126(e). *Id.*
71. The court also ordered CalPERS to submit a number of other records for in camera review that are not relevant to this appeal. *See id.* at 688 ¶ 2.
72. In response to this order, CalPERS submitted 9 sets of records for in camera review. As here relevant, it designated one as "a true and correct copy of the CalPERS Memorandum prepared pursuant to Government Code § 11126(e)(2)(C) related to the August 17, 2020, CalPERS Board closed session." 2 PA 898-99 (Ex. 31). CalPERS explained that it was providing the memorandum "as proof that it exists." 2 PA 889:5-6 (Ex. 29). It did not submit an unredacted transcript.
73. On April 12, 2022, the superior court ruled that this memorandum did not comply with § 11126(e), because CalPERS had failed to prepare it until 7 months after

the meeting (and after Jelincic had sued), long past the one-week statutory deadline. 2 PA 966 (Ex. 39). Although it provided declaratory relief for this violation, it declined to order CalPERS to provide Jelincic with the parts of the transcript that CalPERS claimed related to discussion covered by the pending-litigation exception to the open-meeting requirement. *See id.* at 966-67.

74. The court did not find that this material was protected by that exception. However, it concluded, without reviewing it *in camera*, that CalPERS could properly withhold this information under the CPRA's catchall exception, § 6255. *See id.*
75. The Court declined to order CalPERS to release the litigation memorandum, stating that it would be exempt from disclosure "until the potential litigation risk to which it refers has been resolved or otherwise abates." *Id.* at 964. (citing § [79]27.205, which is currently § 6254.25).
76. CalPERS has never submitted a full copy of the closed-session transcript for in camera review, and neither the superior court not Jelincic has ever seen those parts of the transcript here at issue that CalPERS redacted based on § 11126(e) and that the superior court found could be withheld under § 6255.
77. CalPERS has never submitted any evidence of the contents of these redacted materials.

78. CalPERS has therefore failed to carry its burden to show that any of these redacted materials are exempted from disclosure under § 6255 or any other law.

H. Request for relief

79. For these reasons, and as discussed below, the Court should order the following:

    a. that CalPERS produce the entire transcript and recording of the August 17, 2020 closed session for in camera review;

    b. that CalPERS make public the entire transcript and recording, redacted only as this Court allows, excluding only the following sections that Jelincic does not challenge because they are already public (786:3-789:18, 819:23-820:9, and 829:1-12). The parts that should be produced include the now-redacted parts of the following pages: 724-728, 746,750-754,755-757,761,775-776,790-792,808,813,816-824,833-834,847-853,858-862,865,867-871;

    c. that CalPERS pay costs and attorney's fees associated with this petition under § 6259(d);

    d. such other relief as the court deems appropriate.

May 4, 2022

/s/ Michael T. Risher
Michael T. Risher
Attorney for
Plaintiffs

I. Verifications

1. Jelincic Verification

I, Joseph John Jelincic, Jr, the Plaintiff/Petitioner in this matter, have read this Verified Petition for Writ of Mandate in *Jelincic v. Superior Court (CalPERS)*. I have personal knowledge that the facts stated in paragraphs 1, 50, 51, and 62 of the Petition are true. I am informed, and do believe, that the matters stated in the remainder of the Petition are true. On these grounds I allege that the matters stated herein are true.

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

DATED: 5/3/22 in the City of Hayward, County of Alameda, California.

Joseph John Jelincic, Jr

2. Risher Verification

I, Michael T. Risher, the counsel in this matter, have read this Verified Petition for Writ of Mandate in *Jelincic v. Superior Court (CalPERS)*. I have personal knowledge that the facts stated in paragraphs 4, 8, 9, 22, 52-54, 55-59, 62-77of the Petition are true.

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

DATED: May 4, 2022 in the City of Berkley, County of Alameda, California.

/s/ Michael T. Risher

Michael T. Risher
Attorney for
Plaintiff/Petitioner

MEMORANDUM IN SUPPORT OF PETITION

Although it had the burden of proof, CalPERS never submitted any evidence of the contents of the redacted discussions at issue. It never argued that these parts of the transcript are exempt from disclosure under § 6255. It never provided these parts of the transcript to the court for in-camera review. There is thus no evidence to support the court's ruling that § 6255 justifies withholding any — much less all — of the material at issue.

There is no other basis on which this Court could properly uphold the order. The trial court expressly found that the Board had failed to take steps necessary to close a meeting to discuss pending litigation. To the extent the court relied on the litigation memorandum's characterizations of what had occurred 7 months prior in the closed session, it erred, because the CPRA does not allow courts to use records submitted for in-camera review as substantive evidence regarding the contents of other records. It instead authorizes courts to review the actual records in question only to determine whether their content shows that they are exempt from disclosure. If CalPERS wished to satisfy its burden by submitting records for in-camera review, it had to submit the full transcript itself.

A. Rules of Statutory Interpretation and the Requirements to Construe Open-Government Laws in Favor of Transparency

Here, as always, the Court must "first examine the statutory language, giving it a plain and commonsense meaning. …. in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." *Sierra Club v. Superior Ct.*, 57 Cal. 4th 157, 165 (2013). "If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." *Id.* at 166-67. "If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." *Id.* at 167.

In this case this "usual approach to statutory construction is supplemented by a rule of interpretation that is specific" to California's open-government laws. *Id*. The California Constitution requires that "a statute, court rule, or other authority … shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." *Id.* (quoting Cal. Const. art. I § (3)(b)(2)). This "constitutional canon requires [courts] to interpret [the law] in a way that maximizes the public's access to information." *Id.* at 175. As the text indicates, this rule applied to all statutes that affect public access, procedural as well as substantive. *See Nat'l Laws. Guild, San Francisco Bay Area Chapter v. City of*

Hayward, 9 Cal. 5th 488, 507 (2020) (applying rule to statute governing copying costs).

In addition to this constitutional rule, California courts have long held that all exceptions to the open-meeting and public-records laws must be construed narrowly. *See, e.g., Travis v. Bd. of Trustees of California State Univ.*, 161 Cal. App. 4th 335, 343 (2008) (Bagley-Keene open-meeting "exception should be strictly and narrowly construed and will not be extended beyond the import of its terms."); *Shapiro v. Bd. of Directors*, 134 Cal. App. 4th 170, 185 (2005) (Brown Act pending-litigation exception must be interpreted narrowly); *California State Univ. v. Superior Ct.*, 90 Cal. App. 4th 810, 831 (2001) (CPRA "exemptions from compelled disclosure are narrowly construed.").

Finally, Attorney General opinions on the meaning of California's open-government laws are entitled to "great weight," particularly, where, as here, that office publishes a guide to the law in question. *Californians Aware v. Joint Lab./Mgmt. Benefits Comm.*, 200 Cal. App. 4th 972, 980 (2011); *see* Cal. Attorney General's Office, *A Handy Guide to The Bagley-Keene Open Meeting Act 2004*, available at https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/bagleykeene2004_ada.pdf

B. Overview of the California Public Records Act (CPRA).

The CPRA requires agencies to disclose all public records in their possession unless the statute exempts them from disclosure. §6253(a), (c). The term "'Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics," § 6252(e). "This definition is intended to cover every conceivable kind of record that is involved in the governmental process." *Sander v. State Bar of California*, 58 Cal. 4th 300, 322 (2013).

Importantly, "the fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document." *Los Angeles Cty. Bd. of Supervisors v. Superior Ct.*, 2 Cal. 5th 282, 292 (2016). Instead, "[a]ny reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." § 6253(a). This "requires public agencies to use the equivalent of a surgical scalpel to separate those portions of a record subject to disclosure from privileged portions." *Los Angeles Cty. Bd. of Supervisors*, 2 Cal. 5th at 292 (applying rule to attorney-client privilege).

Here, as in most CPRA cases, "only the agency knows [the records'] actual content, and the plaintiff's lack of knowledge seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." *ACLUNC*, 202 Cal. App. 4th at 82, 84-87. Therefore, and because all records are

presumed to be public, the "agency opposing disclosure bears the burden of proving that an exemption applies." *Id.* at 67. It must meet this burden with a "detailed justification" for withholding each record or part thereof. *Id.* at 85. This explanation must be "specific enough to give the requester a meaningful opportunity to contest the withholding of the documents and the court to determine to determine whether the exemption applies." *Id.* at 83-85; *see generally Golden Door Properties, LLC v. Superior Ct. of San Diego Cty.*, 53 Cal. App. 5th 733, 790 (2020) (emphasizing government's burden to provide specific justifications for each withholding).

The court can (and sometimes must) review records in camera in order to decide whether they are exempt. *See* § 6259(a). "[T]he purpose of *in camera* review is to consider the applicability of an exemption to a specific record." *Schaerr v. United States Dep't of Just.*, 435 F. Supp. 3d 99, 116 n.14 (D.D.C. 2020)) (decided under federal FOIA); *see also Times Mirror Co. v. Superior Ct.*, 53 Cal. 3d 1325, 1338 (1991) (because the CPRA "was modeled on" FOIA, "judicial construction of the FOIA thus serve[s] to illuminate the interpretation of its California counterpart.").

Although the minutes of a *properly* closed meeting are exempt from disclosure under § 11126.1, this exemption does not apply to *improperly* closed meetings or to the records relating to parts of the meeting in which the body discussed matters that should have been discussed in open session. *See Register Div. of Freedom Newspapers, Inc. v. Cty. of Orange*, 158 Cal. App. 3d

893, 906-907 & n.6 (1984); *Coal. of Univ. Emps. v. Regents of Univ. of California*, No. RG03 089302, 2003 WL 22717384, at *8 (Ala. Co. Super. Ct. July 24, 2003) (Richman, J.) (ordering disclosure of parts of closed-session minute book under CPRA and Bagley-Keene because statute "did not justify closing the meetings at issue, at least not in their entirety").

C. Overview of the Bagley-Keen Open Meeting Act

The Bagley-Keene Open Meeting Act is meant to ensure that "actions of state agencies be taken openly and that their deliberations be conducted openly." § 11120; *see also* Cal. Const. Art. I § 3(b)(1) ("the meetings of public bodies…shall be open to public scrutiny."). The CalPERS Board is a State body. *See* §§ 11121(a), 20090. It must therefore conduct its discussions in public except to the extent the statute "expressly" allows a closed session. § 11132; *see* § 11123(a). It cannot justify discussing other topics in closed session by claiming that they constitute "related background information that is essential" to what can properly be discussed in private. *See Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904, 923-224 (2002) (*Shapiro I*).

With exceptions not here relevant, state bodies such as the Board must post an agenda at least 10 days before any meeting. § 11125(a); *cf.* § 11125.4-11125.6 (exceptions). This agenda must "contain[] a brief description of the items of business to be transacted or discussed in either open or closed session." § 11125(b). This description "shall include a citation of the specific statutory authority under which a closed session is being

held." *Id.*; *see* § 11125.3; *Shapiro v. Bd. of Directors*, 134 Cal. App. 4th 170, 181–82 (2005) (*Shapiro II*).

"Prior to holding any closed session, the state body shall disclose, in an open meeting, the general nature of the item or items to be discussed in the closed session." § 11126.3(a). With exceptions not here relevant, "[i]n the closed session, the state body may consider only those matters covered in its disclosure." § 11126.3(b), (c); *cf.* § 11126.3(d) (exceptions).

Most of the exceptions to the open-meeting requirement simply allow bodies to discuss certain topics in closed session. *See generally, e.g.*, § 11126(c)(1)-(19), (d), (f)(1)-(9), (g)-(k). Some of them, however, require the body to take certain steps before having a closed session. *See, e.g.,* §§ 11126(a)(2) (special notice required before discussing employee complaints), 11126(c)(7)(B) (special disclosure required before discussing real estate), 11126(e) (pending litigation).

As discussed below, "the general rules of attorney-client privilege do *not* apply to determine whether a meeting with legal counsel may be held in closed session." *Shapiro II*, 134 Cal. App. 4th at 182; *see id.* at 182, 185; *see generally S. California Edison Co. v. Peevey*, 31 Cal. 4th 781, 810–11 (2003) (Baxter, J., dissenting) (discussing history of provision). "Instead, a legislative body of a local agency is permitted to hold closed-session meetings with counsel to discuss pending litigation only as permitted by the terms of" the open-meeting law. *Shapiro II*, 134 Cal. App. 4th at 182; *see* § 11126(e)(1), (2).

Agencies must keep a minute book of every closed session, which may consist of a recording. § 11126.1. This minute book "shall be available to … [the] court" if, as here, "a violation of [Bagley Keene] is alleged to have occurred at a closed session." *Id.* CalPERS kept both an audio recording and a transcript of the August 2020 closed session at issue. 1 PA 318 (Ex. 10).

D. Discussion

The superior court had no basis to allow CalPERS to withhold the redacted parts of the transcript. There was no evidence in the record to support its conclusion that the public-interest justified this under § 6255. To the extent the court believed that withholding was justified by privilege, it also erred. Bagley-Keen expressly abrogates the authority of State bodies to invoke the attorney client privilege to shield their discussions from public scrutiny. *See* § 11126(e)(2). But the superior court allowed withholding of essentially all of the Board's discussions with CalPERS legal counsel, without reviewing the transcript or receiving any evidence that it fell within the pending-litigation exception. Because CalPERS failed to meet its burden, this Court should reverse.

1. The CPRA's § 6255 catchall exception cannot support withholding.

The CPRA's catchall exemption allows an agency to withhold records if it can show that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." § 6255(a). This test puts the "burden of proof on the proponent of

nondisclosure to demonstrate a clear overbalance on the side of confidentiality." *ACLUNC*, 202 Cal. App. 4th at 68. The requestor has no burden to show anything; even "idle curiosity" is enough to require disclosure absent a countervailing public interest in secrecy. *Id.* at 67. As always, the government must meet its burden with detailed admissible evidence justifying each withholding or redaction, not assertions or generalizations. *See id.* at 74-75, 83-85. If it fails to do so, this Court must reverse. *See id.* at 75, 77-78.

The public has a strong interest in monitoring the operations of government retirement agencies such as CalPERS. *See Sacramento Cty. Employees' Ret. Sys. v. Superior Court*, 195 Cal. App. 4th 440, 468-69 (2011) (rejecting government's § 6255 argument); *see also Westly v. CalPERS*, 105 Cal. App. 4th 1095, 1116 (2003) (CalPERS's funds are "state money. The public also has a strong interest in learning about non-frivolous allegations of misconduct by high-ranking government officials such as the CalPERS CIO. *See BRV, Inc. v. Superior Ct.*, 143 Cal. App. 4th 742, 759 (2006). And, of course, the primary goal Bagley-Keene is to require "deliberations to be conducted openly" so that allow the "public may remain informed" about all such deliberations that are not expressly excluded from the open-meeting requirements. §§ 11120, 11132. There is thus a strong interest in disclosure of the parts of the transcript that should have been conducted in public.

There is no public interest in non-disclosure that could "clearly outweigh" this interest. The public has no interest in

preventing disclosure of information that should have been discussed in public. In fact, § 6255 may not even apply to this information. *See* § 11125.1(a) (materials that are "distributed to all, or a majority of all, of the members of a state body by any person in connection with a matter subject to discussion or consideration at a public meeting of the body, are disclosable public records" "[n]otwithstanding Section 6255"). The Legislature has already balanced in the interests and determined that the public has an absolute right to know about State bodies' discussions unless one of the Bagley-Keene exemptions applies. § 11132.

Moreover, when the government relies on "potential" adverse consequences to justify disclosure under § 6255 it must show more than just a theoretical possibility that these harms will occur. *ACLUNC.*, 202 Cal. App. 4th 72. It cannot rely upon "speculative" harms or "a mere assertion of possible" consequences, even when those consequences are serious (such as threats of physical violence). *See id.*; *id.* at 75 ("the threat … that justifies disclosure cannot be conjectural or speculative"). The agency resisting disclosure must instead "explain[] the nature of the threat that might be averted by withholding the information" and present admissible evidence to show that this threat actually exists. *Id.* at 74.

The only statements at the meeting that even hint of potential litigation considering litigation are that Mr. Meng had "consulted with an attorney" and was "watching the meeting carefully … with an eye toward litigation." 2 PA 754-55 (Ex. 28).

The superior court did not suggest that this showed any real exposure to litigation; instead, it wrote that "[p]otential litigation remains at least a theoretical possibility as of this date, given various statutes of limitations." *See* 2 PA 967 (Ex. 39). But, as discussed above, the mere possibility of future harms is not enough to support withholding under § 6255. Moreover, even if there were evidence that litigation was likely, there is still no evidence that disclosure of the redacted material would adversely affect the public interest. CalPERS thus failed to meet its burden to show that it can withhold the redacted material under § 6255.

2. Neither the pending-litigation exception nor the attorney-client privilege can justify withholding.

Although the superior court expressly found that CalPERS failed to show that it had properly closed the meeting to discuss pending litigation, it nevertheless suggested that this exception to Bagley-Keene allows CalPERS to withhold the redacted parts of the transcript. This too was error.

Pending litigation is defined as ongoing proceedings, instances where the agency is deciding whether or not to initiate litigation, and instances in which it decides that it faces sufficient risk of litigation to merit a closed session. *See* § 11126(e)(2)(A)-(C). CalPERS argued only that it was justified in closing parts of the August 2020 meeting based on this last consideration: that it faced potential exposure to litigation under § 11126(e)(2)(A)-(C). *See* 1 PA 338 (Ex. 11). The court agreed that

this was the only applicable basis for invoking the exception. 2 PA 706 (Ex. 27). There is no contrary evidence.

With that limitation in mind, § 11126(e) reads as follows in relevant part:

> (1) Nothing in this article shall be construed to prevent a state body, based on the advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation.
>
> (2) For purposes of this article, all expressions of the lawyer-client privilege other than those provided in this subdivision are hereby abrogated. This subdivision is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings pursuant to this article. For purposes of this subdivision, litigation shall be considered pending when any of the following circumstances exist:
>
> (A) [when litigation actually exists].
>
> (B)(i) A point has been reached where, in the opinion of the state body on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the state body.
>
> (ii) Based on existing facts and circumstances, the state body is meeting only to decide whether a closed session is authorized pursuant to clause (i).
>
> (C)(i) [When] "the state body has decided to initiate or is deciding whether to initiate litigation."
>
> (ii) The legal counsel of the state body shall prepare and submit to it a memorandum stating the specific reasons and legal authority for the closed session. If the closed session is pursuant to paragraph (1), the memorandum shall include the title of the

> litigation. If the closed session is pursuant to subparagraph (A) or (B), the memorandum shall include the existing facts and circumstances on which it is based. The legal counsel shall submit the memorandum to the state body prior to the closed session, if feasible, and in any case no later than one week after the closed session. The memorandum shall be exempt from disclosure pursuant to Section 6254.25.
>
> § 11126(e).

Thus, in order to close a session based on potential exposure to litigation, the body must follow the following process:

1. Legal counsel is required to submit a memorandum "stating the specific reasons and legal authority for the closed session" that "include[s] the existing facts and circumstances on which it is based." § 11126(e)(2)(C)(ii). This memorandum must be submitted to the body "prior to the closed session, if feasible, and in any case no later than one week after the closed session." *Id.*
2. On the day of the meeting, the body must "disclose, in an open meeting, the general nature of the item or items to be discussed in the closed session." § 11126.3(a).
3. The body may initially meet in closed session "only to decide whether a closed session is authorized" because of the threat of litigation. § 11126(e)(2)(B)(ii).
4. During this preliminary closed session, the body's council must advise the "body that an open session to confer with, or receive advice from him or her with respect to the 'pending litigation' would prejudice the position of the

[State] agency in the litigation." 69 Cal. Op. Att'y Gen. 232 at *4 (1986); *see* § 11126(e)(2)(B)(i).

5. The body must then decide whether it is of "the opinion" that there is a "significant exposure to litigation against the state body." § 11126(e)(2)(B)(i). This requires more than a "mere possibility" of litigation. 71 Cal. Op. Att'y Gen. 96 at *8 (1988).
6. If the body concludes that such exposure exists, it may then decide to proceed to discuss the substance of the threatened litigation in closed session. However, the "body is free to make its own determination as to whether to meet in closed session." 69 Cal. Op. Att'y Gen. 232 at *4. A closed session "is not mandated." *id.*
7. Unless the body concludes that there is significant exposure to litigation, it cannot discuss the substance of the matter in closed session. It must either cease discussion of the matter or conduct it in open session. *See id.*

Here, CalPERS failed to announce in open session that it would discuss pending litigation, failed to draft or submit the litigation memorandum as required by the statute, and, most importantly, failed to form an opinion that there was significant exposure to litigation against it to merit a closed session The last of these failures means that none of its discussions were properly conducted in closed session under § 11126(e). CalPERS's invocation of this section to react parts of the

transcript is simply a post-hoc attempt to keep public information from the public.

a) CalPERS failed to provide notice in open session that it would discuss pending litigation.

"Prior to holding any closed session, the state body shall disclose, in open meeting, the general nature of the item or items to be discussed in the closed session." § 11126.3(a). "In the closed session, the state body may consider only those matters covered in its disclosures." § 11126.3(b).

At a brief open session on August 17, President Jones disclosed that the "purpose the [the closed] meeting is to hear briefing on performance, employment, and personnel items." 1 PA 151, 155 (Ex. 5(I)). Neither he nor anybody else mentioned potential litigation. *See id. at* 155-59. Although the original meeting notice had referenced § 11126(e), § 11126.3(b) requires disclosure at the public session and prohibits discussion of matters not disclosed. At the very least, the failure to disclose any intent to discuss pending litigation strongly suggests that the Board did not actually intend to discuss this topic.

b) CalPERS failed to draft and submit a litigation memorandum to the Board before or within 7 days of the closed session.

As the superior court explained, CalPERS failed to comply with the requirement that it submit a litigation memorandum to the Board before or within one week of the closed session. 2 PA 966 (Ex. 39). Instead, CalPERS drafted a memorandum 7

months after the meeting, several weeks after Jelincic had filed this lawsuit. *Id*. This, too, shows that the Board did not actually decide to discuss pending litigation at the August 2020 closed session, much less form an opinion that it should discuss the redacted material in closed session. Instead, CalPERS is trying to use the untimely memorandum as a post-hoc justification to redact material that its management does not wish to disclose.

The superior court did, however, conclude that CalPERS had "cured" the violation under § 1130.3 by drafting the memorandum after the statutory deadline. *See* order at 5. This was incorrect. Section 11130.3 applies only to cases brought to nullify agency actions on the grounds that the state body failed to provide notice that it would consider these actions. *See* § 11130.3(a) (citing the notice requirements of § 11123 and § 11125). The agency can cure such a violation by providing proper notice of a new meeting and then taking the same action again before any litigation begins. But this is irrelevant here, because Jelincic does not seek to nullify any action that the Board took; he simply seeks access to the discussions that should have been public in the first place. The Act's strict limitations on cases brought to nullify a board's actions do not apply to other types of cases. *See generally Regents of Univ. of California v. Superior Ct.*, 20 Cal. 4th 509, 530 (1999) (discussing history of § 11130.3), superseded by statute on other grounds as recognized in *Shapiro v. San Diego City Council,* 96 Cal. App. 4th 904, 914–15 (2002).

In any event, even if CalPERS could cure its failure to draft a proper litigation memorandum, that would not address the primary problems: the Board never reached "the opinion" that the risk of litigation merited a closed-session discussion, and it discussed matters that had nothing to do with any threatened litigation.

c) CalPERS has failed to meet its burden to show that it properly invoked the pending-litigation exception.

As discussed above, a State body may discuss the substance of threatened litigation only if it is of "the opinion" that there is a "significant exposure to litigation against the state body." § 11126(e)(2)(B)(i). This requires more than just the "mere possibility" of litigation." 71 Cal. Op. Att'y Gen. 96 at *8-*9. Importantly, it is "the opinion of the state body," not of individual members or staff, that counts. § 11126(e)(2)(B)(i). This language mirrors that of a number of statutes that allow bodies to take certain actions when certain conditions are satisfied "in the opinion of" the body. *See, e.g.,* § 26301; § 50703; Sts. & High. Code §§ 18320, 25050(e), (f).

Multimember bodies express opinions by passing resolutions. *See generally Howard Jarvis Taxpayers Assn. v. Padilla*, 62 Cal. 4th 486, 565 (2016) (Liu, J., concurring). And they can do so only by majority vote, unless some rule or statute provides otherwise. *See Cty. of Sonoma v. Superior Ct.*, 173 Cal. App. 4th 322, 346 (2009); *see id.* at 344–46, 348-49; *cf., e.g.,* § 11126(c)(18)(B) (requiring 2/3 vote to close meetings to consider threats). CalPERS own rules require that "decisions by the body …

require the supportive vote of a majority of those members voting" "unless otherwise indicated." 2 PA 554 (Ex. 20(B)) (Board Rules 202.5, 202.15). Because the meeting was held by teleconference, a roll-call vote was required. § 11123(b)(1)(d). To the extent these statutory requirements are ambiguous, they must be read in favor of limiting CalPERS's authority to hold closed discussions. *See* Cal. Const. Art. I § 3(b)(2). Thus, unless a majority of the Board members indicated through a roll-call vote that they believed that there was sufficient exposure to litigation so as to invoke § 11126(e) and that a closed session was necessary and appropriate to discuss it, CalPERS cannot rely on this provision to hide any discussions from the public (other than preliminary discussions held only to decide whether a closed session was appropriate).

As the superior court wrote, "[t]here is no indication that the Board or its counsel had formed an actual legal opinion that a point has been reached where, in the opinion of the state body on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the state body." 2 PA 706 (Ex. 26). The Board therefore never invoked the pending-litigation exception. CalPERS cannot rely on to keep information from the public.

A review of the redacted transcript confirms this. Because the names of the various speakers are visible, one can see that the only vote the Board took was to decide whether its members could read the report on Mr. Meng. *See* 2 PA 877-78 (Ex. 29).

The first redaction appears on page 9 of the transcript. *Id.* at 724. CEO Frost stated that the Board "will be getting a briefing from General Counsel" Matt Jacobs and other managers. Frost then asked Jacobs "to go ahead and engage in briefing [the Board] on [redacted]." The next 4 pages of what Jacobs said are redacted, as is a follow-up question by the chief-compliance officers. *Id.* at 728. This redacted material could conceivably be a briefing to the Board to allow it to reach an opinion about whether a closed session is appropriate, and therefore properly closed. But it is not followed by any sort of discussion or vote about that topic. Instead, the Board heard briefings from other CalPERS staff about other policy matters for some 27 (unredacted) pages. Much of this involves the duty of CalPERS staff to file a "Form 700," which "acts as the disclosure mechanism for transparency regarding the financial interests of filers. *Id.* at 729-30; *see generally id.* at 18-30; *Gananian v. Wagstaffe*, 199 Cal. App. 4th 1532, 1537 (2011) ("Form 700, titled 'Statement of Economic Interests,' is a standard form California public officials and employees must file to disclose their financial holdings."). It is hard to see how this redacted briefing could fall within the provision allowing a discussion "only to decide whether a closed session is authorized" because of the threat of litigation. § 11126(e)(2)(B)(ii). There is certainly no evidence that it does.

The next redaction is a 4-line redaction in comments made by Board President Jones, 2 PA 746, where Jones recounts what he said to Mr. Jacobs months earlier about the investigation into

CIO Meng's conduct. *See id.* at 745 ("late April, early May"), 746 ("As all of you know, somehow the information law leaded about this investigation. And that's when I went to Mr. Jacobs, and said [redacted]"). This context shows that the redacted material was not a discussion of whether the Board should discuss litigation in closed session; it was a substantive discussion.

The circumstances of the next redacted exchange are even more revealing. Member Perez asked about a list of questions he had sent to CEO Marcie Frost, Board Vice President Theresa Taylor, and President Henry Jones. *Id.* at 750; *see also id.* at 714 (list of persons present). He then said that he had not "heard yet what specifically the violations were," referring either to Meng's violations or perhaps more generally to conflicts of interest at CalPERS. *Id.* Frost then answers by referring to Chief Counsel "Jacobs' [redacted]." *Id.* at 750-51. The three of them then have what is plainly a lengthy substantive discussion about these violations, almost all of which is redacted. *Id.* at 751-757. Confirming this, the first words after this redacted discussion are a question from Member Perez: "Okay. How many other 700 people had issues?" *Id.* at 757.

Later in the meeting, Member Middleton discussed how the scandal surrounding CIO Meng's resignation has "hurt CalPERS' reputation." *Id.* at 790. She then told Chief Counsel Jacobs that she was "concerned" about some topic that is redacted. *Id.* Middleton and Jacobs then spent more than a page discussing this concern, all of which is redacted. *Id.* at 790-92. Again, this seems to be a substantive discussion.

This pattern continues: discussions that from all appearances relate to the substance of legal issues without any possible vote or indication that the Board was of the opinion that a closed session was appropriate to discuss pending litigation. *See, e.g., id. at* 775-76, 816-17, 820-824, 862-65.

In short, the transcript confirms the superior court's finding: the Board never took any action to form the opinion necessary to invoke the pending-litigation exception. It also shows that the redacted discussions went beyond a discussion of whether to meeting in closed session. The most likely reason for this is that the Board, as President Jones announced in the open session, was meeting to discuss what it considered to be personnel matters; it had no intention of meeting in closed session to discuss pending litigation. But whatever the reason, the result is the same: because the Board never properly invoked the pending litigation exception, it cannot rely upon this provision to justify its redactions. *See Register Div. of Freedom Newspapers*, 158 Cal. App. 3d 893, 906-908 & n.6 (1984) (rejecting government's claims of attorney-client privilege and ordering disclosure of minutes of improperly closed session).

d) CalPERS failed to show that the parts of the transcript it redacted could be covered by the pending-litigation exception.

Even if an agency properly invokes the pending-litigation exception, it must limit its closed-session discussions to matters relating to "pending litigation when discussion in open session concerning those matters would prejudice the position of the

state body in the litigation." § 11126(e)(1); *see* 69 Cal. Op. Att'y Gen. 232 at *8 (1986). ("discussions must be confined to those authorized by [the pending-litigation exception], namely to receive advice from the [body's] attorney and to confer with him or her regarding the pending litigation when discussion of those matters in open session would prejudice the position of the [agency] in the litigation.").

Although the redactions make it impossible to know for sure, the unredacted parts of the transcript strongly suggest that CalPERS has redacted substantial material that did not fall within the scope of this exception to the open-meeting requirement. Instead, it appears simply to have redacted everything that could possibly be covered by the usual privilege rules, regardless of whether it related to threatened litigation or would prejudice CalPERS in that litigation.

For example, after asking about the specific violations, as discussed in the previous section, Member Perez asked to see a "report and recommendation, the findings," apparently about the investigation of CIO Meng, so that "we all [*i.e.*, the entire Board] can read them." 2 PA at 755 (Ex. 28). He then asked whether the Board needed a motion to approve this. *Id.* General Counsel Jacobs replied to this question, which started a 2-page discussion between Jacobs, Perez, and CEO Frost, all of which is redacted. *Id.* at 755-757. Other members later raised the question of why they had yet to see this report and how they could get access to it. *See Id.* at 834 (Member Brown: "As a person that's responsible for oversight, I want to see that

report."). But her discussion with Mr. Jacobs about this topic are all redacted. *See id.* at 833-34. Later, Member Perez again asked for access to the report and, as a compromise, proposed that "it be treated as closed-session material," to be reviewed "at the CalPERS office." *Id.* at 852. He made a motion, which was seconded. *Id.* But before the Board voted, President Jones asked General Counsel Jacobs a series of questions, all of which are redacted, as are the replies. *Id.* at 853-54.

It is hard to imagine that this is anything other than a discussion of Board procedure, politics, or disagreements; it is even harder to imagine that it can fall within the scope of what can be discussed in closed session as pending litigation, or how revealing it could prejudice CalPERS in any such litigation. These discussions might be covered under the usual rules of attorney-client privilege, but the "general rules of attorney-client privilege do *not* apply to determine whether a meeting with legal counsel may be held in closed session." *Shapiro v. Bd. of Directors*, 134 Cal. App. 4th 170, 182 (2005). They are "irrelevant." *Id.* at 180; *see* § 11126(e)(2) (normal rules "abrogated"). Instead, Bagley-Keene authorizes a closed session only to allow the body to "confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation." § 11126(e)(1).

Later, Board Member Ortega asked about "the Board's role … in hearing about personnel matters," saying that her understanding had been "along the lines of what Mr. Jacobs said

earlier." 2 PA 808 (Ex. 28). But exactly what Mr. Jacobs said earlier is redacted. The scope of the Board's role in running CalPERS is not something that can be discussed in closed session under the pending-litigation exception. Similar examples abound. *See id.* at 813:15-20; 818-19 (apparently discussing the Board's role in personnel issues); *id.* at 132-136; at 143-146 (Member Miller: "I just had a question, probably for Matt." question, answer, and ensuing conversation are redacted); *id.* at 869-71.

Finally, during the second half of the meeting, Member Perez asked to dismiss all of the CalPERS staff except CEO Marcie Frost and General Counsel Matt Jacobs, leaving only them and Board members. *Id.* at 814. Member Perez later explained that he had done this so that he could "have an honest discussion with [CEO Frost] and maybe [Counsel Jacobs]" because he was "angry over this whole process" and "angry that [the Board wasn't] notified about the problems with CIO Meng, even though it had ultimate responsibility for "everyone at … CalPERS." *Id.* at 818. After staff left, Members Perez and Member Brown directed a number of questions at Jacobs; although this dialog is redacted, it appears to relate to CalPERS's reporting requirements to the Fair Political Practices Commission, not to any possible pending litigation. *Id.* at 816-17.

The redacted transcript therefore strongly suggests that not only did the Board fail to invoke the pending-litigation exception, it then discussed matters that would not even have

been covered by that exception had it been invoked. There is no contrary evidence.

e) The CPRA prohibits a court from using records submitted for in-camera review as substantive evidence of the contents of other records.

Although the superior court wrote that "the discussion itself is the sort that would be privileged and would be properly discussed in a closed session," there is no evidence to support this conclusion. *See* 2 PA 967 (Ex. 39). To the extent the court relied upon its in-camera review of the purported litigation memo, it erred. The CPRA authorizes the court to order the government to "disclose *the* public record" after "examining *the* record in camera." § 6259(a) (emphasis added). That the Legislature's twice used the definite article in the phrase "the record" means that both instances of this phrase refer to the same record. *See Lincoln Unified Sch. Dist. v. Superior Ct.*, 45 Cal. App. 5th 1079, 1094 (2020). Thus, the purpose of in camera review under the CPRA is to allow the court to review the contents of a record and determine whether that same record is exempt from disclosure. *See Schaerr v. United States Dep't of Just.*, 435 F. Supp. 3d 99, 116 n.14 (D.D.C. 2020) ("[T]he purpose of *in camera* review [under FOIA] is to consider the applicability of an exemption to a specific record."). It does not authorize the court to rely on statements set forth in one record to determine the contents or status of a different record created months before.

Courts must be careful in using the CPRA's in-camera review procedures because "plaintiff's lack of knowledge [about the contents of the records the court is reviewing] seriously distorts the traditional adversary nature of our legal system's form of dispute resolution" and can deny the "requester a meaningful opportunity to contest' the withholding." *ACLUNC*, 202 Cal. App. 4th 55, 82-83. Broadening the provision to allow the court to use the documents as substantive evidence would exacerbate these problems. Not only would requestors be unable to discuss or rebut this evidence, they would be unable to identify and object to hearsay, improper opinion, or other inadmissible statements. The statute provides for in-camera review, not in camera evidence. *Cf.*, *e.g.,* Evid. Code § 1042(d) (allowing court to receive "evidence" regarding certain privileges in camera). To the extent there is any doubt, it must be resolved in favor of a process that maximizes the public's right to information. Cal. Const. Art. I § 3(b)(2).

Allowing this use of in camera review would be particularly inappropriate here. As CalPERS explained when it submitted the document, "the Court request[ed] that CalPERS provide the memorandum to the Court as proof that it exists," not as substantive evidence. 2 PA 889 (Ex. 29). More generally, the purpose of a litigation memorandum is to describe and analyze the "*existing* facts and circumstances" that would lead a body to decide to hold its discussion in closed session, not to describe what happened at that meeting. § 11126(e)(2)(B)(i), (2)(C)(ii). In addition, this particular memorandum was not created to inform

the Board in advance of the meeting; instead, it was drafted in response to this litigation, 7 months after the meeting and the statutory deadline. There is no indication that its contents were sworn. And CalPERS possesses much stronger evidence of the content of the redacted discussions: the complete certified transcript. Any statements in the memorandum that purport to describe the contents of the transcript "should be viewed with distrust." Evid. Code § 412. To satisfy its burden of proof, CalPERS could either have submitted public evidence about the nature of the discussions at the closed session or submitted the entire transcript for in-camera review. It cannot submit secret evidence.

As discussed above, this Court reviews *de novo* the conclusion that a redaction is proper under the CPRA or that a meeting was properly closed. Even if CalPERS had properly invoked the pending-litigation exception, the Court should order CalPERS to submit the whole transcript for in camera review so that it can determine whether each of the 20 redacted sections is exempt from disclosure. Any discussions of matters that should have been discussed in public must be released. *See Freedom Newspapers*, 158 Cal. App. 3d at 906-908 & n.6.

3. The superior court erred in upholding CalPERS's redactions without reviewing the entire, unredacted transcript.

Even if there were evidence in the record to support CalPERS's redactions under the pending-litigation exception, this Court would have to reverse the order below because the

superior court refused to examine the unredacted transcript in camera. The sole evidence in the public record is that that "none of the redacted material related to pending litigation as that term is used in the Bagley-Keene Act." 2 PA 925 (Ex. 34). A court cannot accept one side's untrustworthy submission while excluding conclusive evidence offered by the other side. *See generally Gordon v. Nissan Motor Co.*, 170 Cal. App. 4th 1103, 1114 (2009) (reversal for improper exclusion of evidence). Doing so would be particularly inappropriate here, where the litigation memo was prepared in response to this litigation and submitted in secret.

CalPERS argued below that the superior court could not review the entire transcript because Evidence Code § 915 prohibits courts from reviewing materials protected by the attorney-client privilege. This is wrong for two reasons: Bagley-Keene expressly abrogates this Evidence Code provision; and the statute unambiguously requires that the entire transcript be made available to the court.

Bagley-Keene requires state agencies to keep a "minute book" of every closed session. § 11126.1. This minute book may "consist of a recording of the closed session." *Id.* CalPERS maintains both a recording of the August 2020 closed session and a transcript of that session. *See* 1 JA 318-19 (Ex. 10). CalPERS stated that it lodged "the transcript" with the court. *Id.* But it turns out that it in fact had redacted this transcript (and presumably the recording) to remove material that it contends is covered by the pending-litigation exception to the Bagley-Keene

Act. Jelincic learned that CalPERS had failed to submit the whole transcript only because the lodged transcript had been posted on the Web; he then argued that this was improper and that the court must review the entire transcript in camera. *See* 1 JA 528-29 (Ex. 19). But court never required CalPERS to provide it with an unredacted transcript for in camera review, and CalPERS never submitted one. This was error.

The biggest problem with CalPERS's contrary argument is that Bagley-Keen expressly abrogates the Evidence Code provisions relating to attorney-client privilege as it applies to meetings:

> For purposes of this article, all expressions of the lawyer-client privilege other than those provided in this subdivision are hereby abrogated. This subdivision is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings pursuant to this article.
>
> § 11126(e)(2).

This unambiguously means that the usual protections for communications between a lawyer and client contained in Evidence Code § 952 and related provisions cannot justify closing a meeting or keeping discussions that occurred at a meeting from the public. *See Shapiro v. Bd. of Directors*, 134 Cal. App. 4th 170, 182, 185 (2005). This in turn means that Evidence Code § 915's prohibition against in-camera review of attorney-client material cannot apply, because that provision applies only to "information claimed to be privileged under this division." Evid. Code § 915(a). Because the Evidence Code attorney-client

privilege does not apply to meetings covered by Bagley-Keene, § 915 does not, either.

Bagley-Keene's treatment of closed-session records supports this same conclusion. The statute mandates that "[t]he minute book" of a closed session be available to the court for in camera inspection when "if a violation of [the Act] is alleged to have occurred at a closed session." § 11126.1. As discussed above, the minute books can be a recording or transcript. *Id.* Nothing in this section or any other part of Bagley-Keen even suggests that redaction is allowed. Section 11126.1 therefore requires the government to make the entire minute book available to the reviewing court, without any redactions.

In short, the Legislature has mandated that the courts may review closed-session transcripts and recording when a violation of Bagley-Keene is alleged. These materials — which reflect discussions among public officials and staff (here, 24 people in all) — simply do not merit the same protections as discussions between private parties and their lawyers. *See* 2 PA 716-21 (Ex. 28) (persons present). Bagley-Keene prohibits the government from redacting material that it claims is protected by the pending-litigation exception from the records that it provides to the court for in-camera review.

For these reasons, the court should have reviewed the full transcript to determine whether CalPERS had properly invoked the pending-litigation exception and, if so, whether the materials it claimed were covered by that exception were in fact within the scope of the statute. This Court should either order release of the

records, review the materials in camera and determine whether they can be withheld, or reverse and order the superior court to conduct this review.

E. Costs and Fees

A prevailing CPRA requestor is entitled to costs and attorney's fees; requestors may not be required to pay the government's costs or fees unless the case is "clearly frivolous." § 6259(d); *Filarsky v. Superior Ct.*, 28 Cal. 4th 419, 427-28 (2002). This provision applies in this Court as it does in the superior court. *See Los Angeles Times v. Alameda Corridor Transp. Auth.*, 88 Cal. App. 4th 1381, 1393 (2001); *San Gabriel Trib. v. Superior Ct.*, 143 Cal. App. 3d 762, 781–82 (1983); *see also Filarsky*, 28 Cal. 4th at 427-29 (§ 6259 prevails over generally applicable provisions relating to costs). This Court should therefore award fees and costs to Jelincic.

F. Conclusion

As the superior court found, CalPERS failed to properly invoke the pending-litigation exception to the open-meeting requirement. It failed to present any evidence of the contents of the redacted parts of the transcript or to provide the court with the entire transcript for in-camera review. All of the evidence in the record about those contents indicates that these discussions did not relate to pending litigation. And there is no evidence to support the notion that the public interest in withholding this unknown information clearly outweighs the public interest in

knowing fully how the CalPERS Board addressed a major failing by the agency.

This Court should therefore either order release of the records, review the materials in camera and determine whether they can be withheld, or reverse and order the superior court to conduct this review.

May 4, 2022

/s/ Michael T. Risher

Michael T. Risher
Attorney for
Plaintiff/Petitioner

CERTIFICATE OF WORD COUNT

The text of this Petition for Writ of Mandate and Memorandum in Support comprises 13,511 words as counted by the Microsoft Word program used to generate it. This count includes footnotes but excludes the tables of contents and authorities, the cover information, any certificate of interested entities or persons, the signature blocks, the verifications, this certificate, any proof of service, and any attachment. *See* Rules of Court 8.204(c), 8.486(a)(6).

May 4, 2022

/s/ Michael T. Risher
Michael T. Risher
Attorney for
Plaintiff/Petitioner

PROOF OF SERVICE

I am employed in the County of Alameda, State of California and a member of the bar of this court. I am over the age of eighteen years, and not a party to this action. My business address is 2081 Center St. #154 Berkeley CA 94704.

1. **Petition for Writ of Mandate and Memorandum in Support**
2. **Petitioner's Appendix, Volumes 1 and 2**
3. **Proof of service**

I caused the above document to be served on each of the persons listed below:

Allyson Bennett Durie Tangri LLP abennett@durietangri.com 953 East 3rd Street Los Angeles, CA 90013 Telephone: 213-992-4499	Ragesh Tangri Durie Tangri LLP rtangri@durietangri.com 217 Leidesdorff Street San Francisco, CA 94111 415-362-6666
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by the following method: A true copy of the above documents was emailed on May 4, 2022 to the persons listed above at the indicated email addresses.

In addition, the Alameda County Superior Court was served with the Petition and Memorandum at 1225 Fallon St. Oakland CA 94612 by first-class mail.

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

Executed on May 4, 2022 at Berkeley, California

_____

Michael T. Risher