

No. S282937 & S282950

**IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA**

THE LAW FOUNDATION OF SILICON VALLEY,
Petitioner

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SANTA CLARA,
Respondent

THE CITY OF GILROY,
Real Party in Interest/Defendant.

After Decision by the Court of Appeal, Sixth Appellate District
Case Nos. H049552 and H049554 (as consolidated)
Santa Clara County Superior Court, Case No. 20CV362347

**LAW FOUNDATION OF SILICON VALLEY'S REPLY
BRIEF IN SUPPORT OF ITS PETITION FOR REVIEW**

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I. INTRODUCTION

The Sixth District's incorrect interpretation of the California Public Records Act ("CPRA" or "Act") should be reversed. For over 100 years, this Court has "supervise[d] and control[led] the opinions of the several district courts of appeal" in order "to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, a uniform rule of decision throughout the state, a correct and uniform construction of the constitution, statutes, and charters, and, in some instances, a final decision by the court of last resort of some doubtful or disputed question of law." (*People v. Davis* (1905) 147 Cal.346, 348; *see also* Rules of Court 8.500(b).) As reflected by the multiple amici who have supported LFSV's Petition for Review ("Petition" or "Pet."), and requests for depublication, this Court should correct the Sixth District's faulty interpretation of the CPRA.

Not only did the Sixth District depart from other Courts of Appeal on the issue of when declaratory relief is permissible under the Act, its opinion improperly ignored Article I, §3(b)(2) of the Constitution. The Sixth District created a massive loophole when it held that the CPRA provides no remedy to a party who proves a governmental entity failed to conduct a reasonable search or destroyed responsive public records. (Opinion [Pet. Ex. A], 13, 21.) This decision is inconsistent with the purpose of the CPRA, the Constitution's goal of governmental transparency, and interpretations of FOIA, on which the CPRA is modeled. (*Id.*, 18-22.)

Gilroy denigrates these legal issues as not being “necessary to secure uniformity of decisions nor to settle an important question of law.” (Answer, 5.) To the contrary, given (1) the multiple amici letters and requests for depublication, (2) the Sixth District’s publication of its ruling, (3) the split with the Fourth District that the decision creates, and (4) the novel and significant questions concerning both Article I, §3(b)(2) and the scope of the CPRA, all the legal issues raised by LFSV underscore the importance of review here.

Rather than address the fundamental legal errors in the Sixth District’s opinion, Gilroy mischaracterizes the opinion and argues that the Sixth District found that it “complied with” the CPRA. (Answer, 5.) Not so. The Sixth District vacated the Superior Court’s findings in favor of LFSV based on mootness and its erroneous conclusion that neither the Constitution nor the CPRA provide any remedy for the kinds of CPRA violations that the Superior Court found. (Op., 13, 15, 17.) And insofar as Gilroy claims that LFSV “*assume[s]* facts or legal issues not in the record” (Answer, 6 [emphasis in original]), the facts it is referring to are the Superior Court’s own findings that the Sixth District acknowledged it “need not address” (Op., 13.)

II. THE PETITION SHOULD BE GRANTED TO ADDRESS THE CALIFORNIA CONSTITUTION.

The Sixth District’s decision ignores the “Constitutional Imperative” to broadly construe the CPRA when it furthers the right of public access, and to narrowly construe the CPRA—and other statutes—when it would limit that access. (Cal. Const., Art. I. §3(b)(2).) Despite this guarantee being at the center of

both questions presented for review by LFSV, Gilroy waits until page 22 of its Answer to mention the Constitutional Imperative. Even then, Gilroy offers an erroneous and conclusory response that relies upon an interpretation of other constitutional provisions that the Sixth District never cited. (Answer, 22-23.) The fact that Gilroy cannot articulate a defense of the Sixth District's decision that cites the court's own reasoning, let alone squarely addresses the issues raised in the Petition, underscores why this Court should grant review.

A. The Sixth District Did Not Address Article I, Section 3(b)(2) Or Its Impact On The Availability Of Retroactive Relief.

As highlighted in the Petition, the California Constitution guarantees the “right of access to information concerning the conduct of the people’s business” such that the “writings of public officials and agencies shall be open to public scrutiny.” (Cal. Const., Art. I., §3(b)(1).) Statutes like the CPRA are to “be *broadly construed* if it furthers the people’s right of access, and *narrowly construed* if it limits the right of access.” (*Id.*, §3(b)(2) [emphasis added].)

Notwithstanding foregoing constitutional right and interpretative mandate, *and with absolutely no reference to them*, the Sixth District ruled that “[t]he CPRA provides *no* ... remedy that may be utilized for any purpose other than to determine whether a particular record or class of records may be disclosed.” (Op., 13 [quoting *County of San Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 127] [emphasis in original].) That conclusion fundamentally reduced the people’s access to records

in direct violation of the constitutional guarantees. It interpreted the CPRA not to permit retrospective declaratory relief, such that all CPRA actions become moot if responsive records are destroyed after a public agency claims them to be exempt, but before the Superior Court can rule whether the agency is correct. The Sixth District’s decision makes it harder—not easier—for the public to compel public agencies to disclose non-exempt records.

Here, for example, the Superior Court found that Gilroy’s refusal to search for responsive police body-camera footage before claiming a blanket exemption under former Section 6254(f) to such footage violated the CPRA, and amounted to being an unreasonable search. (1-PA-166, 168.)¹ Yet, the Sixth District excused these violations, ostensibly because the Superior Court did not separately rule “whether a particular record or class of records must be disclosed.” (Op., 14 [quoting *County of Santa Clara*, 171 Cal.App.4th at 127].) Hence, the Sixth District believed the Superior Court could not “grant Law Foundation any effective relief under the CPRA.” (*Id.*) It then further held that, as a matter of law, the case was moot because the it was “not persuaded” that “the trial court had broad authority to grant declaratory relief with respect to whether [Gilroy’s] past conduct in responding to Law Foundation’s public records requests violated the CPRA.” (*Id.*)

¹ All references to the Record in the Petition and Reply refer to the record submitted with the writ in H049554. Gilroy, in its Answer confuses the issues by referencing the record from the writ it filed in H049552.

All these findings by the Sixth District assume the Superior Court erred by finding Gilroy violated the CPRA because it could not grant any relief at all. Yet, Gilroy incredibly argues that LFSV somehow “failed to raise the issue of Gilroy ‘improperly’ withholding records on appeal[.]” (Answer, 12.) That was the very reason the Superior Court rewarded LFSV relief under CPRA in the first place. (1-PA-166, 168.) As recognized by the Superior Court, and ignored by the Sixth District, in order to compel compliance with the CPRA, the public must be able to enforce their right to inspect records, and obtain declaratory relief in the form of retroactive review pursuant to Government Code Section 7923.000.²

Tellingly, nowhere in its Answer does Gilroy attempt to respond to LFSV’s observation that such retrospective review and the availability of declaratory relief is the norm under the FOIA, the statute on which the CPRA is modeled. (*See* Pet., 20 [citing FOIA cases].) The notion that Article I, §3(b) and the CPRA are *less* protective than the FOIA with respect to retrospective declaratory relief is nonsensical.

As the numerous amici also emphasize, the Sixth District erred as a matter of law when it ruled that declaratory relief under either Section 7923.000 or Code of Civil Procedure (“CCP”) Section 1060, read in light of the Constitutional Imperative, does not extend to past violations of the CPRA, but only prospectively “to determine a public agency’s obligation to disclose records.” (Op., 14-15.) The Sixth District’s decision empowers public

² Unless noted, all references are to the Government Code.

agencies to destroy records withheld as exempt before they can be scrutinized, and greatly increases the likelihood that issues related to similar CPRA violations could evade future review.

B. The Sixth District Did Not Adopt Gilroy's Constitutional Defense.

Faced with the fact that the Sixth District did not evaluate Article I, §3(b)(2) of the Constitution, Gilroy relies on a new argument to argue that review is not warranted. Gilroy argues that other provisions of Proposition 59 (from which Article I, §3(b)(2) originated), including Article I, §3(b)(3)-(5), reflect that its behavior was lawful under the CPRA and that the Sixth District was correct to vacate the Superior Court's findings to the contrary. (Answer, 22-23.) Gilroy is wrong for several reasons.

First, the Sixth District never cited or discussed Article I, §3(b)(3)-(5) in any way. (Op., 13-15.) In fact, it did not opine whether Proposition 59 even impacts the CPRA.

Second, Article I, §3(b)(3)-(5) are specific to particular rights, such as the right of privacy, that are intended to be respected following the passage of Proposition 59. None of these rights were deemed by the Sixth District as the root source for why retroactive declaratory relief supposedly was unavailable under the CPRA, or why public documents did not have to be preserved when requested. So it's not surprising why none of these protections were referenced in the Sixth District's opinion.

Third, to the extent Gilroy argues that Article I, §3(b)(2) did not "substantively alter[] the balance the CPRA has established between government transparency, privacy

protection, and government effectiveness” (Answer, 23)³, such a position does not explain why said Constitutional Imperative concerning interpretation of statutes does not apply to Section 7923.000 or CCP §1060. LFSV does not seek to “repeal or nullify” any constitutional or statutory authority that might protect Gilroy’s legitimate privacy protections. Rather, LFSV’s Petition is directed to ensuring that the right of public access protected through the CPRA is interpreted consistently with the directives of the California Constitution. The Sixth District’s decision, by contrast, ignores the constitutional underpinnings that guarantee openness and transparency in government operations.

III. THE PETITION SHOULD BE GRANTED TO ENSURE EXEMPT RECORDS UNDER THE CPRA ARE PRESERVED.

Whether the CPRA requires exempt records to be preserved also is an important issue of law that goes to the heart of transparency in government as mandated by the California Constitution and required for our democracy to function. (*See* Pet., 7-8, 18, 30.) Taken together, the CPRA and the Constitution require government agencies to preserve any records requested by a member of the public, that those agencies allege are exempt from disclosure, until that member of the public can judicially challenge the exemption. To interpret the CPRA and Constitution otherwise would restrict the public’s

³ (*But see* Pet., 8-9.)

access to records, violate the Constitutional Imperative, and frustrate the CPRA's goal of government accountability.

Correspondingly, the Constitution does not grant any rights to the government to hide its business from the people. Gilroy, and other government agencies, cannot escape the Constitutional mandate of transparency by hiding behind permissive document retention and destruction statutes (*e.g.*, Government Code §§34090(d) & 34090.6(a); Penal Code §832.18), the purpose of which is administrative convenience. Gilroy's position, like the Sixth District's decision, that these "Retention Statutes" somehow supersede the duty to preserve under the CPRA and Constitution is incorrect.

Gilroy is wrong that interpreting the CPRA to require agencies to preserve documents they have withheld as exempt would constitute an "implied repeal of" such Retention Statutes. (Answer, 30.) The case Gilroy cites in support of this argument specifically acknowledge that there is a "presumption against implied repeal," and that "[t]he courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together." (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control District* (1989) 49 Cal.3d 408, 419-20 [citation and quotation omitted].) Here, the permissive retention periods in the Retention Statutes were not only inapplicable to the police bodycam footage at issue, but also consistent with public agencies' separate and independent mandatory duty to preserve responsive and withheld records under the CPRA and Constitution.

Citizens Oversight v. Vu (2019) 35 Cal.App.5th 612, does not conflict with and does not settle the issue. Unlike the overwhelmingly non-exempt bodycam footage from homeless encampment sweeps sought in this matter, the records sought in *Vu* (ballots cast by voters) were categorically exempt under the California Elections Code. (*Id.* at 614.) And contrary to the *permissive* Retention Statutes at issue here, the retention of the election ballots in *Vu* was governed by the California Election Code, which *mandated* their destruction after 22 months. (*Compare* Elec. Code §17301(c) *with* Pen. Code §832.18(b)(5)(A).)

Furthermore, unlike here, the requested records in *Vu* (*i.e.*, election ballots) were exempted from disclosure by a separate and independent statute—*i.e.*, California’s Election Code. Thus, unlike the exemptions enumerated in the CPRA, which the CPRA makes the courts the neutral arbitrators of via *in camera* review, the independent exemption in *Vu* was not subject to *in camera* review by courts. (*See* Elec. Code §17301(b); *see also id.* at §15370.)

A. A Duty To Preserve Public Records Does Not Violate Separation Of Powers.

Construing the CPRA to require preservation of withheld documents does not usurp the role of the Legislature. This Court’s CPRA jurisprudence, discussed at length in LFSV’s Petition (Pet., 8-9, 30-40), has rejected variations of Gilroy’s separation of powers argument (Answer, 6). Instead, the issue of preservation “begs the question of how the statutory language should be interpreted in the first place.” (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1184.)

Like the Sixth District’s reliance on *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, Gilroy also relies on two *non-CPRA* cases for the same inapposite proposition as *Doe*: “statutory construction prohibits adding words to a statute.” (Answer, 24.) But, as this Court noted in both those cases, statutory analysis “begin[s] with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent.” (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) Construing the CPRA’s judicial review and remedies provisions (§§7923.100-115) in light of the public accountability and transparency purposes of the CPRA, coupled with the Constitutional Imperative to broadly construe the same, compels the conclusion that the Legislature and California Electorate intended responsive and withheld records to be preserved for the opportunity of meaningful judicial review. (*See* Pet., 30-40.)

B. The CPRA Requires Records To Be Preserved.

Contrary to Gilroy’s arguments, the CPRA logically requires records to be preserved for a court to review the records *in camera* or otherwise. If agencies could destroy records after declaring them exempt, the judicial review and remedies procedures of the CPRA would be completely frustrated. Courts, for example, could not fulfill their mandatory function to review disputed public records *in camera* pursuant to §7923.105(a). Effectively, public agencies would become the final arbiters of exemptions, which runs counter to black-letter CPRA law that it is an agency’s burden to show an exemption applies (Gov. Code

§7922.000), and that an agency's determination of an exemption is not entitled to any deference. (*Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 446.)

Gilroy argues that requiring the preservation of responsive and withheld records under the CPRA “would mean that records which were once subject to a CPRA request could not be destroyed unless they are reviewed *in camera* by a court – even in the absence of any litigation or dispute pertaining to those documents.” (Answer, 28.) Gilroy misstates LFSV's position. *In camera* review is not a precondition to delete all records. For example, if a public agency discloses responsive records, then it is permitted to delete records consistent with its retention policy. And, even when a public agency withholds the records as exempt, *in camera* review is still not a precondition to deletion. That is, a public agency may delete the records after the expiration of the three-year statute of limitations. Thus, *in camera* review is not a “condition precedent” to deleting records in all instances, as Gilroy suggests.

Additionally, Gilroy attempts to flip the burden of proof in CPRA cases. While it is true that a petitioner must file a verified petition for records, the presumption is that a record is public, and it is expressly the burden of the government agency to prove that an exemption is justified. (Gov. Code §7922.000; *Am. Civil Liberties Union of N. Cal. v. Super. Ct.* (2011) 202 Cal.App.4th 55, 82.) In order for an agency to justify that exemption, the record must exist at the time of court review. Correspondingly,

in order for any remedy to exist for the public through the courts, all requested records claimed as exempt by an agency, like Gilroy, must be preserved.

Nor would requiring preservation of withheld records create a “massive undertaking for public agencies and the judicial system” (Answer, 29) or be “unduly burdensome” (*id.*, 30.) *First*, Gilroy already assumes the *voluntary* burden of preserving public records it discloses pursuant to CPRA requests for three years. (3-PA-348, ¶6.) *Second*, any purported burdens arising from such preservation requirements are minimal, since the CPRA is independently subject to a statute of limitations (CCP §338) and the burden the agencies experience from ensuring preservation is no greater than that which they experience in the normal course of litigation via litigation preservation holds.

Third, the “CPRA should be interpreted in light of modern technological realities.” (*Am. Civil. Liberties Union v. Superior Court* (2017) 3 Cal.5th 1032, 1041.) Government agencies can preserve records they have withheld as exempt with a mere computer click following their review of the same. Once an agency has gone through the initial burden of locating requested records, reviewing them, and classifying them as exempt from disclosure, the additional burden to merely flag those records for preservation is minimal. (*See e.g.*, 4-PA-551-552.)

Fourth, “[t]he Legislature that enacted the PRA recognized that increased access to government information can have both a intangible and tangible costs, and it crafted the PRA accordingly.” (*National Lawyers Guild v. City of Hayward* (2020)

9 Cal.5th 488, 492; *see also City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 627 [“CPRA requests invariably impose some burden on public agencies”].) To the extent Gilroy finds meetings its obligations under the CPRA to be overly burdensome, its recourse lies with the Legislature, not the courts.

Gilroy’s reliance on *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, and *Los Angeles Police Dep’t. v. Superior Court* (1977) 65 Cal.App.3d 661, miss the mark. As discussed in LFSV’s Petition (Pet., 30 n.7), *Los Angeles Police Dep’t.* merely states the unremarkable proposition that the CPRA does not require agencies to create public records in response to CPRA requests. (65 Cal.App.3d at 668.) And *Haynie* stands for the similarly unremarkable proposition that agencies do not have to create privilege logs of withheld records. (26 Cal.4th at 1075.)

LFSV does not argue that the CPRA requires agencies to create records in response to CPRA requests. Rather, as this Court has held, the CPRA “establishes a presumptive right of access to any record *created or maintained* by a public agency that relates in any way to the business of the public agency.” (*Sander v. State Bar of Cal.* (2013) 58 Cal.4th 300, 323 [emphasis added].) Stated differently, the CPRA gives “members of the public access to information in the possession of public agencies.” (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425.) It is axiomatic that public agencies cannot destroy records they already possess at the time of a CPRA request.

Lastly, Gilroy’s attempt to cherry pick distinguishable FOIA cases in aid of its argument is unavailing. As discussed in

the Petition (Pet. 29-30, 44-45), FOIA cases support LFSV's argument that the CPRA requires agencies to preserve responsive records that the agency claims are exempt. That there is a difference in federal courts' interpretations of FOIA why preservation is required is of no import. Under California's Constitutional Imperative that any interpretation of the CPRA must further the public's access, this Court must find that the Constitution requires a public agency to preserve records it alleges are exempt. (See, *City of San Jose*, 2 Cal.5th 608, 620; *Am. C.L. Union Found. v. Superior Court* (2017) 3 Cal.5th 1032, 1036–37.)

IV. THE SIXTH DISTRICT'S RULING CREATES A SPLIT IN AUTHORITY.

Contrary to what Gilroy argues (Answer, 17-20), the Sixth District's ruling also creates a split in authority with at least the Fourth District's decision *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385 ("CYAC") on a number of important legal issues.

First, the Sixth District's ruling barring retrospective relief for CPRA violations directly contradicts the holding in *CYAC*, in which the Fourth District noted "there was no prospective problem shown." (*CYAC*, 220 Cal.App.4th at 1417.) Despite that fact, *CYAC* upheld the Superior Court's granting of declaratory relief under former Section 6258 and award of attorney fees, since National City destroyed responsive documents before they could be ordered produced to *CYAC*. (*Id.*, 1445-47.)

Second, the Sixth District erroneously relied on declaratory relief granted under the CCP, rather than the CPRA. The Sixth

District's decision relies on cases interpreting CCP §1060 to argue declaratory relief is not permissible in CPRA actions, when it is Section 7923.000 that actually governs such relief in CPRA actions. *CYAC* correctly based its decision on Section 7923.000, something the Sixth Circuit completely ignored. However, Gilroy, like the Sixth District, not only does not address this distinction in its Answer, but actually further conflates the two statutes. Gilroy relies upon *Monterey Coastkeeper v. California Regional Water Quality Control Bd., etc.* (2022) 76 Cal.App.5th 1, 13, a case interpreting CCP §1060, to argue that declaratory relief under Section 7923.000 always must be prospective. (Answer, 17.)

Third, the Sixth District's ruling that Gilroy had no obligation to retain records contravenes *CYAC*'s finding that the preservation of responsive records is reasonable to ensure an adequate search is conducted. (*CYAC*, 220 Cal.App.4th at 1430.) There is no way to reconcile the Sixth District's conclusion that the CPRA does not permit relief to be accorded retrospectively where no records exist, even if the public agency's search for records is proven to be inadequate, with *CYAC*'s conclusion to the contrary.

In light of the unambiguous split between *CYAC* and this case, Gilroy attempts to argue *CYAC* is inapplicable for other reasons. For instance, Gilroy claims it conducted a reasonable search for records, whereas National City in *CYAC* did not. (Answer, 17.) Contrary to Gilroy's assertion, *the Superior Court specifically found that Gilroy failed to conduct an adequate search* (1-PA-142, 165-68), and the Sixth District did not disturb that

finding. Gilroy also incorrectly claims *CYAC* is solely predicated upon the timing of *when* documents that should have been searched were destroyed (Answer, 18-19.) Again, the Fourth District in *CYAC* did not rest its decision on when documents were destroyed to award both retrospective declaratory relief and attorney fees. It specifically noted that National City started to discard responsive public records subject to CPRA requests in July 2007, months before the underlying lawsuit was filed. (*CYAC*, 220 Cal.App.4th at 1424.)

V. GILROY IMPROPERLY RAISES IRRELEVANT AND UNNECESSARY FACTS TO AVOID REVIEW.

Finally, Gilroy's Answer repeatedly recharacterizes the nature of both the Superior Court's and the Sixth District's findings, and adduces facts and issues that are not actually set forth in the Sixth District's opinion. These mischaracterizations should not be the basis for any denial of the Petition.

The Sixth District's opinion specifically stated it was making no contrary findings to those that the Superior Court actually reached. (Op., 13.) Thus, it is clear that contrary to what Gilroy states, it is not "undisputed" that it "substantively prevailed" in the litigation in the Superior Court. (Answer, 8.) In fact, it was LFSV who the Superior Court tentatively ruled had prevailed in the litigation. (1-PA-140-183.)⁴

These and many other alleged "undisputed facts" cited by Gilroy also must be similarly disregarded by this Court because

⁴ The October 8, 2020 decision of the Superior Court was not at issue in the Appeal (Op., 14-15), and it did not declare Gilroy as prevailing in the litigation (3-PA-379).

they do not appear in the Sixth District's decision, or were properly contested by LFSV in its petition for rehearing. For example, the Sixth District did not address whether LFSV's record request was pending while Gilroy continued to destroy records, contrary to what Gilroy states. (Answer, 10-11.) Nor were searches properly processed and submitted to Gilroy's records custodian; indeed that is *precisely* what the Superior Court found did not happen. (1-PA-142, 165-73.) Nor did the Superior Court, let alone the Sixth District, rule that Gilroy's records destruction was unintentional. (Answer, 12-13.) The Sixth District's only holding on this issue is that where records have been destroyed, no matter the reason, a petitioner has no claim for relief under the CPRA. (Op., 13.) The Sixth District certainly did not differentiate between how or why records were destroyed. (*Id.*, 17).

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I, Neel Chatterjee, counsel for Petitioner, the Law Foundation of Silicon Valley, hereby certify, pursuant to California Rules of Court, Rule 8.504(d)(1), that the word count for this reply brief, exclusive of caption page, tables, signature blocks, attachments, and this Certificate of Compliance, according to Microsoft Word's word-processing software used to prepare this brief, is 4,114 words.

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Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **GILROY, CITY OF v. S.C. (LAW FOUNDATION OF SILICON VALLEY)**

Case Number: **S282937**

Lower Court Case Number: **H049552**

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