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.

Review After Order Denying CPRA Request
Second Appellate District, Division Three
Case No.: B257230
On Appeal from the Los Angeles Superior Court
The Honorable Luis A. Lavin
Sup. Ct. Case No.: BS145753

REPLY BRIEF ON THE MERITS OF REAL PARTIES IN INTEREST ACLU OF SOUTHERN CALIFORNIA AND ERIC PREVEN

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I. INTRODUCTION

> [I]mplicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.

CBS, Inc. v. Block (1986) 42 Cal.3d 646, 651.

The ACLU seeks copies of invoices reflecting fees and costs billed to the County of Los Angeles by outside counsel in detainee abuse and neglect cases – an annual taxpayer expense of tens of millions of dollars (II P.E. 5:352) – redacted to remove any language reflecting privileged information. The Court of Appeal held that the invoices are privileged in their entirety, but in doing so, it overlooked the interpretation of the privilege recognized by former Chief Justice George in his concurrence in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 ("*Costco*") – that the privilege only applies to communications that are intended to advance the purpose of the legal representation, such as seeking or delivering legal advice or opinion. *See id.* at 743 (George, C.J., conc). As the ACLU establishes in its Brief on the Merits ("B.O.M.") and below, Chief Justice George's interpretation is correct, and thus the privilege does not apply to communications whose purpose is to obtain payment for legal services. The Legislature never intended the broad privilege that the County advocates in this case.

However, if there were any question about the Legislature's intent in enacting Section 952, that uncertainty is resolved by Article I, § 3(b) of California's Constitution ("Section 3(b)"). Under this constitutional mandate, courts must narrowly interpret statutes – such as Evidence Code § 952 ("Section 952") – that exempt public records from disclosure. The County, its employees and its lawyers are public servants. The County exists to serve the public good, and it is accountable to the public in the decisions it makes. Thus, it is not "absurd" to suggest that a more demanding standard should apply to a County that tries to avoid disclosing records detailing a tremendous public expenditure than the standard that applies to records held by private parties. Answer Brief on the Merits ("A.B.M.") at 47-48. The County's argument simply ignores the guiding principle of the California Public Records Act ("CPRA") and Section 3(b) – that to enhance government accountability, the public has a right to obtain and review public records, and exemptions from that access must be construed narrowly. This mandate applies with particular force to records that demonstrate how agencies spend taxpayer money. *See* B.O.M. at 15-16; Section II.A, *infra*.

The County has not met its heavy burden to establish that its records are exempt from disclosure. It tries to convince the Court that the language of Section 952 is so clear and unambiguous that no room exists for the interpretation offered by the ACLU. But Section 952 is facially ambiguous

and has been since the concept of the attorney-client privilege was first introduced in California 143 years ago. The Legislature did not define the phrase "in the course of," nor is the statute clear regarding whether the Legislature intended "confidential communication" to extend to *all* information transmitted confidentially between lawyer and client (regardless of intent, purpose or context), or instead only to information transmitted to serve the purpose of the legal representation, such as attorney advice and opinions. *See* MJN001283 n.2 (fmr. Code Civ. Proc. § 1881, Subd. 2). But extrinsic aids establish that the Legislature intended the term "confidential communication" to apply *only* to communications, advice given, and opinions rendered "in the course of professional employment," *i.e.*, communications to seek or deliver attorney advice and opinions. B.O.M. at 24-25 (citation omitted). Invoices simply do not fall within this definition. Section II.B.1, *infra*.

And this definition makes sense. The County's arguments for secrecy ignore the practical impact of the rule it asks this Court to apply to *all* attorney invoices. If clients have the right to deny their lawyers the use of invoices to support the fee award that belongs to the lawyer, they can be expected to exercise that right when they are unhappy with their lawyer's conduct or the result in the case. The County also fails to acknowledge the wide array of circumstances in which invoices may be needed as evidence, such as complicated fee motions (involving apportionment or lengthy

litigation), or insurance indemnity actions. The County's position invites gamesmanship and would hamstring trial courts' ability to demand the evidence they need to fairly evaluate fee motions. Section II.C, *infra*.

The County asks this Court to pay no heed to the fact that this litigation arises under the CPRA, and that the ACLU seeks public records that will shed light on an issue of tremendous public importance – how the County spends *tens of millions of dollars every year* to defend itself in lawsuits filed by detainees accusing the County of abuse and neglect. II PE 5:351-360. The County's concerns about private litigants are misplaced (A.B.M. at 11) – and can be resolved by a holding that follows Section 3(b) and narrowly interprets the attorney-client privilege in CPRA proceedings. But even without a narrow interpretation, the ACLU still should prevail. Section 952's statutory language, the legislative history and public policy all support the ACLU's interpretation of the attorney-client privilege.

II. ARGUMENT

A. The Court of Appeal Should Have Followed the Constitutional Mandate to Narrowly Interpret Section 952.

The County's claim that Section 3(b) is completely superfluous (A.B.M. at 42 & n.16) ignores the plain language of that constitutional provision, as well as this Court's decision in *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157 ("*Sierra Club*"). The County's construction would render meaningless the key component of Section 3(b) – the mandate that

"[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Cal. Const. Art. I, § 3(b). The County invokes Section 3(b)(5) to support its claim that "Proposition 59 did nothing to change well-settled law ..." (A.B.M. at 42), but that provision does not support that claim. It says only that Section 3(b) does not "*repeal or nullify* ... any constitutional or statutory exception to the right of access to public records." Cal. Const. Art. 1, § 3(b)(5) (emphasis added). It certainly does not prohibit the mandated narrowing of existing exceptions under Section 3(b), as the County claims. A.B.M. at 41.

Indeed, the legislative intent to change existing law to enhance access rights is demonstrated by the very different language adopted in Sections 3(b)(3), 3(b)(4) and 3(b)(6) – which all provide that Section 3(b) does not *modify* the exemptions within the scope of those subsections. Plainly, the Legislature intended, and the electorate approved, a different interpretation for the exemptions that fall within Section 3(b)(5) – as this one does. They are subject to a *constitutional mandate* that they be interpreted narrowly to ensure broad disclosure of public records.

The County's interpretation is contrary to the black-letter law that constitutional provisions prevail over statutes where the two conflict. *E.g.*, *Hotel Employees & Restaurant Employees Int'l Union v. Davis* (1999) 21

Cal.4th 585, 602; *Slocum v. State Board of Equalization* (2005) 134 Cal.App.4th 969, 977. The broad construction of Section 952 urged by the County necessarily yields to the narrow-construction mandate in Section 3(b). Beyond that, the County's interpretation renders the constitutional provision completely meaningless, contrary to the well-established rule requiring courts to give significance to every word in constitutional enactments. *E.g.*, *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 214.

Thus, it is the County's interpretation – not the ACLU's – that is absurd. The County dismisses the ACLU's interpretation because it may result in a more narrow interpretation of the privilege in CPRA cases than in other contexts. A.B.M. at 47-48. But the County does not and cannot explain why this interpretation would be absurd. Section 3(b) was enacted to guarantee that any uncertainty about the scope of an exemption to public access would weigh in favor of access. It necessarily requires broader disclosure of government information than other types of information. An interpretation that limits the circumstances in which an agency can deprive citizens of information that informs on government conduct is consistent with the well-established rule denying agencies the ability to manipulate their records in order to thwart public access (B.O.M. at 14, discussing *Int'l Federation of Professional & Technical Engineers v. Superior Court* (2007) 42 Cal.4th 319), and required by the Constitution.

The County's discussion of *Sierra Club* demonstrates the fatal flaw in its argument. A.B.M. at 42-43, 45-46. In *Sierra Club*, this Court held that its "usual approach to statutory construction [wa]s supplemented by" the constitutional directive to narrowly construe statutes that limit the public's right of access. *See* B.O.M. at 18 (citing *Sierra Club*, 57 Cal.4th at 166). The County's only response is to argue that *Sierra Club* differs because the statute was ambiguous there, but is not here. A.B.M. at 45. This argument is simply incorrect; as established in the Brief on the Merits and below, Section 952 *is* ambiguous in two important respects. *See* B.O.M. at 18, 24; Section B.1, *infra*. And importantly, the County makes no meaningful effort to support its interpretation if the Court finds any ambiguity in the statutory language – essentially conceding that if the Court concludes the language is ambiguous, the County should lose. *See* A.B.M. at 47.

St. Croix v. Superior Court (2014) 228 Cal.App.4th 434 does not support the County's position. A.B.M. at 43-44. There, the real party in interest argued that the court should "construe the charter [defining the relationship with counsel] narrowly to avoid any limitation on the public's right of access." The court, however, held that Section 3(b)(2) did not assist him because the court had "concluded above that the charter establishes an attorney-client relationship between the city attorney and City agencies" and the real party in interest did "not dispute that conclusion

and does not claim that a narrower construction of the charter would produce a different result." 228 Cal.App.4th at 444. Thus, that case did not turn on the question of whether the privilege should be broadly or narrowly interpreted.

Nor do *Musser v. Provencher* (2002) 28 Cal.4th 274, *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, *Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, or *People v. Flores* (1977) 71 Cal.App.3d 559, support the County's claims. A.B.M. at 19. Those cases arose outside of the CPRA context; they necessarily are modified for CPRA requests by Article I, Section 3(b) when there is any reasonable dispute about the scope of the privilege. But even without Section 3(b), they do not control here because none decided whether the privilege applied to a particular category of information.[1] Thus, while they state general principles, they do not apply the principles at issue here, and so do not detract in any way from the well-established law establishing the scope of the privilege for communications that are not intended to facilitate the exchange of information or advice between lawyer and client. *See* Section B.3, *infra.*

[1] In fact, in *Gordon* the court assumes without deciding that a client's "canceled checks are not privileged documents, the check stubs may be privileged if the attorney has used them for recording privileged information." 55 Cal.App.4th at 1557.

B. The Statutory Language, Legislative History and California Cases Support ACLU's Interpretation of Section 952.

1. Section 952 Is Inherently Ambiguous.

The County assumes, with little discussion, that the language of Section 952 is clear and unambiguous and therefore subject to the plain meaning rule. A.B.M. at 16-24. It cites no pertinent authority to support its claim. Instead, it invokes the now unpublished appellate opinion in this case and simply repeats that Court's conclusion as though it were fact. *Id.* at 22-23. But the County's meticulous deconstruction of the statutory language only serves to highlight the inherent ambiguity in the language at issue in this case. A.B.M. at 20-21 n.4. As the ACLU established in the B.O.M., two parts of the statute are ambiguous.

First, the phrase "in the course of" does not simply mean "during" or "while," as the County argues in a footnote, based on nothing except a quotation taken out of context. A.B.M. at 21 n.5 ("the plain meaning of ... [t]he phrase 'in the course of' 'is often' just a wordy way of saying '*during* or *while*'") (quoting *People v. Sinohui* (2002) 28 Cal.4th 205, 215) (emphasis in original)). In cherry-picking language from this Court's decision in *Sinohui*, the County ignores this Court's *holding* that "in the course of" is inherently ambiguous, and thus the Court must "look to extrinsic aids for guidance, beginning with the legislative history." 28 Cal.4th at 216. As the discussion leading up to this holding demonstrates,

the plain meaning of the phrase "in the course of" "provides little guidance" because it can have many meanings. *See id.* at 215; *see also id.* at 215-16 (*"[o]n the other hand, the phrase "in the course of" has also been defined as "in the process of" or "during the progress of"* (emphasis added)). *Accord Lantz v. Workers' Comp. Appeals Board* (2014) 226 Cal.App.4th 298, 308 ("[t]he ambiguity in the statutory phrase 'arising out of and in the course of the employment' led the California Supreme Court to fashion the 'going and coming rule' for situations involving an employee injured while traveling to or from work" (citation omitted)). Because "in the course of" can have multiple meanings, it is inherently ambiguous.

Second, Section 952 is ambiguous in its explanation that "confidential communication" "*includes* a legal opinion formed and the advice given by the lawyer ..." because it remains unclear whether the legislature intended it to mean "may include" or "must include." Evid. Code § 952 (emphasis added). None of the cases cited by the County in the Answer resolves this ambiguity. A.B.M. at 21-22. In *Calvert v. State Bar* (1991) 54 Cal.3d 765, the Court merely recited a version of the definition of "confidential communications" under Section 952, but did not definitively establish what was intended by "includes." *Id.* at 779. The same is true for *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, and *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263. *See* A.B.M. at 22 n.5. And the quotation from *People v. Bolden* (1979) 99

Cal.App.3d 375, 379, stating that the phrase "legal opinion" specifies "one type of information protected" by Section 952, does nothing more than demonstrate that a legal opinion is covered by the privilege.

Because the Answer Brief pretends that these ambiguities do not exist, it makes no real effort to explain why the County should win if the Court concludes the statutory language ambiguous. But as explained below, the extrinsic aids available to this Court establish that the ACLU's definition is correct.

2. Section 952's Legislative History Strongly Supports ACLU's Interpretation of the Attorney-Client Privilege.

As the ACLU explains in its Brief on the Merits, Section 952's legislative history clearly establishes that "cases interpreting the attorney-client privilege prior to 1965 remain relevant and reflective of legislative intent." B.O.M. at 29. The County dismisses the legislative history with little analysis (A.B.M. at 27-28), but it cannot avoid it or the caselaw the Legislature approved with its adoption of Section 952.

Even if the issue presented in this case is not *specifically* addressed in the legislative history or the cases it cites, the inquiry does not end there. The legislative history and cases shape the contours of the privilege to make clear that the privilege does not extend nearly as far as the County claims. Cases decided before the adoption of Section 952 uniformly held that the privilege does not extend to communications by an attorney when

he or she is not acting as an attorney. *See* MJN001285, citing *Ferguson v. Ash* (1915) 27 Cal.App. 375, and the "considerable body of precedent" that applies this standard; *see also* B.O.M. at 32-34 & n.7.[2] For example, in *Ong v. Cole* (1920) 46 Cal.App. 63, 71-73, the court held that the privilege did not apply where the attorney was hired to only draft a title deed. The court explained that the client "communicated to [the attorney] no fact *for the purpose of getting any legal advice* and he gave her none." 46 Cal.App. at 73 (emphasis added). Because it did "not appear that any statement was made by [the client] to [the attorney] *for the purpose of getting any legal advice from him*," the communication did "not come within the rule of privilege." *Id.* (emphasis added); *see also* B.O.M. at 32-33; footnote 2, *supra*, and adjacent text.

As noted in an article cited repeatedly in the Committee Report that resulted in the Legislature's adoption of Section 952 (*e.g.*, MJN001285 n.19), "where the privilege is denied, the function of the attorney appears to be of a mechanical type." Note, Attorney-Client Privilege in California, 10 Stan. L. Rev. 297, 301 (1957-1958). In other words, beyond the attorney's

[2] Significantly, the court in *Ferguson* was clear that an attorney-client relationship existed in that case. 27 Cal.App. at 377-378. However, the privilege did not extend to the particular communication at issue because the attorney was not acting as an attorney in that circumstance. *Id.* at 378. As the court explained, "[i]n such cases the fact that the agent sustains the character of an attorney does not render the communication attending it privileged ...." *Id.* at 379. Thus, the Legislature expressly intended to adopt a rule that focuses on context in deciding whether the privilege applies to the particular communication at issue.

being hired in a business capacity, communications that are not "made for the purpose of seeking or delivering the lawyer's legal advice or representation" (*Costco*, 47 Cal.4th at 743 (George, C.J., concurring)), also fall outside of the privilege.

The County mentions this rule in the Answer (A.B.M. at 27), but does not acknowledge its impact on the facts of this case. Producing an invoice based on time entries already submitted by an attorney, and sending that invoice to a client, are nothing more than mechanical tasks that any non-attorney could perform. There is no evidence here – nor could there be – that the invoices were prepared or transmitted for the purpose of seeking or delivering legal advice or opinion. In the end, the County does nothing more than rotely repeat its claim that everything communicated between lawyer and client is privileged, without offering any rationale for applying the privilege here. But divorcing the privilege from the policy underlying it can only lead to abuse – which is exactly what the County asks this Court to allow here.

Finally, contrary to the County's assertion, ACLU does not contend that a privileged communication *must* contain a lawyer's opinion or advice. *See* A.B.M. at 28. ACLU agrees that in the 1967 amendment of Section 952, the Legislature made clear that the statute's reference to "legal opinion" also protects uncommunicated opinions. But this is beside the point. ACLU's point is that invoices are not the type of communications

that fall within the scope of the privilege because they are generated and exist for a purpose other than seeking or delivering a legal opinion or advice. *See* Section 3, *infra*.

3. An Attorney's Communications with a Client Are Not Privileged Where They Fall Outside of the Purpose of the Legal Representation.

As the County concedes, not every communication between lawyer and client is protected by the attorney-client privilege. A.B.M. at 48-49. When a lawyer is acting *qua* lawyer, the intent and purpose of the communications differ from when the lawyer is engaged in the business aspect of getting paid for services rendered. The County argues that this distinction cannot exist because information about the cost of litigation is so integrated into the purpose underlying the attorney-client relationship that all such information must be privileged in its entirety. A.B.M. at 24-26. ACLU does not deny that information about the cost of litigation may be privileged under certain circumstances.[3] For example, when an attorney is discussing the potential costs associated with different strategies at a case's inception, those strategic decisions clearly are privileged. However, it does not follow that information about the cost of litigation after services are rendered, in the form of invoices, is *necessarily* privileged *in its entirety*

[3] The ACLU also does not claim that all "financial information relevant to the representation" is outside of the attorney-client privilege, as the County seems to claim. A.B.M. at 28. This case involves a very specific kind of financial information – attorney invoices.

merely because an attorney sent the invoices to his or her client in a confidential manner.[4] This type of information simply does not advance the legal representation. Indeed, the County did not identify any *facts* in the record to establish that these particular invoices are privileged – beyond the assertion that the County's attorneys treat invoices as confidential. *See* A.B.M. at 21, citing III PE 6:724-727. Thus, it has not offered any evidence to support its claim that these invoices were transmitted *in the course of* the attorney-client relationship.

As Chief Justice George emphasized in his concurring opinion in *Costco*, 47 Cal.4th at 743, California courts have made clear that lawyers can act as an attorney representing a client and still have unprivileged communications with that client. *See also* cases cited in B.O.M. at 32-34 & n.7; A.B.M. at 48-49. Contrary to the County's claim, the majority and concurring opinions are consistent – this Court need not choose one or the other – because the majority did not reach the issue addressed in the concurrence. A.B.M. at 31. Indeed, even though he agreed with the majority on every point, Chief Justice George felt compelled to pen a concurring opinion about the "purpose of the communication" requirement in attorney-client privilege because "the majority emphasizes the purpose of

[4] Whether or not litigation is pending is irrelevant to the scope of the privilege. That issue is addressed, in the CPRA context, in the pending litigation exemption, which is not at issue here. Thus, the fact that the invoices at issue may be from pending litigation is a red herring. A.B.M. at 11-12.

the relationship between the attorney and the client." 47 Cal.4th at 742 (George, C.J., conc.). He explained that while it was "certainly" true that "[t]he privilege does not apply outside the context of such [attorney-client] relationship," "we should not forget that the *purpose of the communication* also is critical to the application of the privilege." *Id.* (emphasis added).

The Court explained in *Montebello Rose Co. v. Agric. Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 32, that the appropriate test is whether the dominant purpose of the particular communication at issue was to secure or render legal service or advice. *Id.* There, an employer hired an attorney to engage in bargaining with a union. *Id.* at 31. After reviewing communications between the attorney and his employer, the Agriculture Labor Relations Board concluded that certain communications were not related to a request for legal advice because they were made by the attorney in his "nonlegal capacity as a labor negotiator." *Id.* The Court of Appeal agreed, reasoning that "[s]ince [the employer's] labor negotiations could have been conducted by a nonattorney, it is self-evident that communications with [the attorney] relating to the conduct of those negotiations were not privileged unless the dominant purpose of the particular communication was to secure or render legal service or advice." *Id.* at 32.

The statutory requirement that the communication occur "in the course of" the attorney-client relationship has been embedded in the

language of the statute for decades. *Costco*, 47 Cal.4th at 742 (George, C.J., conc.). Thus, the County's claim that the privilege "protects a *transmission* irrespective of its content," is beside the point. A.B.M. at 35, citing *Costco*, 47 Cal.4th at 739. As the County concedes, this rule only applies "so long as the communication is made in the course of the relationship." A.B.M. at 35. The County's bootstrapping does not meet its burden of proving that the invoices the ACLU seeks were transmitted "in the course of the relationship" under Section 952.

In an attempt to avoid this long line of cases, the County mischaracterizes a quote from *Costco*, claiming that "application of attorney-client privilege depends on 'the dominant purpose of the relationships between the [client] and its [attorneys],' not on the dominant purpose of the communication." A.B.M. 28 (citing *Costco*, 47 Cal.4th at 739-740). The context of the Court's discussion makes clear that it does not support the broad interpretation advocated by the County. The Court disapproved *2,022 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377, to the extent it required *in camera* review of all communications between an insurance company and its claims adjusters, who also were attorneys, in order to determine if the attorneys were acting as attorneys or non-attorneys in their work for the client. *Costco*, 47 Cal.4th at 739-740. Because courts may not order disclosure of communications claimed to be privileged in

order to evaluate the privilege claim, this Court held that the lower court erred in compelling such disclosure. *Id.*[5]

But the Court did not consider or decide which communications occur "in the course of" an attorney-client relationship – the key issue here. *Id.* at 740 ("[i]f the trial court determined the communications were made *during the course of an attorney-client relationship*, the communications, including any reports of factual material, would be privileged, even though the factual material might be discoverable by some other means" (emphasis added)); *see also id.* at 743 (George, C.J., conc.) (the Court's analysis in *Roberts*, 5 Cal.4th at 371, "was not restricted to an examination of the purpose of the attorney-client relationship, but rather considered whether the nature of the communication itself fell within the bounds of the statute"). Thus, the Court's discussion in *Costco* merely reiterates its holding in *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600, that the privilege includes facts transmitted between lawyer and client for the purpose of procuring legal advice or an opinion.

The County also attacks Chief Justice George's explanation of the dominant purpose test by arguing that client communications are not "similar in nature to ... the lawyer's legal opinion or advice." *See* A.B.M.

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[5] The court would not be required to analyze any particular communication here. Rather, this Court is deciding as a matter of law whether all invoice information is privileged, as the County claims. It can resolve this issue categorically without examining the invoices at issue.

at 34 (quoting *Costco*, 47 Cal.4th at 743). But the County again overlooks the context of the discussion. As the concurring opinion states at the beginning of that same paragraph, the Chief Justice was explaining that the privilege applies to "those communications between the lawyer and the client that are made *for the purpose of seeking or delivering the lawyer's legal advice or representation*" – and thus plainly applies to the client's communications to his or her lawyer. The client's communications for this purpose are "similar in nature to ... the lawyer's legal opinion or advice" because they are made for the purpose of seeking that opinion or advice. *See Mitchell*, 37 Cal.3d at 600.

The County also attempts to limit the reach of the concurring opinion by criticizing Chief Justice George's application of the principle *ejusdem generis*. Again, however, its arguments are not persuasive. A.B.M. at 32-35.

- *First*, the County claims that *ejusdem generis* plays no role when the Legislature's intent is clear. *Id.* at 33-34. But as the ACLU has established, the language of the statute is ambiguous, and the legislative history supports the ACLU's interpretation. Sections 1, 2, *supra*.
- *Second*, the County argues that *ejusdem generis* does not apply because "includes" is a term of enlargement. *Id.* at 34. This argument proves nothing. The ACLU does not argue

that the statute extends *only* to attorney advice and opinion. It agrees that "includes" enlarges the type of information protected by the privilege – to include, for example, facts transmitted for the purpose of seeking an attorney's advice or opinion. The ACLU's point is that – as required by *ejusdem generis* – the information protected must be similar in nature to attorney advice or opinion. The County has no meaningful response to this requirement.

- *Third*, applying *ejusdem generis* to the statute would not eliminate the privilege for communications from client to counsel, as the County claims. *Id.* at 34-35. Communications by a client seeking a lawyer's opinion or advice *are* similar because they are made for the purpose of seeking that opinion or advice. The same is not true for invoices.
- *Fourth*, the County cites no authority to support its attempt to limit application of *ejusdem generis* to lists of more than two items. California courts have applied this principle to small lists. *E.g.*, *People v. Arias* (2008) 45 Cal.4th 169, 180 (applying *ejusdem generis* to limit general term based on statutory enumeration of three items); *Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1468–1469 (same as to contractual enumeration of two

items). And the ACLU has cited clear evidence that the Legislature intended to protect information similar to attorney advice and opinion. *See* MJN001283, n.2 (fmr. Code Civ. Proc. § 1881 subd. 2); MJN001285. Again, the County's argument is empty.

4. None of the County's Arguments Justifies the Broad Interpretation of the Privilege That It Seeks.

The Court should reject the laundry list of arguments the County offers in an attempt to justify the broad privilege it asks this Court to adopt. *First*, the County's concerns that opponents might use invoice information to discover anticipated strategy (A.B.M. at 25) are purely hypothetical and highly unlikely – as well as irrelevant to the questions presented in this case about the scope of the privilege. In most cases involving private parties outside of the CPRA context, current invoices would be irrelevant and not discoverable. In any case in which invoices generated in pending litigation might be relevant and potentially discoverable, the concerns could be managed through the discovery process. Trial courts have been, for years, managing these very issues at the trial level with success. Moreover, the County's speculation is particularly misplaced in this case – the County is a public entity with extensive resources (taxpayer money) to spend on litigation. Los Angeles County is not at risk of going broke over discovery issues like this.

Second, the County's arguments ignore the fact that the ACLU asks this Court to reject the appellate court's holding that *every attorney invoice* is privileged, without regard to content, context or purpose. Indeed, the record reflects that most of the invoices at issue here contain unprivileged information. *See* B.O.M. at 35-36; III PE 6:726-727 (Granbo declaration); III PE 6:729 (Kim declaration). *See also* II PE 5:595-III PE 5:684 (samples of fee invoices to County in other matters, with minimal redactions); 5:588-589 (testimony regarding preparation of invoices, with no suggestion that they were intended to convey legal advice or opinion).

Third, the County also argues that public records advocates do not need invoices, because the same information may be available from other sources. *See* A.B.M. at 49. It does not identify other public records that might contain the information the ACLU seeks. Does the County believe that the underlying timesheets are not privileged and that they are public records subject to disclosure under the CPRA? The ACLU assumes that outside counsel would object strenuously if the ACLU submitted a CPRA request to them. Thus, the County's argument ultimately is meaningless because it does not explain *how* the public would obtain the information it needs to oversee this tremendous expenditure of public funds.

Fourth, the County also relies on Business & Professions Code § 6149 ("Section 6149") to argue that a narrow reading of the attorney-client privilege would contravene legislative intent to keep written fee

contracts privileged. *See* A.B.M. at 23-24. But written fee contracts – typically retainer agreements – may contain a variety of privileged information, such as provisions for payment by third parties, or agreements about strategic decisions like default or settlement. The Legislature's decision to protect fee agreements does not mean that it intends to protect every type of information that may be found in such agreements.

Indeed, the County's citation to Section 6149 highlights a significant flaw in its reasoning regarding the scope of the attorney-client privilege. If all confidential communications between client and attorney are privileged, as the County contends, then written fee contracts automatically are privileged under Section 952. Thus, there is no reason for the Legislature to single out this particular communication and declare it to be privileged. The County's interpretation renders Section 6149 meaningless, contrary to well-established law. *Bighorn-Desert View Water Agency*, 39 Cal.4th at 214.

Finally, the County attempts to distinguish *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57 ("*Anderson-Barker*"), because it turns on a different exemption – pending litigation – rather than the attorney-client privilege. A.B.M. at 35-37. But the pending litigation exemption is based on the attorney-client privilege. In *Anderson-Barker*, the court relied on the "dominant purpose" test, as adopted by the court of appeal in *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411,

explaining that it "should apply where a document may have been prepared for a dual purpose." 211 Cal.App.4th at 65. In turn, the *City of Hemet* court relied on the attorney-client privilege in adopting the dual purpose test. 37 Cal.App.4th at 1418. Thus, *Anderson-Barker* also strongly supports the ACLU's interpretation of the attorney-client privilege.

5. Case Law Developed in the Fee Litigation Context Also Demonstrates that Invoices Are Not Privileged.

The County dismisses the many cases cited by the ACLU addressing the production or examination of invoices in the fee-litigation context, although it cannot point to any contrary authority. *See* A.B.M. at 38. As explained in the Brief on the Merits, this Court's cases for the last four decades have emphasized the importance of detailed fee information to support fee awards under the lodestar method. *See* B.O.M. at 36-40. And despite the frequency with which courts decide fee motions based on detailed billing records and invoices, there is no published decision holding invoices to be privileged. Moreover, although this Court's fee motion jurisprudence consistently treats invoice information as unprivileged, the Legislature has never taken steps to extend the privilege to invoices, implicitly approving of the lodestar method, its use of detailed billing information, and the court's authority to demand invoices.

In response to this extensive caselaw and the implicit legislative acceptance of the lodestar method (and the fee detail necessary to support a

fee motion), the County cites a single case – *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639, 642-643. But in *Smith*, the court assumed without deciding that the documents plaintiffs sought – "*work product* and legal bills" – were protected by attorney client privilege. *Id.* (emphasis added). The parties apparently did not raise – and the court certainly did not discuss – the question of whether the privilege extends to the invoices. Thus, this lone example of a court assuming that invoices *and work product* are privileged ultimately proves nothing.

The County also attempts to distinguish *Hartford Casualty Ins. Co. v. J.R. Marketing* (2015) 61 Cal.4th 988 (A.B.M. at 39-40), where this Court recently held that an insurer could sue Cumis counsel directly for reimbursement of defense fees and costs pursuant to a court order that preserved the insurer's right to recover "unreasonable and unnecessary" amounts billed by counsel. *Id.* at 998-1000. In doing so, the Court rejected the suggestion that the invoices may be privileged in their entirety – and therefore unavailable as evidence – explaining that "[i]f privileged information ... is included in counsel's billing records, it can be redacted for purposes of assessing whether counsel's bills are reasonable." *Id.* at 1005-1006.

The County's effort to distinguish *Hartford* hinges on its claim that the privilege in the invoices was waived when they were submitted to the insurer for payment. A.B.M. at 39-40. Yet, the law is clear that

communications with an insurer do not waive the attorney-client privilege if the insurer has an obligation to defend the insured and "the communication is intended for the information or assistance of the attorney in so defending him." *Travelers Ins. Co. v. Superior Court* (1983) 143 Cal.App.3d 436, 449; *see also, e.g., Sierra Vista Hospital v. Superior Court* (1967) 248 Cal.App.2d 359, 367 (insured's communications to insurer subject to attorney-client privilege). Certainly, invoices sent to the insurance company that is obligated to pay them easily would fall within this rule. Thus, even assuming the invoices were privileged – which the County has not established – that privilege is not waived when they are sent to the insurance company for payment.[6] The County's attempt to distinguish *Hartford* based on this incorrect assumption also must be rejected. *Hartford* is just the latest in a long line of cases recognizing that the attorney-client privilege does not extend to invoice information.

[6] The County's suggestion that the client never received a bill (A.B.M. at 39) ignores the facts of that case. Litigation began a full year before the insurance company was ordered to provide a defense to the insured. *Hartford*, 61 Cal.4th at 993-994. It belies belief to assume that the client did not receive any of the invoices, at least during that period of time.

C. The County's Arguments Ignore the Real-World Application of the Rule It Seeks.

1. Contrary to the County's Claim, Many Clients Have No Incentive to Support their Lawyer's Fee Motion.

The County claims that all clients have incentive to waive the privilege in support of their attorney's fee claim, or they will "face the consequences." *See* A.B.M. at 53 (citing *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309 (class counsel submitted detailed billing records for *in camera* review at the court's behest)). But this argument demonstrates another flaw in the County's position – it makes no sense to suggest that the Legislature intended to adopt a privilege that routinely would be waived in litigation, upon the demand of a court or request of counsel.

Moreover, the County's invocation of "consequences" overlooks the fact that in many cases, clients derive little or no financial benefit from a fee motion, and therefore have no legal or financial incentive to advance an attorney's case for fees. Many clients have good cause to take the necessary steps to recover fees – perhaps the client is responsible for fees and seeking reimbursement, or the client is pleased with the lawyer's efforts and wants to ensure that the lawyer is paid well. But that is not always the case. Other clients will believe they have good cause to *refuse* to waive the privilege – perhaps because the client is unhappy with the

attorney at the conclusion of the matter, or simply does not care whether or not the lawyer is paid.

For example, under California's Fair Employment and Housing Act ("FEHA") (Gov't Code § 12900 *et seq.*), attorneys for a plaintiff who prevails on a FEHA claim are entitled to an award of attorney's fees and costs. Gov't Code § 12965(b). A prevailing party is defined, in part, as "the party with a net monetary recovery ...." Code Civ. Proc. § 1032(a)(4). Thus, even if a plaintiff wins a minimal amount, the attorney is entitled to all of his or her fees expended in prosecuting the matter. *See id.; Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1233 (affirming FEHA award of $150,000 to client and $680,520 to attorneys); *see also, e.g., Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 164 (rejecting proportionality requirement for fee award in action brought under consumer protection statute); *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 420-421 (in action under 42 U.S.C. § 1988, affirming award of $1.1 million to attorneys, although client recovered only $30,300). It is easy to see how a client might be unhappy with an attorney who fails to recover all that the client believes due, and loathe to see the attorney recover full fees (which may dwarf the client's recovery).

What incentive does an unhappy client in this situation have to waive the privilege so his or her attorney can collect? And what possible

consequence does the client face for refusing to waive the privilege? The answer to both questions is none. If a client refused to waive the privilege in the fee motion context, the only consequence would be that his or her attorney would not have all of the evidence that might be necessary to support a fee award. The only individual facing any consequences from this decision would be the attorney seeking the fees to which he or she is entitled.

And this is not the only circumstance in which inequitable results will flow from a decision to give the client the exclusive right to decide whether invoices are available to support a fee claim. As the ACLU's Brief on the Merits explained, this Court's decision in *Hartford*, 61 Cal.4th 988, is a perfect example of the problems that would arise from such a rule. B.O.M. at 43-44. These problems are far worse in the CPRA context, where invoices often are the only records available to evaluate the tremendous amount of money the government spends on legal fees every year. *E.g.*, II PE 5:351-360.

The County's claim that there is no widespread problem of clients' refusal to waive the privilege for their attorneys is a red-herring. *See* A.B.M. at 55. A problem need not be widespread for it to require a solution. In any event, presumably this has not yet been a problem because California courts have had the freedom to reject privilege claims asserted in an attempt to prevent the disclosure of attorney invoices that are needed to

resolve a dispute – as this Court did in *Hartford*, 61 Cal.4th at 1005-1006. If, however, this Court agreed with the County and removed that option, it is impossible to know how long it would take California courts to work their way through the problems that would flow out of that decision, and how much ink would be spilled in the process.

Nor are the County's arguments bolstered by federal cases involving fee disputes. A.B.M. at 55, citing *Evans v. Jeff D.* (1986) 475 U.S. 717, and related cases. All of those decisions are based on a federal statute allowing clients to waive, settle, or negotiate attorney's fees – which is very different from California law. This rule has created a number of conflicts between clients and attorneys where their interests diverge, as demonstrated by the cases the County cites. A.B.M. at 55. Thus, these cases bolster the ACLU's position, by providing a cautionary example of the harms that may flow out of a decision to give the client such broad control over the fee recovery that in California belongs to the attorney. They certainly do not allay the problems that will face attorneys practicing in federal court if they have an ethical obligation to treat invoices as confidential.

Finally, the County dismisses the ethical conflict for lawyers practicing in federal court, claiming that retainer agreements are treated differently under federal and state law, which the County believes demonstrates that no ethical conflict would arise in this case. But the County *misconstrues* the authority it cites. A.B.M. at 58-59, citing *Hoot*

Winc, LLC v. RSM McGladrey Fin. Process Outsourcing, LLC (S.D. Cal. Nov. 16, 2009) 2009 WL 3857425, at *2; *Ralls v. United States* (9th Cir. 1995) 52 F.3d 223, 225; *United States v. Blackman* (9th Cir. 1995) 72 F.3d 1418, 1424. In *Hoot Winc*, the court concluded that "retainer agreements are not protected," but it cited cases regarding fee arrangements and the identity of the fee payer – which indisputably contain less information than retainer agreements. Thus, these cases are not examples of a conflict between federal and state law, as the County claims.

Nor do *Agster v. Maricopa County* (9th Cir. 2005) 422 F.3d 836, or *Wilcox v. Arpaio* (9th Cir. 2014) 753 F.3d 872 support the County's claim. A.B.M. at 59. Those cases involve the peer review and mediation privileges – not, as here, an independent obligation imposed on the attorney by state law, under potential penalty of disciplinary proceedings. In the end, the County cannot explain how federal practitioners will resolve the conflict between an obligation to submit invoices to support a fee motion, and a client's refusal to waive the privilege in those invoices.

2. Invoices May Not Be *Required* in All Cases in Which Fees Are Sought, but Many Fee Disputes Cannot Be Fairly Resolved Without Them.

None of the County's arguments supports its insistence that invoices are extraneous and unnecessary in fee litigation. *First*, the County suggests that the ACLU's position is inconsistent, because it recognizes that invoices are not strictly required to support a fee award, but also points out that in

many instances a fee motion cannot be adjudicated without that level of detail. A.B.M. at 52-57. It claims that ACLU "confuses the *methodology* for calculating fees with the *evidence* necessary for recovering fees" when discussing the need for invoices to support a fee motion. A.B.M. at 56-57 (emphasis in original). But this Court has established a high standard to support fee awards under the lodestar method. *E.g., Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 (upholding lower court's calculation of the fee award where "[t]he lodestar was based on detailed documentation by counsel and there was extensive litigation concerning the time spent and the prevailing hourly rate in the area for comparable services").

ACLU does not contend that a detailed invoice is required to calculate the appropriate lodestar in every case. In some cases a trial court can fairly evaluate a fee request based on the general evidence an attorney may provide in a declaration. *E.g., Sommers v. Erb* (1992) 2 Cal.App.4th 1644, 1651-52 (finding attorney's declaration sufficient to support small fee award where counsel estimated 130-150 hours spent on the case, outlined various tasks and procedures performed during that limited period, and declared his hourly rate). But that is not always the case. *See, e.g., Bell v. Vista Unified Sch. Dist.* (2000) 82 Cal.App.4th 672, 689 (holding that block billing records were insufficient to support fee motion where "it [was] virtually impossible to break down hours on a task-by-task basis between those related to the Brown Act [for which attorney's fees could be awarded]

and those that [were] not"). Often, a trial court will *need* detailed information to meet the requirements this Court has established to justify a fee award. Until now, trial courts have had the freedom to demand more detailed information, including invoices, to evaluate a fee request – which is particularly appropriate in large, complicated cases, or in cases in which a fee must be apportioned. But a decision in the County's favor would apply to all invoices – and all fee motions – removing the discretion trial courts currently have to demand the evidence they consider necessary to support the fee motion they are asked to decide.

Second, the County also ignores the fact that attorney invoices commonly are presented to California courts as evidence of fees, and the courts are well equipped to deal with any possible attorney-client privilege issues. *See, e.g., Hartford*, 61 Cal.4th at 1005 ("[t]rial courts are accustomed to dealing with claims of attorney-client privilege in a manner that balances the competing interests of the parties, and can thus presumably address any privilege issues that arise on a case-by-case basis"); *see also* B.O.M. at 38-39 (detailed analysis of *Hartford*). Thus, the County's concerns about disclosing information that may reflect strategy or be privileged in some way, are easily resolved.

Third, the County also misconstrues ACLU's argument regarding involuntary waiver where invoices are submitted to support fee claims. *See* A.B.M. at 54. As explained in the ACLU's Brief on the Merits, the

attorney-client privilege is waived only if "the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action." *Southern Cal. Gas Co. v. Public Util. Com.* (1990) 50 Cal.3d 31, 37. In those cases, the attorney-client communication was the sole evidence available to support the defense raised by the client, and thus they fell within the narrow scope of cases finding involuntary waiver. But given cases holding that invoices are not strictly necessary, it currently is unclear what courts will conclude on this issue, if they are forced to decide if they can compel disclosure of invoices.

Fourth, in arguing that "information" is not privileged (A.B.M. at 57), the County overlooks the many cases that find waiver where a substantial part of the communication is disclosed. *See* B.O.M. at 46. Thus, an attorney who supports a fee request with the underlying timesheets risks a finding of waiver as to the invoices if the timesheets were largely duplicative of the invoices.

The rule advocated by the County would impose a heavy burden on trial courts trying to balance the obligation for sufficient support of motions with the intricacies of the attorney-client privilege. Such a rule would only create another issue to be litigated in the many fee disputes that arise in California courts, and lead to inconsistent results as courts reach different conclusions on these complicated issues.

III. CONCLUSION

The attorney-client privilege is a powerful weapon. When it applies, it prevails over all attempts to discover or obtain the privileged information. But it is for this reason that this Court must ensure that the privilege does not reach beyond the Legislature's intent. The County's interpretation would rend the privilege from the policy underlying it, expanding its scope to reach information and documents that indisputably were not transmitted for the purpose of seeking or delivering legal advice or opinion. And it would be flatly contrary to the mandate of Article I, Section 3(b) to narrowly construe statutes that restrict the public's right of access. The public is entitled to oversee the County's annual expenditure of tens of millions of dollars defending against detainee abuse and neglect cases. The County should not be allowed to deny the public the records it needs to do that.

For the reasons set forth above and in the ACLU's Brief on the Merits, the ACLU respectfully requests that the Court reverse the Court of Appeal's Opinion in this matter, and direct that Court to affirm the trial court's decision.

Respectfully submitted this 13th day of January, 2016.

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COMPLIANCE CERTIFICATE

I certify that pursuant to CA Rule of Court 8.520(c)(1), the attached "Reply Brief On The Merits Of Real Parties In Interest ACLU Of Southern California And Eric Preven" is proportionately spaced, has a typeface of 13 points, and according to the word processing systems used to prepare this Reply Brief contains 8,395 words, including footnotes, but excluding the caption, tables, this certificate, and signature blocks.

Dated: January 13, 2016

DAVIS WRIGHT TREMAINE LLP

By: 

Colin D. Wells

PROOF OF SERVICE

I, Bradley Redmond, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Davis Wright Tremaine LLP, 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533.

On January 13, 2016, I served the foregoing document described as:

REPLY BRIEF ON THE MERITS OF REAL PARTIES IN INTEREST ACLU OF SOUTHERN CALIFORNIA AND ERIC PREVEN

on the interested parties in this action as stated below:

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Hon. Carolyn B. Kuhl Presiding Judge Los Angeles Superior Court 111 North Hill Street Los Angeles, CA 90012	*ACLU of Southern California, et al. v. County of Los Angeles, et al.* Case No. BS145753, Superior Court of California, County of Los Angeles
Clerk of the Court Court of Appeal of the State of California Second Appellate District Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	*County of Los Angeles Board of Supervisors, et al. v. Superior Court of The Los Angeles County, Respondent and ACLU of Southern California, Real Parties in Interest* Case No. 2d Civ. No. B257230, Court of Appeal of the State of California, 2nd Appellate Dist., Div. 3
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☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on January 13, 2016 at San Francisco, California.

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

Bradley Redmond
Print Name

Bradley Redmond
Signature