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January 13, 2021

Via electronic filing by
Katie Townsend (SBN 254321)
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Chief Justice Tani Gorre Cantil-Sakauye
and Associate Justices
Supreme Court of California
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Re: Motion to Seal the Record in Application of Burton (Susan) for Clemency *(S255392) / Confidentiality of Clemency Records*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

The Reporters Committee for Freedom of the Press writes in response to the Court's invitation for comment from interested parties on its proposed administrative order that would modify the Court's treatment of records submitted by the Governor in support of applications for clemency for individuals twice convicted of felonies under article V, section 8, subdivision (a) of the California Constitution. As an organization dedicated to defending the First Amendment and newsgathering rights of journalists, the Reporters Committee has a strong interest in ensuring that court records are presumptively accessible to members of the press and the public.

The Court's reexamination of the policy treating clemency files submitted by the Governor as confidential and sealed by default is welcome and necessary. However,

the Reporters Committee joins the First Amendment Coalition in submitting that the Court should treat these documents as it treats other records filed with courts under California Rules of Court 8.45, 8.46, 8.47, and 2.550(d)–(e). Documents filed in support of clemency applications should be presumptively open to public inspection absent a "motion or application . . . accompanied by a declaration" filed by the Governor's Office containing facts sufficient to establish that:

> (1) There exists an overriding interest that overcomes the right of public access to the record;
> (2) The overriding interest supports sealing the record;
> (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
> (4) The proposed sealing is narrowly tailored; and
> (5) No less restrictive means exist to achieve the overriding interest.

(Cal. Rules of Court, rule 2.550(d).)

While the Court's proposed amendment to Internal Operating Practices and Procedures, XIV.A is an improvement over current policy, it nevertheless places the burden on the public to assert its right of access on a case-by-case basis, rather than appropriately placing the burden on the Governor's Office to demonstrate that the public's right of access has been overcome in a given case. An amendment to the Court's Internal Operating Practices and Procedures that instead recognizes that the California Rules of Court control this inquiry would properly place this burden on the party advocating for sealing, and make clear the public's presumptive right to inspect clemency files under the common law, First Amendment, and California

Constitution. In addition, as stated below, presumptive public access to such materials will facilitate important reporting in the public interest about the exercise of executive pardon power.

I. The access provisions in the California Rules of Court comport with the public's common law and constitutional rights of access to court records.

The Court's proposed administrative order acknowledges that applications for executive clemency, including supporting documentation, are "records" that have been "lodged" with the Court within the meaning of California Rules of Court 8.45(b)(1) and (2). And, in contrast to the current, published Internal Operating Practices and Procedure, XIV.A, the Court's proposed administrative order would not designate clemency files as "confidential." (See Cal. Rules of Court, rule 8.45(b)(5).)[1]

While an improvement over current policy, the Court's proposed administrative order departs from the California Rules of Court in an important way. Under the Court's proposal, "[w]hen a clemency record is before the court, a person seeking access to its contents must file a motion to unseal the record. The extent to which the contents of the record will be made available to the public is evaluated on a case-by-case basis." In essence, clemency files would be automatically sealed, by default, and remain so until a member of the press or public affirmatively moves for access. The California Rules of Court, on the other

[1] While the proposed administrative order notes that such applications "often contain sensitive material," there is no indication in the source of the Governor's clemency power, (Cal. Const., art. V, § 8, subd. (a)), that the materials in the Governor's application to this Court for a recommendation of clemency should be sealed or treated as confidential.

hand, provide in relevant part that "[t]o obtain an order [sealing a record not previously sealed by a trial court], a party must serve and file a motion or application in the reviewing court, accompanied by a declaration containing facts sufficient to justify the sealing." (Cal. Rules of Court, rule 8.46(d)(2).) This framework comports with the constitutional and common law presumptions in favor of public access; it places the burden on the party seeking confidentiality to demonstrate to the Court that the presumption is overcome in a particular case.

The relevant California Rules of Court are derived from and align with this Court's decision in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 [86 Cal.Rptr.2d 778, 980 P.2d 337] (*NBC Subsidiary*). (Advisory Com. com., Cal. Rules of Court, rule 8.46 [stating that California Rules of Court, rules 8.46 and 2.550–2.551 are based on *NBC Subsidiary* and "recognize the First Amendment right of access to documents used at trial or as a basis of adjudication"].) In *NBC Subsidiary*, this Court interpreted an open courts statute (California Code of Civil Procedure section 124) in the context of a trial that was preemptively closed to the public by the trial court due to concerns about press coverage of the proceeding. The Court held that courts must provide public notice of a contemplated closure of proceedings or sealing of court records; additionally, "*before* substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find" the factors quoted above, and now set

forth in California Rule of Court 2.550(d). (*NBC Subsidiary*, *supra*, 20 Cal.4th at pp. 1217–18, original italics.)

In so holding, the Court looked to the line of Supreme Court of the United States cases recognizing our "'unbroken, uncontradicted history' that a 'presumption of openness inheres in the very nature of a criminal trial under our system of justice,'" and concluding that "'absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.'" (*Id.* at p. 1200 [quoting *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 555, 573 [100 S.Ct. 2814, 65 L.Ed.2d 973]].) And *NBC Subsidiary* affirmed this Court's adoption of the First Amendment principle that courts cannot order proceedings closed at their "unfettered discretion." (See *id.* at p. 1202 [citing *Richmond Newspapers*, *supra*, 448 U.S. at p. 598].) As the Court's decision in *NBC Subsidiary* and the California Rules of Court make clear, these principles apply equally to the public's right of access to court records. (See *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 309 [165 Cal.Rptr.3d 250, 314 P.3d 488] ["access to court records is governed by long-standing common law principles as well as constitutional principles derived from the First Amendment right of public access to trials" (citing *NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1208, fn. 25; *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106 [7 Cal.Rptr.2d 841])].) The Court should not promulgate an Internal Operating Practice and Procedure inconsistent with these well-settled principles by permitting automatic, default sealing of an entire category of court records and eschewing the

case-by-case findings required by *NBC Subsidiary* and California Rule of Court 2.550(d). That clemency files may contain "sensitive material" does not justify an automatic, default sealing rule.

II. Application of the constitutional and common law presumptions of public access to clemency files will facilitate essential reporting on the exercise of executive pardon power.

Just as California Constitution, article V, section 8, subdivision (a) provides a check on the Governor's clemency power by requiring the Governor to seek the recommendation of this Court before pardoning some individuals, the transparency provided by consistent public access to clemency files will enable the press to serve its function as a watchdog guarding against the risk of executive overreach.

The news media played an essential role in uncovering perhaps the best-known overt abuse of state executive pardon power. In 1977, journalist Lee Smith broke the news that Roger Humphreys, a convicted double-murderer sentenced to 20 to 40 years in 1975, had been granted work-release status by Tennessee Governor Ray Blanton and hired as an official state photographer. (Hunt, Coup: The Day the Democrats Ousted Their Governor, Put Republican Lamar Alexander in Office Early, and Stopped a Pardon Scandal (2013) pp. 48–49.) Humphreys' father was the chairman of a county patronage committee that worked on behalf of the Blanton campaign. (*Id.* at 49.) Blanton then conducted an interview on a local television station, during which he defended his treatment of Humphreys, suggested the station's FCC license should not be renewed, and

stated: "I have not sold a single pardon or parole. . . . Neither has any of my people." (*Id.* at 52.) The story became national news; three years later, the FBI arrested three of Blanton's aids (eventually convicting two) on charges of accepting payoffs for arranging the pardon and release of certain prisoners. (*Id.* at 69.)

More recently, increased transparency surrounding use of executive clemency authority has led to other important public interest reporting. For example, access to data about individuals who were granted and denied federal pardons (obtained via the federal Freedom of Information Act) enabled ProPublica and *The Washington Post* to determine that "[w]hite criminals seeking presidential pardons over the past decade have been nearly four times as likely to succeed as minorities." (Linzer & LaFleur, *Presidential Pardons Heavily Favor Whites* (Dec. 3, 2011) ProPublica <https://perma.cc/5M5Y-GVUU> [as of Jan. 7, 2021]; LaFleur, *How ProPublica Analyzed Pardon Data* (Dec. 3, 2011) ProPublica <https://perma.cc/L638-VEDP> [as of Jan. 7, 2021].) Moreover, the ProPublica-*Washington Post* investigation found that federal pardon applicants frequently found favor after donating to elected officials, who then lobbied the executive branch on their behalf. (Linzer, *Pardon Applicants Benefit From Friends in High Places* (Dec. 4, 2011) ProPublica <https://perma.cc/C96A-HJUM> [as of Jan. 7, 2021] ["Since 2000, a total of 196 members of Congress . . . have written to the pardons office on behalf of more than 200 donors and constituents, according to copies of their letters obtained through the Freedom of Information Act. Many of the letters urged the

White House and the Justice Department to take special note of felons whom lawmakers described as close friends"].) This reporting provides a vivid example of the kinds of insight the public can gain when the press is able to access records related to the exercise of executive pardon power.

* * *

For these reasons, the Reporters Committee respectfully urges the Court to revise its proposed administrative order to treat the sealing of clemency files as it does the sealing of other court records, in accordance with the California Rules of Court. Doing so would properly place the burden to demonstrate that sealing is necessary in a given matter on the Governor's Office, vindicate the public's presumptive rights of access under common law, the First Amendment, and the California Constitution, and facilitate the news media's ability to gather and report news regarding the exercise of clemency power.

Thank you for your consideration of this response.

Respectfully submitted,

REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

/s/ Katie Townsend
Katie Townsend,
Legal Director

cc: Office of the Governor (*via U.S. Mail*)
First Amendment Coalition (*via electronic filing*)

PROOF OF SERVICE

I, Demetrios Papageorgiou, affirm that I am over the age of 18 years, employed in the City of Washington, D.C., and not a party to the above-captioned action. I am an employee of the Reporters Committee for the Press, and my business address is 1156 15th Street NW, Suite 1020, Washington, D.C. 20005. On January 13, 2021, I served the following document: **Response of the Reporters Committee for Freedom of the Press to the Court's Proposed Administrative Order Regarding Confidentiality of Clemency Records** as follows.

[x] **By TrueFiling electronic delivery:** All counsel of record in *Application of Burton (Susan) for Clemency (S255392).*

[x] By mail: I enclosed a copy of the copy of the document identified above in an envelope and deposited the sealed envelope with the U.S. Postal Service, with the postage fully prepaid. The envelope was addressed as follows:

Eliza Hersh, Deputy Legal Affairs Secretary
Office of Governor Gavin Newsom
State Capitol
1303 10th Street, Suite 1173
Sacramento, CA 95814

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

Executed on January 13, 2021, in Washington, D.C.

/s/ Demetrios Papageorgiou
Demetrios Papageorgiou
dpapageorgiou@rcfp.org