Case No. S226645

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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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.

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After a Decision by the Court of Appeal
Second Appellate District, Division Three, Case No. B257230

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# APPLICATION OF AMICUS CURIAE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS COUNTY OF LOS ANGELES BOARD OF SUPERVISORS AND PROPOSED AMICUS CURIAE BRIEF

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**APPLICATION OF AMICUS CURIAE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS COUNTY OF LOS ANGELES BOARD OF SUPERVISORS AND PROPOSED AMICUS CURIAE BRIEF**

TO: THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT

## I. INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), the Education Legal Alliance of the California School Boards Association (Amicus Curiae) respectfully requests permission to file the accompanying amicus curiae brief (Amicus Curiae Brief) in support of Petitioners County of Los Angeles Board of Supervisors (Petitioners or County). Amicus Curiae will address why the Court of Appeal's decision properly applied the language of the California Public Records Act (CPRA) and the Evidence Code's codification of the protection of confidential communications between attorney and client when determining that attorney invoices transmitted to public entities clients are not subject to disclosure under the CPRA. Amicus Curiae will also address how a decision requiring disclosure, even of redacted invoices, would be problematic for the over 1,000 school districts and county offices of education in California, along with their elected school board members, officials, and employees.

## II. INTEREST OF AMICUS CURIAE

The California School Boards Association (CSBA) is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local board governance and advocates on behalf of school districts and county offices of education.

As part of CSBA, the Education Legal Alliance (ELA) helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The ELA represents its members by addressing legal issues of statewide concern to school districts. The ELA's activities include joining in litigation where the interests of public education are at stake.

In the instant case, Amicus Curiae represents the interests of its members. While members of the ELA support the goal of transparency underlying the CPRA, school boards and county boards of education need the ability to confidentially confer and receive information from their counsel in order to carry out their duties as elected officials. Their status as public agencies, subject to the CPRA, should not result in less protection for their confidential communications with counsel when compared to any private entity. If this Court were to accept the ACLU's invitation to narrow

the privilege as to public entities, each member of CSBA would be dramatically and negatively impacted.

## III. AMICUS CURIAE BRIEF WILL ASSIST THE COURT

Amicus Curiae have reviewed the parties' briefs and are familiar with the questions involved in this case and the scope of their presentation. Amicus Curiae believes that its Amicus Curiae Brief will assist the Court in the following key ways: (1) by addressing relevant points of law and arguments not discussed in the briefs of either party; (2) further distinguishing and clarifying the case law relied upon by the parties; (3) illuminating the practical and legal consequences on school districts and county offices of education from any narrowing of the attorney-client privilege under the guise of the CPRA.

## IV. CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that the Court accept the accompanying brief for filing in this case.

DATED: February 16, 2016

DANNIS WOLIVER KELLY
SUE ANN SALMON EVANS
WILLIAM B. TUNICK

By: _____
Sue Ann Salmon Evans

By: _____
William B. Tunick
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## PROPOSED AMICUS CURIAE BRIEF OF THE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS COUNTY OF LOS ANGELES BOARD OF SUPERVISORS

COMES NOW Amicus Curiae, the Education Legal Alliance of the California School Boards Association, to offer the following argument regarding the above captioned matter. The Education Legal Alliance of the California School Boards Association (Amicus Curiae) submits this amicus curiae brief in support of Petitioners County of Los Angeles Board of Supervisors, et al. (Petitioners or County), pursuant to California Rules of Court, rule 8.520 (Amicus Curiae Brief). As part of California School Boards Association (CSBA), the Education Legal Alliance (ELA) helps to ensure that local school boards and county boards of education[1] retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. By submitting this Amicus Curiae Brief, the ELA asserts its vital interest in the outcome of this matter and in this Court's review of the issues raised by this action.

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[1] The arguments raised throughout this brief apply equally to school districts and county offices of education even where the brief refers only to school districts for brevity.

## I. INTRODUCTION

The apparent goal of the ACLU in this case is reasonable – encouraging public oversight of the expenditure of public funds. The ELA does not take issue with this goal; however, it is concerned by the attempt to undercut the attorney-client privilege of school districts and county offices of education in its name. The ends advocated by the ACLU do not justify the means.

Public entities are entitled to the protection of confidential communications with counsel. Neither the statutes nor any court has ever suggested the protection afforded public entities is different than the protection provided to private entities. Such a bifurcated standard, however, is where the ACLU's arguments lead. Because those arguments are premised on an interpretation of the California Public Records Act (CPRA), they would require that only public entities in the CPRA context be required to disclose otherwise confidential invoices from counsel.

A private individual looking to pursue a claim against a school district could request a school district's attorney's invoices at any time. Those invoices would likely contain the name of the attorney(s) working on the matter, when the attorney(s) worked on specific tasks, how much was billed for each task, and a narrative describing the task itself. This disclosure would allow those seeking to litigate against a school district the opportunity to pull back the curtain of confidentiality that otherwise

protects the activities of a school district's attorney and gain an insight into the school district's position or strategy. The school district, however, would not have access to similar information as the CPRA does not apply to private individuals. The only support offered for this outcome is the need to broadly interpret the CPRA; however, that is of little utility when the interpretation at issue is that of the Evidence Code, not the CPRA.

The Evidence Code clearly sets forth that attorney invoices enjoy the protection given to any other confidential communication between an attorney and a client. The Legislature's decision to wholly incorporate these privileges into the CPRA illustrates it did not intend a separate, quasi-confidential standard for public entities. Not only would such a result be at odds with the plain language of the statutes, it would have substantial impacts on school districts. Unlike cities and counties, almost all school districts rely completely on outside counsel for legal representation and advice, meaning the impacts on public agencies may be felt most strongly by school districts. While a private entity like the ACLU can attempt to dismiss these impacts as hypothetical, they are very real concerns with very real impacts for school districts.

Disclosure, even of redacted invoices, will place public entities at a strategic disadvantage. Given this, school districts and their counsel are likely to include less information in invoices leading to less information for school districts regarding the use of public funds or the need to spend

additional funds to have that information provided through other, confidential, avenues. Eliminating the bright line rule recognized in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 (*Costco*) will only lead to disputes over redaction of invoices – with public entities at risk for paying the opponent's attorneys' fees if they over-redact.

The ACLU's attempt to justify for this impingement on the attorney-client privilege of public entities rings hollow. The ELA agrees the public should have information about how public entity funds are spent. As to legal expenditures, that information is available in non-privileged records such as school district audits, budgets, ledgers, warrants, and checks issued to attorneys. Thus, it is not true that this Court must narrow the protection for clients and attorneys in the name of public oversight when that oversight can be accomplished without violating attorney-client privilege.

## II. STATEMENT OF THE CASE

### A. FACTS AND PROCEDURAL HISTORY

Amicus Curiae hereby adopts and incorporates by reference the factual background and procedural history set forth in the "Relevant Background" at pages 13-16 of Petitioners' Answer Brief on the Merits.

## B. ISSUE PRESENTED

This case presents the following issue: In light of the CPRA's incorporation of the attorney-client privilege, does the CPRA require a public entity to publically disclose otherwise confidential billing records provided to the entity by outside attorneys?

# III. ARGUMENT

This Court's rulings have steadfastly protected confidential communications between clients and attorneys – even when the client is a public entity. It has noted public entities must enjoy the same protection as private entities in this regard. Despite this, the ACLU now asks to unravel this protection for public entities – to create a special rule limiting the attorney-client privilege of public entities in the context of CPRA requests. There is no legal or policy justification to support this request.

Such a ruling would have substantial detrimental impacts on school districts not contemplated by the Legislature which fully incorporated the protections of the Evidence Code into the CPRA. The statutory language reflect the Legislature's judgment on the protections provided to all parties, including public entities. The ACLU's interest in the confidential legal strategies of the County does not warrant deviating from this direction.

## A. THE ABILITY OF A SCHOOL DISTRICT TO CONFIDENTIALLY COMMUNICATE WITH ITS ATTORNEY IS PROTECTED IN THE SAME WAY AS A COMMUNICATION FROM ANY CLIENT

Much of the ACLU's argument in this case focuses on the interplay between the CPRA and privileges found in the Evidence Code. It argues the application of the Evidence Code's attorney-client privilege to public entities should be viewed through the lens of constitutional provisions applicable to the CPRA. But this is irrelevant to the issue presented – the application of the attorney-client privilege to attorney invoices. The fact the issue arises in the context of a CPRA request does not alter the analysis. To do so would suggest public entities enjoy only quasi-confidential communications with their attorneys while private entities are not so limited. Such a result flies in the face of the statutory language and the holdings of this Court.

### 1. It Is Vital That A School District Be Able To Confidentially Communicate With Its Attorney

Akin to any other entity or individual, school districts require legal representation. Such counsel, however, is of limited value without confidentiality. "[T]he fundamental purpose behind the [attorney-client] privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) If an attorney or client anticipated that their

discussions or transmissions would become subject to disclosure they would be hesitant to freely discuss. This would prevent the client from providing full information to the attorney and prevent the attorney from providing optimal legal representation.

This rationale is equally weighty in the context of public entities. "California law recognizes that 'public entities need confidential legal advice to the same extent as do private clients.'" (*St. Croix v. Superior Court* (2014) 228 Cal.App.4th 434, 445, quoting *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 374.) Accordingly, "state law establishes that the privilege's protection of the confidentiality of written attorney-client communications is fundamental to the attorney-client relationship, in the public sector as well as in the private sector,... (See Evid. Code, § 950 et seq.; *Roberts, supra,* 5 Cal.4th at pp. 380–381.)" (*St. Croix*, *supra,* 228 Cal.App.4th at p. 443.)

The ACLU's arguments, however, would provide public entities with less protection than private parties by suggesting Proposition 59 requires the attorney-client privilege be construed narrowly in the context of a CPRA request. (Real Parties in Interest, Reply Brief ["RB"], p. 4.) This attempt to graft a standard for applying the CPRA onto the attorney-client privilege analysis would create two standards for the protection of attorney client privilege – one applied to private entities and another for

public entities where records are requested through a CPRA request.[2] This cannot be the intent of the Legislature.

The importance of the privilege for local public entities is magnified as the elected officials that govern them must meet and conduct their business only in open and noticed public meetings. (See Govt. Code, § 54950 et seq. [Brown Act].) This limits the opportunities for governing boards to discuss or deliberate on questions with legal repercussions without sharing sensitive information with those who may use it against the school district. Board members are also more likely to communicate with counsel through confidential written correspondence – as compared to private entities – because, unlike private entities, the Brown Act prevents a majority of board members from discussing school district business outside of meetings, but does allow them to receive correspondence from counsel between meetings. (Govt. Code, § 54952.2.)

Any limitation on this privilege is of special importance to school districts as the vast majority rely on outside counsel. Of the over 1,000 school districts, it is estimated that less than 5% have in-house legal counsel. Most retain private outside counsel for all legal matters, and as

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[2] Additionally, this would create inconsistency between requests for a public entity's invoices through a CPRA request – viewed in light of Proposition 59 – and through discovery requests during litigation outside the Proposition 59 context.

noted above, rely on written transmissions from these counsel for legal services. It is imperative that this channel of communication – one of the few ways board members can receive confidential information from their counsel – remain open and unfettered.

### 2. The Explicit Language Of The CPRA Illustrates The Legislature's Decision To Limit Public Disclosure In Order To Protect Confidential Attorney-Client Communications

This case focuses on the tension between the ability of clients and attorneys to confidentially communicate and transparency in government communications. Addressing such tensions, however, is not new to California courts. They have consistently followed the language of the CPRA, explaining that it represents the Legislature's balance of competing policy goals. The same approach is warranted here.

The CPRA was enacted "for the explicit purpose of 'increasing freedom of information' by giving the public 'access to information in possession of public agencies.' (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [].)" (*Roberts, supra,* 5 Cal.4th at p. 370.) At the same time, "[t]he right of access to public records under the CPRA is not absolute." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282.) The goals of the CPRA can, and do, come into conflict with other "equally important" policy goals. (*City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1433.) This "inherent tension" is part and parcel of the CPRA. (*Los*

*Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 241.)

The enactment of any public records disclosure requirement, like the CPRA, must necessarily confront these tensions and address questions as to the appropriate scope of disclosure. The language of the CPRA represents the Legislature's judgment in balancing competing policy interests. Relevant here is the CPRA's exemption incorporating "provisions of the Evidence Code relating to privilege." (Govt. Code, § 6254, subd. (k).) "By its reference to the privileges contained in the Evidence Code, ... the [CPRA] has made the attorney-client privilege applicable to public records." (*Roberts, supra,* 5 Cal.4th at p. 370[].)" (*St. Croix, supra,* 228 Cal.App.4th at p. 441.) The incorporation of attorney-client privilege evidences intent to protect all such communications of a public entity from disclosure even in light of the CPRA's broad goal of disclosure.

Given the explicit statutory language, ACLU argues the constitutional amendments of Proposition 59 – related to application of the CPRA – should impact the application of privileges found in the Evidence Code. (Real Parties in Interest, Opening Brief [OB], p. 14.) Yet it has no impact on the scope of attorney-client privilege. Proposition 59 only enshrined existing CPRA requirements and their application into the Constitution. (Cal. Const., art. I, § 3, subd. (b)(5) ["This subdivision does not repeal or nullify, expressly or by implication, any constitutional or

statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision..."].) It neither altered the courts' application of the CPRA (*Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370, 1382) nor in any way altered the attorney-client privilege. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166 [characterizing the provisions of Proposition 59 as "a rule of interpretation that is specific to" the PRA].) Bootstrapping arguments founded on Proposition 59 to attorney-client privilege would lead to results which voters never intended or even addressed. Such rationale would undercut the Evidence Code's explicit language which provides complete protection for communications between public entities and their attorneys.

## B. NARROWING THE ATTORNEY-CLIENT PRIVILEGE WILL NOT SERVE THE GOALS OF THE PRIVILEGE OR THE CPRA

ACLU's arguments wrap themselves in the cloak of the policies behind the CPRA and attorney-client privilege. The practical result of these arguments, however, is at odds with the policy goals of both. Requiring only public entities to disclose attorney invoices – and only in response to CPRA requests – would uniquely limit the attorney-client privilege of public entities. Creating ambiguity as to the scope of the privilege will place public entities at a strategic disadvantage and result in an increase in public entities' legal fees. Nothing in the CPRA or the Evidence Code suggests the Legislature or the voters intended such results.

### 1. Disclosure Of Confidential Invoices Will Place School Districts At A Strategic Disadvantage

The motivation behind protecting attorney-client communications is to protect the interests of the client that may be compromised if such communications were disclosed. (*Costco, supra,* 47 Cal.4th at p. 732.) The attempt to reach communications between public entities and their attorneys strikes at this purpose and would result in disclosure of information about the legal positions of school districts to legal opponents and adversaries. Even if the ACLU finds it difficult to understand how such information, even from redacted invoices, could provide an advantage, many opposing school districts would find it less challenging.

#### a. Disclosure, Even Of Redacted Invoices, Could Damage A Client's Legal Interests

Although the content of a communication is irrelevant to its protection as an attorney-client communication (*Costco, supra,* 47 Cal.4th at p. 739), the content of the invoices at issue is relevant to understanding why disclosure would be problematic. The invoices are more than a statement showing the amount owed. They contain information as to the what, where, when, how, and why of an attorney's work for a school district. For most school districts, the invoices contain several pages of information including the name of the "matter" (usually itself a description of the general topic of the work performed), the date of any work by an attorney, a narrative description of that work, the amount of time billed for

that work, the hourly rate billed by the attorney, the amount billed for each entry, and the total amount billed for the time period of the invoice.

It is not a stretch to understand how such information might be useful to a school district's legal opponent in both non-litigation and litigation settings. The ACLU labels this concern as "illusory" or "hypothetical." (OB, p. 4; RB, p. 21.) While the ACLU may not be concerned if its legal opposition was privy to this information, school districts have very real concerns about such disclosure. In fact, the ACLU's request in this case belies its position; it admits it sought the invoices to review the County's legal "tactics" and strategies. (OB, p. 8.) ACLU cannot state the invoices were requested for this purpose while at the same time arguing they do not contain such information.

If disclosed, this information would provide an unprecedented opening for opponents to view the previously confidential strategies and workings of legal representation. This is true even if invoices were redacted to protect "privileged information." Knowing when attorneys are working on a matter, what they are working on, how much time they are spending, and which attorneys are working on the matter – particularly in combination – could tell an opposing party a lot about the interworking of a school district's strategy. This Court's holding in *Costco* is premised, in part, on the fact that even the bare "fact of transmission … merits protection, since discovery of the transmission of the specific document

might very well reveal the transmitter's intended strategy." (*Costco, supra,* 47 Cal.4th at p. 734.) The importance of insight as to the work of attorneys should not be downplayed. This information, even if it appears pedestrian on its face, could have significant impacts on a school district if it was disclosed to those negotiating or litigating against the school district.

**b. The ACLU's Arguments Would Create A Double Standard, Providing Less Protection For A Public Entity's Communications With Its Counsel**

The impact of the outcome advocated by the ACLU would be felt more significantly by public entities than private parties for two reasons. First, it suggests a double-standard approach to the protection of attorney-client communications – one lesser standard for public entities in the CPRA context and another for private entities. Second, private entities are not subject to the CPRA, so even if all invoices were no longer confidential, the situations in which private entities would need to disclose the same information would be much more limited. As *Roberts* holds, there is no rationale for substandard treatment of public entities when it comes to attorney-client communications.

The ACLU admits its arguments would necessarily lead to two standards: one standard for private parties and another "more demanding standard" for communications between public entities and their attorneys. (RB, p. 2.) At the same time, the ACLU takes issue with the fact that, just the same as any private party, public entities are allowed to waive attorney-

client privilege and disclose communications where advantageous, while claiming privilege where necessary to protect their interests. (OB, pp. 7 & 13.) These arguments illustrate that the ACLU seeks to narrow the attorney-client privilege of public entities through the guise of the CPRA, creating a lower standard of protection for public entities. There is no justification or legal support offered for such a bifurcated standard.

Even with a blanket rule requiring disclosure of invoices beyond the CPRA context, the ability to request invoices at any time and for any reason under the CPRA only applies to public entities. In contrast, there are several prerequisites to requesting such information from a private party through discovery – the existence of pending litigation, that the request for the invoices be an appropriate discovery request, and the request would be limited as to litigation related matters. (Code Civ. Proc., § 2017.010; see also RB, p. 21 ["In most cases involving private parties, outside of the CPRA context, current invoices would be irrelevant and not discoverable"].) This may blunt the impact for private parties, but the impact on school districts would not be so limited.

Those seeking this information from school districts would not need to meet discovery-specific requirements. Instead, they could make a CPRA request to a school district for any invoice, at any time, for any reason. (*Los Angeles Unified School District, supra,* 228 Cal.App.4th at p. 242.) The disparity in the scope of disclosure between private and public entities

is clear. School districts would be under a constant requirement to disclose this sensitive information, while private entities would only need to disclose specific information in response to an appropriate discovery request. While it is not surprising that the CPRA would require public entities to disclose records more freely than private entities, what is problematic is that in the context of this case, such disclosure would be of records which are otherwise privileged by the Evidence Code for all parties.

Not only does the required disclosure place school districts in a weakened position, the very specter of that potential disclosure could also prove problematic for school districts pursuing their own claims for attorneys' fees. The ACLU argues that detailed attorney invoices are necessary for recovery of attorneys' fees. (RB, p. 31.) Assuming for the purpose of argument this is correct, it places school districts in a difficult position. If information must be included in invoices for a school district to recover fees from an opposing party, it creates the risk those details will be available to the same opponent during litigation; if, instead, the invoices contain minimal information in order to avoid disclosing strategy during litigation, it may be more difficult for the school district to recover its attorneys' fees from the opposing party.

This same concern would be raised where a school district is being reimbursed by insurance for legal costs. Reimbursement may be dependent on detailed invoices; however, if those invoices are subject to disclosure a

school district may have to decide between reimbursement and disclosing sensitive information. Both of these scenarios would place a school district and its counsel in an impossible situation – regardless of what option is chosen the school district's position is compromised.

Open government requirements should not be applied to place public entities at such a strategic disadvantage.

> These courts recognize that public entities need confidential legal advice to the same extent as do private clients: " 'Government should have no advantage in legal strife; neither should it be a second-class citizen. ...' Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. ...."

(*Roberts*, *supra,* 5 Cal.4th at p. 374, quoting *Sutter Sensible Planning v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 824-825.) Concluding that invoices transmitted between attorneys and their public entity clients are no longer privileged, however, would create such a handicap.

If the Legislature sought to place school districts at a strategic disadvantage through the CPRA, it would be explicit in the CPRA's exemptions. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 219 [if the Legislature had intended a particular effect, it would have clearly said so].) Instead, the Legislature grafted the identical privileges already applied to private parties by the Evidence Code

into the CPRA. Interpreting these provisions to place public entities at a strategic disadvantage runs counter to *Roberts* and the Legislature's intent.

### 2. Limiting The Privilege Will Result In Less Information Flowing To Governing Boards And Increase School District Legal Costs

Ordering disclosure of invoices, even if redacted, transmitted between an attorney and their client will narrow and undercut the fundamental purpose of the privilege. Two results are likely from a such a rule: (1) attorney invoices provided to public entities will contain less or no detailed information; and, (2) legal costs will increase as attorneys will need to find other protected avenues to provide this information to clients. Neither of these outcomes serve the goals of the CPRA, attorney-client privilege, or benefit the public. Instead they result in less information and less local control over a public entities' expenditures for legal services.

#### a. Requiring Disclosure Will Incentivize Including Minimal Information In Invoices

The most obvious impact of a ruling reversing the Court of Appeal would be an immediate change in the way outside counsel invoice public entity clients. It is entirely reasonable that attorneys would cease including any sensitive information, or even information that might hint at strategy or the school district's approach to a legal issue, in invoices provided to school districts if they knew that such communications would now be

subject to public disclosure under the CPRA. This would not assist a school district in monitoring its expenditure of public funds.

Without confidence in the confidentiality of communications, attorneys and clients are unlikely to be able to have a completely unfettered exchange of information. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1207-08 ["As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."]; *Chubb & Son v. Superior Court* (2015) 228 Cal.App.4th 1094, 1115 ["clients are more likely to speak candidly with their attorneys when they understand that their confidences will remain confidential."].) For this reason, attorneys are unlikely to provide any useful information in invoices if there is the possibility they may be disclosed.

Allowing redaction of invoices will not resolve this concern. What the ACLU views as pedestrian information that may remain on a redacted invoice, could still be problematic for a school district's legal interests if released. Information on who, when, and how much time is spent would allow opponents to triangulate a school district's position or strategy. Further, any requirement to disclose redacted invoices will necessarily raise questions as to the scope of redaction. If school districts and their counsel are unsure as to what portions may be redacted or disclosed, the same

concern that would motivate providing minimal information in an invoice will continue to exist regardless of the ability to redact some information.

Elected governing board members are known as "trustees" for a reason. They are entrusted with using public resources to provide education to students in the most efficient manner. It would be difficult, if not impossible, for them to meet this standard without sufficient information about the use of school district resources. ACLU's position, however, would put school district governing boards in a untenable position – they could continue to receive detailed attorney invoices to inform their understanding of their spending, knowing that such information could be disclosed to the public and potentially harm the school district's interests or they could decide to receive less information to protect the school district's interests but in so doing, have less information about how public funds are being spent. Neither option would be particularly appealing to school board members nor should they be forced into this dilemma.

**b. Replacing The Transmission Of Information Otherwise Provided Through Invoices Will Increase Costs**

To fill the information gap created by less information being provided through invoices, attorneys working with school districts will be forced to provide additional legal memorandum and/or speak with governing boards during closed sessions in order to provide information.

This will not only increase the legal costs for the school districts, but it illustrates an additional flaw in the ACLU's argument.

The disclosure of a communication between an attorney and a school district should not depend on the characterization of the communication. The protection should not turn on formatting. (See *In re Jordan* (1974) 12 Cal.3d 575, 580 [law review articles or newspaper clippings sent from attorney to client were within definition of "information" under 952 and therefore "information of the type protected by the privilege"]; see also *Mitchell, supra,* 37 Cal.3d at p. 601.) The ACLU's argument, however, would create such a test. That approach would not only deviate from the Evidence Code, but ultimately cost school districts – and the public – more in legal costs as attorneys spend more time formalizing into other communications information which would otherwise be provided to school districts without additional cost through invoices.

### 3. The Absence Of A Bright Line Standard Will Itself Narrow The Privilege

Lack of clarity as to the scope of a privilege, without more, narrows the privilege. If invoices, or even "redacted" invoices, are subject to disclosure it will add two layers of ambiguity, the existence of which themselves will serve to limit the privilege. Ambiguity does not beget confidence and without confidence clients would be rightfully hesitant about communicating sensitive information to their counsel.

Accepting ACLU's arguments would mean overturning several decades of precedent, most recently this Court's holding in *Costco* that the content or label of a communication is irrelevant to the application of privilege. This will create ambiguity that will not only lead to school districts being less willing to communicate with counsel, but it could have financial consequences as well. If communications between school districts and their counsel are not protected by attorney-client privilege, they may become subject to disclosure under the CPRA. Without a bright line rule, like *Costco*, disputes over what records are subject to CPRA requests will increase. That will increase spending on litigation – the very evil the ACLU seeks to combat – and will open school districts to liability for the attorneys' fees of requesters who are successful in persuading a court that a specific communication with the school district's attorney was not privileged. (Govt. Code, § 6259, subd. (d) ["The court shall award costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to [the CPRA]".)

Unlike the rule set forth in *Costco*, in this matter even the ACLU is unable to enunciate a clear standard for what information would be privileged, stating that "reference to attorney opinions, advice and similar information" could be redacted from invoices. (OB, p. 1.) How would the ACLU define "similar information?" Would courts define it the same way?

This raises a further concern, how would the question of appropriate redactions be addressed in light of Evidence Code, section 915 and this Court's holding in *Costco*: "a court may not order disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege." (47 Cal.4th at p. 740.) *Costco* specifically rejected the trial court's approach of reviewing a privileged communication in camera to determine which portions should be redacted as privileged. (*Id.* at p. 736.) This creates a question as to how a court would review such a redaction, a question that the ACLU does not answer. While this concern may seem academic, it would be very practical to a school district responding to a CPRA request and attempting to avoid litigation and the penalty of attorneys' fees if it redacts the wrong word. This Court should not open the door to these type of word-by-word disputes that it closed in *Costco.*

Creating a new, lower standard of attorney-client protection for public entities responding to CPRA requests will result in less information being provided to governing boards and an increase in litigation (and the attendant attorneys' fees) over disclosure of previously confidential communications between school districts and their counsel. These results do not further the goals of the CPRA or the attorney-client privilege.

## C. THE INTENT OF THE CPRA DOES NOT REQUIRE DISCLOSURE OF CONFIDENTIAL INVOICES

Lastly, ACLU raises the often-used argument that disclosure is necessary to meet the goals of the CPRA. (OB, p. 47.) It asserts that absent disclosure the public will be without information on how public entities spend public funds and this alone justifies narrowing the attorney-client privilege. Not so. Information about the ways in which school districts and other public entities spend their funds – including on legal services – has been, and will continue to be available to the public. Moreover, this and other California courts have consistently explained that such arguments are best addressed to the Legislature.

To the extent the ACLU argues protection of confidential attorney invoices will prevent access to information about how public entities spend on legal services, it misses an important point – this information is otherwise available. (OB, p. 6.) It admits that to the extent the narratives contained in invoices include "privileged information" they may be redacted before disclosure. (RB, p. 1.) What would remain after such redaction would likely be limited to the amount spent on legal services, when those fees were incurred, and potentially which attorneys or law firms were involved. Much of this same information, however, would be available through other records subject to disclosure under the CPRA. Budgets, ledgers, warrants, checks, and other internally created records that

a school district or other public entity may use to document payment for attorney services are likely public records subject to disclosure. The fact they may contain some of the same information that is contained in the invoices would not make those records privileged. (*Costco, supra,* 47 Cal.4th at p. 735.) But that same fact would mean that they would provide the public with the very type of information the ACLU seeks. They would show which attorneys/firms worked with the school district, how much the school district is paying those attorneys, when it is making those payments, and may also show the matters for which the payments were made. Additionally, any filings by a public entity would be public records which the ACLU could retrieve from the courthouse, or in most cases, a court's website. Thus, the need to narrow the attorney-client privilege is not as pressing as the ACLU suggest.

Finally, even assuming such invoices were the only means to obtain the information sought, those policy concerns in and of themselves would not justify limitation of privilege. *Roberts* acknowledged that: "Open government is a constructive value in our democratic society." (5 Cal.4th at p. 380.) But, at the same time also recognized that: "The attorney-client privilege, however, also has a strong basis in public policy and the administration of justice. The attorney-client privilege has a venerable pedigree that can be traced back 400 years." (*Id.*) *Roberts* noted it was left to the Legislature to determine how to reconcile these policies:

> The balance between the competing interests in open government and effective administration of justice has been struck for local governing bodies in the Public Records Act and the Brown Act. We see no reason to disturb the equilibrium achieved by that legislation.

(*Id.* at p. 381.)

This approach is specifically warranted when examining the extent of the attorney-client privilege. "Courts are required to go cautiously when interpreting statues that might either expand or limit privileges, for we are forbidden to create privileges or establish exceptions to privileges through case-by-case decisionmaking." (*Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 912.) Even where the Legislature's decision may result in "suppression" of information, this Court has acknowledged that such a decision is the Legislature's to make. (*Costco, supra,* 47 Cal.4th at p. 739.)

Just as in *Roberts,* the Court of Appeal in this case took heed of the Legislature's intent expressed through the language of the CPRA and the Evidence Code. The statutes reflect the Legislature's determination of the balancing of these important policy goals. To the extent the ACLU disagrees with this balance, its arguments are best addressed to the Legislature.

## IV. CONCLUSION

The attorney-client privilege and the CPRA are both premised on important policy goals. Given the privilege's focus on confidentiality and the CPRA's focus on openness, it is not surprising that there are situations in which they may conflict. Anticipating this, the Legislature crafted the CPRA to explicitly exclude all privileged communications. Narrowing this provision, by requiring disclosure of attorney invoices would upset the balance struck by the Legislature and substantially impinge the ability of school districts to obtain unfiltered legal counsel. Based on the foregoing, Amicus Curiae urges the Court to affirm the holding of the Court of Appeal in its entirety.

DATED: February 16, 2016

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## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c) of the California Rules of Court, this Amicus Curiae Brief Of The Education Legal Alliance Of The California School Boards Association In Support Of Petitioners was produced using 13-point Roman type including footnotes and contains approximately 5914 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: February 16, 2016

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## PROOF OF SERVICE

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

I am employed in the 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: 275 Battery Street, Suite 1150, San Francisco, CA 94111.

On the date set forth below I served the foregoing document described as **APPLICATION OF AMICUS CURIAE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS COUNTY OF LOS ANGELES BOARD OF SUPERVISORS AND PROPOSED AMICUS CURIAE BRIEF** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

**SEE ATTACHED SERVICE LIST**

☒ **(VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at Long Beach, California with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of 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.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

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I declare under penalty of perjury under the laws of the State of California that the foregoing February 16, 2016 at San Francisco, California.

Nancy Taylor

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