

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

3 * * * * *

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

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

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

15 THE COURT: Welcome.

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

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

22 THE COURT: Say that again, Counsel.

23 MR. McMINN: Bill McMinn.

24 THE COURT: I got that.

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

27 THE COURT: Got it.

28 MR. LOY: David Loy from American Civil

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

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

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

8 MR. CHADWICK: All right.

9 THE COURT: Thank you.

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

12 THE COURT: Oceanside.

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

16 THE COURT: Thank you.

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

19 THE COURT: Thank you.

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

22 THE COURT: Thank you.

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

26 Okay. So about four or five. Thank you.

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

1 (Multiple affirmative responses.)

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

5 (Multiple affirmative responses.)

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

8 Uh-oh, who is on the phone?

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

11 THE COURT: Anyone else on the phone?

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

16 (Court reporter interruption.)

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

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

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

27 MR. PINCKARD: Thank you, your Honor.

28 I also want to thank the Court for a very

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

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

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

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

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

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

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

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

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

1 SB 1421.

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

12 I know from the pleadings --

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

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

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

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

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

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

14 THE COURT: Uh-huh.

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

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

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

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

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

22 THE COURT: Uh-huh.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 What public good is served to put that out
9 there? If I made an impulsive, immature, stupid
10 decision as a young police officer 30 years ago,
11 40 years ago, 45 years ago, and then I moved on -- I'm a
12 doctor. I'm a lawyer. I'm something else. I've got
13 children, grandchildren, great grandchildren -- and now
14 that record, which had been private and subject to
15 nondisclosure for 45 years, is suddenly subject to
16 SB 1421 if it falls into any of those four categories,
17 more specifically, the two categories that we're most
18 concerned about.

19 That flies in the face of what the Public
20 Records Act is about. That goes to the heart of what
21 6255 addresses and what 6254(c) addresses, which clearly
22 says that personnel records of public employees are, by
23 default, not subject to disclosure. But then we get
24 into the same sort of balancing that 6255 allows for,
25 and we make a case-by-case analysis.

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

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

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

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

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

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

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

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

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

1 and oranges.

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

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

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

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

27 THE COURT: Absolutely.

28 MR. PINCKARD: -- from the Pitchess disclosure

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

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

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

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

28 We see in the newspaper, the editorials they

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

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

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

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

1 Perhaps.

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

15 So there may actually be records disclosed that
16 are not even subject to -- or shouldn't even be subject
17 to SB 1421 but for the fact that, at the time, the law
18 guaranteed my privacy and my confidentiality, and I
19 chose a la People v. West to just simply accept the
20 discipline imposed without fighting it. And now, 35 or
21 45 years later, I'm getting that thrown back into my
22 face. It's damaging my reputation. It damages my
23 standing in the community. Those are penalties. Those
24 are consequences. That's an abrogation of certain
25 rights that I had a right to rely upon and believe
26 45 years ago.

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

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

13 First of all, do you understand what I said?

14 MR. PINCKARD: I do.

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

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

19 THE COURT: I got it.

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

22 THE COURT: I understand.

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

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

26 THE COURT: Sure.

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

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

5 THE COURT: Okay.

6 MR. PINCKARD: Thank you.

7 THE COURT: Well done.

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

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

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

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

22 THE COURT: All right.

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

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

28 MS. GREENE: In granting the motion for leave

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

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

14 MS. GREENE: I did.

15 THE COURT: Proceed.

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

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

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

28 THE COURT: Okay.

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

4 THE COURT: What are you requesting?

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

8 THE COURT: That will be denied.

9 Next issue.

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

12 THE COURT: That's okay.

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

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

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

1 because there's no present controversy between us.

2 THE COURT: Okay. As to that issue, whether
3 it's premature, the Court is ruling -- I allowed them to
4 intervene. I did that at the last hearing. But I sense
5 what you're saying. "Judge" -- you want a chance to
6 respond to what the intervenors had requested to the
7 Court.

8 MS. GREENE: Correct. Because, currently, we
9 are not adverse parties. There's also the granting of
10 costs as to the intervenors, and I question who the --
11 that order as to -- because we're not adverse.

12 THE COURT: Is cost the main issue? Is that
13 what you're concerned about, Counsel?

14 MS. GREENE: No. What I'm concerned about is
15 that there may arise issues in the future as to the
16 application of certain privileges and whether they
17 survive --

18 (Court reporter interruption.)

19 MS. GREENE: -- the application of certain
20 privileges, the meaning of direct cost, duplication --
21 but again, these things have not yet arisen. So if the
22 order simply is that the injunction will not be --
23 remain in effect and the respondents -- the respondents
24 are ordered to comply with the statute, that's fine.
25 But when we get beyond that, to the interpretation of
26 the order, we would not like to be foreclosed from
27 bringing those issues forward.

28 THE COURT: I think I understand what you're

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

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

9 THE COURT: All right.

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

19 THE COURT: I understand the issue.

20 MS. GREENE: Okay.

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

23 Who do you represent, again?

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

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

1 Who are you?

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

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

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

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

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

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

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

16 THE COURT: Thank you.

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

19 THE COURT: Thank you.

20 Any position?

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

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

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

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

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

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

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

26 MR. LOY: Correct, your Honor.

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

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

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

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

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

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

16 Do you have any objection to that?

17 MR. CHADWICK: I do, your Honor.

18 THE COURT: Make it.

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

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

28 THE COURT: Oh, yeah.

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

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

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

15 MR. CHADWICK: All right.

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

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

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

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

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

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

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

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

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

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

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

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

11 (Court reporter interruption.)

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

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

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

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

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

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

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

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

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

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

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

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

12 MS. GREENE: Okay.

13 THE COURT: Okay. I want to move forward.

14 MS. GREENE: Okay.

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

24 MS. GREENE: Yes.

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

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

3 THE COURT: Very good.

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

13 MS. GREENE: Correct.

14 MS. HENDRICKSON: Yes.

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

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

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

21 MS. GREENE: Sounds good.

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

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

28 All right. Should we let ACLU go first?

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

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

5 MR. CHADWICK: Thank you, your Honor.

6 THE COURT: I appreciate that.

7 Let's go.

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

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

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

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

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

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

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

1 procedures protecting police officer records are purely
2 creatures of statute.

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

10 "Maintained" means in current possession and control.

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

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

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

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

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

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

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

1 process to officers before those findings are made.

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

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

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

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

1 control of the official records is a purely statutory
2 matter.

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

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

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

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

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

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

26 Thank you, your Honor.

27 THE COURT: Thank you, Counsel.

28 Let's hear from the media, please.

1 MR. CHADWICK: Thank you, your Honor.

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

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

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

28 So there is no guarantee, as petitioners'

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

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

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

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

24 Under the law, associational standing requires
25 that the -- specific allegations establishing that at
26 least one identified member has suffered or would suffer
27 harm. And that's Summers versus Earth Island Institute,
28 555 U.S. 488, 498. Not a single member -- not a single

1 actual member has been identified by any of the
2 petitioners.

3 Second, the petitioners cannot show that any
4 officer -- any individual officer's rights would be
5 violated by disclosure, even if the statute were not
6 retroactively applicable. Because case law establishes
7 that officers do not have a right to claim an invasion
8 of privacy on the basis of disclosure of information,
9 even when that information was prohibited -- disclosure
10 was prohibited by the Pitchess statutes. And that's the
11 Rosales versus City of Los Angeles case, 82 Cal.App.4th
12 419, 428 to 429. That's also cited in our papers.

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

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

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

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

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

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

1 don't have standing. And that's described in the East
2 Bay Municipal Employees Union versus County of Alameda
3 case, which is 3 Cal.App.3rd 578 at 580, and the
4 Brotherhood of Teamsters & Auto Truck Drivers versus
5 Unemployment Insurance Board, 190 Cal.App.3rd 1515,
6 1522.

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

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

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

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

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

1 broader than personnel records.

2 THE COURT: Uh-huh.

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

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

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

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

3 And the reason for that is to increase public
4 trust. We want -- if we know, then we can observe.
5 Then we can trust. It's a fairly fundamental construct.
6 If nothing that has ever happened before January 1st,
7 2019, can ever be learned, that's fundamentally contrary
8 to those central purposes of the statute. You've
9 recognized those purposes in your decision, and I think
10 you recognized that the construction by the petitioner
11 would be contrary to that.

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

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

28 The other thing I wanted to mention, your

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

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

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

25 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

14 THE COURT: Anybody else?

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

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

1 concern for this Court.

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

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

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

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

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

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

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

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

24 MS. GREENE: Yes, your Honor.

25 MS. HENDRICKSON: Yes, your Honor.

26 THE COURT: I like that. Thank you.

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

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

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

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

11 (Proceedings concluded at
12 3:03 p.m.)

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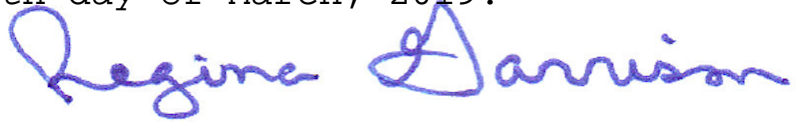
1 STATE OF CALIFORNIA
2 COUNTY OF SAN DIEGO

3
4 I, Regina L. Garrison, Official Reporter for the
5 Superior Court of the State of California, in and for
6 the County of San Diego, do hereby certify:

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

9 That my notes were transcribed into typewriting
10 under my direction and the proceedings held on March 1,
11 2019, contained within pages 1 through 60, are a true
12 and correct transcription.

13
14 Dated this 16th day of March, 2019.

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17 REGINA L. GARRISON, CSR NO. 12921
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