IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

DEPARTMENT 67 BEFORE HON. EDDIE C. STURGEON, JUDGE

CARLSBAD POLICE OFFICERS ASSOCIATION et al, Petitioners, vs. CITY OF CARLSBAD, a municipal corporation; NEIL GALLUCCI, Chief of Police, City of Carlsbad et al, Respondents, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES and FLORA RIVERA, Intervenors.	CASE NO. 37-2019-00005450-CU-WM-CTL ORDER TO SHOW CAUSE CERTIFIED TRANSCRIPT

REPORTER'S TRANSCRIPT

SAN DIEGO, CALIFORNIA

MARCH 1, 2019

REPORTED BY REGINA L. GARRISON, CSR NO. 12921

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SAN DIEGO, CALIFORNIA; FRIDAY, MARCH 1, 2019; 1:39 P.M.
DEPARTMENT 67 HON. EDDIE C. STURGEON
* * * * *

THE COURT: We're going to go on the record. Here we go. Like I said, this is the Police Officers Association of Carlsbad et al versus the City of Carlsbad et al. Now, slowly but surely, full appearances, starting with petitioner.

MS. MARGOLIES: Good afternoon, your Honor. Amy Margolies from Bobbitt, Pinckard & Fields, on behalf of petitioners.

MR. PINCKARD: Good afternoon, your Honor. Rick Pinckard, Bobbitt, Pinckard & Fields, on behalf of petitioners.

THE COURT: Welcome.

MS. GREENE: Andra Greene, general counsel for San Diego Unified School District and our police chief, Michael Marquez.

MR. McMINN: Good afternoon, your Honor. Bill McMinn for Police Chief Stainbrook and the Port of San Diego.

THE COURT: Say that again, Counsel.

MR. McMINN: Bill McMinn.

THE COURT: I got that.

MR. McMINN: Harbor Police Chief Stainbrook and the Port of San Diego.

THE COURT: Got it.

MR. LOY: David Loy from American Civil

Liberties Union of San Diego & Imperial Counties and Flora Rivera, intervenors.

MR. CHADWICK: James Chadwick, your Honor, on behalf of the media intervenors. If you would like me to recite them all --

THE COURT: No. We'll just use "media" for everybody.

MR. CHADWICK: All right.

THE COURT: Thank you.

MS. HIGLE: Amy Higle for the City of Oceanside and Chief Frank McCoy, your Honor.

THE COURT: Oceanside.

MS. HENDRICKSON: Lauren Hendrickson for City of Coronado, City of El Cajon, City of National City, Chuck Kaye, Jeff Davis and Manuel Rodriguez, your Honor.

THE COURT: Thank you.

MR. HALGREN: Matthew Halgren also for the media intervenors.

THE COURT: Thank you.

MR. KARLIN: David Karlin on behalf of the City of San Diego and Chief Nisleit.

THE COURT: Thank you.

How many on the defense side wish -- respondent's side -- let me say it correctly -- wish to argue?

Okay. So about four or five. Thank you.

With that -- and can I assume, for the record, everyone has read the Court's tentative?

(Multiple affirmative responses.)

THE COURT: I assume you got a phone call, this morning, that it had been published this morning. Fair enough?

(Multiple affirmative responses.)

THE COURT: All right. Try to make yourself comfortable.

Uh-oh, who is on the phone?

MS. ROXAS: Beverly Roxas, City of Carlsbad and Police Chief Gallucci.

THE COURT: Anyone else on the phone?

All right. Let's do some work. We'll try to get you some chairs. There will be some chairs coming in. Okay. There are some chairs over here. We've got enough chairs.

(Court reporter interruption.)

THE COURT: Now that everyone has moved, will you stand up and speak so the court reporter -- state your name first so she knows who is speaking. Fair enough?

Obviously, very important issue, Counsel. Clearly, the Court understands not only the issue that is involved in this case, but also the potential ramifications involved in this case. Very serious.

Now, on behalf of the petitioners, you may address the Court.

MR. PINCKARD: Thank you, your Honor.

I also want to thank the Court for a very

concise tentative. I think, when we started out this process, we had a tentative that was about 31 pages from the judge in Contra Costa County. So the ability of this Court to distill the issues to that which is really important and to keep that at four pages --

THE COURT: If there's one thing I'm known for, it's being concise. I will tell you that.

MR. PINCKARD: And it's greatly appreciated, your Honor. Thank you.

I think that when we first started down this road, as the petitioners, we may have had perhaps an overly simple or simplistic perspective as we were standing at the threshold looking forward. And I think that what our intent was, initially, was basically to stick as narrowly as possible as we could to an analysis of statutory construction, and to the extent necessary, look at whether there was a retrospective impairment of a right if we weren't able to reach a consensus on whether the statute, on its face, in its own language, was meant to be or intended to be retroactive in its application.

I think that, as we got further and further down this road -- and, you know, particularly in regards to the pleadings that we received from our respective colleagues at the ACLU and the media intervenors -- it became quickly apparent that what we were really going to be dealing with are public policy issues, and that was not originally our intent. I think that what we

wanted to focus on was the language of the statute itself, and try to avoid a controversy or begging a controversy on what the public policy underpinnings of the statute were.

I don't know that we did a good job in that regard, because I think we have kind of gotten into the area of looking at the underlying public policy issues. Certainly, it's apparent in the ACLU and the media intervenors' papers that they're looking at why we have this statute, you know, what the need is, what the process was, what was meant, what wasn't meant, and a little broader than what we were looking at originally.

I'm going to try to confine this back to the path that we started on, which was a much narrower path to simply examine the statutory language and to look at a statutory construction analysis. And I think that, you know, everybody seems to agree that there is no specific wording in this statute that says that SB 1421 and the changes to 832.5, 832.7 are meant to be retroactive. I don't think there's any debate or dispute in that regard.

I think where we split off is where the petitioners believe that, irrespective of what the language actually says or doesn't say, we still have a retrospective impairment of vested rights. And the vested rights that we're looking at in this instance are the privacy interests of the peace officers whose records are subject to disclosure as a result of

SB 1421.

We the petitioners still believe strongly that a traditional statutory construction analysis would render this particular statute prospective only, and meaning that only records that were created or maintained by an agency moving forward, after January 1st of 2019, would be subject to the disclosure. We're not prepared, at this point, to waive those arguments, but we understand that the Court's direction in your tentative is elsewhere. So we'll try to get there.

I know from the pleadings --

THE COURT: So let's -- if I may interrupt, two things. So it is your position -- "and I think very clearly, Judge" -- that you're saying "Judge, listen, the only records" -- according to your reading of the statute -- "would be new records or new records that have commenced since January 1 of 2019," correct?

MR. PINCKARD: Yes. And in an abstract sense, I'm going to refine that argument somewhat as we proceed. Because I think there is a distinction to be made, and perhaps this is a good segue.

THE COURT: And then also go back and tell me -- I've read it, but obviously, based on what I have written, you see I am having trouble with it being a vested right. So you may want to explain that a little bit more, too, to the Court, Counsel.

MR. PINCKARD: Your Honor, I think that the way

petitioners look at the law -- and there's a difference between a statutory grant of confidentiality versus a constitutional grant to privacy. So we look at that, and we say that's an area where a distinction can be made.

The Pitchess statutes created confidentiality over the records that were defined in 832.5, 832.7. It created a process under the evidence code 1035, 1043. To the extent that the legislature wants to revisit that and change it up and say "Well, we're going to eliminate or we're going to trim back some of that confidentiality," I would -- I would agree that the legislature certainly has that prerogative.

THE COURT: Uh-huh.

MR. PINCKARD: But I think that there is a distinction to be made between the confidentiality rights and the process for procuring those confidential records versus the privacy interest that exists in the discipline records.

As to issues involving use of force, every police officer anywhere in the county of San Diego that uses force -- and it doesn't even have to be force that results in death or serious bodily injury -- every police officer in every agency in this county has to fill out a use-of-force report form. It's an incident report that specifies the amount of force that is used, and requires an explanation to justify that use of force. That form is a part of the incident report.

If I'm arrested and there's force used on me, there's going to be an arrest report. There's going to be a use-of-force report. To the extent that the Public Records Act requires exposure of one or both of those reports, okay, I concede that point. That's fine. I don't have a problem with that. So when we look at the four categories that SB 1421 has created -- use-of-force reports, the incident reports -- now they are specifically subject to disclosure under SB 1421. Fine. I don't have a problem with that.

THE COURT: Let me interrupt. But when you say that, I assume you're saying "Judge, I agree with that part, but I'm limiting it to use-of-force reports from January 1, 2019, forward." Or are you saying they can go back now?

MR. PINCKARD: Your Honor, I will say this in these proceedings, now having a better perspective based on the Court's tentative, as well as counsels' -- and I'm referring to intervenors -- counsels' pleadings, that's a hill that I -- I don't think we need to die on. If an agency has those reports, the incident reports --

THE COURT: Uh-huh.

MR. PINCKARD: -- that's not something that I think petitioners have a huge interest in concealing from public view. When I use force as a police officer, I need to have a legal justification either under Ram v. Connor, 835(a), or Tennessee v. Garner. I don't make that decision to use force based upon what the existence

of the law is or the state of the law regarding peace officer confidentiality.

The same thing with reports dealing with a discharge of a firearm at a person. Again, there's going to be an investigation of my use of deadly force. And whether I hit somebody or kill them, hit them and wound them, or don't even hit them, if I'm pointing a firearm at somebody and I pull the trigger, that's a use of deadly force. There will be an incident report. There will be an investigation that is conducted and completed by the homicide unit of whatever police department I'm working for.

And as to that report, again, that's not something that the petitioners have an interest in saying "By golly, we should never allow those records to be disclosed publicly." In fact, I scratch my head and ask myself how is it that they're not. I mean, I understand 6254 creates a list of exceptions to disclosure. 6255 creates a balancing process so that if we get past one of the specific exemptions or exceptions, we can do a case-by-case analysis. I understand that.

And I understand what the ACLU and what the media are saying regarding the public's right to know. If I shoot somebody or shoot at somebody, is there an important interest to the public to know why I did that? And again, petitioners are not at odds with that. I do not make the decision, as a police officer, whether I'm

going to use deadly force or some other force, based upon the state of the law regarding the privacy of my personnel records.

So as to those categories -- those two categories of the four that SB 1421 addresses, we're not here to fight about those. We have perfectly capable counsel from the represented jurisdictions whose responsibility it is to either respond to those public records requests or give a good reason why they didn't. And I'll leave that between the cities and the people who have an interest in obtaining that information. So as to those two types of records, I think a distinction can be made.

As to the records that deal with discipline, that's a different issue. And I do believe that there is a vested privacy interest in those records under certain circumstances. And again, I'm not going to say under every circumstance, but there is a recognizable privacy interest in my discipline records, which is different than a confidentiality that was afforded to shootings and use-of-force reports under the old Pitchess statutes. And that's where we -- the petitioners would ask the Court to direct their attention to see if you're comfortable making a distinction between the incident reports versus the discipline records.

Discipline is a different issue. It's a different item. Now I know that the ACLU and the media

will say "But we have a right and the public has a right to know whether or not there is rampant, gross misconduct within a police department. And the only way that we can know that is to get these records."

Well, the first thing we have to recognize is that SB 1421 does not open the drawers for every form of discipline. It opens the drawers to two specific categories of discipline. One of those is going to be a matter of public record anyway. If I commit a sexual assault on duty, I'm going to be arrested. There's going to be a criminal charge brought against me. That's going to be a matter of public record under the Public Records Act, to some limited extent anyway.

The problem that we have with the language in SB 1421 -- when it addresses sexual assault, it doesn't confine itself to the traditional, conventional definitions of sexual assault. It has wording in there about sex under coercion, force, in exchange for, an enforcement action, you know, things that we would look at and we would all say "Yes, that is improper for a police officer to engage in. That is serious misconduct." But then it has another sentence at the tail end of the definition of what constitutes a sexual assault, and it says "any sexual act committed on duty."

So if I go home on my lunch hour, which is a violation of policy, and I have sex with my wife, well, that's sexual misconduct on duty. And we've seen this play out where we have a Chula Vista police officer who

is now all over the news because he met his girlfriend and had sex on duty. I'm not saying that that's not misconduct. I'm not saying that's misconduct that shouldn't be addressed by a police department. It was addressed by the police department. They imposed a severe form of discipline on him, and he resigned as a result of that.

What public good is served to put that out there? If I made an impulsive, immature, stupid decision as a young police officer 30 years ago, 40 years ago, 45 years ago, and then I moved on -- I'm a doctor. I'm a lawyer. I'm something else. I've got children, grandchildren, great grandchildren -- and now that record, which had been private and subject to nondisclosure for 45 years, is suddenly subject to SB 1421 if it falls into any of those four categories, more specifically, the two categories that we're most concerned about.

That flies in the face of what the Public Records Act is about. That goes to the heart of what 6255 addresses and what 6254(c) addresses, which clearly says that personnel records of public employees are, by default, not subject to disclosure. But then we get into the same sort of balancing that 6255 allows for, and we make a case-by-case analysis.

What public good is served in dredging up something that is 45 years old? I've moved on. There's no threat or risk to the public. And now my great

grandchildren get to sit down and read the newspaper and say "Oh, I didn't know great granddad did that," as well as all the people who then also know about this. That's the concern that we have with SB 1421. That's the privacy interest that we're addressing.

Is there a privacy interest in concealing reports -- investigative incident reports when I've shot and killed somebody? I don't personally believe that. I don't know what basis cities and counties throughout this state have relied upon for however many years they've been relying upon it to not release certain aspects of those reports. I don't know. But I don't represent those jurisdictions.

What we're looking at is the privacy interest that attaches to discipline records and how far back are we going to go. Are we going to go back further than the Pitchess statutes? You know, the City of San Diego was incorporated in the 1800s. Are we going to go all the way back just because the records are there? "Well, by gosh, we have to produce them because they were maintained by the City." That's the problem that we're looking at.

And if we can make a distinction -- if there is a distinction to be made between the first two categories -- deadly force, use of force, if we can make a distinction between those two categories from the sexual misconduct and the dishonesty, then I would submit we can make a further distinction to say, look,

some of these should not be produced. There is a privacy interest in those matters. They should not -- there is no good public need to know that information. There is no good that is served to the public in releasing that information.

So we would invite the Court to make that distinction, make the distinction between the incident reports and the discipline reports. And I understand that the intervenors have pointed out, "Well, we have the Smith case. We have People v. Superior Court, Smith, Real Party in Interest. How do we reconcile the outcome of that case with what petitioners are asserting in this case?"

And I look at that case, and I say it's apples and oranges. In the Smith case, what we have, first of all, is a contested judicial proceeding. This was an SVP -- a sexually violent predator -- SVP case, a petition that was filed by a prosecutor. It's a reciprocal discovery issue. How can I cross-examine a state doctor about this prisoner's mindset without having access to the reports or the information that underlies their conclusion?

When I read Smith, I read that as a case that said "Look, we've got reciprocal discovery in criminal cases now under 1054.1, and, by golly, we're going to extend reciprocal discovery concepts to SVP commitment proceedings." I don't have a problem with that. I don't have a problem with that at all. But it's apples

and oranges.

That's a contested judicial proceeding, and one of the most important aspects that comes out of the Smith case is there's a protective order. So in that case, we're not just releasing it to the public for wherever it lands -- whoever can get it and wherever it lands and however it's going to be used. In that case, it is a very specific -- frankly, common-sense approach to dealing with SVPs and effectuating the purposes of the SVPA. That's a different circumstance than what we have here.

Intervenors say "Yeah, but your clients had no expectation of privacy over these Pitchess records because it's subject to disclosure under a Pitchess motion." That's not true. That's not true. When I was a deputy city attorney for San Diego, I did Pitchess motions for years. As the sheriff's legal counsel, I did Pitchess motions for years. The only thing that is released in a Pitchess motion, assuming that you can get past the affidavit requirement and the good cause requirement, are names, addresses and phone numbers.

THE COURT: Counsel, let the record reflect, before here, I did 16 years in criminal law. I've done numerous Pitchess motions.

MR. PINCKARD: And specifically excluded, as the Court is well aware --

THE COURT: Absolutely.

MR. PINCKARD: -- from the Pitchess disclosure

is conclusions. And discipline is a conclusion. So to say that "Well, the petitioners should not have an expectation of privacy because they know, through the Pitchess process, that records are going to be disclosed," it's not true.

And in addition to those safeguards that used to reside in 832.5 and 1043 and 1045, there's a protective order. Again, we don't have that here. Once this information is out there, it's out there for any and all purposes. And you have to ask yourself: Is that the purpose of the Public Records Act? Is it really the purpose?

When I make a mistake as a 22-year-old cop and I do something foolish on an impulse and a momentary lapse of judgment, should that be available forever to throw back in my face? Intervenors say there's no -- there's no consequence. There's no legal consequence. There's no additional penalty attached. That's not true. That's not true.

I can tell you this. The officer down in Chula Vista, he's never going to get employed again as a police officer. This stuff is splashed across the newspaper. He's tainted goods. That will be an indelible mark on him that will follow him for the rest of his life. He will never be employed as a police officer in the state of California again. Because chiefs are sensitive to scrutiny.

We see in the newspaper, the editorials they

wrote on Sheriff Gore, they're slapping him with one hand and patting him on the back with the other. There are whips on that poor guy. "Well, you're a scoundrel." "No, you're a saint." Okay. Well, finally, he's going to give us all the records, and he's not going to charge us. That's the mentality of law enforcement management.

And I'm not faulting them. They have a whole bunch of things that they have to worry about that I don't. But the bottom line is the risk averts. And when this information gets out into the public, that's it. It is forever a taint on that individual. His reputation is shot.

And I know -- reputation, well, geez, that's something that you have a vested property interest in. Under the Lubey case, absolutely, it is. If my employer harms my reputation, they have to give me a Lubey hearing, a liberty interest hearing, so I can at least try to clear my name. We don't have that with this particular application that's being forwarded by the intervenors on SB 1421. There is no liberty interest hearing. There is no name-clearing hearing. The information is out there, and it's out there for any and all purposes. That's a problem.

When we look at that, we say that's abrogating. That's not just impairing; that's abrogating my rights -- my privacy rights. I've made decisions that were based upon the belief and understanding that these records were going to be confidential. Perhaps.

Perhaps.

Had I known 35 years ago that my grandchildren would be picking up a newspaper and reading about my stupidity in my youth, I would have said "Hey, huh-uh. I'm going to fight this. I'm going to fight this. And who knows?" I can go down to the Civil Service Commission. The Civil Service Commission could look at that and say "The findings of your appointing authority are overturned." That would be a record that would be exempt from disclosure even under SB 1421, because SB 1421 says only sustained allegations are discoverable or disclosable. And it defines "sustained" as a decision reached by the appointing authority and any appeal following therefrom.

So there may actually be records disclosed that are not even subject to -- or shouldn't even be subject to SB 1421 but for the fact that, at the time, the law guaranteed my privacy and my confidentiality, and I chose a la People v. West to just simply accept the discipline imposed without fighting it. And now, 35 or 45 years later, I'm getting that thrown back into my face. It's damaging my reputation. It damages my standing in the community. Those are penalties. Those are consequences. That's an abrogation of certain rights that I had a right to rely upon and believe 45 years ago.

To sum up, if the Court was willing to modify its ruling --

THE COURT: Let's talk about that. Let me -- based on your argument -- and I want you to kind of just take time and really -- so I really understand it, sir. "Judge, I think, clearly, under their statute, there are four categories." In one of your arguments, you say "Well, Judge" -- if I limit it just to two, you don't have a problem with releasing some of the material that would be in an officers jacket, if I may use that term, pre-January 1, 2019. "However, Judge, if it has anything to do with discipline, Judge, none of that should be -- would be allowed under the statute, unless it is post-January 1, 2019."

First of all, do you understand what I said?

MR. PINCKARD: I do.

THE COURT: Is that what you're conveying to the Court?

MR. PINCKARD: Your Honor, that is exactly what I'm conveying to the Court. It is.

THE COURT: I got it.

MR. PINCKARD: It is. Because one has a different interest attached to it than the other.

THE COURT: I understand.

Now, sum up, if there's anything else.

MR. PINCKARD: In summation, we would just invite the Court to look at those --

THE COURT: Sure.

MR. PINCKARD: -- four categories. To the extent that the first two don't have any implication on

any privacy interests, then that's a public records request, and the -- the conventional analysis for granting or denying stands or falls on its own merit. The discipline records are different.

THE COURT: Okay.

MR. PINCKARD: Thank you.

THE COURT: Well done.

I've got a lot of eyes staring at me. All right. Who wants -- pick your order. Who wants to go?

MR. CHADWICK: Your Honor, I would defer as counsel for the media intervenors, because I expect that the agencies may have things to say not only in response to what counsel for the petitioners have said, but also in response -- if they're directed to --

THE COURT: You are an intervenor? Who is ACLU? You're an intervenor. I'm going to let the other parties go first. I agree with that. So let's talk about all the agencies. Just let me know who you are and who you represent.

MS. GREENE: Your Honor, Andra Greene, general counsel for San Diego Unified School District.

THE COURT: All right.

MS. GREENE: I am concerned that, in granting the motion for intervening, the Court has gone beyond what we understood to be at issue here.

THE COURT: Start over, Counsel. I missed the first part.

MS. GREENE: In granting the motion for leave

to intervene, you indicated that the matters at issue would not be expanded. I understood what was at issue today to be whether an order to show cause why a permanent injunction should not be issued. We took no position on that because we were -- intended to simply take direction. But your order goes beyond that, to grant the -- let me see the language -- "granting the media complaint in intervention by providing the requested records," et cetera. I did not understand that that was at issue today.

THE COURT: I don't mean to be rude, Counsel, but did you read their request in their complaint in intervention?

MS. GREENE: I did.

THE COURT: Proceed.

MS. GREENE: But I understood today's hearing to be on an OSC why an injunction should not remain in place.

THE COURT: So what are you requesting, if anything, Counsel?

MS. GREENE: Well, there is now a complaint in intervention that is not yet at issue. None of us have responded to it. Frankly, I believe it is premature in that it alleges a violation of the Public Records Act, and none of us had yet violated the Public Records Act, but we haven't had an opportunity. We intend to demur to it.

THE COURT: Okay.

MS. GREENE: It appears that your order forecloses that without us having the opportunity to brief the issue.

THE COURT: What are you requesting?

MS. GREENE: I'm requesting that your order be amended to delete the intervention -- the granting of the complaint in intervention.

THE COURT: That will be denied.

Next issue.

MS. GREENE: Okay. And I don't want to belabor the point --

THE COURT: That's okay.

MS. GREENE: -- but there may arise other issues with respect to compliance. I wanted to clarify that you're saying that you will not allow us to demur to the complaint?

THE COURT: I'm saying that, at this time -- are you making a motion at this time to -- tell me what your motion is. I'll rule on it.

MS. GREENE: I'm not making a motion. I'm simply saying that what we all understood -- or at least what I understood was an OSC re why an injunction should not be issued, and that there is not -- the complaint in intervention by the media intervenors is not yet at issue. We have not responded to it. They did not bring a motion, and so we took no issue. I think that we're entitled to brief the issue, first of all, as to whether the complaint in intervention is even -- is premature,

because there's no present controversy between us.
THE COURT: Okay. As to that issue, whether it's premature, the Court is ruling -- I allowed them to intervene. I did that at the last hearing. But I sense what you're saying. "Judge" -- you want a chance to respond to what the intervenors had requested to the Court.
MS. GREENE: Correct. Because, currently, we are not adverse parties. There's also the granting of costs as to the intervenors, and I question who the -- that order as to -- because we're not adverse.
THE COURT: Is cost the main issue? Is that what you're concerned about, Counsel?
MS. GREENE: No. What I'm concerned about is that there may arise issues in the future as to the application of certain privileges and whether they survive --
(Court reporter interruption.)
MS. GREENE: -- the application of certain privileges, the meaning of direct cost, duplication -- but again, these things have not yet arisen. So if the order simply is that the injunction will not be -- remain in effect and the respondents -- the respondents are ordered to comply with the statute, that's fine. But when we get beyond that, to the interpretation of the order, we would not like to be foreclosed from bringing those issues forward.
THE COURT: I think I understand what you're

saying. "So if there's a problem in the future, Judge, where maybe you don't think that the statute is being complied with correctly," you'd like to bring that to the Court? Is that -- I'm still --

MS. GREENE: I think what I'm trying to say is that, very simply, we understood this was an OSC. My clients understood that. And that's what we reacted to, and we did not respond.

THE COURT: All right.

MS. GREENE: We have a pending complaint in intervention that our response is due next week, and we intend to demur. If the case -- if your order would allow the intervenors to come in -- specifically stated, that they would not be allowed to enlarge the case. What they've done, by naming all of us, is set up potential claims against each one of us for violation -- each individual party for violation, which was not the original petition.

THE COURT: I understand the issue.

MS. GREENE: Okay.

THE COURT: Who represents all the other agencies? You just heard what --

Who do you represent, again?

MS. GREENE: Andra Greene for San Diego Unified School District.

THE COURT: You just heard what San Diego Unified said. Let everyone know who is on your position on that exact issue.

Who are you?

MS. HENDRICKSON: Your Honor, Lauren Hendrickson, Coronado, El Cajon, National City and their respective police chiefs. I support what my colleague said. The complaint in intervention does contain a cause of action against all of the respondents for violations of the Public Records Act. By our calculations, our response to that complaint was not due until March 13th. It was actually served the day prior to our response to the original petition was due.

We would appreciate this Court's guidance on the issue of SB 1421 and the retroactivity of that and how it applies. We do have concerns that we do not believe the cause of action brought by the media intervenors is ripe at this time. We agree that we're not necessarily -- that there's no controversy between us. We've all said we were going to comply with the Public Records Act. That's why we're here. And I think that we had the intention to demur to that complaint as well on the grounds that it is not ripe at this point.

So we issue the same -- we have the same concerns.

MR. KARLIN: Your Honor, David Karlin on behalf of the City of San Diego. I, again, echo the comments of my colleagues. And just to point out, that -- the ACLU, in their complaint for intervention, did not enlarge the issues. What -- in terms of what -- the Police Officers Association matter, is they simply asked

that the relief that was being requested be denied. We have no issue with that.

The issue we do have is where the media now comes in in intervention and now alleges that the local agencies have violated the Public Records Act. And again, as stated by my colleagues, it's not ripe. We haven't answered.

MS. HIGLE: Good afternoon, your Honor. Annie Higle -- I'm sorry -- with the City of Oceanside. I also echo my colleague's comments. Our concern is that there is no motion on behalf of these intervenors pending today for the Court to have ruled on. And we also intended to demur to the complaint in intervention. We have not had that opportunity in light of the Court's ruling on the complaint in intervention.

THE COURT: Thank you.

MR. McMINN: Your Honor, the Port agrees with our agency colleagues on the matter.

THE COURT: Thank you.

Any position?

Okay. Two seconds on media. What's your position on what counsel just said? And then I'll tell you what I think I'm going to do -- not think I'm going to do -- I'm going to do.

MR. CHADWICK: Your Honor, I guess I've made the point that the agency respondents either filed statements of non-opposition to the media intervenors' motion to intervene, or they filed oppositions that

raised these very concerns, which the Court obviously considered before granting relief to intervene. I have more to say about that subject, your Honor, but I will reserve that in the event that you want to hear more from us.

THE COURT: I'm going to make a tentative ruling, and you each get whatever time, and then I'm going to rule. I clearly understand your issue -- and I'm talking to San Diego Unified and all of the agencies -- my thought -- I'm going to rule on the retroactivity today. I think that's critical. It's a main issue. Something that -- but I clearly understand your issue, Counsel.

MS. GREENE: Thank you, your Honor. I wasn't sure I was actually clear.

THE COURT: No, no. You were clear. I got it. So my thought process is this. Everyone get the tentative ruling out. I'm going to strike the last two paragraphs, subject, then, to further hearings by the agencies against the intervenors. If you're going to demur to their -- I don't know what you're going to do, but you may do that. But hold on. Let's be technical.

Who is -- ACLU, I really don't have to strike yours because yours was -- you were just saying "denied," correct?

MR. LOY: Correct, your Honor.

THE COURT: See that last paragraph, then -- see, it says similarly granted -- just put it this way,

I'm going to grant. It will be -- well, that's the tentative. So ACLU is okay.

But clearly -- well, first of all, you do what you're going to do with those -- with all of these -- the intervenors. You deal with what you want to do.

But to the media, do you understand what I'm doing?

MR. CHADWICK: I understand that you are proposing to reserve the question of the -- the agency's obligation to comply with the relief sought by media intervenors for another day.

THE COURT: The specific -- that's a very good sentence -- the specific relief which was put forth in their petition, which would be the media. Absolutely right, Counsel. It would be another day.

Do you have any objection to that?

MR. CHADWICK: I do, your Honor.

THE COURT: Make it.

MR. CHADWICK: Well, I pointed out my -- my objections that I think this issue has already been raised and determined, and that this is, essentially, a motion for reconsideration, and there's no new facts, circumstances or law.

But I also want to make a few other points, your Honor. First and foremost, under Code of Civil Procedure section 387(b), as intervenors, we have the right to a party --

THE COURT: Oh, yeah.

MR. CHADWICK: -- the same rights of any party, and that includes demanding anything adverse to both the plaintiff and the defendant, which is exactly what we've done in our request for relief.

So we absolutely have the right to seek this relief, and we believe the Court has -- has appropriately granted the relief that we sought. The case law makes it clear. This Court has authority to grant relief to the intervenors, requiring public agency respondents, in a reverse-CPRA case, to provide requested records. And for that, I'm citing, your Honor --

THE COURT: Counsel, I don't disagree with any of that.

MR. CHADWICK: All right.

THE COURT: This is more a fundamental -- just a fundamental "Am I going to let them have a chance to prove" -- that's all it is.

MR. CHADWICK: Okay. So let me, then -- I think what their argument is -- essentially, is that determination is premature. You shouldn't order them to do it now --

THE COURT: "We didn't have enough time. We didn't think it was on the table, Judge, so give us enough time to make a decision of what we're going to do, whether we're going to file a demurrer or whatever response." That's what they're saying.

MR. CHADWICK: So I think, in that regard, your

Honor, they've been aware of our -- of the relief we were going to request since we filed for leave to intervene. As soon as we filed -- we were allowed to intervene, they knew they needed to address that issue.

Under the California Public Records Act, which is the primary basis for the relief we seek, all proceedings are supposed to be expedited to result in the earliest resolution possible. That's government code section 6258. So I don't think that they're surprised by this, your Honor. I don't think there's any claim that this is something unexpected or unanticipated.

And so I think, really, you put your -- you sort of put your finger on it, your Honor, when you asked them if what they're really concerned about are the costs. I think they are concerned about the fact that if you grant relief to the media intervenors, that we're going to come after them for fees. Well, you've already told us we can't seek fees.

THE COURT: I hope I sent that message, last hearing, over your objection.

MR. CHADWICK: Yes. And we preserved our rights. But if we're going to do anything about that, it's going to be an appeal. They're going to have a right to weigh in on it, and they're going to have plenty of due process and opportunities to contest any order of fees.

In the meantime, your Honor, if there's no

order requiring disclosure, there are pragmatic consequences to that. An order requiring disclosure is necessary to ensure that disclosure is actually made. These agencies did not respond to requests that were made before -- well before there was an application for relief and a stay granted. And a lot of those requests were -- were ripe. They were more than 24 days old.

And responses -- there was no disclosures before the stay was granted. So in the first place, we have a basis for relief. We have an actual controversy.

(Court reporter interruption.)

MR. CHADWICK: I'm sorry. I'll try to slow down.

We have an actual controversy here because there was a preexisting request with which the agencies did not comply. So beyond that, your Honor, if there's no order, then what we're facing is the possibility of it's simply going to be voluntarily whether or not records are disclosed.

This is, again, assuming the absence of a stay. If a stay is granted or a writ of supersedeas is granted, it's moot. But if not -- and, your Honor, we'll point out that, at least one of these cases in Los Angeles, the media has decided not to appeal. So this is at least -- this is more than just a hypothetical possibility.

If there is no appeal and there is no stay and there is no order, then we could have a situation where

individual officers could be potentially threatening litigation or bringing litigation and tying this up again in the courts, because there's no order saying that disclosure is required. There's just a -- there's a sort of nonbinding determination.

So, your Honor, my position is -- on behalf of the media intervenors, is that this matter is ripe, that there is a basis for issuing the order, that there are significant ramifications to not doing so. And at this point, the merits of this case have now been fully heard and adjudicated, and it's time to enter a judgment, which means disclosing all issues raised, including the relief sought by the media intervenors.

THE COURT: Has everyone had a chance to think about the impact of if I don't -- if I don't issue a full ruling today? I'm sure you have. So can I assume from all the police agents -- peace officer agencies that "Judge, no, no, no. We want to litigate the intervenors' complaint"? Is that what I'm hearing from you, "Judge, we want to litigate that"?

MS. GREENE: Your Honor -- Andra Greene -- I'm not sure that we really want to litigate anything. But there are two aspects to the media intervenors' complaint. One is seeking an interpretation of the statute, with which we do not agree -- disagree.

The other is whether each individual agency and its chiefs of police has violated the Public Records Act. That is the part that concerns us and that we

think is not ripe at this time. We have not been afforded the opportunity to do that, because the stay has been in place. It's absolutely not true that we didn't respond before the stay was imposed. And we are ready to produce documents.

So, again, it will make it moot or -- but at this point, it's premature, and it's not really something I think the Court has to waste its time on at this point.

THE COURT: And it may become moot based on my ruling.

MS. GREENE: Okay.

THE COURT: Okay. I want to move forward.

MS. GREENE: Okay.

THE COURT: I'm going to make a ruling, though. All right. So the ruling is right now. I'm not going to address that issue now. So as to the -- actually, it's the second-to-last par- -- it says -- I'm going to start where media intervenor request for an order denied -- petition is granted -- and then go on -- the request for the immediate stay is denied -- after the stay is lifted, the Court grants -- I'm striking that language. Do you see where I am?

MS. GREENE: Yes.

THE COURT: I'm striking that. I'm keeping the last one in, because ACLU didn't request it. So I want to make sure -- media, do you understand what I'm doing? I appreciate that.

MR. CHADWICK: You're striking the ultimate paragraph of the tentative from the proposed final --

THE COURT: Very good.

But hold on. Let's look at the big picture here -- and we haven't gotten to the motion of the stay, but my thought process, going through this -- if I continue with my stay for appellate purposes -- and I'm going back over here to March 31st, March 29th -- it may be moot anyway. I won't say anything more. Because -- Counsel, you're saying "Judge, you've got to make your decision of your responsive pleadings by March 13th." Does that apply to all of you?

MS. GREENE: Correct.

MS. HENDRICKSON: Yes.

THE COURT: Well, let's see what you do.

MS. GREENE: Well, we can't respond to the records request.

THE COURT: No, I understand. But let's see what you do to the complaint in intervention. That's what I'm going to wait and see.

MS. GREENE: Sounds good.

THE COURT: All right. Let's move on.

So now let's get to the issue of retroactivity. Please say the peace officers agency -- not yet. Anybody want to say -- Counsel, do you want to say anything about -- no? Any police agents -- any peace officers agency wish to address the Court?

All right. Should we let ACLU go first?

MR. LOY: Happy to proceed, your Honor. I'll try to be brief.

THE COURT: Let's go. And then we'll have the media. Fair enough?

MR. CHADWICK: Thank you, your Honor.

THE COURT: I appreciate that.

Let's go.

MR. LOY: Your Honor, I would like to start with what's not disputed, and this is on the language in the California Supreme Court and 1421 itself. Police officers have extraordinary power. The public has a compelling interest in knowing how they use or abuse that power, and 1421 covers a limited set of records in which the public's interest is paramount.

Now the police unions, I presume, opposed 1421 in the legislature. They fought and lost that political battle. They come to court trying to limit it, but their argument has two fundamental flaws. One, as a matter of law, there is and can be no constitutional right to privacy in public records of egregious misconduct or any official misconduct. And some expectation that a statute won't change in the future is not a vested right in the perpetual application of that statute.

Now this is a purely statutory matter in the sense that the alleged privacy right that the police unions are invoking, as they say in their opening brief on page 5, was established by statute. And I have not

heard petitioners contend that, going forward, even after January 1 of this year, that all of the records covered by 1421 can't be made available to the public on the terms and conditions specified in 1421, in which the legislature did carefully calibrate and allow certain kinds of redactions and delays.

But the legislature recalibrated that balance. And so by saying that the legislature could open up these records after January 1 going forward, I think they've effectively conceded that there is no inherent constitutional right to privacy to conceal official records of public employee misconduct.

Now, a side note, police officers are public officials for First Amendment purposes, as the Court of Appeal said in Gomes against Fried, 136 Cal.App.3d 924. And as the Court of Appeal said in the BRV case cited in the briefs, people who qualify as public officials for First Amendment purposes also have significantly -- and I quote -- significantly reduced expectation of privacy in the matters of their public employment. The right to access public records, quote, to observe the conduct of public business is not forfeited by the risk of injury to official reputation.

So there is no constitutional right here. To be very clear, police officers have no constitutional right to conceal official records of the kind of conduct and misconduct covered by 1421. And Article 1, Section 3, of the California Constitution confirms the

procedures protecting police officer records are purely creatures of statute.

And so we look to the statute. And what the legislature created in 1421 was an amendment to the preexisting scheme, imposing a prospective duty on the agency based on the date of the request, the date when the records were requested. Plain language makes it clear. It applies to any and all records maintained by the agency. "Any and all" means any and all. "Maintained" means in current possession and control.

Petitioners would say "Well, the legislature didn't say 'currently maintained' or 'already maintained.'" I suggest that is a redundancy and superfluous. And we presume, as a matter of law, legislatures don't write statutes to be superfluous. You don't have to say "currently maintained" to say maintained. Because "maintained," by definition, means current. And that's a conclusion that five supreme courts have endorsed, you know, in the cases cited in our brief.

And one of those cases from the Hawaii Supreme Court was specifically about police disciplinary records of suspension and discharge. And the Hawaii Supreme Court said, once the legislature opened those up, it applied to all records then on file, regardless of when they were created or when the incident happened.

Now I submit that the petitioners are kind of assuming the conclusion by suggesting the statute

applies retroactively. Retroactive and retroactivity are kind of terms of art, and what they mean in the case law -- a statute is retroactive if the statute changes the legal consequences of conduct completed in the past or it strips some vested right as beyond the legislature's power to control. 1421 does not meet either of those conditions.

There is no change in the legal consequence of a past conduct. 1421 does not punish officers for anything they did in the past. It does not change what was lawful to unlawful. It does not impose any new discipline or termination that was not already imposed. All it does is give the public a right to know how and why officers did what they did and what consequences the agencies attached to it for the limited set of records at issue.

The alleged reputational injury to a public official or a police officer is not a legal consequence for purposes of retroactivity analysis. A legal consequence must mean one that is imposed by force of law. The social consequence of reputation is not a legal consequence because it has no force of law.

Now the petitioners cite the Lubey case for the first time in their reply brief, and Lubey does discuss officers' reputational interests, you know, when there is a finding of misconduct that can impact an officer's reputation and impose a stigma. But the reason Lubey discussed that is -- that's why we give robust due

process to officers before those findings are made.

Lubey, in fact, supports intervenors' position, because the Court held, in Lubey, the reason you have to hold a hearing before making a finding of misconduct is precisely because we can't count on these records being confidential. Because, in Lubey, the city had tried to argue we don't -- we didn't need to give a pre-termination hearing to these officers, because their termination and their misconduct findings were confidential. So they don't get a hearing because of that.

And the Court said "No. That's not how it works." And if I may quote, "It is unrealistic to assume that a citizen's charges of misconduct against police officers, investigated by the police department, found true by the police chief, and resulting in termination, have nevertheless somehow retained their confidentiality."

So the reason we give robust pre-termination due process is precisely because the officers couldn't count on it being confidential. So that's a reason to give notice and hearing before termination. It's not a reason to keep these records perpetually secret.

Now, as I said before, the expectation in the perpetual application of the old version of the Pitchess statute is not some vested right that they can rely on in perpetuity. There was no vested right to have a statute applied to me if it changes tomorrow. The

control of the official records is a purely statutory matter.

This is not a constitutional issue, as they've effectively conceded. The legislature did previously afford statutory remedies to officers to object to certain disclosures. The legislature has now amended that right and that remedy. And what the legislature creates, it can amend on a matter purely governed by statute, involving the control of governmental records of official conduct in the line of duty, especially for the kinds of conduct at issue in 1421.

As explained in the cases we've cited in the brief, in Michael against Gates, in Rosales, any previous privilege confirmed by the Pitchess statutes was a conditional, limited creature of statute and statute only. And as the Fourth DCA held and as Justice McConnell wrote in Doe against California Department of Justice that is cited in our briefs, the fear of exposure or reputational harm is not justifiable reliance on some previous statutory expectation that certain information would not become public.

And there is no vested right and no justifiable reliance to prevent the amendment of a statute to now allow disclosure of information that people find embarrassing. What the legislature can amend -- or create, it can amend. So as a matter of law, any alleged reliance on the previous version of the Pitchess statutes is simply unreasonable as a matter of law.

It's also, as we've pointed out, unsubstantiated by any admissible evidence. Counsel speculates about records from 45 years ago, speculates about what may happen to this officer in Chula Vista. And he says the Chula Vista officer may never be employed by -- as a police officer. Well, that's a consequence of what he did on the job. And his findings of misconduct aren't necessarily concealed from the police themselves.

If he's concerned about his reputation, you know, perhaps he shouldn't have committed misconduct in the line of duty, where, for example, anyone with a cell phone could have videoed him doing that, and broadcast it to the world. He had no vested right to rely on some unilateral expectation that the legislature might not change the law going forward.

In any event, it's also implausible to suggest that officers across the board would fail to contest findings of discipline, given what's at stake in these serious cases and the issues governed by 1421 itself. And so, for all these reasons, we ask the Court to confirm those portions of the tentative which properly hold that 1421 applies to all records that it covers, regardless of when they were created or what conduct they describe.

Thank you, your Honor.

THE COURT: Thank you, Counsel.

Let's hear from the media, please.

MR. CHADWICK: Thank you, your Honor.

James Chadwick on behalf of the media intervenors. It probably won't surprise you to hear that we agree with your decision on the merits of the petition. And we think that you've identified the core issues, and you've addressed them concisely and correctly.

The plain language of SB 1421 demonstrates the legislature's intent that it apply to pre-2019 records, as you've found. The legislative history further supports that conclusion. So even if there were some question about the impairment of vested rights or -- or attaching new consequences, where the legislature clearly intends that the law be so applied, it will apply, unless there is something unconstitutional about the application of the statute of retroactivity. And no such showing has been made.

You've correctly identified that the officers have no vested rights. The disclosures under the Pitchess statutes were limited, but they were possible. And as you know, obviously, when information about officer misconduct comes out, it's the information about the conduct that comes out. Whether or not it resulted in discipline is sort of tangential, and that information can and does become the subject of criminal proceedings at times, which are attended by the press and the public and others.

So there is no guarantee, as petitioners'

counsel has asserted, that this information would ever remain confidential. And lastly, as you've also concluded, the amendments enacted by SB 1421 imposed no new legal consequences on past conduct, and Mr. Loy has ably explained why, so I won't repeat that.

What I would like to focus on briefly is the question of the standing of the petitioners to bring these actions, where you ruled against the intervenors. I want to explain why I think the Court should reconsider that question.

First, the law is that the burden is on the petitioner -- the plaintiffs to establish that they have standing. So their petitions, their evidence must demonstrate the basis for standing, and that's the People ex rel. Feuer case, 29 Cal.App.5th 486 at 495.

We've identified the requirements in our papers for asserting standing. Members would otherwise have standing to sue in their own right. The interests that the association seeks to protect are germane to its purpose. Neither the claims asserted, nor the relief requested requires the participation of individual members in a lawsuit. Neither of the first requirement -- first two requirements are met.

Under the law, associational standing requires that the -- specific allegations establishing that at least one identified member has suffered or would suffer harm. And that's Summers versus Earth Island Institute, 555 U.S. 488, 498. Not a single member -- not a single

actual member has been identified by any of the petitioners.

Second, the petitioners cannot show that any officer -- any individual officer's rights would be violated by disclosure, even if the statute were not retroactively applicable. Because case law establishes that officers do not have a right to claim an invasion of privacy on the basis of disclosure of information, even when that information was prohibited -- disclosure was prohibited by the Pitchess statutes. And that's the Rosales versus City of Los Angeles case, 82 Cal.App.4th 419, 428 to 429. That's also cited in our papers.

So the individual members don't have standing. Because even if you were wrong, which you're not, the SB 1421 provides statutory amendments that are retroactively applicable. Even if disclosure were wrongful, they would not have standing to assert a claim for an invasion of privacy, which is the only issue that's been raised, based on that disclosure. So there's no standing here by the individual members themselves, and therefore the petitioners cannot assert standing.

The law has also specifically held, your Honor, that privacy rights are personal. They cannot be asserted by anyone other than the individual that holds them. And that is the Association For Los Angeles Deputy Sheriffs versus Los Angeles Times Communications case, 239 Cal.App.4th 808 at 821. In that case, the

Court of Appeal held that the L.A. Deputy Sheriffs Association, which is the collective bargaining unit representing deputy sheriffs, did not have standing to assert the privacy claims of its members in seeking to enjoin a newspaper from disclosing information about police officer discipline. So, again, for that reason as well, your Honor, there's no standing here on the part of the petitioners.

Now the petitioners have asserted that this kind of situation, statutes relating to the disclosure of information about their members, is within the scope -- is germane to their purposes, within the scope of their representation of their members. It's not. Your Honor, the statutes that govern this are the Meyers-Milias-Brown Act.

Under government code section 3504, which defines the scope of the representation of a collective bargaining unit of its members, it accepts the scope of the representation shall not include consideration of the merits and necessity or organization of any service or activity provided by law or executive order. And that's government code section 3504.

Courts have looked at this language, interpreting the scope of representational standing. And they have held that, where an enactment or action -- some -- some action taken by an employer falls within that exception, then the unions do not have standing to assert the rights of their members in litigation. They

don't have standing. And that's described in the East Bay Municipal Employees Union versus County of Alameda case, which is 3 Cal.App.3rd 578 at 580, and the Brotherhood of Teamsters & Auto Truck Drivers versus Unemployment Insurance Board, 190 Cal.App.3rd 1515, 1522.

This litigation does not include collective bargaining or terms of employment. It doesn't even control something over which the employers of the union members have control. This is a statewide legislative enactment. It is a policy decision by the California legislature that imposes and mandates on all public agencies, including the respondents here. It is not something about which they have any ability to bargain. It is not something about which the union members can bargain. The collective bargaining agreement cannot effectively discharge the statutory obligations of the respondents. So it is not within the scope of their representational standing under the Meyers-Milias-Brown Act.

The final point I want to make with respect to standing, your Honor, is that the supreme court has warned about this very kind of proceeding. It's now become popularly known as reverse-CPRA proceedings. And in Filarsky versus Superior Court, the California Supreme Court said that reverse-CPRA actions like this one would circumvent the established special statutory procedure under the CPRA and eliminate statutory

protections and incentives for members of the public, in seeking disclosure of public records, thus frustrating the legislature's purpose of furthering the fundamental right of every person in this state to have prompt access to information in the possession of public agencies.

That's exactly what this case does. It seeks to categorically deny public access to a whole range of records, including records which the unions apparently now concede are actually subject to disclosure. And it goes on to make -- to impose the burden on everyone involved, to try to come in here and try to sort this situation out in a complex and, frankly, somewhat chaotic situation, where not talking about individual rights of individual officers, who may or may not be employed as union members anymore, may not have, you know, any interest in actually pursuing anything, may not care -- so we're talking about this in the abstract, because unions without standing have brought an action to try to foreclose disclosure. And that, I submit, is fundamentally contrary to the policy of Filarsky. And for that reason as well, standing should not be recognized.

I want to make just a couple of other points in response to arguments raised by counsel for the unions, your Honor. Counsel for the unions is absolutely correct about something. The statutory mandate for disclosure under SB 1421, the amendments to 832.7, are

broader than personnel records.

THE COURT: Uh-huh.

MR. CHADWICK: These amendments do not apply just to personnel records. They apply to all records contained in these categories of information. Incident reports, use-of-weapon -- use-of-firearm reports, they're not personnel records. They were never going to be within the scope of a Pitchess statute. They've never been within the scope of a Pitchess statute. So to the degree that SB 1421 applies to records not covered by the Pitchess statutes, there couldn't ever possibly be any cognizable interest in preventing disclosure.

So what I would -- what I'm suggesting to you is that that's not a concession by the unions. That's something that is absolutely clear and required by law under SB 1421. And I want to make it clear, your Honor, that while there are, obviously, as the Court has recognized, very vital questions of public policy here, we're not here just talking about public policy in some vague concept of the people's right to know. We're here talking specifically about what this statute means and what its purpose is.

And its purpose is directly relevant to its construction. That is the fundamental purpose of statutory construction, is to determine and implement the purpose of the legislature in passing the law. The purpose of the law is to cast light on the conduct of

law enforcement agencies and officers. What have officers done? How have the agencies dealt with it?

And the reason for that is to increase public trust. We want -- if we know, then we can observe. Then we can trust. It's a fairly fundamental construct. If nothing that has ever happened before January 1st, 2019, can ever be learned, that's fundamentally contrary to those central purposes of the statute. You've recognized those purposes in your decision, and I think you recognized that the construction by the petitioner would be contrary to that.

Just a couple of other points, your Honor. With respect to these sort of specters raised of records going back to the 1800s and reputational interests, first, under penal code section 835, there is a statute requiring that records be maintained -- records of officer discipline be maintained for five years. I can tell you, your Honor, that most agencies destroy records. And, in fact, the question of records getting destroyed in even less periods of time has already been an issue around the state, arising from the amendment of SB 1421, because intervenors wanted to make sure records were not destroyed while this litigation is pending.

So record destruction policies are in effect. If there were records about police officer discipline in San Diego from the 1800s, then San Diego is probably in a unique state.

The other thing I wanted to mention, your

Honor, is this idea of consequences. I have to emphasize this, too. Mr. Loy is correct. The consequences of an officer's misconduct are not the consequences of that information becoming public. They are the consequences of the officer engaging in that conduct. That conduct is not a secret within the law enforcement community, because law enforcement officers are not -- law enforcement agencies are not prohibited from conveying that information to each other.

And, in fact, information about some kinds of misconduct -- in particular, when any officer has been convicted of anything, that's all shared with the Commission on Police Officer Standards and Training. And any law enforcement agency that wants that information can get it from POST. So if we don't want law enforcement agencies to be able to know about the misconduct of officers who moved from agency to agency, and thereby escaped the consequences of their past misconduct, then I suppose that the construction urged by the petitioner would be a good thing.

But I submit to your Honor that, to the degree we're talking about policy, that's not the policy we want. That's it. Thank you very much, your Honor. I appreciate your indulgence.

THE COURT: Thank you.

Response? And, Counsel, just give me a couple of minutes on his argument on standing, the records, and whatever else you want to reply to. Anybody.

MR. PINCKARD: Your Honor, petitioners are comfortable submitting on the pleadings on the issue of standing. We're -- the Court's tentative is in good company. Even in Ventura county, where the judge cites the merits, even though he granted the injunction, they're still addressing the -- the issue of standing. And I think that the Court has reached an appropriate resolution to that.

I think the only -- the only thing that I want to say -- and I thank Mr. Loy for reminding me, that I meant to say this initially -- I agree with him when he says that there is no constitutional interest in protecting the secrecy of official records of official misconduct. I don't dispute that. And I think there are a number of good public policy reasons supporting that premise.

What we have to understand about police officers and police agencies is that police officers are subject to investigation and discipline for things that have nothing to do with the performance of their duty. Police officers have this thing called "conduct unbecoming" that they have to deal with. And management is very -- very liberal in pursuing investigations for off-duty, unofficial misconduct, which results in discipline on a routine basis.

In fact, I would say that probably a good third to a half of discipline is based upon off-duty conduct. So to the extent that we have on-duty conduct, well, I

think -- you know, academically, in the abstract, I don't disagree with the ACLU. But that's not a police officer's life. I've represented police officers who were the subject of an investigation because, when he got home, their wife yelled too loudly at her husband and created a disturbance in the neighborhood that then became the subject of a conduct unbecoming investigation, which was ultimately sustained, and discipline was imposed.

There is no interest in the public's need to know. There is no public interest in that sort of information being put out into the public venue. So, to the extent that we look at the reality, with police misconduct, it's not just limited to on-duty conduct.

The fourth component of SB 1421 deals with dishonesty. And the way dishonesty is defined in the statute -- if I want to watch the football game, and I call in sick when I could have dragged my butt to work, that's dishonesty. That's dishonest. And that's dishonesty relating to conduct. I didn't show up to work. That's information that would be disclosable, even though it's off-duty and has nothing to do with whether I used force, whether I shot somebody, whether I sexually assaulted somebody.

So the reach of the statute -- and that's why we invite the Court to bifurcate and say "All right. Incident reports and use-of-force reports, you know, okay." But the discipline records are different,

specifically as it pertains to off-duty acts or omissions.

And I just want to make the record clear, because I thought I heard one of the counsel for intervenors say that we had conceded that the privacy or the confidentiality is a creature of statute. In People v. Mooc, which we cite in our papers, they point out that there was a privacy interest underlying the Court's decision in the Pitchess decision itself. And clearly, that couldn't be referring to a statutory scheme that hadn't yet been created. It is a fundamental privacy right emanating from the state constitution. And that's the right that we're seeking to protect.

THE COURT: Anybody else?

Closed. Thank you. Let's do some work.

Sometimes when the Court goes through its analysis, I don't -- once I get to where I'm going to get, I always then think, "Well, what effect is this going to have?" And I will tell you I had a big concern, Counsel -- speaking to the plaintiff on this issue -- I can imagine there would be some peace officers, "Well, I had a disciplinary hearing ten years ago. And at that time, this was all confidential, Judge. And now -- and based on that, knowing it was going to be confidential, Judge, I did X. If you were going to tell me that it wasn't going to be confidential, Judge, I may not have done X." I gave a great deal of thought to that, Counsel. That is a

concern for this Court.

So I want you to know I thought about that tremendously. But let's look at the law, at least in this Court's humble opinion. We look at the statute. We look at the wording of the statute, which is the first place you start to make an interpretation of what the statute means or says. The language in that statute -- and if that's not clear enough -- by the way, I think it is very clear enough -- you would turn to the legislative history.

I think it's very clear, based on -- I'm not going to go through all my reasoning, Counsel. You have it. And I say this so respectfully. This was not a hard call for the Court. That's how strong I feel about it. That -- it was not a hard call. It's a troubling call, because of what I said. But as far as the law is concerned, it is clear that this statute applies retroactively. I can't say it any stronger than that.

I'm going to hold off anything else. I'm going to make some very specific rulings for any type of appellate reasoning -- reason, for any type of appellate review. Number one, Counsel, I'm going to disagree with the media. I think you do have standing. So there's a rule. Petitioner, you have standing, at least in this Court.

The petitioners' petition for preemptory writ of mandate is denied, directly. Petitioners' request for an alternative writ of mandate is denied.

I'm going to make it very clear. This Court finds that Senate Bill 1421 applies retroactively to all -- key word "all" -- personnel records of peace officers, not only now, but prior to January 1, 2019.

I want to make it clear also that, in -- there was a distinction or an argument as to whether this is a vested constitutional right of privacy. This is a statute, as was well said by the ACLU. There was not a constitutional vested right of privacy, and so that argument will be disregarded by the Court.

I'm going to stay -- very important -- I'm going to stay this ruling until March 29th, 2019, in case anyone wants to appeal this. You have an absolute right. And in all my cases like this, I always stay it for any type of appellate review.

Last issue. We still have an outstanding issue. I do not want -- I want to fast-track this. I think it's of public importance. And I'm talking about the -- whatever the police agencies are going to do with the complaint in intervention. File your things. My thought process, though -- I want to do a status conference maybe at the end of March to see what really is going to happen. Is everybody comfortable with that?

MS. GREENE: Yes, your Honor.

MS. HENDRICKSON: Yes, your Honor.

THE COURT: I like that. Thank you.

Let's do it on -- is March 20th -- we can either do it on March 22nd or April 25th. You tell me.

MS. HENDRICKSON: Your Honor, can we do April 5th, so that that way we will know whether an appeal has been filed?

THE COURT: That's awesome. That's a very good idea, Counsel. I appreciate that. Ready? So a status conference to see where we are with the remaining issues in the case, that will be on April 5th at 1:30.

Just lastly, the briefing from all of you was excellent, very high quality. And I appreciate your consideration for this Court. Thank you.

(Proceedings concluded at 3:03 p.m.)

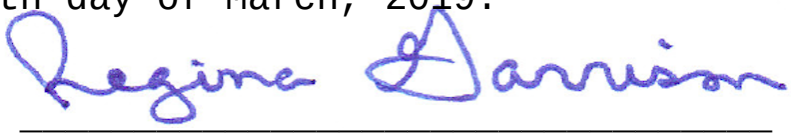
STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

I, Regina L. Garrison, Official Reporter for the Superior Court of the State of California, in and for the County of San Diego, do hereby certify:

That as such reporter, I reported in machine shorthand the proceedings held in the foregoing case;

That my notes were transcribed into typewriting under my direction and the proceedings held on March 1, 2019, contained within pages 1 through 60, are a true and correct transcription.

Dated this 16th day of March, 2019.



REGINA L. GARRISON, CSR NO. 12921