No. S226645

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS, et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; ACLU OF SOUTHERN CALIFORNIA, et al., Real Parties in Interest.	2d Civ. No. B257230 Los Angeles County Super. Ct. No. BS145753 Honorable Luis A. Lavin Department 82 Telephone: (213) 893-0530

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION[1/]

This case exemplifies the common occurrence of applying well-settled law to a novel fact situation. The Court of Appeal carefully analyzed the language and purpose of California's attorney-client privilege statute (Evid. Code, § 952)[2/] as well as this court's jurisprudence on the privilege, including its unanimous decision in *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725 (*Costco*). The Court of Appeal then came to the unremarkable conclusion that invoices for legal services fall within the scope of the privilege, thus determining that the County had properly invoked the privilege in denying the ACLU's CPRA request for certain invoices sent to the County by its outside counsel.

The ACLU, desperate to avoid the plain language of section 952 and the clear holding of *Costco,* urges this court to grant review and craft an opinion based, not on *Costco*, but on the concurring opinion in *Costco* by former Chief Justice George. (See, e.g., PR 22 [the Court of Appeal "should have followed former Chief Justice George's concurrence . . . ."], 26 [the Court of Appeal decision is "flatly contrary to . . . former Chief

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1/ We use the following abbreviations in this brief:

"The ACLU": Collectively, the ACLU of Southern California and Eric Preven, real parties in interest in the Court of Appeal;

"The County": Collectively, the Los Angeles County Board of Supervisors and the Office Of County Counsel, petitioners in the Court of Appeal;

"CPRA": California Public Records Act, Gov. Code, § 6250 et seq.;

"Opn.": Slip opinion in *County of Los Angeles Board of Supervisors et al. v. Superior Court* (*ACLU*) (Apr. 13, 2015, B257230);

"PR": The ACLU's Petition For Review;

"Olson letter": Letter to Supreme Court in support of review from Karl Olson, counsel for amici curiae, dated June 9, 2015.

2/ All further unidentified statutory references are to the Evidence Code.

Justice George's concurrence in *Costco*"].) In so arguing, the ACLU mangles the concurrence, creating a legal standard nowhere mentioned there, let alone in the majority opinion (in which, of course, Chief Justice George joined).

This case presents no issue for review. The Court of Appeal's decision raises no important legal issue that requires this court's resolution, and it creates no conflict in the law. Indeed, the ACLU is unable to cite (and we are unaware of) a single California decision holding that attorney invoices are outside the scope of California's attorney-client privilege. Nor is review warranted by the ACLU's oft-expressed concern that the decision will cause insoluble practical problems in fee-litigation proceedings. Even if that were true—it is not—there still would be no basis for review.

RELEVANT BACKGROUND

A. The ACLU's CPRA Request And The County's Response.

The ACLU submitted a CPRA request to the County seeking invoices specifying the amounts the County had been billed by any law firm in connection with nine lawsuits brought by inmates alleging jail violence. (Opn., p. 2.)

The County agreed to produce redacted invoices for the three completed lawsuits, but declined to provide invoices for the remaining six, which were still pending. The County asserted that the "'detailed description, timing, and amount of attorney work performed, which communicates to the client and discloses attorney strategy, tactics, thought processes and analysis' were privileged and therefore exempt from disclosure under Government Code section 6254, subdivision (k)" (records exempt under law, including Evidence Code provisions relating to privilege). (Opn., pp. 3, 7.)

B. The Superior Court Proceedings.

The ACLU petitioned the superior court for a writ of mandate, seeking to compel the County to disclose the records for all nine lawsuits. In response, the County reiterated that the billing records were protected by the attorney-client privilege. (Opn., pp. 3-4.)

The court granted the ACLU's petition, concluding that the County had not shown the billing records were attorney-client privileged communications exempt from disclosure. The court reasoned that the County had failed to "assert specific facts demonstrating how the challenged document qualifies as a privileged communication" or to "produce any 'actual evidence concerning the contents of the billing statements, including whether they were produced for a litigation-related purpose.'" (Opn., p. 4.)

Accordingly, the court ordered the County to disclose the billing statements in all nine cases, except for redaction of information that "'reflect[s] an attorney's legal opinion or advice, or reveal[s] an attorney's mental impressions or theories of the case.'" (Opn., p. 5.)

The County filed a petition for writ of mandate challenging the trial court's ruling, and the Court of Appeal issued an order to show cause. (Opn., p. 5.)

C. The Court Of Appeal Decision.

The Court of Appeal characterized the dispute as a collision between two "public policies of the highest order"—the CPRA, which "fosters transparency in government," and the attorney-client privilege, which "enhances the effectiveness of our legal system." (Opn., p. 2.) The court concluded that "the tension must here be resolved in favor of the privilege,"

because "the CPRA expressly exempts attorney-client privileged communications from the CPRA's reach." (*Ibid.*)

In discussing the CPRA, the court cited authorities holding that "[t]he people's right of access is not absolute," because the "CPRA contains over two dozen express exemptions." (Opn., p. 7.) Both the CPRA's right of access and its express exemptions are enshrined in the California Constitution. (*Ibid.* ["'The 2004 initiative that amended the state Constitution to include a right of access to public records explicitly preserves such statutory exemptions. (Cal. Const. art I, § 3, subd. (b)(5)),'" quoting *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329, fn. 2 (*International Federation*)].)

Specifically, subdivision (k) of Government Code section 6254 provides an exemption for "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." In this way, "'the Public Records Act has made the attorney-client privilege applicable to public records,'" quoting *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370 (*Roberts*). (Opn., p. 7.) In short, "'the public is entitled to access . . . *[u]nless one of the exceptions stated in the Act applies.*'" (Opn., p. 8, quoting *International Federation, supra*, 42 Cal.4th at p. 329, emphasis added.)

The court next addressed the attorney-client privilege. In doing so, it relied heavily on this Court's jurisprudence. (Opn., pp. 8-9, citing, inter alia, *Costco, supra,* 47 Cal.4th 725, *Roberts, supra,* 5 Cal.4th at p. 371, *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599 (*Mitchell*).) The court explained that "Evidence Code section 954 'confers a privilege on

the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . ."'" (Opn., p. 8.) "Confidential communication" is defined in Evidence Code section 952 to mean "'information transmitted between a client and his or her lawyer in the course of that relationship and in confidence,'" and "'includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.' 'The term "confidential communication" is broadly construed, and communications between a lawyer and his [or her] client are presumed confidential, with the burden on the party seeking disclosure to show otherwise.'" (Opn., p. 9.) The privilege is "'absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstance peculiar to the case.'" (*Ibid.*)

The court next turned to the legal question at hand—whether billing statements are protected by the attorney-client privilege under California law; it concluded that they are. (Opn., pp. 9-19.)

The court first observed that while "several cases have touched on the fringes of this question, none have squarely decided it," and therefore they "are not authority for propositions not considered." (Opn., pp. 9-12, referring to *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57 (*Anderson-Barker*), *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639, and *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309 (*Concepcion*).) The court also mentioned several non-California cases, some holding that billing records are privileged, others holding that they are not, but noted that those cases

"are of limited utility" because "in California the attorney-client privilege is a creature of statute and governed by California law." (Opn., p. 12, fn. 3.)[3/]

The court next analyzed the precise language of Evidence Code section 952, and concluded that "[a] communication between attorney and client, arising in the course of representation for which the client sought legal advice, need not include a legal opinion or advice to qualify as a privileged communication." (Opn., p. 12.) The court thus expressly rejected the ACLU's contention that "'communications that do not contain legal advice or opinion are not privileged.'" (Opn., p. 13.) The court based its conclusion on the "plain, commonsense meaning of the language used by the Legislature"; on legislative history showing the term "a legal opinion" was not part of the original definition of "confidential communication" and thus could not have been intended as a required element; and on the duty to avoid the "absurd result" that would ensue when the communication originates with the client and thus is unlikely to contain a legal opinion or advice, yet clearly fits the statutory definition. (Opn., pp. 13-16.) The court also noted that the ACLU's interpretation "does not comport with existing authority," which holds or states that section 952 uses "legal opinion" and "advice" as examples—not required elements—of a confidential communication. (Opn. pp. 16-17.) Moreover, "[t]he ACLU cites no authority in which a communication between attorney and client, arising out of the attorney's legal representation of the client, was held to be outside the

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[3/] Amici, apparently having skipped the Court of Appeal's discussion of non-California authorities, boldly—and incorrectly—assert that courts in other jurisdictions "consistently" have found invoices not exempt from disclosure. (Olson letter, p. 8.) Had amici read the decision more carefully, they would have discovered the error in their assertion.

scope of Evidence Code section 952 because it did not contain a legal opinion or advice." (Opn., p. 17.)

The court then analyzed *Costco* in detail, concluding, "*Costco* compels rejection of the ACLU's position." (Opn., p. 17.) In *Costco,* this Court held that an attorney's letter to a client containing factual information, from which all opinions and impressions had been redacted, was nevertheless protected by the attorney-client privilege. (Opn., pp. 17-18.) The Court of Appeal summed up: "*Costco* teaches that the proper focus in the privilege inquiry is not whether the communication contains an attorney's opinion or advice, but whether the relationship is one of attorney-client and whether the communication was confidentially transmitted in the course of that relationship. . . . *Costco* . . . made clear that the privilege protects a "'*transmission* irrespective of its content.'" (Opn., p. 19.)

The Court of Appeal concluded that "the County met its burden of establishing the preliminary facts necessary to support application of the privilege." (Opn., p. 20.) It was undisputed that "the law firms in question were retained to provide the County with legal advice in the matters to which the invoices pertained," that "the invoices constituted information transmitted by the law firms to the County in the course of the representation," and that the invoices were intended to be kept confidential. (*Ibid.*) "Thus, the invoices were confidential communications between attorney and client within the meaning of Evidence Code section 952." (*Ibid.*)

Finally, the Court of Appeal discussed and rejected several of the ACLU's additional arguments. (Opn., pp. 22-24.) Since the ACLU repeats

those arguments in this court, we will address them in the argument section of this brief.

ARGUMENT: THERE IS NO GROUND FOR REVIEW

A. No Important Question Of Law Requires Resolution.

1. Attorney invoices are within the scope of the attorney-client privilege if they meet the definition of a "confidential communication" under Evidence Code section 952.

The single question raised in the petition for review asks whether invoices for legal services sent to the County by outside counsel are "within the scope of the attorney-client privilege, and *absolutely exempt* from disclosure" under the CPRA, even if "all references to attorney opinions, advice and similar information [are] redacted." (PR 1, emphasis added.)

The ACLU's question, as framed, is a non-issue. The Court of Appeal decision does not hold that invoices are "absolutely exempt" from disclosure; nor has the County ever taken that position in this or any other case. The analysis is more nuanced. Invoices are privileged and exempt from CPRA disclosure only if they comply with the requirements of section 952, which provides:

> As used in this article, "confidential communication between client and lawyer" means information [1] transmitted between a client and his or her lawyer [2] in the course of that relationship and [3] in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is

> reasonably necessary for the transmission of the information or [4] the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

Thus, to be privileged, a document (including an invoice) must be *transmitted* between lawyer and client, *in the course of their relationship* and *in confidence.* The rule carefully defines a limited category of third persons allowed to be present without destroying the privilege to include those whose presence is necessary for the *accomplishment of the purpose for which the lawyer is consulted.*

That the communication must relate to the *purpose* for which the lawyer was hired is an important element of the attorney-client privilege. One justice who joined in the unanimous decision in *Costco* also wrote separately to clarify this very point: To be privileged, the confidential communication must not only be between the attorney and the client, but it must also occur "'in the course of' the attorney-client relationship (Evid. Code, § 952)—that is, the communication must have been made for the purpose of the legal representation. . . . [W]e should not forget that the purpose of the communication . . . is critical to the application of the privilege." (*Costco, supra,* 47 Cal.4th at p. 742 (conc. opn. of George, C.J.).)

The parameters of the attorney-client privilege are well set out in the Evidence Code and the authorities that have interpreted it. No communication is "absolutely" privileged, or "absolutely" exempt from CPRA disclosure. The question presented by the ACLU to this court needs no resolution.

2. *Costco* unambiguously reaffirmed that the attorney-client privilege protects factual matters as well as legal opinions and advice.

As the Court of Appeal recognized, this court held in *Costco* that California's attorney-client privilege protects not just legal opinions and advice, but all matters that meet the statutory definition of a "confidential communication between client and lawyer," including factual matters. (See above, pp. 6-7.) Citing to its own prior decisions, the *Costco* court stated: "'Neither the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between "factual" and "legal" information.'" (47 Cal.4th at p. 734, quoting *Mitchell, supra*, 37 Cal.3d at p. 601; also citing *In re Jordan* (1974) 12 Cal.3d 575, 580 ["finding the attorney-client privilege attached to copies of cases and law review articles transmitted by an attorney to the attorney's client"].)

Without question, *Costco* and its precedents "compel[] rejection of the ACLU's position" that only legal opinions and advice are privileged. (Opn., p. 17.)[4/]

[4/] Amici curiae erroneously state that under *Costco,* the "'dominant purpose' of a communication determines whether the privilege applies." (Olson letter, p. 8.) In fact, *Costco* expressly rejected that test and the case that applied it. (47 Cal.4th at pp. 739-740.) *Costco* holds that what needs determining is *not* the dominant purpose of the communication, but "the dominant purpose *of the relationship* between the [client] and its [attorneys], i.e., was it one of attorney-client or one of claims adjuster-insurance corporation . . . ." (*Ibid.*, original emphasis.)

3. Chief Justice George's *Costco* concurrence is irrelevant to the issues before this court and in any event is entirely consistent with the Court of Appeal decision here.

Changing tack in this court, the ACLU argues that the Court of Appeal erred by relying on *Costco*; instead, it "should have followed former Chief Justice George's concurrence" in *Costco.* (PR 22; see also 2, 17, 23, 26.) To state the argument is to refute it. For one thing, Court of Appeal error is not ground for review. For another, there is no conflict between *Costco* or Chief Justice George's concurring opinion in *Costco* and the Court of Appeal's decision here. And for another, even if there were a conflict, the majority opinion would prevail.

Chief Justice George began his concurrence by confirming his *agreement* with the majority that the letter at issue, sent by outside counsel to corporate counsel, "containing both factual recitations and legal advice, is protected by the attorney-client privilege"; that "the trial court erred in requiring disclosure of the letter"; and that "the Court of Appeal erred in declining to grant extraordinary relief on the ground that disclosure of the letter in redacted form did not harm petitioner." (*Costco, supra,* 47 Cal.4th at p. 741.)

Chief Justice George explained that he wrote separately to clarify that "to be privileged, the communication . . . must occur 'in the course of' the attorney-client relationship (Evid. Code, § 952)—that is, the communication must have been made for the purpose of the legal representation." (47 Cal.4th at p. 742, noting that Evidence Code section 951 defines a client as "a person who 'consults a lawyer for the purpose of retaining the lawyer or securing legal services or advice from

him in his professional capacity.'") The concurrence stressed that the communication must be made "for the purpose of the attorney's professional representation, and not for some unrelated purpose," such as when "'the attorney merely acts as a negotiator for the client, gives business advice or otherwise acts as a business agent.'" (*Id.* at pp. 742, 744.) Chief Justice George also observed that section 952 lists the lawyer's legal opinion and advice as "specific examples" of confidential attorney-client communications, and privileged matter "must be similar in nature to the enumerated examples" under the principle of *ejusdem generis.* (*Id.* at p. 743.)

The ACLU, reading far more into the concurrence than it actually says, contends that it supports the proposition that the privilege protects "only legal opinions, advice, and other information communicated for the purpose of *advancing the legal representation.*" (PR 2, emphasis added.) The contention fails on three grounds.

First, neither the limiting phrase "advancing the legal representation" nor the concept behind it appears anywhere in Chief Justice George's concurrence, or—as the ACLU must concede—in *Costco* itself. Yet the ACLU repeats it (or its synonym "furthering the legal representation") like a mantra. (PR 3 (twice), 17, 18, 19, 22, 25, 36.)

Second, the ACLU is simply wrong in concluding that "invoices are not privileged because their purpose is not to further the legal representation." (PR 22, capitalization normalized.) Outside the pro bono and perhaps some other contexts, an attorney who agrees to represent a client by performing legal services does so in exchange for the client's promise to pay for those services. Presenting the client with regular, accurate, invoices is the means by which the attorney gets paid. A client

who delays or forgets or refuses to pay is likely to receive multiple invoices. Absent payment, the attorney may withdraw from the representation under certain circumstances. (Cal. Rules Prof. Conduct, rule 3-700(C)(1)(f).) Without a doubt, the purpose of attorney invoices is to advance or further the legal representation because without payment, the legal representation may cease altogether.

And third, attorney invoices may "advance the legal representation" by conveying information relating to the attorney's tactics, strategy or opinions. Such information may be found not just in obvious forms (e.g., a formal opinion letter) but in more subtle ones as well. As this court observed in a case holding that a summary of witness statements is protected work product, "[D]isclosing a list of witnesses from whom an attorney has taken recorded statements may . . . reveal the attorney's impressions of the case"; for example, taking statements from only 10 out of 50 witnesses to an accident "may well indicate the attorney's evaluation or conclusion as to which witnesses were in the best position to see the cause of the accident." (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 494-495, 501 [the "very existence" of such a summary "is owed to the lawyer's thought process" and "would not exist but for the attorney's initiative, decision, and effort to obtain it"].) Information typically found in attorney invoices, e.g., the amounts billed and paid in the course of ongoing litigation, the identity and specialty of the lawyers working on the case and when they performed their work, whether the work has suddenly increased or plateaued or tapered off may well convey similar clues to the attorney's opinions and strategy. As an amicus explained in the Court of Appeal, "Unless an attorney submits a wholly inadequate block-billed periodic invoice 'for services rendered,' every aspect of an attorney's itemized billing records—from items as specific as the descriptions of work

performed to items as general as the presence *or even absence* of work on certain topics or at certain times during the litigation—will reflect an attorney's theory of the case."[5/]

For these reasons, this court should decline the ACLU's request to jettison *Costco* and to craft an opinion based on the ACLU's skewed interpretation of the concurring opinion in that case.

B. There Is No Conflict Among The Courts Of Appeal As To Whether The Attorney-Client Privilege Protects Attorney Invoices.

Straining to establish an alternate ground for review, the ACLU contends review is necessary "to secure uniformity of decision." (PR 6, 12.) Yet the ACLU does not and cannot cite a single decision holding that attorney invoices are *not* protected by California's attorney-client privilege.

The ACLU first points to *Anderson-Barker, supra*, 211 Cal.App.4th 57, claiming it is "contrary to" the Court of Appeal decision here. (PR 3.) Not so. Unlike this case, *Anderson-Barker* did not deal with the CPRA's privilege exemption, but with a separate exemption for "pending litigation." (See Opn., p. 10.) *Anderson-Barker* held the pending-ligation exemption did not apply to the billing records at issue there because they were not specifically prepared for use in the litigation—a unique court-created test pertaining only to that exemption. (*Anderson-Barker, supra,* 211 Cal.App.4th at pp. 64-65.) The CPRA's attorney-client privilege exemption played no role in the decision. As the Court of Appeal here

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[5/] Letter brief submitted by the Association of Southern California Defense Counsel (ASCDC) in support of the County's writ petition, pp. 3-4, 6, filed in the Court of Appeal July 10, 2014.

correctly concluded, "[B]ecause cases are not authority for propositions not considered (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626), *Anderson-Barker* does not answer the question before us." (Opn., p. 10.)[6/]

The ACLU also relies on language in *Concepcion, supra,* 223 Cal.App.4th at pp. 1326-1327, in which the court simply opined, without a discussion or holding, "[W]e seriously doubt that all—or even most—of the information on each of the billing records proffered to the court was privileged." (PR 21.) But as Court of Appeal here remarked, "While *Concepcion* was skeptical of the notion that the billing records were privileged on the wholly different facts of that case, the court offered no analysis of the basis for its view." (Opn., pp. 11-12.)

Finally, the ACLU quotes a partial sentence from *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1256, without noting it comes from the *concurring and dissenting* opinion of Justice Vogel: "'In support of its motion, Google presented Quinn Emanuel's invoices, redacted as necessary to protect Google's attorney-client privilege . . . .'" (PR 21.) In any event, the language the ACLU highlights in both *Maughan* and *Concepcion* is unquestionably dicta. "Dicta is not authority upon which [a court] can rely." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 850.)

No case prior to this one has "squarely decided" or even cursorily addressed the "dispositive question of whether billing statements qualify as privileged communications under Evidence Code section 952." (See Opn.,

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[6/] Amici's contention that the Court of Appeal decision in this case "conflicts with a case [*Anderson-Barker*] . . . involving the same issue"—is thus flatly wrong. (Olson letter, pp. 1, 7-8.) As explained above, each case dealt with a different CPRA exemption and is governed by different substantive law.

p. 9.) Granting review would do nothing to secure "uniformity of decision."

C. The Court Of Appeal Correctly Decided The Privilege Issue.

This court exercises discretionary review under limited circumstances, including "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The correction of appeal error in a specific case is not this court's function or focus. (*People v. Davis* (1905) 147 Cal. 346, 348-349.)

Having demonstrated that review is not necessary to secure uniformity of decision or to settle an important legal question, we could end our discussion. However, since the ACLU (and amici) accuse the Court of Appeal of one particularly serious error, we address it briefly here, showing that the court got it exactly right.

The ACLU claims that by applying the attorney-client privilege to attorney invoices and rendering them exempt from CPRA disclosure, the Court of Appeal violated the "constitutional mandate that courts *narrowly* construe statutes that restrict the public's access to public records." (PR 3, 12, 13-18; see also Olson letter, pp. 3-7.)

It is true that as a general rule, the CPRA is construed broadly, and its exemptions are construed narrowly. (*Anderson-Barker, supra,* 211 Cal.App.4th at p. 60.) But that does not answer the question of how to construe a CPRA exemption that is itself not only a statutory privilege, but one that must be liberally construed and is anchored in "public policy and the administration of justice." (*Musser v. Provencher* (2002) 28 Cal.4th 274, 283; *Roberts, supra,* 5 Cal.4th at p. 380.) As the Court of Appeal

explained, because "the invoices in question fall within the express parameters of Evidence Code section 952[, w]e may not disregard the plain application of the statute under the guise of narrow construction. *A narrow construction of an exception that is a statutory privilege cannot reasonably be construed to be narrower than the scope of the privilege itself.*" (Opn., p. 22, emphasis added.)

The court's conclusion is the only one possible, given that the 2004 amendment to the California Constitution expressly preserved the CPRA's existing statutory exemptions, including the exemption for attorney-client privileged documents. (*International Federation, supra,* 42 Cal.4th at p. 329, fn. 2.)

Ironically, the only authority the ACLU cites in support of its argument soundly refutes it. In *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166-167, this Court held: "Given the strong public policy of the people's right to information concerning the people's business [citation], and the constitutional mandate to construe statutes limiting the right of access narrowly [citation], all public records are subject to disclosure *unless the Legislature has expressly provided to the contrary.*" (Emphasis added; interior quotations omitted; see PR 14-15.)[7] Here, the Legislature *has* expressly provided to the contrary, carving out an unambiguous exemption for records exempt under law, "including, but not limited to, provisions of the Evidence Code relating to privilege." (Gov. Code, § 6254, subd. (k); see also *International Federation, supra,*

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[7] In *Sierra Club*, this Court interpreted a CPRA exclusion for "computer software" to require disclosure of a mapping database in a certain file format but not of the software required to manipulate the database. (57 Cal.4th at pp. 170-171.)

42 Cal.4th at p. 329 ["*Unless one of the exceptions stated in the Act applies,* the public is entitled to access . . . ."; emphasis added].)[8/]

Contrary to the ACLU's assertions, the Court of Appeal did not err in its interpretation of the CPRA's privilege exemption.

D. The ACLU's Assertions That The Court Of Appeal Decision Will Cause Insoluble Practical Problems Are Baseless; Nor Are They Grounds For Review.

The ACLU levels a sky-is-falling argument against the Court of Appeal decision, focusing on pernicious effects it submits the decision may have in fee-recovery proceedings. (PR 3-4, 26-31.) According to the ACLU, the decision's holding that attorney invoices are privileged client communications within the meaning of the Evidence Code "threatens to withdraw from trial courts the most reliable evidence of the reasonableness of a fee request," and it will produce additional complications for California attorneys practicing in federal courts. (*Ibid.*) The ACLU dismisses out of hand the Court of Appeal's reasons for rejecting its arguments. (PR 31-35.)

The ACLU is manufacturing a problem out of whole cloth. First, an attorney's client may waive the privilege that attaches to invoices in order to present the strongest evidence in support of the fee request. (See Opn., pp. 23-24.) The waiver may occur at the time of the fee request or it may be part of the engagement agreement. Although the ACLU conjures up hypothetical situations in which clients "invoke their privilege and prevent attorneys from proving their fees" (PR 32-33), that is hardly a real-world problem. It bears remembering that clients *want* their fees paid (lest

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[8/] Like the ACLU, amici curiae accurately quote the "unless" clauses in this court's decisions, but then completely ignore them. (Olson letter, pp. 3, 5; PR 14-15.)

the fees come out of their pockets), and they are highly motivated to cooperate with their attorneys' efforts to recover them. Refusing to waive the privilege would be completely contrary to clients' self-interest.

And, any concerns about obstreperous clients somehow vindictively obstructing their counsel's efforts to seek fees can be avoided by a simple provision in the retainer agreement requiring the client to cooperate in any effort by the attorney to seek fees. That is, after all, how the matter is handled in the federal courts, where, although fee invoices are admissible, the client has a more powerful tool to block the attorney's recovery of fees—under federal law a fee award belongs to the client, not the attorney, so the client has the power to bar recovery of any fee. (*Evans v. Jeff D.* (1986) 475 U.S. 717, 730-732 [attorney fees under 42 U.S.C. § 1988 are awarded to the client, not the attorney; hence, the client can waive the fee claim as a condition of settlement]; *Venegas v. Mitchell* (1990) 495 U.S. 82, 87 ["it is the party, rather than the lawyer" who is eligible for fees under the statute].)

Therefore, in order for the attorney to recover fees, the client must waive, transfer or assign the right to collect them—a problem easily addressed by appropriate language in an engagement or retainer agreement. (*Pony v. County of Los Angeles* (9th Cir. 2006) 433 F.3d 1138, 1145 [plaintiff may contractually transfer to attorney her right to collect fees under § 1988].) Absent a "contractual assignment to counsel," attorney fee awards must be made "directly to the prevailing party, with the ultimate disposition of the award dependent on the contract between the lawyer and the client." (*Gillbrook v. City of Westminster* (9th Cir. 1999) 177 F.3d 839, 875 [affirming § 1988 fee award made directly to prevailing plaintiffs because they "did not enter into a retainer agreement with [their attorney]

providing that any monies awarded to plaintiffs as 'prevailing parties' under § 1988 would be assigned to [their attorney]"].)

The second reason the Court of Appeal decision does not impact attorneys seeking fees is that it has long been the law in California that attorneys may submit proof in a form other than invoices or detailed billing statements. "'California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent.'" (*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698, quoting Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 3d ed. 2014 supp.) § 9.83, p. 9-70; see also, e.g., *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 487-488 [party "can carry its burden of establishing its entitlement to attorney fees by submitting a declaration from counsel instead of billing records or invoices"]; *Concepcion, supra,* 223 Cal.App,.4th at p. 1324 ["It is not necessary to provide detailed billing timesheets to support an award of attorney fees under the lodestar method"]; *In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 [trial court properly "accepted [summary] declarations of counsel attesting to the hours worked"]; *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375-1376 [declarations sufficient and detailed billing records not required]; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 64 [same].)

The ACLU suggests that using this alternative method is problematic if invoices are privileged because "the privilege may extend to that information as well." (PR 34.) But, as demonstrated, an attorney declaration stating the relevant facts of the case and the nature of the work necessary is sufficient.

Finally, even if realistic (and it is not), the ACLU's fear that applying the attorney-client privilege to invoices will "'wreak havoc with the procedures for seeking fees'" (Opn., p. 23) is not reason to grant review. Whether the privilege attaches to any particular category of document depends entirely on whether it meets the definition of a "confidential communication between client and lawyer" set forth in the Evidence Code, not on any practical consequences a party (or an amicus) believes a finding of privilege might have.[2/] Such consequences may be of concern to the Legislature, but not this court. As this court remarked, specifically referring to the CPRA's attorney-client privilege exception (Gov. Code, § 6254, subd. (k)):

> It is not our function . . . to add language or imply exceptions to statutes passed by the Legislature. [Citations.] Our deference to the Legislature is particularly necessary when we are called upon to interpret the attorney-client privilege, because the Legislature has determined that evidentiary privileges shall be available only as defined by statute. (Evid. Code, § 911.)

(*Roberts, supra,* 5 Cal.4th at pp. 372-373.)

The ACLU's and amici's concerns are irrelevant here. The attorney-client "'privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or *any particular circumstances peculiar to the case.*'" (*Costco, supra,* 47 Cal.4th at p. 732, emphasis added.)

[2/] Amici argue that the Court of Appeal's decision "would prevent the public from monitoring public spending." (Olson letter, pp. 8-10, capitalization normalized.)

CONCLUSION

For all the reasons set forth above, this Court should deny the ACLU's petition for review.

Dated: June 15, 2015

Respectfully submitted,

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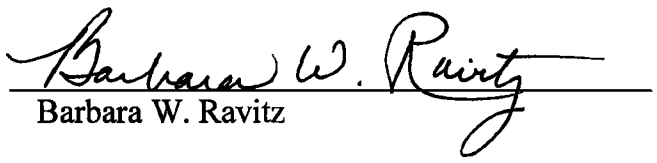
By: 
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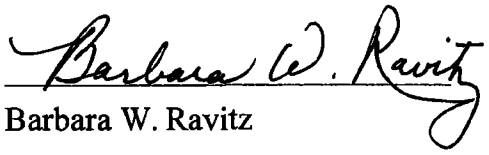
CERTIFICATION

Pursuant to California Rules of Court, Rule 8.504(d)(1), I certify that this **Answer to Petition For Review** contains **5,722** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: June 15, 2015



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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **June 15, 2015**, I served the foregoing document described as **Answer To Petition For Review** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes as stated below.

BY MAIL: I mailed a copy of the document identified above as follows:

I placed the envelope(s) for collection and mailing on the date stated above, at Los Angeles, California, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

The envelope was or envelopes were addressed as follows:

SEE ATTACHED SERVICE LIST

Executed on **June 15, 2015**, at Los Angeles, California.

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

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