S194951

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RICHARD SANDER, JOE HICKS,
CALIFORNIA FIRST AMENDMENT COALITION,

Plaintiffs and Appellants,

v.

THE STATE BAR OF CALIFORNIA and the BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,

Defendants and Respondents.

After a Published Decision by the Court of Appeal First Appellate District, Division Three Case No. A128647, Reversing a Judgment Entered by the Superior Court for the County of San Francisco, Case No. CPF-08-508880, The Honorable Curtis E.A. Karnow presiding

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF OF FOR PEOPLE OF COLOR, INC. IN SUPPORT OF RESPONDENTS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.520(f)(4), amicus and its counsel certify that, apart from amicus and counsel representing amicus in this action, as disclosed on the cover of the brief, they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that amicus or its counsel reasonably believe the justices of this Court should consider in determining whether to disqualify themselves.

DATED: February 17, 2012

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rule of Court 8.520(f), For People of Color, Inc. respectfully requests permission to file the accompanying *amicus curiae* brief in support of Respondents the State Bar of California and the Board of Governors of the State Bar of California.[1] This application is timely made within 30 days after the filing of the last reply brief by the parties.

THE *AMICUS CURIAE*

Founded in 2000, For People of Color, Inc. is a leading non-profit organization working to diversify the legal profession by providing free, high-quality law school admissions consulting services to thousands of prospective law school applicants from disadvantaged communities. For People of Color, Inc. also assists individuals taking the California bar examination and law school students and attorneys who wish to secure judicial clerkships.

INTEREST OF *AMICUS CURIAE*

For People of Color, Inc. has an interest in ensuring that the Court considers the privacy concerns of its membership, which is comprised of aspiring law students, enrolled law students, and attorneys of all racial and ethnic backgrounds. We seek the Court's permission to file the accompanying *amicus curiae* brief to ensure that the interests of the

[1] This brief only addresses the second question presented by the Court regarding the effect of the representations of confidentiality made by the State Bar of California to the individuals from whom the information was collected. For People of Color, Inc. supports the State Bar's position that its records are not subject to public disclosure.

individuals whose private information is at issue in this case is adequately considered. The proposed *amicus curiae* brief will elucidate the significant privacy concerns raised by the release of California bar exam applicants' private information. For People of Color, Inc. contends that legitimate privacy concerns, supported by the representations made by the State Bar of California pertaining to the protection of private data, are of paramount importance and trump any public right of access to such information.

Because this Court's decision will have a significant impact on the privacy rights of For People of Color, Inc.'s members, it respectfully requests that its request for leave to file the attached *amicus curiae* brief be granted.

DATED: February 17, 2012

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I. INTRODUCTION

The purpose of this *amicus curiae* brief is to address the second issue posed by the Court: "[W]hat is the effect, if any, of the representation of confidentiality made by the State Bar to the individuals from whom the information was collected?"

Applicants for admission to practice law in California ("applicants") entrust the State Bar of California (the "State Bar") – an entity directly governed by this Court – with a wide-range of personal information under promises that such information will remain confidential. Now, Plaintiffs Richard Sander, Joe Hicks, and the California First Amendment Coalition (collectively, "Plaintiffs") request that the State Bar renege on its promises by disclosing thirty years worth of applicants' private information in the name of the public's right to access documents relating to government function. However any public right of access is not absolute and must be balanced against countervailing interests such as privacy.

The State Bar's promises of confidentiality reconfirm the constitutional right of applicants to control the dissemination of their personal information. Applicants have a reasonable expectation of privacy in the information at issue based on the State Bar's promises of confidentiality, which must be honored to preserve the integrity of the State Bar and the judiciary overall. Applicants' reasonable expectation of privacy is also supported by the State Bar's longstanding pattern of nondisclosure of applicants' records. The State Bar has never released applicants' private information to members of the public and there is no reason why it should be compelled to start now.

Furthermore, a legally protected privacy interest is established through various State and Federal statutes that safeguard the information at issue. For example, the Family Education Rights and Privacy Act ("FERPA") strictly regulates the dissemination of educational records by educational institutions, requiring student consent whenever individually identifiable records are disclosed. Although FERPA does not directly apply to the State Bar, it does apply to the type of records at issue and offers additional support for the reasonable expectation of privacy.

Moreover, any public interest in accessing the information at issue is outweighed by the seriousness of the privacy invasion. There is no public interest in accessing private applicants' information because it reveals nothing about the workings of the State Bar; it merely reveals information about individual applicants. Any public interest in understanding the characteristics of the individuals applying for and ultimately earning admission to practice law in this State is sufficiently served by the general statistics released by the State Bar and other publicly available information. Finally, the possibility that any information released by the State Bar could be re-identified, or cross-referenced with other publicly available data to reveal individual identities, weighs strongly against disclosure.

Due to applicants' constitutional right to control the dissemination of their personal information, which was disclosed to the State Bar under representations of confidentiality, any interest in public access is outweighed. The constitutional right to privacy controls.

II. STATEMENT OF FACTS

A. The State Bar Promises to Keep Confidential Applicants' Personal, Demographic, and Educational Data.

The State Bar administers the attorney licensing process within the state. *See* Cal. Bus. & Prof. Code § 6046. An applicant seeking a license to practice law in California must submit the following three completed applications: (1) the Application to Register with the State Bar ("Bar Registration Form"); (2) the Application for Determination of Moral Character ("Moral Character Application"); and (3) the Application to take the California Bar Examination ("Bar Exam Application"). *See* Rules of

State Bar, rule 4.16(A); *see also* Cal. Bus. & Prof Code § 6060. Through the course of completing these applications, applicants are compelled to disclose a wide-range of personal information to the State Bar, including personally identifiable information, demographic information, and educational records. Given the breadth of the personal information collected by the State Bar, it expressly promises applicants that it will keep this data confidential.

The applications are replete with promises of confidentiality. The Moral Character Application states: "I understand that the contents of my moral character investigation are confidential and I will not receive and am not entitled to have disclosed to me the information received or obtained during such investigation."[2] (AA, Exh. 103 at 1259) The Bar Exam Application is titled, "Confidential Application and Questionnaire" and requires applicants to sign a declaration authorizing "educational or other institutions or agencies to release to the [State Bar] any information, files, transcripts, or records requested <u>in connection</u> with the processing of this application." (AA, Exh, 46 at 401-404) (emphasis added.) The demographic survey contained in both the State Bar Application and the Bar Registration Form, where applicants are asked to reveal their gender and race, states that "information will be treated in a confidential manner and will be used only for research purposes." (AA, Exh. 45 at 397, Exh. 46 at 405 and Exh. 102 at 1257.)

The information requested by the State Bar *is not optional*. The Rules Regulating Admission to Practice Law in California ("State Bar Rules") grant the State Bar the "right to reject… an (application) that is… not completed and submitted according to instructions." Rules of State

2 California Business and Professions Code section 6060.2 also requires that the State Bar "keep confidential all investigations or proceedings concerning the moral character of an applicant."

Bar, rule 1.4. For example, the demographic survey states that, "[t]he following information is to be furnished by each applicant as part of the application process." Such mandatory language suggests that applicants seeking admission must furnish their demographic data or risk having their application rejected under Rules of State Bar, rule 1.4.

B. The State Bar Has Historically Kept Its Promises of Confidentiality.

In accordance with the promises of confidentiality made to applicants, the State Bar has a rule that "[a]pplicant records are confidential," with limited enumerated exceptions. Rules of State Bar, rule 4.4. The disclosure of records pursuant to a public request is not among the enumerated exceptions. *See* Rules of State Bar, rule 4.4 and 4.62 (A-B). The State Bar does not even release to applicants their own bar exam score unless they failed the exam. *See* Rules of State Bar, rule 4.62(B). It does not release results on the multiple choice component of the bar exam under any circumstances. *See* Rules of State Bar, rule 4.62 (A). The State Bar has never released to any third party member of the public the individual score, academic history and ethnicity data of applicants. (AA, Exh, 102 at 1257). Instead, the State Bar publishes a list of the people who passed the exam and a twenty page statistical report detailing passage rates by school, race, and gender, as well as statistics on first-time and repeat takers of the bar exam. (AA, Exh. 44 at 382; AA, Exh. 44 at 388; Exh. 56 at 573-592.)

C. Plaintiffs' Request for Applicants' Private Data.

Notwithstanding the State Bar's unequivocal promises of confidentiality and long-standing adherence to its promises, Plaintiffs seek the following information for *all applicants* during the period of 1972 to 2007: (1) race, (2) law school, (3) whether the applicant is a transfer student, (4) year of law school graduation, (5) total raw score on first bar exam, (6) total scaled score in first bar exam, (7) raw MBE score on exam, (8) scaled MBE score on exam, (9) raw essay score on exam, (10) scaled essay score on exam, (11) raw performance test score on exam, (12) scaled performance test score on exam, (13) bar passage, (14) law school GPA, (15) LSAT score, and (16) undergraduate GPA. (AA, Exh. 53, at 534.) As discussed below, applicants' inalienable constitutional right to privacy, reconfirmed by the State Bar's promises of confidentiality, dictate that Plaintiffs' request must be denied.

III. ARGUMENT

The public's right to access government files is not absolute, and must be balanced against individual privacy rights. *See International Federation of Professional and Technical Engineers v. Superior Court* (2007) 42 Cal.4th 319, 329 [64 Cal.Rptr.3d 693] (*International Federation*) (balancing the disclosure under the California Public Records Act against individual privacy interests); *Pantos v. San Francisco* (1984) 151 Cal.App.3d 258, 264-65 [198 Cal.Rptr. 489] (balancing the public's interest in withholding jurors' responses to questionnaires against the public's interest in disclosure).

Section 1 of article I of the California Constitution provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, <u>and privacy</u>." Cal. Const. art. I, § 1 (emphases added). The right to privacy was enshrined in the California Constitution by amendment in 1972, to establish the right to privacy as an inalienable right that cannot be violated by anyone. *Porten v. University of San Francisco* (1976) 64 Cal. App. 3d 825, 829 [134 Cal. Rptr. 839].

A constitutionally protected right to privacy is established where: (1) there is a specific, legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) the potential for a serious invasion of the privacy interest. *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35 [26 Cal.Rptr.2d 834]. "Informational Privacy" protects individuals' "interests in precluding the dissemination or misuse of sensitive and confidential information." *Hill, supra*, 7 Cal.4th at 35 [26 Cal.Rptr.2d 834]. Here, applicants' constitutional right to privacy requires that their personal, demographic, and educational records not be disclosed.

A. Applicants Have a Reasonable Expectation of Privacy in the Information Requested Based on the State Bar's Promises of Confidentiality and Historical Nondisclosure.

"A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." *Hill, supra*, 7 Cal. 4th at 37 (citations omitted.) "The extent of [a privacy] interest is not independent of the circumstances" and takes into account the "customs, practices, and physical settings surrounding particular activities." *Id.* at 36-37 (citing *Plante v. Gonzalez* (5th Cir. 1978) 575 F.2d 1119, 1135, *cert. den.* (1979) 439 U.S. 1129 [59 L.Ed.2d 90, 99 S.Ct. 1047].) A reasonable expectation of privacy exists where applicants are required to disclose their personal information, confidentiality was guaranteed by an arm of the judiciary, and a long-standing practice of nondisclosure exists.

1. The Mandatory Nature of the State Bar's Request for Applicants' Information Paired with Promises of Confidentiality Supports a Reasonable Expectation of Privacy.

The State Bar requires applicants to provide their private information in exchange for promises of confidentiality. "The presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant." *Hill, supra*, 7 Cal. 4th at 36-37. In *Pantos, supra,* 151 Cal.App.3d at 264, the court denied the public access to jurors' answers to questionnaires, in part, because the prospective jurors were "compelled by law to supply answers" and the questionnaires at issue contained an express promise of confidentiality: "'*[t]his questionnaire is confidential. It is for the exclusive use of the Superior Court of San Francisco*' and 'these questions are for court use only and *will not be made public*.'" (emphasis in original.) The court recognized the importance of jurors' reliance on the court's representations of confidentiality in supplying answers to the questionnaires, reasoning that "it cannot be said that this information would normally be volunteered . . . without the promise of confidentiality duly honored by the court." *Id; see also Perry v. Brown* (9th Cir. Feb. 2, 2012, No. 11-17255) __ F.3d __ [2012 WL 308539 at *7] (finding it reasonable for a party to rely on a judicial commitment to not publicly broadcast a video recording of a trial).[3]

Similarly here, applicants seeking to obtain a license to practice law in California <u>must</u> provide the State Bar with personal information that is promised to be kept confidential. This information includes, but is not limited to, personal identification information, demographic information, and educational records. The State Bar has the "right to reject . . . an [application] that is . . . not completed and submitted according to instructions." Rules of State Bar, rule 1.4. Applicants have no need to challenge this required disclosure because they reasonably expect that the promises of confidentiality furnished by the State Bar will be met. As in *Pantos*, the contention that applicants would willingly disclose their personal information to the State Bar without assurances of confidentiality, is at best, speculative.

[3] For People of Color, Inc.("FPOC") completely supports the Ninth Circuit's holding in *Perry v. Brown* (9th Cir. Feb. 2, 2012) __ F.3d __, 2012 WL 372713 affirming the rights of same-sex couples to marry. FPOC merely cites this companion case for its analysis on the importance of a court's promise of confidentiality.

2. **The Interest in Preserving Judicial Integrity Supports Applicants' Reasonable Expectation of Privacy.**

Applicants expect the State Bar to fully adhere to its promises, therefore its promises of confidentiality creates a reasonable expectation of privacy. *See Hill, supra*, 7 Cal. 4th at 37 (recognizing that privacy rights are based on community norms). "The interest in preserving the sanctity of the judicial process is a compelling reason to override the presumption in favor of [public access to judicial records]." *Perry*, *supra*, 2012 WL 308539 at *2. In *Perry*, the court considered whether a judge improperly authorized the unsealing of a video recording of a trial after another judge had explicitly promised the parties that the recording would not be publicly broadcast. *Id.* at *1. In concluding that the record was improperly unsealed, the Ninth Circuit relied on the importance of adhering to "solemn commitments" made by the judiciary. *Id.* at *2. As the court stated, "[t]he integrity of our judicial system depends in no small part on the ability of litigants and members of the public to rely on a judge's word." *Perry*, *supra*, 2012 WL 308539 at *2. Any contrary result would be both "implausible" and "illogical." *Id.* at *5.

The integrity in the State Bar's admission process outweighs any public right of access in applicants' records. The State Bar promised to keep applicants' records confidential and applicants reasonably relied on those promises in releasing their information to the State Bar. As the administrative arm of this highest Court and the gatekeeper of the legal profession, applicants have a well-founded expectation that the promises of confidentiality will be honored. The State Bar cannot compromise the integrity of the attorney admissions process by reneging on these critical promises of confidentiality. To do so would foster a severe distrust by applicants, members of the bar, and the public at large in both the State Bar and the judicial system. Such a price is far too great to compel public disclosure of applicants' private information.

3. Applicants' Reasonable Expectation of Privacy is Further Supported by the State Bar's Historical Nondisclosure of Applicants' Personal Information.

The State Bar's rules expressly provide that, with limited enumerated exceptions, "[a]pplicant records are confidential." Rules of State Bar, rule 4.4. The disclosure of records pursuant to a public request is not among the enumerated exceptions. *See* Rules of State Bar, rule 4.4 and 4.62 (A-B). The State Bar has never released to any third party member of the public the individual applicants' scores, academic history and ethnicity data. (AA, Exh. 102 at 1257). The State Bar's policy is to not even release to an applicant her own bar exam score, unless the applicant failed the exam. *See* Rules of State Bar, rule 4.62(B). If applicants are successful on the exam, they are not entitled to their own exam scores. *Id.* Further, the State Bar does not release results on the multiple choice component of the bar exam under any circumstances. *See* Rules of State Bar, rule 4.62 (A). Based on the State Bar's historical nondisclosure of the very information sought by Plaintiffs, it is reasonable for applicants to expect the State Bar to fully adhere to its promises of confidentiality.

The State Bar's promise regarding its limited use of applicants' private information further supports a reasonable expectation of privacy. For example, applicants authorize academic institutions to release their educational data to the State Bar solely for the purpose of processing their Bar Exam Applications. (AA, Exh. 45 at 396; Exh. 46 at 404; Exh. 103 at 1259.)[4] It would be unreasonable to suggest that applicants intended their

[4] Applicants' also authorized the use of their demographic information for "research purposes." (AA, Exh. 46 at 405.) Plaintiffs argue that this release should be interpreted to extend to anyone's research, and not only research commissioned by the State Bar. Such an interpretation is

private information to be subject to public disclosure. In *Porten, supra,* 64 Cal.App.3d at 828, the court found that a transfer student who provided his new university with his grades from his prior university stated a claim for invasion of privacy against his new university for releasing his grades to a third party. The new university assured the student that his grades "would be used only for the purpose of evaluating his application for admission, that they would be kept confidential and that they would not be disclosed to third parties without [the student's] authorization." The court reasoned that California's "constitutional provision protecting privacy is aimed at curbing 'the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party.'" *Id.* at 832. Similarly, applicants have a reasonable expectation that their information will only be used for the limited purpose of processing their applications.

Considering the circumstances under which applicants provided their private information to the State Bar and its longstanding practice of nondisclosure, one can only conclude that applicants' expectation of privacy is reasonable.

B. State and Federal Statutes Recognize a Privacy Interest in the Information Held by the State Bar and thus Heightens Applicants' Reasonable Expectation of Privacy.

The various state and federal laws that limit the dissemination of the information held by the State Bar augment applicants' expectation of privacy. "A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use . . . " *Hill, supra,* 7 Cal.4th at 35. "Whether established social norms safeguard a particular type of information . . . from

unreasonable in light of the State Bar's historical pattern of protecting applicants' private information from public disclosure.

public or private intervention is to be determined from the usual sources of positive law governing the right to privacy . . . [including] statutory enactment." *Hill, supra,* 7 Cal.4th at 36. Here, the Family Education Rights and Privacy Act and the California Education and Government Codes limit the dissemination of the type of information held by the State Bar, thus supporting applicants' reasonable expectation of privacy and favoring nondisclosure.

1. The Family Education Rights and Privacy Act Supports Applicants' Reasonable Expectation that Their Information Will Remain Confidential.

The Family Education Rights and Privacy Act ("FERPA") protects a student's privacy by limiting the dissemination of educational records. *See* 20 U.S.C. § 1232g. Educational institutions that have a pattern or practice of releasing a student's educational records without her consent may lose federal funding. *Id.* at § 1232g(b)(2)(A). When a student does authorize an educational institution to release her educational records to a third party, such as the State Bar, FERPA regulations require that the educational institution release the information "only on the condition that the party . . . will not disclose the information to any other party without the prior consent of the . . . student." 34 C.F.R. § 99.33(a)(1).[5] If a third party, such as the State Bar, receives educational records and violates the re-disclosure requirements, then FERPA prohibits educational institutions "from permitting access to information from education records to that third

[5] FERPA regulations recognize a limited exception for a third party's release of de-identified data if it "has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information." 34 C.F.R. § 99.31(b)(1). However, if the student's identity is easily traceable, then the third party may not release de-identified educational records. Due to the risk of re-identification, disclosure of applicants' educational records in the manner proposed by Plaintiffs does not guarantee that applicants' identity will not be easily traceable.

party for a period of not less than five years." 20 U.S.C. § 1232g(b)(4)(B). By limiting the dissemination of educational records, FERPA creates a legally protected privacy right in this information.

The consent that applicants provide to the State Bar is exceedingly narrow and does not authorize wide-spread public disclosure. When applying to take the California bar exam, applicants are *required* to authorize educational institutions to release their educational records to the State Bar for the purpose of processing their bar applications. (AA, Exh. 45 at 396; Exh. 46 at 404.) Through this limited consent, the State Bar collects and retains applicants' educational records, including law school attended, law school GPA, law school graduation year, undergraduate GPA, and transfer status. (AA, Exh. 47 at 386-88.) Compelling the State Bar to release applicants' private information will far exceed the limited consent granted by applicants and, pursuant to FERPA, educational institutions may be prohibited from permitting the State Bar to access information from education records for a period of not less than five years.

The limited consent given to the State Bar together with FERPA's privacy protections support applicants' expectation of privacy. By providing a limited consent, applicants reasonably expect that the State Bar will only use their educational records to process their application to take the California bar exam. Given FERPA's guidelines, it is unreasonable to contend that applicants would anticipate that the State Bar, at some future time, would disclose their educational records to the public.

2. California Statutes Support Applicants' Expectation that the Information Will Remain Confidential.

a. The CPRA Is Inapplicable to the State Bar.

Applicants' information held by the State Bar is not subject to public disclosure under the California Public Records Act ("CPRA"). In *Chronicle Pub. Co. v. Superior Court In and For City and County of San*

Francisco (1960) 54 Cal.2d 548, 573 [7 Cal.Rptr. 109], this Court declared that pursuant to section 6001 of the Business and Professions Code, the State Bar is not subject to "open meetings" and "public records" laws unless the Legislature "expressly so declares." In 1968, when the California Legislature enacted the CPRA, it expressly exempted the State Bar's records from the CPRA's disclosure requirements. *See* Government Code § 6252(f); Cal. Const. art. VI, § 9. The Legislature's exclusion of the State Bar's records from the CPRA implies a legislative intent to shield the State Bar's records from public disclosure.

b. California Statutes Also Specifically Protect the Dissemination of Applicants' Examination Data.

The California Education Code limits the dissemination of LSAT scores. Section 99161 of the California Education Code provides that "(a) No test agency shall release or disclose any test score identifiable with any individual test subject, in any form whatsoever, to any test score recipient, unless the agency is specifically authorized by the test subject to release that test score to the recipient." Education Code § 99161(a). This includes LSAT scores. *See* Education Code § 99151(c). Pursuant to Section 99161(a), the Law Schools Admissions Council ("LSAC") is prohibited from releasing applicants' LSAT scores to the public without the applicants' consent. It would be a failure of the policy established by Section 99161 to compel the State Bar to release applicants' LSAT scores.

Section 99161 of the Education Code and the Government Code similarly support applicants' privacy interest in their California bar exam scores. While Section 99161 of the California Education Code does not apply to the California bar exam, it does establish a policy against disclosure of standardized test scores. *See* Education Code §§ 99151(c), 99161. Although the CPRA is not applicable to the State Bar, by prohibiting the disclosure of "[t]est questions, scoring keys, and other examination data used to administer a licensing examination . . . ", it establishes a privacy right in licensing examinations such as the California bar exam. Government Code § 6254(g). By limiting the dissemination of examination data, the California Education and Government Codes create a legally protected privacy interest that strengthens applicants' expectation that their examination data held by the State Bar will remain confidential.

C. Any Public Right of Access is Outweighed by the Serious Invasion of Privacy that Will Result if the State Bar's Promises of Confidentiality are Breached and Applicants' Data is Released in the Manner Proposed by Plaintiffs.

The extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy. *Hill, supra*, 7 Cal. 4th at 37. In order to determine whether an alleged invasion of privacy is sufficiently serious to constitute a violation of that constitutional right, the competing privacy and non-privacy interests must be balanced. *Id.*; *International Federation*, *supra*, 42 Cal.4th at 338-39.

Here, privacy interests far outweigh any interest that the public may have in the sensitive information at issue. First, much of the requested information does not qualify as official information about the inner-workings of the State Bar. Instead, Plaintiffs' largely seek private information about each individual applicant from 1972 to 2007 that the State Bar merely happens to hold. Second, any public interest in understanding the internal workings of the State Bar is sufficiently served by the general statistics already released by the State Bar after each administration of the exam, which summarizes applicants' performance on the exam by law school, race/ethnicity, as well as other criteria.[6] Finally,

[6] Also, as discussed above, there is a strong public interest in maintaining trust in the State Bar, as both an arm of the judiciary and the gatekeeper of the legal profession. *See Perry, supra,* 2012 WL 308539 at *7. Releasing the requested information in violation of the

the possibility that the data may be re-identified if produced as proposed by Plaintiffs, resulting in the wide-spread disclosure of individualized data in violation of the State Bar's promises of confidentiality, weighs strongly in favor of non-disclosure. Applicants' data should not be released in violation of the State Bar's promises because a serious invasion of privacy will result and any public interest in accessing the information is minimal.

1. The Invasion of Applicants' Privacy Is Unwarranted Because Plaintiffs Are Not Seeking "Official Information" About the State Bar.

The public's right of access is limited to those documents that reflect the State Bar's workings and does not encompass "private information that happens to be collected in the records of a public entity." *International Federation*, *supra*, 42 Cal.4th at 340. For example, in *U.S. Dept. of Justice v. Reporters Committee* (1989) 489 U.S. 749, 780 [109 S.Ct. 1468], the U.S. Supreme Court held that the Freedom of Information Act ("FOIA") did not require the Department of Justice's disclosure of an individual citizen's criminal record because the information was only compiled by the Department of Justice but did not reflect official information about that governmental agency. "'[W]hen the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'" *International Federation*, *supra*, 42 Cal.4th at 340 (citing *Reporters Committee*, *supra*, 489 U.S. at 780.) Here, Plaintiffs seek applicants' personal information, such as race, GPAs, and LSAT scores, none of which qualifies as official information about the workings of the State Bar. Invasion of applicants' privacy in this instance is completely unwarranted

State Bar's express promise of confidentiality will severely undermine that interest.

because the majority of the information at issue is collected and stored by the State Bar under promises of confidentiality.

2. Any Public Interest in Understanding the State Bar's Admissions Process is Sufficiently Served by the General Statistics Released.

The public's right of access is minimized when government agencies release detailed reports of their workings. In *City of San Jose v. Superior Court of Santa Clara County* (1999) 74 Cal.App.4th 1008, 1025 [88 Cal.Rptr.2d 552], the court held that a newspaper was not entitled to individualized information about people who complained about airport noise in part because the "[c]ity disclose[d] a substantial amount of detailed information about public complaints of airport noise." The court found that because "[t]his information provides the public with data to analyze the City's performance of its duty to record, investigate and report airport noise complaints," the City was not required to disclose additional information about the individual complaints. *Id.*

Similarly, the State Bar publishes substantial information after each administration of the bar exam, summarizing applicants' performance on the bar exam. In addition to publishing a list of the applicants who passed the bar exam, the State Bar publishes a twenty-page statistical report detailing passage rates by school, race, and gender, as well as statistics on first-time and repeat takers of the bar exam. (AA, Exh. 44 at 382; AA, Exh. 44 at 388; Exh. 56 at 573-592.) In addition, each State Bar member has a public online profile on the State Bar's website, which lists the member's name, address, phone number, date of admission to the State Bar, law school attended, undergraduate school attended, in addition to other information. *See* Rules of State Bar, rule 2.2.[7] Because the public is

[7] *See* State Bar's website at http://members.calbar.ca.gov/fal/Member Search/QuickSearch.

already provided with substantial information about applicants' performance on the bar exam, any public interest in releasing individualized data is minimal at best and therefore disclosure is unwarranted.

3. Re-identification Resulting in the Widespread Public Disclosure of Applicants' Private Information is Likely if the Records are Produced as Proposed by Plaintiffs.

The party seeking disclosure of confidential personal information bears the burden of demonstrating that certain protective measures and safeguards can be employed to minimize the intrusion on privacy interests. *See Hill, supra,* 7 Cal.4th at 38 (citing *Whalen v. Roe* (1977) 429 U.S. 589, 600-602 [97 S.Ct. 869, 876-77] and *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 626, fn. 7 [109 S.Ct. 1402, 1418, fn. 7]). However, "if sensitive information is gathered and feasible safeguards are slipshod or nonexistent . . . the prospect of actionable invasion of privacy is enhanced." *Id.*

Recognizing the confidential nature of the information sought and the related privacy rights of applicants, Plaintiffs insist that the data can be anonymized[8] and produced in a manner that purportedly maintains the applicants' confidentiality. However, Plaintiffs have vastly over-stated the reliability of anonymization. In fact, research in the field of computer science, and subsequent legal scholarship analyzing the implication of such research on privacy laws, reveal that anonymization is not as iron-clad a protection as previously believed. *See* Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization* (2010) 57 UCLA L.Rev.1701 (hereinafter *Broken Promises of Privacy*).

[8] "Anonymization" is a process by which information in a database is manipulated to make it difficult to identify data subjects. *Broken Promises of Privacy* at pg. 1707.

a. Plaintiffs' Anonymization Proposal Fails to Protect Against Re-identification.

Plaintiffs have outlined a flawed proposal that they believe will effectively anonymize the requested information. First, Plaintiffs suggest that any "identity" variables, such as name, social security number, birth date, and other variables that might directly disclose an individual's identity be removed from the data. (AA, Exh. 53, at 530-31.) Second, Plaintiffs suggest that the State Bar cluster the information so that no combination of publicly available variables (such as law school, race, and graduation year) produces a group of fewer than five individuals. (AA, Exh. 53, at 531.) To facilitate clusters of fewer than five, Plaintiffs have requested that the information be produced in "broad categories." *Id.* at 532. For example, they request that race be reported in one of four categories: black, white, Hispanic, or other. They also request that law school graduation years be reported in five-year ranges, so that, for example, the data of law school graduates from 2003-2007 would be clustered together. This second step is intended to prevent members of the public from identifying individuals by matching the State Bar's data with other publicly available data. *See id.* at 531-32. None of these measures guarantee that applicants' information will not be re-identified.

b. The Fallacy of Anonymization: Recent Examples of Re-identification Demonstrate the Weaknesses of Anonymization.

Although Plaintiffs propose that applicants' information can be produced in a manner that allegedly maintains individual anonymity, they fail to recognize the inherent limitations of anonymization in today's informational age.

In *Broken Promises of Privacy*, Paul Ohm describes three instances where the release of so-called anonymized data was re-identified using publicly available information, resulting in the unintentional and devastating exposure of highly-confidential information. *Broken Promises of Privacy* at 1717-1722. The first example involves America Online's ("AOL") public release of users' search queries. *Id.* at 1717. Although AOL removed AOL usernames and IP addresses prior to release, New York Times reporters were able to match information that appeared in the search queries with other publicly known information to reveal the people behind the searches. *Id.* at 1718. The second example involves the re-identification of the Massachusetts governor's medical records. Using anonymized summaries of state employee's hospital visits which were released to researchers, and publicly-available voter rolls from the City of Cambridge, researchers were able to identify the governor's health records, including diagnoses and prescriptions. *Id* at 1719-1720. In the third example, researchers connected anonymized user records released by Netflix to specific individual users, having only a little bit of information about the user. *Id.* at 1721. For instance, simply knowing the precise rating given to a few movies or when the rating was provided will substantially narrow the scope of potential users who provided the rating. *Id.* In each of these three examples, sophisticated data administrators "anonymized" the data by removing direct identifiers, and never anticipated that it could be used to reveal individual identities.

In fact, FERPA recognizes the need for considering other publicly available information in assessing whether education records can be released. Under FERPA regulations, a third party receiving educational records, such as the State Bar, may release the information without an applicant's prior written consent, only if it "has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information." 34 C.F.R. § 99.31(b)(1). The

Department of Education's Family Policy Compliance Office ("Compliance Office"), which is responsible for enforcing FERPA, has issued opinions declaring that there are instances when although the information is redacted in a manner sufficient to prevent re-identification from a single release, " [if] the same requestor made multiple requests from various sources . . . the cumulative effect of releasing the records in that form would be that the identities of the student[s] . . . would be made easily traceable."[9] Accordingly, in providing guidance to educational institutions, the Compliance Office has ruled that an entity trying to release educational records must ensure that "de-identified information from education records is reported in a manner that *fully prevents* the identification of students. If that cannot be done, the data must not be reported."[10]

These few examples demonstrate the myriad ways in which certain seemingly non-unique data variables can be easily linked together to re-identify individual applicants. In a case such as this, where FERPA is implicated because educational records are being sought, the records cannot be produced unless re-identification is fully prevented. As shown by these three case studies, it is impossible to predict the amount of outside information that can be combined with so-called anonymized information to reveal individual identities and lead to the disclosure of highly confidential information. Preserving applicants' privacy interests is paramount. Therefore, the records should not be disclosed to the public. Doing so will forever expose all applicants to potential re-identification, not only by Plaintiffs, but by sophisticated data-miners.

[9] *See* Family Policy Compliance Office Guidance Letter to School District re: Disclosure of Education Records to Texas Office of Attorney General ("Compliance Office Texas Guidance Letter"), Apr. 6, 2006, found at http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/tx040606.html (emphasis added.)

[10] *Id.*

c. Plaintiffs Underestimate the Sources of Publicly Knowable Information and the Manner in Which it Can be Used to Reveal Individual Identities.

Plaintiffs fail to recognize that in a day and age like today, where much of our personal information is readily available on the internet and collected, stored, and sold by businesses, much more information is "publicly knowable." *See Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524, 528 (2011) (recognizing that businesses keep databases containing millions of names, email addresses, telephone numbers, and street addresses); Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy* (2001) 53 Stan. L.Rev. 1393, 1400-1413 (recognizing various databases containing personal information). It is therefore important to fully consider all potential ramifications of publicly releasing private information, even if anonymized, because that information can be re-identified.[11] *See* Ohm, *Broken Promises of Privacy,* 57 UCLA L.Rev. at 1716 (explaining re-identification).

The concept of re-identification using by publicly available information can be demonstrated through the following hypothetical:

Jane Doe is a young attorney who recently passed the California bar exam and is applying for a job. Jane posts her resume on an employment website such as www.monster.com to maximize her chances of finding employment in a difficult job market. Her resume includes both her undergraduate and law school GPAs because she performed reasonably well in school and knows that legal employers likely will not hire a recent graduate without reference to grades. Despite doing well in school, her first

[11] "Re-identification" or "deanonymization" refers to the process of linking anonymized records to outside information to discover the true identity of the data subjects. *Broken Promises of Privacy* at 1705, 1707-1708.

two attempts at the California bar exam were unsuccessful; she finally passed the exam on her third attempt.

If the State Bar's records become public, even if anonymized as proposed by Plaintiffs, any member of the public could potentially, with little effort, discover that Jane failed the bar exam twice, in addition to other private information. Looking at Plaintiffs' sample data in the form requested from the State Bar, if a potential employer found Jane's resume online she could easily discover additional information about Jane. The employer knows that Jane's undergraduate GPA is 3.96 and her law school GPA is 3.53, based on Jane's resume, and could therefore determine her LSAT score, her multiple attempts to pass the bar exam, and how she performed on each section of the exam. (AA, Exh. 53, at 554.) This could provide a basis for denying employment to Jane. Such an unintentional disclosure of highly confidential information violates Jane's constitutional right to informational privacy. *See Hill, supra,* 7 Cal.4th at 35 (recognizing that the right to control the dissemination of one's private information is constitutionally protected). This risk of unauthorized disclosure can be avoided by simply upholding the State Bar's promises of confidentiality.

Plaintiffs may argue that the ease of re-identification in this instance can be attributed to Jane's voluntary disclosure of her GPAs in a public domain such as the internet. However, disclosure of one's GPA for the purpose of obtaining employment does not equate to the voluntary disclosure of LSAT and bar exam scores. *See U.S. v. Jones* (Jan. 23, 2012) __ U.S. __ [132 S.Ct. 945, 957] (Sotomayor, J., concurring) (disclosure of certain information to a member of the public for a limited purpose should not disentitle that information to Fourth Amendment protection). A person such as Jane has a reasonable expectation of privacy in her exam scores and that expectation cannot be waived by the disclosure of other unrelated information in a manner that is commonplace in today's digital age. *See id.*

(recognizing that we live in a digital age in which people reveal a great deal about themselves on the internet in carrying out mundane daily tasks); *see also Hill, supra*, 7 Cal.4th at 37 (quoting Rest.2d Torts, § 652D, com. c ("The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens.")) In this digital age, when the realm of "publicly knowable" information is constantly expanding, re-identification is more than possible—it is probable.

Applicants have a constitutional right to control the dissemination and use of their private information, especially in light of the express promises of confidentiality made by the State Bar. *See Hill, supra*, 7 Cal. 4th at 35. The State's highest Court, through the State Bar, should not abridge this right by disclosing to third parties private information with which it was entrusted based on explicit and repeated promises of confidentiality. *See Pantos, supra,* 151 Cal.App.3d at 265 (denying access to juror questionnaire answers, in part, because of the court's promise of confidentiality to the jurors). Although the public's right of access to information regarding the conduct of the people's business is an important one, it is not absolute. *See Craemer v. Superior Court In and For Marin County* (1968) 265 Cal.App.2d 216, 222 [71 Cal.Rptr. 193] (holding that a criminal defendant's constitutional right to a fair trial will, in certain circumstances, outweigh the public's interest to inspect grand jury transcripts). Where, as here, the interest in withholding information greatly outweighs the public's interest in disclosure, the information should be withheld.

IV. CONCLUSION

The State Bar's promises of confidentiality create a reasonable expectation of privacy. Reneging on these promises will compromise the integrity of the attorney admissions process. In addition, these promises of confidentiality reconfirm applicants' constitutional right to control the dissemination of their information. Here, Plaintiffs seek permission from this Court to violate this inalienable privacy right. The public has little to no interest in individual applicants' private information. For these reasons, the State Bar's promises of confidentiality should be upheld and Plaintiffs' request denied.

Respectfully submitted,

DATED: February 17, 2012

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rules of Court, rules 8.204(b) and 8.520(c), I certify that this *amicus curiae* brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 6,964 words including all footnotes but excluding the table of contents, table of authorities, and signatures, as counted by the computer program used to generate this brief.

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1888 Century Park East, Suite 1700, Los Angeles, California 90067-1721. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On **February 17, 2012**, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

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

Executed on **February 17, 2012**, at Los Angeles, California.

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