

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION EIGHT

RONALD AUSTIN,  
Petitioner and Appellant,

v.

BURBANK POLICE  
DEPARTMENT,

Respondent.

Court of Appeal Case No.  
B307677

Superior Court  
No. 19STCP04741

**APPLICATION TO FILE AMICUS CURIAE BRIEF AND  
AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA  
CITIES IN SUPPORT OF RESPONDENT**

In the Appeal from an Order of the Los Angeles County Superior  
Court, Hon. James C. Chalfant, Judge Presiding

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ATTORNEYS FOR AMICUS CURIAE  
LEAGUE OF CALIFORNIA CITIES

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I. APPLICATION TO FILE AMICUS CURIAE BRIEF.

The League of California Cities (Cal Cities) is an association of 477 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and enhancing the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Cal Cities and its members have an interest in the outcome of this appeal and, in particular, the question of whether this appeal presents “extraordinary circumstances” that can justify its treatment as a writ petition. The members of Cal Cities and other public agencies receive numerous requests for public records under the Public Records Act, Gov. Code, § 6250 et seq. Cal Cities believes that it is important that the rules governing such litigation, including appellate review, be clear and definite, for the benefit of public agencies, requesters, and the public alike.

Cal Cities also believes that its amicus curiae brief, submitted in support of Respondent City of Burbank (sued as Burbank Police Department) (Burbank), will assist the court by addressing the question of whether extraordinary circumstances exist justifying the treatment of this appeal as a writ petition

and alerting the court to judicially noticeable facts bearing on the resolution of that question.

The amicus curiae brief was drafted by counsel for Cal Cities and no party or party's counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. Apart from the amicus curiae or its counsel, no person or entity made a monetary contribution intended to fund the preparation or submission of this brief.

II. AMICUS CURIAE BRIEF IN SUPPORT OF CITY OF BURBANK.

A. INTRODUCTION.

Cal Cities does not take issue with the responsibilities of public agencies under the Public Records Act, (the Act; Gov. Code, § 6250 et seq.)<sup>1</sup> To the contrary, it supports the goals of transparency in governance that underlie the Act.

However, Section 6259 provides that either a requester or a public agency may obtain appellate review of a disclosure order under the Act only by a timely writ petition, and not by an appeal such as Mr. Austin has filed. It is true that, in unusual and extraordinary circumstances, appellate courts have the discretion to treat an improper appeal as a writ petition and so reach the merits of a dispute. However, to do so under the circumstances of this case would be contrary to the plain language of the Act and undercut the Act's goal of prompt judicial resolution of disputes under it. It would be especially inappropriate for this court to find "extraordinary circumstances" justifying the treatment of this appeal as a writ petition where, as here, the requester and his counsel have initiated numerous trial court proceedings under the very statute, Section 6259, that specifies the sole avenue of appellate review; they must therefore be charged with having full knowledge of the terms of that statute, including its provisions

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<sup>1</sup> Unless otherwise indicated, subsequent statutory references are to the Government Code.



allowing review solely by writ petition, at the time Mr. Austin brought this appeal.

Because this case presents no extraordinary circumstances justifying the treatment of Mr. Austin’s appeal as a writ petition, and Mr. Austin in his opening brief suggests none, the court should hold him to the plain language of the Act and dismiss his appeal.

B. ARGUMENT.

1. The Act Unequivocally Requires that Any Party Seeking Appellate Review of an Order Concerning Disclosure Under the Act Proceed by a Petition for an Extraordinary Writ.

Section 6259, subdivisions (a) and (b) allow persons requesting public records under the Act to file a petition in the superior court seeking an order compelling disclosure and specify procedures for the superior court’s review. Section 6259, subdivision (c) addresses review of a trial court’s decision. That statute provides that a trial court’s order either supporting the decision of a public official refusing disclosure of material requested under the Act or directing disclosure by a public official “is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ.” (§ 6259, subd. (c).) Section 6259, subdivision (c) “unambiguously forecloses an appeal and instead expressly authorizes a writ as the sole and exclusive means to challenge the trial court’s ruling.” (*MinCal Consumer Law Group v. Carlsbad Police Department*

(2013) 214 Cal.App.4th 259, 263-64 (*MinCal*). In addition, as Burbank discusses in its Respondent's Brief, Section 6259 requires that the writ petition be filed within 20 days after service of the notice of entry of the order either directing disclosure or supporting the decision refusing disclosure, or within an additional 20 days as the trial court may allow for good cause. (§ 6259, subd. (c).) If a writ petition is not filed within the time limit, the court lacks the power to review the merits of the trial court's ruling. (*MinCal, supra*, 214 Cal.App.4th at p. 264.)

Section 6259's requirement of writ review sought within 20 days embodies the Legislature's intent to expedite judicial review of all decisions concerning disclosure under the Act. In *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, the California Supreme Court explained the legislative objective of the provision limiting appellate review of a trial court's order to a petition for extraordinary writ "was to expedite the process and make the appellate remedy more effective." (*Filarsky, supra*, 28 Cal.4th at p. 427.) Certainly, a writ petition filed within 20 days that is complete under California Rules of Court, rule 8.486 with a verified petition, record, a transcript, and a memorandum, is likely to be decided far sooner than an appeal. The court in *Filarsky* also noted that the requirement to proceed by extraordinary writ was meant to prevent public agencies from delaying the disclosure of public records by appealing a trial court decision and using continuances in order to frustrate the intent of the Act. (*Id.* at pp. 426-427.) However, the Legislature expressly specified that an order *denying* disclosure falls within

the short statutory time limit and writ requirement. Hence, the requirements of Section 6259, subdivision (c) apply equally to a requester challenging an order denying disclosure as well as to a public agency resisting disclosure.

2. The Court Should Not Treat Mr. Austin's Appeal as a Petition for Writ Relief Because Mr. Austin does Not Demonstrate, and the Record Does Not Reflect, Extraordinary Circumstances to Justify Such Treatment.

Under limited, extraordinary circumstances appellate courts have the discretion to treat an appeal from a nonappealable order as a petition for writ relief, and thus reach the merits of a challenge to an order. (*MinCal, supra*, 214 Cal.App.4th at pp. 265-66, citing *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001, 1006; *Olson v. Cory* (1983) 35 Cal.3d 390, 400–401; *City of Gardena v. Rikuo Corp.* (2011) 192 Cal.App.4th 595, 599, fn. 4.) This power may be invoked where (1) the briefs and record contain in substance all the elements prescribed by the rules of court for an original mandate proceeding and (2) there are extraordinary circumstances justifying the exercise of that discretionary power. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 745–747.)

In *Coronado Police Officers Assn.*, for example, a case involving Section 6259, subdivision (c), the court treated an improper appeal as a petition because extraordinary circumstances were present. (*Coronado Police Officers Assn., supra*, 106 Cal.App.4th at p. 1006.) The court was persuaded by the requester filing a notice of appeal within the statutory time

period for seeking writ review and the fact that a dismissal for lack of appellate jurisdiction would lead to further trial court proceedings and not further judicial economy. (*Ibid.*) In *Olson*, *supra*, 35 Cal.3d at pp. 400-401, the court found there to be extraordinary circumstances where the issue of appealability was far from clear, the case presented only a single issue, and all of the parties urged to court to decide the case rather than dismiss the appeal. On the other hand, in *City of Gardena*, the court dismissed an appeal from an unappealable order where, among other things, the appellant did not assert that its appeal should be treated as an extraordinary writ. (*City of Gardena*, *supra*, 192 Cal.App.4th 595, 599, fn. 4.)

In its October 21, 2020 order denying Burbank's motion to dismiss, the court invited the parties to address whether there are extraordinary circumstances (not merely absence of prejudice to respondent) justifying the court's exercise of discretion to treat this as a writ proceeding. The court need not reach this question if it determines that Mr. Austin did not file his notice of appeal within the 20-day time period. (*MinCal*, *supra*, 214 Cal.App.4th at p. 264 [holding 20-day time limit for seeking appellate review by writ petition to be jurisdictional].) Cal Cities will not separately address whether Mr. Austin's notice of appeal was filed within the 20-day period.

But even if one assumes, *arguendo*, that Mr. Austin's notice of appeal would have been timely if the court were to treat it as a writ petition, the court should not do so, for multiple reasons.

First, Mr. Austin makes no effort to show that the case presents extraordinary circumstances justifying the treatment of his appeal as a writ petition. Although he mentions *Coronado*, he does not discuss its application to this case. In *MinCal*, the requester had similarly failed to point to extraordinary circumstances justified treating his appeal as a writ petition, and the court declined to exercise its discretion to do so in part for this reason.<sup>2</sup> (*MinCal*, *supra*, 214 Cal.App.4th at p. 265 [“*MinCal* presents no extraordinary or compelling reason for us to disregard this jurisdictional time limit, or consider its appeal as a writ petition.”].) Thus, *MinCal* stands for the proposition that a court may decline to treat a notice of appeal from a nonappealable order as a writ petition where, as here, a litigant offers no cognizable reason for doing so. (See, also, *Sela v. Medical Board of California* (2015) 237 Cal.App.4th 221, 231 [refusing to treat improper appeal as writ petition where physician failed to give a sufficient reason for proceeding by direct appeal rather than writ petition as required by Business & Professions Code section 2337.])

Second, this case presents nothing like the further trial court proceedings that treating an appeal as a writ petition

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<sup>2</sup> The court in *MinCal* also concluded that the notice of appeal was filed outside the 20-day period in which to bring a writ petition and that this deadline was jurisdictional. (*MinCal*, *supra*, 214 Cal.App.4th at p. 264.) However, “[w]hen an appellate court bases its decision on alternative grounds, none is dictum.” (*Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 485.)

obviated in *Coronado*. And, unlike in *Olson*, the question of appealability is not at all close and the parties do not all urge the court to reach the merits of Mr. Austin's appeal. Mr. Austin does suggest that Burbank will not be prejudiced if the court treats his appeal as a writ petition. (Appellant's Opening Brief, p. 10.) However, in its order concerning Burbank's motion to dismiss, this court invited the parties to address whether there are extraordinary circumstances justifying treatment of this appeal as a writ proceeding *other than* a lack of prejudice. Mr. Austin has declined the court's invitation to do so.

Mr. Austin cites *Butt v. City of Richmond* (1996) 44 Cal.App.4th 925, but in that case the court held that an order granting fees under the Act was reviewable from a final judgment in the proceedings; it did not address whether there were extraordinary circumstances justifying treatment of an appeal as a writ petition. (*Id.* at pp. 929-931.) *Butt* therefore is inapposite.

Third, Mr. Austin could not show extraordinary circumstances on this record even had he tried to do so. Cal Cities submits that "extraordinary circumstances" that might excuse the pursuit of an appeal rather than the filing of a writ petition should be narrowly limited given Section 6259's express direction and the Legislature's goal of prompt judicial review of disclosure orders. Hence, it cannot be the case that extraordinary circumstances are always present when a requester appeals from the denial of a request under the Act. Such a view would negate the rule that orders granting or denying disclosure are nonappealable and rewrite the Act. Although the Legislature

could have chosen to allow a requester, but not a public agency, to proceed by appeal, it did not do so. Indeed, expediting judicial decision-making under the Act benefits public agencies as well as requesters because it affords early certainty concerning an agency's obligations. And there is nothing unusual or extraordinary about the issuance of an order declining to order disclosure, for example, where requested material is exempt from disclosure or not a public record at all.

3. Because Mr. Austin and His Counsel are Highly Experienced Litigants who have Brought Numerous Court Challenges to Disclosure Decisions Under the Act, the Court Should Not Relieve Them from their Mistaken Pursuit of this Appeal.

Finally, whatever may constitute extraordinary circumstances on other facts, the court should find no extraordinary circumstances where, as here, a requester is represented by counsel, both are highly experienced litigants under the Act, and nothing else justifies such a finding. Well before Mr. Austin mistakenly appealed from the trial court's order in this case, Mr. Austin and his present attorney filed numerous trial court petitions under the Act.<sup>3</sup> In these cases, Mr.

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<sup>3</sup> (See, e.g., Motion for Judicial Notice (MJN), Exh. A [*Austin v. Los Angeles Animal Control*, Los Angeles Superior Court (LASC) 19STCP04600, filed 10/24/19, seeking complaints made to Animal Control, writ of mandate under Sections 6258 and 6259 (¶ 30), and attorneys' fees under "Government Code section 6529(d)" [sic-Section 6259, subdivision (d)]]; MJN Exh. B [*Austin v. Baldwin Park Police Department*, LASC 19STCP04717, filed 11/1/19, seeking names of shooting victims, writ of mandate under Sections 6258 and 6259 (¶ 30), and attorneys' fees under

Footnote continued on next page...

Austin and his attorney expressly sought relief under Section 6259, the very statute that requires that appellate review of a trial court's decision to require or deny production proceed by a writ petition. They also requested attorney's fees under subdivision (d) of Section 6259. Mr. Austin and his current counsel filed more than 30 cases under the Act in Los Angeles County alone before they filed their notice of appeal in this case. (MJN, Exh. A-I.) Therefore, the court should consider Mr. Austin and his attorney to have been highly experienced and fully

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...footnote continued from previous page.

Section 6259, subdivision (d) (¶ 33)]; MJN Exh. C [*Austin v. Torrance Police Department*, LASC 19STCP04773, filed 11/6/19, seeking name of shooting victim, writ of mandate under Sections 6258 and 6259 (¶ 30), and attorneys' fees under Section 6259, subdivision (d) (¶ 33)]; MJN Exh. D [*Austin v. Signal Hill Police Department*, LASC 19STCP04899, filed 11/15/19, seeking name of assault victim, writ of mandate under Sections 6258 and 6259 (¶ 30), and attorneys' fees under Section 6259, subdivision (d)(¶ 33)]; MJN Exh. E [*Austin v. Los Angeles Police Department*, LASC 19STCP04951, filed 11/19/19, seeking name of assault victim, writ of mandate under Sections 6258 and 6259 (¶ 30), and attorneys' fees under Section 6259, subdivision (d)(¶ 33)]; MJN Exh. F [*Austin v. Irwindale Police Department*, LASC 20STCP00105, filed 1/10/20, seeking name of car crash victim, writ of mandate under Sections 6258 and 6259 (¶ 30), and attorneys' fees under Section 6259, subdivision (d)(¶ 33)]; Exh. G [*Austin v. City of Bell Gardens*, LASC 20STCP00142, filed 1/13/20, seeking names of drivers in traffic accident, writ of mandate under Sections 6258 and 6259 (¶ 30), and attorneys' fees under Section 6259, subdivision (d)(¶ 33)]; and Exh. H [*Austin v. Los Angeles County Sheriff's Department*, LASC 20STCP00417, filed 1/31/20, seeking name of woman claiming drink was spiked, writ of mandate under Sections 6258 and 6259 (¶ 30), and attorneys' fees under Section 6259, subdivision (d)(¶ 33)].)



familiar with all of the terms of Section 6259, including Section 6259, subdivision (c), at the time they filed this improper appeal. There is no reason for this court to excuse what is at best a reckless disregard of the requirements of Section 6259 by treating Mr. Austin's improper appeal as a writ petition. (Cf. *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206 [an attorney's mistake of law is not a ground for relief under Code of Civil Procedure section 473, subdivision (b) where the mistake is "simply the result of professional incompetence, general ignorance of the law, or unjustifiable negligence in discovering the law.[,]" internal quotes omitted]; *Toho-Towa Co., Ltd. V. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1112 [no mistake of law where experienced attorney failed to submit evidence opposing motion in mistaken believe he did not bear burden of rebutting the movant's evidence]; *Tracy v. Freshwater* (2d Cir.2010) 623 F.3d 90, 102 [the degree of solicitude a court may give a pro se litigant may be lessened where the particular litigant is experienced in litigation and familiar with the procedural setting presented].)

It may be easier and less costly to simply file a notice of appeal rather than to make the necessary effort to file a writ petition, which would entail preparing a verified petition, assembling the record, and drafting arguments within 20 days. But sophisticated litigants should have no expectation that an appellate court will save an improper appeal. Section 6259 unequivocally makes the trial court's order unappealable and

provides that appellate review must proceed by a writ petition.

Mr. Austin failed to do so here.

C. CONCLUSION

Section 6259 means what it says. There must be something more than the mere fact that a requester mistakenly seeks review by appeal for a court to treat a notice of appeal as a Section 6259 writ petition. But Mr. Austin suggests no extraordinary circumstances that would allow the court to consider the merits his improper appeal. Indeed, to deem a requester's appeal to be a writ proceeding based solely on the requester's error would countenance delay and be contrary to the plain terms and purposes of Section 6259. That is especially true where a litigant is fully aware of Section 6259's procedural requirements, but nonetheless ignores them. The court should dismiss this appeal.

Dated: April 23, 2021

RESPECTFULLY SUBMITTED,  
BERLINER COHEN

By: /s/ Thomas P. Murphy

ANDREW L. FABER  
THOMAS P. MURPHY  
ATTORNEYS FOR AMICUS  
CURIAE LEAGUE OF  
CALIFORNIA CITIES

**CERTIFICATE OF WORD COUNT**

Pursuant to California Rules of Court Rule 8.204 (c)(1), counsel for Amicus Curiae exclusive of this certification, the cover, and the tables, this Application to File Amicus Curiae Brief and Amicus Curiae Brief of League of California Cities in Support of Respondent contains 3,135 words, as determined by the word count of the computer program used to prepare the brief.

Dated: April 23, 2021

RESPECTFULLY SUBMITTED,  
BERLINER COHEN

By: /s/ Thomas P. Murphy  
THOMAS P. MURPHY

1 *Ronald Austin v. Burbank Police Department*, 2d District Court of Appeal No. B307677,  
2 Los Angeles County Superior Court Case Number 19STCP4741

3 PROOF OF SERVICE

4 I, Nicole Packer, declare under penalty of perjury under the laws of the State of  
5 California that the following facts are true and correct:

6 I am a citizen of the United States, over the age of eighteen years, and not a party to the  
7 within action. I am an employee of Berliner Cohen, LLP, and my business address is Ten  
8 Almaden Boulevard, Eleventh Floor, San Jose, California 95113-2233. On April 23, 2021, I  
9 served the following document(s):

10 **APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE**  
11 **BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF**  
12 **RESPONDENT**

- 13  by placing the document(s) listed above in a sealed envelope with postage thereon fully  
14 prepaid, in the United States mail at San Jose, California addressed as set forth below.
- 15  by overnight mail by placing the document(s) listed above in a sealed overnight mail  
16 envelope with postage thereon fully prepaid, addressed as set forth below.
- 17  by e-mail or electronic transmission. Based on a court order or an agreement of the  
18 parties to accept service by e-mail or electronic transmission, I cause the documents to be  
19 sent to the persons at the e-mail addresses listed below. I did not receive, within a  
20 reasonable time after the transmission, any electronic message or other indication that the  
21 transmission was unsuccessful.

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Hon. James C. Chalfant, Judge  
c/o Los Angeles Superior Court, Clerk of the  
Court  
111 North Hill Street  
Los Angeles, CA 90012

29 I am readily familiar with my firm's practice for collection and processing of  
30 correspondence for mailing with the United States Postal Service/Express Mail, Federal Express  
31 and other overnight mail services, to wit, that correspondence will be deposited with the United  
32 States Postal Service/overnight mail service this same day in the ordinary course of business.

33 Executed on April 23, 2021, at San Jose, California.

34   
35 \_\_\_\_\_  
36 NICOLE PACKER

1 *Ronald Austin v. Burbank Police Department*, 2d District Court of Appeal No. B307677,  
Los Angeles County Superior Court Case Number 19STCP4741

2 PROOF OF SERVICE

3 I, Thomas P. Murphy, declare under penalty of perjury under the laws of the State of  
4 California that the following facts are true and correct:

5 I am a citizen of the United States, over the age of eighteen years, and not a party to the  
6 within action. I am an employee of Berliner Cohen, LLP, and my business address is Ten  
7 Almaden Boulevard, Eleventh Floor, San Jose, California 95113-2233. On April 23, 2021, I  
8 served the following document(s):

9 **APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE  
10 BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF  
11 RESPONDENT**

12 **MOTION FOR JUDICIAL NOTICE IN SUPPORT OF AMICUS CURIAE BRIEF  
13 OF LEAGUE OF CALIFORNIA CITIES; DECLARATION OF THOMAS P.  
14 MURPHY IN SUPPORT THEREOF**

15 **EXHIBITS IN SUPPORT OF MOTION FOR JUDICIAL NOTICE IN SUPPORT  
16 OF AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES**

17  by placing the document(s) listed above in a sealed envelope with postage thereon fully  
18 prepaid, in the United States mail at San Jose, California addressed as set forth below.

19  by overnight mail by placing the document(s) listed above in a sealed overnight mail  
20 envelope with postage thereon fully prepaid, addressed as set forth below.

21  SERVICE VIA TRUEFILING ELECTRONIC SERVICE SYSTEM: I transmitted via  
22 the Internet true copies of the above-listed documents through the Court's Mandatory  
23 Electronic Filing System via the TrueFiling Portal to the recipients listed below, and  
24 concurrently caused the above-listed documents to be sent to the recipients listed  
25 immediately below, pursuant to the E-Service list maintained by and as it exists on that  
26 database.

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I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service/Express Mail, Federal Express and other overnight mail services, to wit, that correspondence will be deposited with the United States Postal Service/overnight mail service this same day in the ordinary course of business.

Executed on April 23, 2021, at San Jose, California.

  
THOMAS P. MURPHY