COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

ESTUARDO ARDON, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff/Appellee, vs. CITY OF LOS ANGELES, Defendant/Appellant	Case No. B252476 Los Angeles County Superior Court No. BD363959 [Related to Case Nos. BC40437; BC404694, BC363735; and BC447863]

AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLANT CITY OF LOS ANGELES

The Honorable Lee Smalley Edmon

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: August 4, 2014

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INTRODUCTION

In 1981, the California legislature made various small changes to California's open meeting law and the Public Records Act ("PRA"), Government Code sections 6250 *et seq*. Included in that bill was new Government Code section 6254.5, a common-sense provision that prevents public entities from playing favorites by providing a non-public document to a favored friend, and then withholding it from a less-politically appealing group. Until now, no court has ever suggested that this uncontroversial provision results in a waiver of the attorney-client and work-product privileges when a low-level clerk or other staff member accidentally turns over privileged materials in response to a PRA request. After all, if that were the case, then public entities would be forced to create an entirely new, and expensive bureaucracy by which public entities for responding to public record requests to avoid the risk of an inadvertent yet catastrophic disclosure. Yet that is exactly what Respondent Eduardo Ardon suggests in this case.

As explained in the City of Los Angeles' brief, section 6254.5 of the PRA does not repeal Evidence Code section 912's protections for attorney-client and work-product privileges. The relevant case law, the legislative history and policy considerations all show that section 6254.5 applies only to deliberate and selective disclosure, while section 912's more specific provisions protect against inadvertent disclosure of privileged material.

Amici focus on three points in this brief. *First*, an analysis of the plain text of the statute demonstrates that section 6254.5 does not apply to an unauthorized disclosure of privileged material. (*See infra*, Part II.A) The only case to address the issue, *Masonite Corp v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436, holds that an

unauthorized disclosure is not within the scope of the discloser's "agency" or "employment," and thus does not satisfy a textual prerequisite to application of section 6254.5's waiver provision. Pursuant to *Masonite*, the trial court plainly erred here.

A different, but related textual analysis compels the same result. (See *infra*, Part II.B.) An agency employee or representative who does not have authority to waive privileged material cannot "disclose" privileged information because the employee has not met his or her duty under the PRA disclosure statute (section 6253) to first inform the holder of the privilege of the likelihood of waiver. Thus, even if the employee transmits privileged material, the agency itself as the holder of the privilege has not "disclosed" the material, and has not met a textual prerequisite to application of section 6254.5.

Second, *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, a seminal case on privilege and the PRA, instructs that the public is best served by preserving the existing balance between privilege and existing open government law. (*See infra*, Part III.A.) *Roberts* also explains that the PRA's attorney-client privilege protections should be harmonized with a later-enacted statute that purports to repeal those protections unless the two statutes cannot be reconciled. (*See infra*, Part III.B.) Here, applying section 6254.5 to selective disclosure rather than reading it as requiring an automatic waiver anytime there is an inadvertent disclosure harmonizes the statute with Evidence Code section 912. (*See infra*, Part III.C.)

Third, any construction of section 6254.5 that requires an automatic waiver will have drastic consequences for public entities and California taxpayers, and would undermine the purpose and application of the PRA. (*See infra*, Part IV.) Costs for responding to PRA requests would skyrocket,

as a full-blown litigation privilege review and a corresponding investigation would be required for most documents or other records subject to a PRA request. And the public and the courts would suffer as PRA requests would be met with over-designation of privileged material (also leading to many more legal challenges in the courts), delays in production, and fewer available records. Section 6254.5 was never intended to require of public entities a standard of perfection and staffing that cannot be expected from even the most sophisticated law firms involved in multi-billion dollar litigation.

DISCUSSION

I. THE PARTIES' CONTENTIONS REGARDING SECTION 6254.5.

The issue on appeal is whether under section 6254.5 of the PRA any disclosure of a privileged document constitutes an automatic waiver of the privilege. Section 6254.5 reads, in part:

> Notwithstanding any other provisions of the law, ***whenever a state or local agency discloses a public record*** which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law. For purposes of this section, "agency" includes a member, agent, officer, or employee of the agency ***acting within the scope of his or her membership, agency, office, or employment.*** (emphasis added)

Ardon contends, and the trial court held, that the plain language of the statute is unambiguous, and that "plain language provides that a local agency's disclosure of documents pursuant to a PRA request results in an ***automatic waiver*** of any privilege that may have applied." (Respondent's Brief ["Resp. Br."] at p.12; see also 2 CT 467-68). Ardon's entire argument rests on the plain text of the statute. He contends the Court's analysis should begin and end there. According to Ardon, the Court should not imply

another exception into the statute because the plain text already explicitly delineates nine other exceptions to the waiver rule. (Resp. Br. at pp. 13-14.) Likewise, the Court should not consider the legislative history because the plain text is unambiguous. (Resp. Br. at pp. 15-16.) He argues that none of the relevant case law permits the Court to judicially insert language into the statute that contradicts the plain text. (Resp. Br. at pp. 17-18). Finally, Ardon dismisses as a matter for the Legislature any real-world impact of creating an "automatic waiver" rule under the PRA. (Resp. Br. at pp. 17.)

The City of Los Angeles ("City") contends that section 6254.5 only applies to selective, intentional disclosure of many categories of documents otherwise exempt from the PRA (Appellant's Opening Brief ["City Br."] at pp. 24-32; Appellant's Reply Brief ["Reply"] at pp. 7-9). In contrast, Evidence Code section 912 governs whether an inadvertent disclosure constitutes a waiver of more specific privileges—here, the attorney-client and the work-product privileges. (*Id.*) The City contends the two statutes can and should be read together and "harmonized." (City Br. at pp.32; Reply at pp. 4-9). The City's argument is based on the relevant statutes, case law, legislative history, and policy concerns, all which are addressed in detail in the City's briefs. (See generally City Br. & Reply.)

II. UNDER THE PLAIN TEXT OF SECTION 6254.5, A STATUTORY PREREQUISITE FOR WAIVER IS NOT MET WHEN EMPLOYEE OR REPRESENTATIVE TRANSMITS A PRIVILEGED DOCUMENT WITHOUT THE AUTHORITY TO WAIVE THE PRIVILEGE.

Two separate textual analyses both support the City's construction of section 6254.5. Both analyses show that under the plain text of the statute, an authorized waiver of privileged material is a *prerequisite* to application of section 6254.5. *First*, an unauthorized transmission of privileged materials does not fulfill section 6254.5's prerequisite that the disclosure be within the

scope of the "agency" or "employment" of the discloser. This was the conclusion of *Masonite Corp v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436, a case almost completely ignored by Ardon. *Second*, an unintentional transmission of privileged materials does not implicate the statute because the statute's prerequisite that the agency "discloses" the document has not been met. Those two textual analyses are discussed in more detail below.

A. Textual Analysis: *Masonite* Holds That Section 6254.5 Does Not Apply Because Inadvertent Disclosure Is Not Within The Scope Of The Discloser's "Authority" or "Employment."

Ardon's "plain text" interpretation of section 6254.5 was explicitly rejected in *Masonite Corp v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436.

Masonite was a "facility operator" governed by The Air Toxics "Hot Spots" Information and Assessment Act of 1987 ("Act"), which obligated Masonite to submit to the Air Quality Management District various emissions inventory reports. The Act identifies as public records all information contained in emission inventory reports, except certain information that facility operators designate as privileged and confidential "trade secrets." The PRA exempts "trade secrets" from disclosure. (Government Code section 6254.7(d).) Masonite properly designated certain information as trade secrets, which the facility operator subsequently mistakenly disclosed. (*Masonite,* 42 Cal.App.4th at pp.442-44.)

The court held the inadvertent disclosure of trade secrets that are *exempt* from public disclosure under the PRA *does not waive the privilege.* (*Id.* at p. 449.) "[T]he exemptions from public disclosure afforded by [the PRA] . . . are absolute . . . ." (*Id.*) Exempt material "[does] not become

public record[] by virtue of mistaken disclosure . . . ." (*Id.* at p. 450.) Specifically, the *Masonite* court held that the plain text of section 6254.5 did not apply to the transmission of a protected trade secret document by a facility operator not authorized to disclose trade secret documents. (*Id.* at p. 452.)

Notably, the *Masonite* Court's ruling was based on the plain text of section 6254.5. A prerequisite to the phrase "this disclosure shall constitute is a waiver" is that the "state or local agency discloses a public record which is otherwise exempt from this chapter." (Gov't Code §6254.5.) In turn, "'[a]gency' includes a member, agent, officer, or employee of the agency acting within the scope of his or her membership, *agency*, office, or *employment.*" (Gov't Code §6254.5 [emphasis added].) The *Masonite* court ruled that the transmission did not fall within section 6254.5's prerequisite that the "agency" disclose the document because the unauthorized transmission of trade secret information was outside the scope of the operator's "agency" or "employment." (*Masonite, supra*, 42 Cal.App.4th at p. 452 ["the mistaken and inadvertent release" of trade secret information was "outside the proper scope of the employee's duties"]. In short, *Masonite* explains that where an employee is not authorized to waive a privilege, the text of the statute has not been satisfied, and section 6254.5's waiver provision does not apply.

Ardon offers no explanation why the holding of *Masonite* does not compel reversal of the trial court's ruling. Ardon's only reference to *Masonite* is a citation to support the proposition that "disclosure, even if inadvertent, constitutes waiver pursuant to section 6254.5." (Resp. Br. at p.

17.)[1] *Masonite* holds the exact opposite. And neither Ardon nor the trial court's order (2 CT 478-479) addresses *Masonite*'s ruling that the plain language of section 6254.5 renders the statute inapplicable where a public entity transmits a non-public document when it has no authority to waive a privilege.

B. Textual Analysis: Section 6454.5 Does Not Apply Because The Agency Cannot "Disclose" A Privileged Document Unless The Holder Of The Privilege Determines It Is Discloseable.

A different reading of the text section 6254.5 compels the same conclusion.

As discussed *supra*, section 6254.5 only applies when an agency "discloses" a record. "Discloses" is not specifically defined in Section 6254.5 or in the PRA. (See Gov't Code §6252 [definitions].) While both Ardon and the trial court contend that the plain text of section 6254.5 is unambiguous, they both erroneously assumed that the term "disclosed" means "transmitted." *Masonite* holds otherwise, as discussed in the preceding section.

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[1] Ardon may be referring to the Category 2 documents in *Masonite*. Those documents had not been labeled as trade secret documents, and thus were *not exempt* under the PRA in the first instance. This distinction *does not apply to attorney-client privileged* information under Evidence Code 912. The law provides that the privilege attaches to all confidential attorney-client communications whether or not they are designated "privileged." "[T]he absence of prominent notations of confidentiality does not make [attorney-client communications] any less privileged." (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.App.4th 807, 818.) The standard for determining the existence of the attorney-client privilege and the PRA exemption is "whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged . . . ." (*Id.*) *Masonite's* prohibition on the resurrection of non-exempt trade secret protection does not apply.

Section 6253, not section 6254.5, governs the procedure by which a public entity "discloses" public records under the PRA. (Gov't Code §6253.) Statutory language "must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1479, 1387.)

Section 6253 requires that all public records are open to inspection, except as otherwise provided. (Gov't Code §6253(a).) Documents protected by attorney-client and work-product privileges are explicitly excluded. (Gov't Code §6254(k).) If the documents are not exempt from the PRA, the public agency "shall make the records promptly available" upon payment by the requestor. (Gov't Code §6253(b).) Public entities have ten days to respond. (Gov't Code §6253(c).)

Most significantly, section 6253(c) mandates that the public agency first "determine" whether documents are "disclosable public records." (Gov't Code §6253(c).) The agency has no discretion whether to make such a determination; it "shall" do so. (*Id.;* see *Common Cause v. Board of Supervisors of Los Angeles County* (1989) 49 Cal.3d 432, 443 ["It is a well-settled principle of statutory construction that the word "may" is ordinarily construed as permissive, whereas "shall" is ordinarily construed as mandatory" (citations omitted)].) The same sort of mandatory language governed in *Masonite,* where the Health & Safety Code provisions regarding trade secrets mandated an evaluation by the agency. (42 Cal.App. at p. 452 & n.12 ["the district shall notify . . . "][the "district shall release . . ."].)

A determination of "discloseability" *must* involve the person who has authority to waive an exemption to the PRA. For most exemptions under

section 6254, the person who may determine whether a document is exempt from disclosure is an authorized employee of the agency. However, for documents protected by attorney-client and work-product privileges, the employee may not waive the privilege unless expressly authorized to do so. (See *Commodity Futures Trading Comm'n v. Weintraub* (1985) 471 U.S. 343, 348.) The only manner in which a public agency can fulfill its duty to determine whether the documents are "discloseable public documents" is to inform the holder of the privilege that the request calls for privileged documents, and permit the holder of the privilege the opportunity to make a determination as to whether the privilege should be waived. (*See Masonite,* 42 Cal.App.4th at p. 452 [waiver under PRA cannot occur absent notification of holder of trade secret, and opportunity to respond]; see also *Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 112 [waiver only if holder of privilege fails to claim privilege "*knowing* that the disclosure of privileged information is sought" (emphasis added)]; *cf. O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 577 [production of privileged document *ad*vertently and *without* objection . . . would show a bona fide consensual waiver (emphasis in original)]; *Calvert v. State Bar* (1991) 54 Cal.3d 765, 780 [finding waiver after consultation with client and opportunity to object].)

As explained in the City's Brief, for the attorney-client privilege, the City is the "holder of the privilege" under Evidence Code section 953. (City Br. at p. 34-36.) When the holder of the privilege is an entity such as the City, the privilege belongs to the entity rather than any individual officer or employee. (*People ex rel. v. Lockyer* (2000) 83 Cal.App.4th 387, 398; *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 35; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 ["We conclude that a local governing body is the

holder of the attorney-client privilege with respect to written legal opinions by the governing body's attorney"]; Cal. R. Prof. Conduct 3-600 [attorneys' client is "is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement"]. The "particular engagement" at issue is the City's telephone users' tax, over which the City Council is the final arbiter. (See generally *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241.) Accordingly, the client is the City Council, not the City Administrator or a clerk in the City Administrator's Office.

For the attorney-client privileges at issue in this case, the League of Cities and City Attorney hold that privilege. (City Br. at 37-41; *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 278.)[2]

Thus, under section 6253, the mandatory duty to determine whether a document is "publicly discloseable" under the PRA requires that the person responding to the PRA request notify the City and the City Attorney and the League[3] (as the holders of the privilege) to allow them to determine whether the documents should be disclosed, i.e. whether the privilege should be waived. That determination by the holder of the privilege is measured by the well-established rules of waiver. It must be the intentional relinquishment of a known right. (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201,

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[2] Ardon's contention that the League Memo is not privileged is addressed in the City's Reply Brief. (Reply Br. at 12-19). And any concern about the City's standing to assert the privilege is alleviated by the League's assertion of privilege herein.

[3] For the League, the argument against waiver is even stronger. Yet under Ardon's interpretation, an error by a clerk in the City Administrator's office waives the League's work-product privilege as to the whole world, not just the City.

211; *Los Angeles Gay and Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 309 [Under Evidence Code section 912, "privilege may only be waived through a clear manifestation of an intent to waive].) "[I]t must clearly appear there is an intention to waive and a court will not run to such a conclusion." (*Torbensen v. Family Life Ins. Co.* (1958) 163 Cal.App.2d 401, 404.) As the City describes in detail in its briefs, the record here is devoid of any such knowing relinquishment or intention. (City Br. at pp. 2-6, 34-41; Reply Br. at pp. 9-11.)

Ultimately, both textual analyses are two sides of the same coin. It does not matter if the Court considers the disclosure of a privileged document outside the scope of the discloser's "agency" or "employment", or alternatively, whether the Court does not consider the transmission as the agency "disclosing" the document. The principle is the same: a public agency can only act through its authorized agent, and actions taken by its employees that are outside the scope of their authority are *ultra vires*, are void, and are not binding on the entity. Under either reading of the plain text of the statute, section 6245.5 does not apply.

C. The Court Does Not Need To Carve Out A Judicial Exception to Section 6254.5 Because It Does Not Apply In The First Instance

Ardon argues that the Court should refrain from carving out a judicial exception to section 6254.5. (Resp. Br. at pp. 13-14.) Ardon contends that 6254.5 already delineates nine exceptions to section 6254.5's waiver provision. (*Id.*) He contends that the court should not read another exception for inadvertent disclosure into the statute where the Legislature presumably chose to omit such an exception. (*Id.*)

This argument misses the point. The relevant question is not whether the Court should carve out an inadvertent disclosure exception to section

6254.5. There is no need for an exception. Where a disclosure is "inadvertent", *i.e.*, where it is unauthorized by the holder of the privilege, the preconditions for section 6254.5 are not met, and it does not apply in the first instance.

III. THE CALIFORNIA SUPREME COURT DOES NOT PERMIT SECTION 6254.5 TO REPEAL EVIDENCE CODE SECTION 912 WHERE THE TWO PROVISIONS CAN BE HARMONIZED.

Even absent the foregoing textual analysis of section 6254.5, relevant California Supreme Court precedent supports the City's interpretation of the statute. That precedent is entirely ignored by Ardon.

A. The California Supreme Court Recognized That The Public Is Best Served By Maintaining The Existing Balance Between Attorney-Client Privilege On One Hand And Open Government Laws On The Other.

In 1993, the California Supreme Court addressed the scope of attorney-client privilege under the PRA. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363). The *Roberts* Court considered whether a later-enacted provision of California's open meeting statute, the Brown Act, that purported to "abrogate attorney-client privilege" except in certain circumstances repealed the vast majority of attorney-client privilege protection under the PRA and the Brown Act. The Court held that it did not.

The *Roberts* Court recognized that the public was best served by the existing balance between preserving attorney-client privilege under the PRA and providing open access to government information, meetings and documents. The court noted that "[o]pen government is a constructive value in our democratic society." (*Roberts,* 5 Cal.4th at p. 380.) "The attorney-client privilege, however, also has a strong basis in public policy and the administration of justice. The attorney-client privilege has a venerable pedigree that can be traced back 400 years." (*Id.*) "[T]he privilege seeks to

insure 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice....'" (*Id.*, quoting *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) The Court emphasized that the privilege is "no mere peripheral evidentiary rule, but is held vital to the effective administration of justice." (*Roberts*, 5 Cal.4th at 308.) It serves the public interest, and aids both the public and public entities by "promot[ing] forthright legal advice and thus screens out meritless litigation that could occupy the courts at the public's expense." (*Id.*, citing *City & County of San Francisco, v. Superior Court* (1951) 37 Cal.2d 227, 235). "The privilege serves to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" (*Id.*, quoting *Upjohn v. United States* (1981) 449 U.S. 383, 398.)

The *Roberts* court explained the practical value of maintaining the privilege for public entities. (*Id.*) "The public interest is served by the privilege because it permits local government agencies to seek advice that may prevent the agency from becoming embroiled in litigation, and it may permit the agency to avoid unnecessary controversy with various members of the public." (*Id.* at pp. 380-81.) The Court also admonished that the importance of the attorney-client privilege to public entities should not be—and is not—overridden by the PRA's competing "interest in open government." (*Id.*; see also *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732 ["The privilege is given on the grounds of *public policy* in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result in the suppression of relevant evidence" (emphasis added)].) Moreover, the Court "recognize[d] that public

entities need confidential legal advice to the same extent as do private clients." (*Roberts*, 5 Cal.4th at p. 374.) "Government should have no advantage in legal strife; neither should it be a second class citizen." (*Id.*, quoting *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 824-25.)

B. The *Roberts* Court Held A Later-Enacted Statute Cannot Repeal Attorney-Client Privilege Under The PRA Unless The Two Statutes Cannot Be Harmonized.

Not only did the Roberts court endorse the then-existing balance between privilege and the PRA, the *Roberts* Court prohibited exactly the sort of statutory interpretation that Ardon espouses here. The Court refused to read a later-enacted statutory provision as a repeal of the Evidence Code attorney-client provisions unless the two conflicting statutes "cannot be harmonized." (*Roberts,* 5 Cal.4th p. 379.) Specifically, the Court considered the scope and effect of a 1987 Amendment to the Brown Act, which on its face "abrogated" all expression of the lawyer-client privilege other than those provided in the statute. (*Id.* at pp. 378-79; see also Gov't. Code §54956.9.) The Court characterized the claim as "essentially that section 54956.9 repeals the attorney-client privilege contained in the Public Records Act by implication. That is, section 54956.9 and its regulation of closed meetings between an attorney and a local agency applies to abrogate the attorney-client privilege which the Public Records Act makes applicable to public documents." (*Roberts*, at pp. 378-9.)

The Court refused to read the "abrogation" statute as a repeal of the attorney-client privilege. It instructed that "***repeals by implication are not favored, and we do not recognize them unless two apparently conflicting laws cannot be harmonized.***" (*Id.* at p. 379, citing *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298) (emphasis added.) "As we

recently reiterated, '[s]o strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision' [i]n order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.'" (*Id.*, quoting *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 43.) The Court saw "no evidence of such legislative intent in this case. " (*Id.*) It was "the decision of the Legislature in enacting the PRA to afford public entities the attorney-client privilege as to writings to the extent authorized by the evidence code." (*Id.* at 380; *John St. Croix v. Superior Court (Grossman)* (July 28, 2014) 2014 WL 3704275 at *3.) It held that the two bodies of law were "readily harmonized" if the Court interpreted the later-enacted statute in a more limited fashion (and one consistent with the legislative intent) rather than as a wholesale repeal of the attorney-client privilege under the PRA. (*Id.*)

C. Government Code Section 6254.5 and Evidence Code Section 912 Can And Should Be Harmonized.

The reasoning of *Roberts* controls here. Govt. Code section 6254(k) (incorporating Evidence Code section 912) is easily harmonized with Government Code section 6254.5. As the City explains in detail in its Brief and Reply, section 6254.5 was enacted in 1981 as part of a larger bill that amended various sections of the Brown Act and the PRA. (City Br. at 25-29; Stats. 1981, c. 968, p.3680 §3.) It was intended to codify the prohibition against selective disclosure in *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645. (City Br. at 27-29.) There, the Court ruled that under the PRA the Department of Consumer Affairs could not withhold from the Black Panther Party otherwise non-public records of complaints against collection companies when the department routinely provided those same reports to the

companies themselves. (*Black Panther Party*, 42 Cal.App.3d at p. 685). "The Public Records Act denies public officials any power to pick and choose the recipients of disclosure." (*Id.* at pp. 656-57.) Section 6254.5 simply codifies this ruling, holding that once a public agency has intentionally "picked and chosen" to disclose a document to one member of the public, it cannot then withhold it from another.

It is critical to note that the scope of potentially *waivable* documents under 6254.5's waiver provision is much, much broader than those under Evidence Code section 912. The provisions can be harmonized by broadly applying section 6254.5 to selective disclosure of *any* of the PRA's myriad categories of exempt documents (see generally Gov't Code §6254), while limiting Evidence Code section 912's protections to just the few statutory privileges specifically enumerated in the statute. "It is an elementary principle that specific provisions of a statutory scheme modify more general provisions of the same scheme." (*Common Cause v. Board of Supervisors of Los Angeles County* (1989) 49 Cal.3d 432, 443-444.) Moreover, applying section 6254.5 only to selective disclosure—rather than to *any* inadvertent transmission of an otherwise non-public document—comports perfectly with Evidence Code 912's rule that "an underling's slip-up" is not a disclosure of the attorney-client privilege. (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 577.)

In reaching the opposition conclusion, the trial court noted that "disclosure of documents under the Public Records Act is not the same as disclosure in the course of litigation discovery." (2 CT 476.) While true, that statement does not preclude harmonizing Evidence Code section 912 with section 6254.5. For example, the trial court noted that inadvertent disclosure in the course of litigation overseen by a judge provides "a clear mechanism

for redress," while there is not such mechanism under the PRA. (2 CT 477-78.) This lack of immediate judicial supervision does not leave an aggrieved public entity without any remedy. It can always file an action for injunctive or declaratory relief. More important, however, the distinction between the available remedies does not preclude harmonizing these two statutes. Rather, it just means that public entities are faced with a more difficult and potentially costly challenge to maintain privilege when there is an inadvertent disclosure under the PRA.

Ardon does not cite a single case that suggests that section 912 and section 6254.5 cannot be harmonized by properly reading section 6254.5 to prevent selective disclosure. Instead, Ardon cites a number of cases for the proposition that "disclosure, even if inadvertent, constitutes waiver pursuant to section 6254.5." (Resp. Br. at p. 17.) Ardon's argument misses the point. The issue is not whether an unintentional disclosure *can* be a waiver under 6254.5. It can be, provided that it is also a waiver under section 912.

None of Ardon's citations compel—or even suggest—that the Court should rule that a mistaken transmission of a protected document is a waiver under section 6254.5 when it would not be a waiver under section 912. (*See* City Br. at pp.29-31 [analyzing cases later cited Ardon]; see also *Vallejos v. California Highway Patrol* (1979) 89 Cal.App.3d 781, 787 [case involved neither Evidence Code §912 nor any type of disclosure of protected documents; held that the CHP incident reports were not exempted from disclosure under the PRA].)

Similarly, Ardon provides no legislative history that demonstrates that the Court should not harmonize section 6254.5 and Evidence Code 912. (Resp. Br. at pp.15-16) Instead, Ardon simply challenges whether the City's showing is sufficient, and then speculates that even if section 6254.5 was

enacted to prevent selective disclosure, it also could have been enacted for some other, unexplained purpose. (Resp. Br. at p.16.) This argument is pure supposition, not evidence of legislative history.

IV. ARDON'S PROPOSED RULE WOULD LIMIT ACCESS TO PUBLIC DOCUMENTS, INCREASE COSTS TO TAXPAYERS, AND WOULD UNDERMINE THE PUBLIC RECORDS ACT ITSELF.

Amici are concerned that Ardon and the trial court severely underestimate the consequences of their proposed interpretation of section 6254.5.

A. The Current Process For Responding To PRA Requests Ensures That The Public Can Obtain Records Quickly And Directly From The Agency.

Currently, designated employees—often a clerk or other junior employee—from a public agency is responsible for responding to PRA requests. In larger entities, such as large cities or counties or large state agencies, each department has a designated person to respond to PRA requests. The City Attorney or County Counsel often has no responsibility for the production, and in large cities and counties which receive hundreds or thousands of PRA requests annually, the City Attorney or County Counsel is often unaware of the requests unless specifically consulted. This process best serves the public. Agencies can respond quickly to PRA requests and within the short ten-day window mandated by the statute (Govt. Code §6253(c)). Requests are provided with a knowledgeable contact at the relevant agency (rather than going through an attorney) who is familiar with the department's documents and procedures. The agency contact provides the requester the guidance required by the statute (Gov't Code §6253.1) and can assist the requestor in tailoring the request to meet the requester's needs. (Gov't Code §6251(a)(3).)

For example, currently, a low-level clerk can determine whether to produce a five-page document called for by a PRA request by performing a general review for relevance and then disclosing the document unless it is reasonably apparent that privilege applies. That said, the clerk may or may not be aware if document is the subject of ongoing litigation, may not recognize the names of attorneys on the document, and may not have the level of sophistication or knowledge to determine whether the content of the document contains privileged or work-product information. Nonetheless, the clerk can quickly (within 10 days) produce responsive documents to the requester, while at the same time providing reasonable protection for both attorney-client and work-product privilege.

B. Ardon's Proposed Process Would Decrease The Accessibility Of Documents To PRA Requesters And Would Force The Public To Bear The Costs Of A Full-Blown Litigation Privilege Review For PRA Requests.

Ardon proposes a drastic overhaul of the current system for responding to PRA requests. If the trial court's ruling stands, public entities will be allowed no leeway for mistake. Outside of documents compelled in litigation, *any* transmission—be it completely accidental, mistaken, deliberate, or even malicious—of attorney-client or work-product privileged material would be a waiver as to the world. The holder of the privilege would be irrelevant, and would not be required to consent or even know about the transmission for a waiver to occur. Any time any employee transmits an otherwise privileged document (whether pursuant to the PRA or not), the privilege would be waived as to the world.

The practical effects of Ardon's proposed rule are significant. *First*, the costs to public entities would radically increase. A "perfection" standard would effectively require that *every* document produced in response to a PRA

request be screened by an attorney or paralegal for privilege. As an initial matter, in order to handle a more sophisticated review, public entities would be forced to staff virtually all PRA desk with additional attorneys and paralegals rather than clerks or other employees.[4] The additional costs would not end there. The scope of review would increase exponentially. At a minimum, public entities would have to perform a full-blown litigation-style privilege review—without the protections of the inadvertent disclosure doctrine that protect litigants. All of this review would be required in a ten day window. (Gov't. Code §6253(c).)

Second, Ardon's proposed rule would undermine the purpose and application of the PRA, as the public would lose ease of access to public documents. The PRA "declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state." (Gov't Code §6252.) The proposed regime would limit this "fundamental" right. A statute, court rule or other authority . . . shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const. Art. I, §3(b)(2); see *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 312-13.)

Requesters would get fewer documents and would get them after longer delays. Wary public entities—knowing that a mistake would leave to a waiver—would be overly cautious in designating material as privileged.

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[4] Most smaller public cities that rely on private outside counsel to act as their city attorneys would particularly feel the bite. The inability to protect their own work-production would disincentivize the most competent attorneys from public representation. In turn, costs for attorneys would increase and the quality of representation would decrease.

Moreover, delays in production would be the norm because of the increased logistical difficulties from a litigation-style privilege review. (*See* Gov't Code §6253(c) [describing conditions permitting delays, including the need for consultation with other agencies]) Over-use of privilege designations by concerned public entities would, in turn, spawn more PRA litigation, more cost to the taxpayers, and less access by requesters forced to resort to litigation to obtain documents.

Though *Amici* represent a large percentage of the public entities that would implement Ardon's proposed radical overhaul of California's public records apparatus, ultimately, the burden would not be borne by the entities, but by the taxpayers. They would pay more, and have less access to information under such a regime.

Ardon dismisses this concern entirely. He contends it "is an issue the City should raise with the California Legislature, not this court." (Resp. Br. at p.17.) This argument again misses the point. The fact that Ardon's interpretation would lead to such drastic results is further evidence that the Legislature never intended section 6254.5 to be read to require automatic waiver. Ardon also questions whether such an overhaul would likely result, as many cities and counties already "require review by the city attorney or county counsel when there is a question whether a responsive document is exempt." (Resp. Br. at p.17 n.14.) Ardon misunderstands how his construction of the statute would operate. Currently, when a clerk has a question, he or she *may* consult an attorney. Under Ardon's proposed regime in which inadvertent disclosure constitutes a waiver, the city or county employee would need to treat *each* document as if it were privileged, and then take the requisite time and resources to investigate the content and context of the document in a small time window, and then likely refer the

document for legal review. It would not be enough to simply have an attorney available if questions arise.

There is no reason to read section 6245.5 to require such an overhaul of the law and procedures governing PRA requests. "[T]he law does not require that the holder of the privilege take 'strenuous or Herculean efforts' to resist disclosure." (*Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 683.) As the California Supreme Court said, "we must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Coronado* (1995) 12 Cal.4th 145, 151.)

CONCLUSION

For the foregoing reasons, the Court should reverse the Court's trial ruling.

Dated: August 4, 2014

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 6,327 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on August 4, 2014.

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CORRECTED PROOF OF SERVICE

I, ANITA MURDOCK, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

On August 6, 2014, I served the attached:

AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLANT CITY OF LOS ANGELES

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

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☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☒ **BY E-FILING**: I electronically filed the attached document with the Court of Appeal, Second Appellate District by using the electronic filing system.

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

Executed August 6, 2014, at San Francisco, California.

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