LEWIS BRISBOIS BISGAARD & SMITH LLP
TONY M. SAIN, SB# 251626
E-Mail: Tony.Sain@lewisbrisbois.com
ABIGAIL J. R. McLAUGHLIN, SB# 313208
E-Mail: Abigail.McLaughlin@lewisbrisbois.com
633 West 5th Street, Suite 4000
Los Angeles, California 90071
Telephone: 213.250.1800
Facsimile: 213.250.7900

Attorneys for Respondent,
CITY OF FRESNO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO, CENTRAL DIVISION

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a non-profit corporation, Petitioner, vs. CITY OF FRESNO, Respondent.	Case No. 24CECG01635 [*Assigned for All Purposes to: Hon. Kent Hamlin*] **RESPONDENT'S SUPPLEMENTAL BRIEF REGARDING OPPOSITION TO MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** *Filed Concurrently with Declaration of Abigail J.R. McLaughlin; Declaration of Kathleen Abdulla* Date: March 21, 2025 Time: 1:30 p.m. Dept.: 53 Petition Filed: April 22, 2024

TO THE HONORABLE COURT, PETITIONER, AND COUNSEL OF RECORD:

Respondent CITY OF FRESNO ("Respondent") hereby presents its Supplemental Brief Regarding its Opposition to Petitioner AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA's ("Petitioner" or "ACLU") motion for an order and judgment granting Petitioner's Verified Petition for Writ of Mandate Under the California Public Records Act ("CPRA") and the California Constitution and Complaint for Injunctive and Declaratory Relief ("Motion for Judgment"), as Ordered by the Court on January 8, 2025, and Respondent hereby states as follows:

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1. INTRODUCTION & SUMMARY OF THE ARGUMENT.

In response to the Court's queries at its January 8, 2025 initial hearing on Petitioner's Motion for Judgment, Respondent offers the following clarifications and authority.

First, in response to the Court's query as to whether or not such reports are police investigatory records, and despite Petitioner's erroneous contentions otherwise, **police use of force reports, including K-9 Use of Force Reports and Accidental Bite Reports are law enforcement investigatory records**. Specifically, K-9 Use of Force Reports and Accidental Bite Reports are created in regards to either an administrative or criminal investigation as to the use of force by a K-9, accidental or otherwise. Where a document is created pursuant to an investigation by law enforcement, such document is subject to the police enforcement investigatory records exemption, whether or not that investigation results in criminal enforcement or administrative discipline.

Second, in response to the Court's query as to (a) any arrest report or comparable pre-2019 exceptions apply here, or (b) if the police investigatory records exemption has an end date, (a) there is no applicable exception to the law enforcement investigatory records exemption as to Petitioner's at-issue CPRA request; and (b) the law enforcement investigatory records exemption does not have a time limit. Petitioner is not a victim (or an authorized representative of a victim) that gets access to additional incident information as to law enforcement investigations under Government Code § 7923.605, and Petitioner did not request arrest information stemming from law enforcement investigations under Government Code § 7923.610 as to arrestees – except the actual K-9 Use of Force Reports and Accidental Bite Reports: so **those pre-2019 exceptions to the law enforcement investigatory records exemption do not apply here**. Further, **there is no time-limit as to the law enforcement investigatory records exemption under applicable California law**.

Third, in response to the Court's query as to why the legislative intent/history must be reviewed here, the answer is because the term "great bodily injury" ("GBI") is *not* defined in the CPRA, and using the Penal Code sentencing-enhancement definition (particularly as expanded by case law on sentencing enhancements) would create a GBI definition that clearly runs counter to the 2019 CPRA statutory revisions' legislative intent. Specifically, the legislative history of SB 1421 demonstrates that "great bodily injury" is to be *narrowly* construed (not broadly construed, as would

be the case if one adopted the inapplicable sentencing enhancement definition of that term), and the requested K-9 use of force and accidental bite records are thus *not* disclosable under the CPRA.

Indeed, where, as here, Petitioner's interpretation of a statute would lead to an absurd result – the disclosure of essentially *all* use of force records (since the sentencing enhancement case law expands the statutory definition of GBI from "significant or substantial physical injury" all the way down to bruises, scrapes, and physical pain) – then such interpretation cannot be legally correct for this Court to adopt. Rather, based on the legislative history in this matter, the Legislature's clear intent, and the language of the statute, supports Respondent's narrow definition of "great bodily injury" to be *only* the kind of injuries associated with the legal definition of "serious bodily injury" ("SBI") as such pertains to police uses of force: namely, "a bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ" (*See Gov. Code §* 12525.2(d)(4).)

Thus, based on this proper definition of GBI, Respondent analyzed every record responsive to Petitioner's CPRA Request Nos. 10 -12 (requesting K-9 Use of Force Reports and Accidental Bite Reports) and determined that all records were exempt because no responsive record dealt with an incident where the deployment of K9 force caused "great bodily injury" or death. Accordingly, Respondent disclosed the redacted responsive records pursuant to its voluntary and partial waiver of the law enforcement investigatory exemption, so as to provide Petitioner with at least some of the information they were seeking, but since Respondent has *not* waived the exemption as to any unproduced-undisclosed police records, Respondent has fulfilled its obligations under the CPRA: and no further CPRA disclosures to Petitioner's requests are due under California law.

2. POLICE USE OF FORCE REPORTS, INCLUDING K-9 REPORTS AND ACCIDENTAL BITE REPORTS, ARE LAW ENFORCEMENT INVESTIGATORY RECORDS BECAUSE SUCH ARE PART OF POLICE INVESTIGATIONS.

Put simply, K-9 Use of Force and Accidental Bite reports are exempt law enforcement investigatory records because such are created: (a) for the purpose of documenting uses of force associated with criminal law enforcement activities; and/or (b) for the purpose of administrative investigation as to whether police officers are complying with police procedures regarding the

training and supervision of police dogs (K-9 units), including procedures to avoid accidental bites. [Abdulla Decl., ¶4.]

To elaborate, as stated in Respondent's Opposition to Petitioner's Motion for Judgment ("Respondent's Opposition"), under Government Code § 7923.600(a), public entities are *not* required to disclose "records of complaints to, or investigation conducted by . . . any state or local police agency." Further, under Government Code § 7923.605(b), public entities are *not* required to disclose "that portion of those investigative files that reflect the analysis or conclusion of the investigation officer."

The source of the Court's query on this issue was that, at the January 8, 2025 hearing in this matter, Petitioner (erroneously) argued that police use of force reports, and K-9 force reports and accidental bite reports are not investigatory records because they are "all administrative records that are kept in the regular course of police business," and "only become exempt as investigatory when the prospect of enforcement proceedings is concrete and definite." [McLaughlin Decl., ¶2, Exh. A at 22:7-23:18.] However, Petitioner's argument is *not* based on any established law.

As previously cited in our Opposition, in *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, the Court disagreed with Haynie's interpretation that "records of investigations should be defined so as to exclude investigations that are merely 'routine' or 'everyday police activity,' such as his traffic stop." (*Id.* at pp. 1070-1071.) Investigation records are exempted where civil *or* criminal investigations are "undertaken *for the purpose* of determining whether a violation of law may occur or has occurred. If a violation or potential violation is detected, the exemption also extends to records of investigations conducted *for the purpose* of uncovering information surrounding the commission of the violation and its agency." (*Id.* at p. 1071 [emphasis added].)

Here, *both* Use of Force Reports and Accidental Bite Reports are part of investigations undertaken for the purpose of determining whether a violation of law and/or policy may occur or has occurred. For Use of Force Reports, such are always used in conjunction with the investigation of a crime and sometimes used in conjunction with an internal affairs investigation into an officer. [Abdulla Decl., ¶5.] As demonstrated by the documents disclosed by Respondent to Petitioner, such Use of Force Reports include a case number, details as to the use of force (including the resistance

by the citizen), and who is the assigned *investigator*. [*See, e.g.*, Opp. to Mtn. for Judgment, Griffin Decl., Exh. 2 at pp. 109-124[1].] Accidental Bite Reports are also investigations into either accidental bites that occurred during a law enforcement investigation into some crime, or administrative investigations into accidental bites for potential misconduct by police officers and associated complaints – whether submitted internally, such as by supervisors, or externally, such as by civilians. [Abdulla Decl., ¶5.]

For example, one of the Accidental Bite Reports voluntarily disclosed by Respondent pertained to an accidental bite during a Fresno Police Department Canine Unit Demonstration, and, thus, such included an investigative disposition as to the incident and an appropriate case number. [*See id.* at p. 96.] Likewise, where an accidental bite occurred during an investigation into a crime, such report included a case number and an incident overview, which included the nature of the criminal *investigation* where the bite occurred. [*Id.* at 101, 106.]

Moreover, these types of records are created because there is always a concrete and definite prospective of enforcement proceedings: whether it is the enforcement of a criminal violation when it comes to Use of Force Reports or an administrative/policy violation when it comes to an Accidental Bite Reports and associated complaints. [Abdulla Decl., ¶6.]

Because such reports are linked to an actual investigation, such reports are exempt from CPRA disclosure. (*See Castañeras, supra,* 98 Cal.App.4th ,at pp. 305-306 [finding drone footage linked to an actual investigation was exempt form disclosure under the CPRA].) Though such Use of Force Report and Accidental Bite Reports may be routine, they are routine in regards to law enforcement's investigations into those types of incidents, whether criminal or administrative, and are thus part of corresponding investigatory files. [Abdulla Decl., ¶7; *see also Haynie, supra,* at p. 1070 (finding that interpretation that "routine" investigations should be excluded from investigatory records exemption would "impair 'routine' investigations).]

[1] For the Court's ease, the referenced page numbers are as to the page numbers for the entire PDF, *i.e.*, the PDF is 906 pages total and the referenced pages are 109-124 of those 906 total pages.

Thus, it is *not* necessary that there be a "concrete and definite prospect of enforcement" proceedings before the exemption attaches, because records of investigations are "exempt on their face, whether or not they are ever included in an investigatory file." (*Haynie, supra,* at p. 1069-1070 [further stating that limiting the investigatory records exemption "only to records of investigations when the likelihood of enforcement has ripened into something concrete and definite would expose to the public the very sensitive investigative stages of determining whether a crime has been committed or who has committed it."]; *see also Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 175-177 [noting that public policy supported conclusion that unsuccessful or inconclusive investigations are still exempt from CPRA disclosure, including police misconduct allegations].) Such rationale extends not only to the K-9 Use of Force Reports and Accidental Bite Reports requested here, but also the referenced supporting records in conjunction with such reports – *i.e.* civil liability recording, civil statement, application report, body camera footage – because such associated records are also part of the investigation as well, and relied upon in connection with such. (*See Castañeras, supra,* 98 Cal.App.5th at p. 306 [drone footage linked to an investigation and part of an investigatory file exempt from disclosure]; *Haynie, supra,* 26 Cal.4th at p. 1071-1072 [tape recordings of citizen report relating to investigation exempt].

Therefore, under applicable law, K-9 Use of Force Reports and Accidental Bite Reports –as well as any related supporting records or recordings – <u>are</u> law enforcement investigatory records, even if they are routine, and such are thus <u>exempt</u> from disclosure in their entirety under Government Code § 7923.600(a) (the law enforcement investigatory records exemption from CPRA). Accordingly, Respondent did not have to provide <u>any</u> Use of Force Reports or Accidental Bite Reports in response to Petitioner's CPRA Request. [*See* Abdulla Decl., ¶¶3-8.]

Notably, that Respondent elected to provide at least *some* responsive information to Petitioner, in the spirit of compromise, does *not* render the undisclosed/unproduced exempt information withheld CPRA-disclosable. (*See Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1183, 1189 [finding that, in the context of the CPRA, "the Legislature intended to permit state and local agency to waive an exemption by making a voluntary and knowing disclosure"]; *see also* Abdulla Decl., ¶9.) In other words, partial waiver of an exemption as to *some*, limited amount of

exempt information does *not* require the custodial government entity to disclose-produce all of the information it has of a similar nature. (*See Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1270 ["Waiver of privilege as to one aspect of a protected relationship does not necessarily waive the privilege as to other aspects of the privileged relationship."] [citing *Jones v. Superior Court* (1986) 119 Cal.App.3d 534, 551, regarding partial disclosure of a medical history]; *see also* Cal. Gov. Code § 7923.625(c) [indicating that an agency is *permitted*, but *not* required, to disclose more than the minimum].)

Thus, since the case law is very clear that such Use of Force Reports and Accidental Bite Reports are, in fact, *exempt* from the CPRA public records disclosure requirements, Petitioner can only be entitled to receive such if there is an applicable *exception* to that exemption: and, as detailed both below and in our original Respondent's Opposition, *there is **no** applicable exception here*.

3. THERE IS NO APPLICABLE EXCEPTION TO THE LAW ENFORCEMENT INVESTIGATORY RECORDS EXEMPTION AS TO PETITIONER'S C.P.R.A. REQUEST, AND THE LAW ENFORCEMENT INVESTIGATORY RECORDS EXEMPTION DOES NOT HAVE AN END DATE.

As discussed at length in Respondent's Opposition and below, Petitioner's assertion that Penal Code § 832.7(b)(1)(a)(ii) creates an exception requiring Respondent to disclose Use of Force Reports and Accidental Bite Reports is unsupported by California Law. However, Petitioner additionally asserts that (1) Respondent must disclose arrestee information under Government Code §§ 7923.605 and 7923.610; and (2) the investigatory records exemption is subject to a time limitations. However, neither of these assertions are true.

A. The Pre-2019 Exception For Disclosure Of Certain Incident-Arrestee Information Does *Not* Apply Here Because Petitioner Is *Not* One Of The Statutorily Authorized Requesters Of Such – Namely, The Victim.

As to the first of the pre-2019 exceptions to the law enforcement investigatory records exemption that Petitioner claims to apply (the exception for specified incident information), such does *not* apply here because that exception is *only* available **when the requester is the victim of that incident, or the victim's authorized representative**.

To elaborate, under Government Code § 7923.605, "a state or local law enforcement agency shall disclose the names and addresses of persons involved in, or witnesses other than the confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, *to the victims of an incident, or an authorized representative thereof*, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951 . . ." subject to certain exemptions. (Emphasis added.) Here, since Petitioner is not a victim of any K-9 use of force incident, nor an authorized representative thereof, this exception to the law enforcement investigatory records exemption is *not* applicable to this matter.

B. The Pre-2019 Exception For Disclosure Of Limited *Arrestee* Information Does *Not* Apply Here Because Petitioner Did Not Request Such.

As to the second of the pre-2019 exceptions Petitioner claims to apply (the limited exception for specified arrestee information), such does *not* apply here because that exception: (a) is only available for the very narrow, specific list of arrestee information including in the Government Code; and (b) does not extend to the Use of Force Reports and Accidental Bite Reports that Petitioner actually requested here (in other words, *Petitioner never requested such information*).

To elaborate, as mentioned in Respondent's Opposition, Government Code § 7923.610 lists specific *arrestee* identifying information that is disclosable to the public. But, that list is very narrow and such is confined to the arrestee's: (1) full name; (2) occupation; (3) date of birth; (4) hair and eye color; (5) height and weight; (6) date and time of arrest; (7) date and time of booking; (8) factual circumstances surround the arrest; (9) amount of bail set, if any; (10) time and manner of release *or* location where the arrestee is currently being held; (11) all criminal charges on which the arrestee is being held; (12) all outstanding warrants from other jurisdictions; and (13) any parole or probation holds. (Gov. Code § 7923.610(a)-(i).) However, while such arrestee identifying information is thus

disclosable to all requesters (*see id*.), the exception does *not* require the custodial government agency to disclose any of the underlying reports documenting such arrestee information.

To elaborate, this limited exception to the CPRA's investigatory records exemption requires "agencies to disclose specific information derived from the materials in investigatory files *rather than the materials, themselves*." (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 393 [emphasis added]; *Haynie, supra*, 26 Cal.4th at p. 1072 ["This section specifies the information—*not the records*—that must be provided . . . In enacting this provision, the Legislature required the disclosure of *information derived from the records* while, in most cases, preserving the exemption for the records themselves."] [internal quotations omitted, emphasis added].)

Thus, since K-9 Use of Force Reports and Accidental Bite reports are both (a) *not* included under the Section 7923.610 list of disclosable arrestee identifying information, and (b) *not* arrest reports [*see* Abdulla Decl., ¶5], this exception does not apply to Petitioner's requested records.

C. Even If Arrestee Information Is Disclosable Under Certain Inapplicable Circumstances, Petitioner Never Requested Such Arrestee Information.

Notwithstanding the foregoing, even if some circumstances inapplicable to the reports at issue here could theoretically have rendered certain information therein disclosable, such would remain outside of Respondent's CPRA duty to disclose such information in this case for one very simple reason: **Petitioner never requested such arrestee identifying information** here.

To elaborate, Petitioner did not request arrestee *information* via its in-dispute CPRA request. Rather, Petitioner requested "[a]ny completed use of force *forms* or use of force *reports* concerning use of a police canine," "[u]se of force *reports* documenting police canine bite(s) and/or injur(ies); and *[r]ecords, including reports*, concerning accidental police canine bite(s) and/or injur(ies)." [Opp. to Mtn. for Judgment, Griffin Decl., Exh. 1 at pp. 5-6 (emphasis added).] Thus, arrestee *information* derived from such investigatory records was *not* the subject of Petitioner's CPRA Request; rather, **Petitioner sought the exempt investigatory records (reports, etc.) themselves**. *See id*. As a result, even if such information had been theoretically disclosable under circumstances inapplicable to this case, Respondent was under no duty to disclose such arrestee information, because such was *not* responsive to Petitioner's at-issue CPRA Request.

D. It Is Hornbook Law That Once A Record Falls Under The Police Investigatory Records Exemption, Unless An Exception Applies (Which Is *Not* The Case Here), That Exemption From CPRA Disclosure Lasts Forever.

Furthermore, it is well-established that there is no expiration date on the police investigatory records exemption. [Opp. to Mtn. for Judgment at pp. 4-5 (§3(B)).] In other words, once a public record falls under the law enforcement investigatory records exemption, where no exception to that exemption applies, such record is *permanently* exempt from disclosure. (*Williams*, *supra,* 5 Cal.4th at 355 ["We conclude the exemption for law enforcement investigatory files does not end when the investigation ends. While there may be reasons of policy that would support a time limitation on the exemption for investigatory files, such a limitation is virtually impossible to reconcile with the language and history of [Government Code § 7923.600(a)]."].) Thus, **there is no time limit or end date to the police investigatory records exemption**. *Rackauckas*, *supra,* 104 Cal.App.4th at pp. 174-175; *Haynie*, *supra*, 26 Cal.4th at pp. 1065, 1070; *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048, 1058-1059.

In arguing contrary to this hornbook law, Petitioner confuses a small, very narrow *caveat* to an exception that governs when a public entity can withhold otherwise-disclosable/excepted records in response to an investigation being opened. Specifically, as part of 2019's SB 1421 and AB 748, new (very narrow) exceptions to the police investigatory records exemption were created: however, those new exceptions (returning specified police investigatory records to disclosability in limited circumstances) also came with caveats that restored the exemptions for limited periods and as long as specified conditions were met.

Specifically, as an example of one of these caveats temporarily restoring the exemption from CPRA disclosure, Government Code § 7923.625 outlines differing circumstances where CPRA-disclosable recordings relating to critical incidents (a subject excepted from the exemption) may be temporarily withheld for a period of time due to an active criminal or administrative investigation, but "shall be disclosed promptly when the specific basis for withholding is resolved." (Gov. Code § 7923.625(a)(2).) However, the timing caveats specified in this statute are about how long the custodial government agency can withhold the *excepted* records from disclosure: those timing

caveats have nothing to do with how long the policy agency can withhold from disclosure public records that are not excepted, and thus remain exempt.

For example, Section 7923.625 holds that audio and video recordings of a critical incident are excepted from the law enforcement investigatory records exemption: with a "critical incident" being defined as (1) an officer-involved shooting at a person, and (2) a use of force resulting in death or great bodily injury. (*See* Gov. Code § 7923.625(e).) However, Section 7923.625 also carves out a temporary exception to that exception (a caveat) temporarily restoring the non-disclosability (exemption) of such recordings: (a) for up to 45 days, if the agency provides the CPRA requester with a written explanation of why disclosure would substantially interfere with its ongoing investigation; and (b) for longer thereafter, *if* additional conditions are met. (*See* Gov. Code § 7923.625(a)(1)-(2), (b).) In other words, the Petitioner-cited section relates to the *duration of a caveat* to the exception that makes critical incident recordings disclosable once the temporary delay for an ongoing investigation expires.

But *nothing* in the Petitioner-cited section about the duration of that caveat to the excepted critical incident records has any bearing on how long un-excepted police investigatory records remain protected/exempt from CPRA disclosure (as noted above, where no exception applies, the police investigatory records exemption is permanent). Where, as here, an exception does *not* apply, the duration restrictions of the associated caveat to that exception are wholly irrelevant. Put simply, nothing in Petitioner's citation here negates the fact that *un-excepted, exempt law enforcement investigatory records remain exempt from CPRA disclosure for all time.*

4. THE LEGISLATIVE HISTORY OF S.B. 1421 DEMONSTRATES THAT "GREAT BODILY INJURY" IS TO BE NARROWLY CONSTRUED TO MEAN SERIOUS INJURIES ONLY THAT DO NOT INCLUDE THE KINDS OF PUNCTURES, LACERATIONS, AND BRUISES TYPICALLY ASSOCIATED WITH DOG BITES, AND THE REQUESTED K-9 USE OF FORCE AND ACCIDENTAL BITE RECORDS THUS REMAIN EXEMPT FROM DISCLOSURE UNDER THE C.P.R.A.

Petitioner contends that one can look to the plain text of the only know statutory definition of "great bodily injury" ("GBI") that we have in California law and understand exactly what kinds

of records are disclosable: *not so*. For if that were the case, in making that argument, Petitioner would have no need to deviate (as Petitioner does) from the plain text into case law expansions and reinterpretations of the statute that defines GBI only in the context of sentencing enhancements. In other words, **no party can rely on a plain text reading of Penal Code section 12022.7 to make their argument here because the statute is both vague and there is nothing in its contents, or in the contents of the CPRA, that in any way suggests that this Penal Code definition was ever meant to apply to CPRA disclosability**.

Rather, while claiming to be seeking a "plain text" reading, Petitioner asks the Court to rely on (inapplicable) *case law* to get to the result Petitioner seeks; but Petitioner's arguments defy reason and the canons of statutory construction. Specifically, Penal Code section 12022.7 focuses on when an additional three years can be added to the sentence of someone who commits or attempts to commit a felony while causing GBI: the statute has *nothing* to do with the CPRA or any disclosure of any public records. (*See* Penal Code § 12022.7(a).) In that section, GBI is defined as "a significant or substantial physical injury." (*See* Penal Code § 12022.7(f).) However, because this statutory phrase is inherently vague, Petitioner cannot rely upon its plain text. Thus, Petitioner turns to the *case law*: which has defined under what circumstances the GBI sentencing enhancement may apply. Under those sentencing enhancement cases, as detailed below, GBI has been defined all the way down to minor injuries and even physical pain.

However, Petitioner's reliance on both the Penal Code sentencing enhancement statute, and the associated case law, is misplaced: and one can immediately see that such is misplaced by a careful review of the legislative history of SB 1421 and by standard statutory construction rules – which show *nothing* to support Petitioner's presumption that the GBI definition of Penal Code § 12022.7(f) was ever intended to control the disclosability of police use of force records.

A. The Legislative Intent is Important and Demonstrates That This Court Should Define "Great Bodily Injury" Narrowly in the Context of CPRA Disclosure.

The Court's "primary task in construing a statute is to determine the Legislature's intent, and '[t]he statutory language, of course, is the best indicator of legislative intent.'" (*Williams*, *supra*, 5 Cal.4th at 385 [quoting *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826].) Thus, it is important to

look at the legislative history to see how such statute was drafted and came to be. (*See id.* at pp. 385-387 [discussing at length the legislative history of the law enforcement investigatory records exemption in support of interpretation of the same].) "A court should not lightly adopt an interpretation of statutory language that renders the language useless in many of the cases it was intended to govern." (*Id.* at p. 354.)

As discussed in Respondent's Opposition, the doctrines of statutory construction state that, when construing a statute, such must not be done in a way that leads to absurd results, when that result seems to be contrary to the legislative intent. [Opp. to Mtn. for Judgment at pp. 14-16 (§4(B)(3)-(4)).] Here, Petitioner's interpretation of the statutory language would render the narrow definition of GBI as intended by the legislature useless in the many cases it was intended to govern, including this one. [*See id.* at p. 6 (§4(A)) (discussing that, if GBI is defined as used in Penal Code § 832.7(b), virtually any and all police uses of force would fall into the CPRA-discoverable category of officer uses of force resulting in death or GBI).]

It is undisputed that the CPRA itself (Gov. Code §§ 7920.00-7931.000) does *not* specifically define GBI in the context of the disclosability of law enforcement records. It is further undisputed that GBI has different meanings when it comes to different bodies of law. For example, in the context of police use of force, where GBI and SBI are deemed to be fungible terms, GBI appears to have a meaning akin to "a bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ" (*see* Gov. Code § 12525.2(d)(4)); versus how GBI is used in the context of a sentencing enhancement (Penal Code § 12022.7 ("a significant or substantial physical injury"). Here, the legislative intent informs the Court and the public that the Legislature was not trying to embrace the Penal Code definition of GBI because, if it was, such would lead to absurd results: such as uses of force causing mere physical pain or bruising being considered "serious" police uses of force; or incorporating virtually all uses of force when the SB 1421 amendment process continually sought to narrow the scope of disclosable force.

These absurd results are specifically conceded by Petitioner, in stating that Petitioner believes that the statute should comply with the Penal Code definition of GBI. [McLaughlin Decl.,

Exh. A at 50:16-50:7.] However, Petitioner erroneously argues that the Penal Code definition would not extend to any pain, while in the same breath Petitioner suggests that GBI includes "serious contusions and swelling and bruising." [*Id.* at 50:25-51:4.]

As mentioned by Respondent in its Opposition, Penal Code § 12022.7's GBI definition has been interpreted to include "some physical pain or damage, such as lacerations, bruises, or abrasions." (*People v. Quinonez* (2020) 46 Cal.App.5th 457, 464 [cleaned up] [citing cases in support]; *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047-48 [same].) Thus, if using the Penal Code GBI definition, any force that caused any physical pain, scratch, scrape or bruise would be disclosable under the CPRA: which is in stark contrast to the legislative history that demonstrates that the Legislature was trying to narrow, *not* broaden, the scope of disclosable police force.

As discussed at length in Respondent's Opposition, the original version of SB 1421 not only included the language for uses of force that result in death or GBI, but also included two types of non-deadly uses of force: TASERs (which typically result in punctures and burn-like abrasions) and batons (which typically result in bruises and potentially non-life-threatening fractures)). However, in later amendments of the bill TASERs and batons were removed and the language of disclosable police force – such that SB 1421 was narrowed to open law enforcement investigatory records *only* in *very limited* cases to provide greater transparency as to *only the most serious police complaints*. [Opp. to Mtn. for Judgment at pp. 11-14 (§4(B)(3); Req. for Jud. Ntc. at Exh. D, p. 7.]

Of note, Petitioner attempts to argue that, because the original version of SB 1421 used the term "serious bodily injury," the legislature consciously considered and rejected that terminology and instead adopted GBI. [McLaughlin Decl., Exh. A at 51:8-12.] Yet, "serious bodily injury" also was not specifically defined in these earlier drafts *and* was it used *prior to* the removal of TASERs and batons from the language: which, in turn, demonstrates that the Legislature did not consider the use of non-lethal, intermediate force to result in GBI. Moreover, Petitioner ignores the whole body of applicable case law (decided long before SB 1421 was drafted) holding that, when it comes to police uses of force, the terms GBI and SBI mean the same thing. If, by adopting the GBI term, the Legislature intended to *expand* the disclosability of police force, then why would the legislative history reveal that the Legislature was reducing the scope of disclosable force to only the most

"serious" cases? One cannot reduce the scope of police force disclosures to only the most serious cases if one makes any force that causes a bruise or any pain disclosable: such is an absurd argument.

Additionally, it is important to remember that an attempt in the Legislature to broaden the Penal Code § 832.7 exception to *all* uses of force failed. [*Id.* at p. 13.] Specifically, the sponsors of SB 1421 then sought to add to Penal Code § 832.7(b)(1)(A) an exception for "[a]n incident involving the use of force to make a member of the public comply with an officer, force that is unreasonable, or excessive force against a person by a peace officer or custodial officer," which was rejected. [Req. for Jud. Ntc. at Exh. H, p. 82.] If the definition of GBI is as broad as Petitioner contends – to include physical pain, scratches, scrapes, and bruises – then there would be no need for SB 1421's sponsors to seek to expand its disclosability.

In sum, **Petitioner is trying to accomplish by litigation what could not be accomplished by legislation**, and this Court must not make an erroneous interpretation to broaden the scope of Penal Code § 832.7(b)(1)(A)(ii) where the Legislature was clear that the scope was to be narrow and within the definition of police uses of force under applicable law. (*See Cal. Gov. Code §* 12525.2(d)(4) (defining SBI in the context of police uses of force to be "a bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ"); *People v. Arnett* (2006) 139 Cal.App.4th 1609, 1613 (under California law, GBI has essentially the same meaning as SBI); *Acosta v. City & County of San Francisco* (9th Cir. 1996) 83 F.3d 1143, 1145 n.3 (observing that an officer's deadly force is lawful to protect against "great bodily injury"); *see also Williams*, *supra*, 5 Cal.4th 337 at p. 361 ["Requests for broader disclosure must be directed to the Legislature."]; *Rackauckas*, *supra*, 104 Cal.App.4th at p. 176 ["If the Times wishes to redraft the language of the exemption, it should direct its efforts to the Legislature, not the judiciary."].) Thus, per the language of the statute and the Legislature's intent, **GBI should and must be defined as force that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ**.

B. Where Petitioner Analyzed Respondent's K-9 Use of Force Records and Determined No Great Bodily Injury or Death Resulted From Such Force, Such Records Were Appropriately Withheld As Exempt From CPRA Disclosure.

1. In Contrast to Police Use of Force Law, Which Defines Levels of Force By Foreseeability Of Injury, CPRA Disclosability Regarding GBI is Determined by Actuality of Outcomes.

The case law on police use of force has clarified that there are three levels of force: deadly, non-deadly-intermediate (or moderate), and non-deadly-low. (*See* Opp. to Mtn. for Judgment at pp. 9-11 (§4(B)(2)).) It is also true that, when it comes to determining in which of these three levels police force shall be categorized, the case law holds that force categorization is not outcome-determinative, but foreseeability-determinative. (*Id.*; *see also Smith v. Hemet* (9th Cir. 2005) 394 F.3d 589, 706 ["deadly force" is "force employed [that] creates a substantial risk of causing death or serious bodily injury"]; Penal Code § 835a(e) [same]; *Sanders v. City of Fresno* (E.D. Cal. 2008) 551 F. Supp.2d 1149, 1168 [where individual "died following a struggle in which multiple Taser applications were used," the use of a TASER was an intermediate or moderate, *not* deadly quantum of force because "[n]o evidence [was] presented that Tasers constitute force that creates a substantial risk of death"]; *Deorle v. Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1279-80 [holding that, even where death resulted from use of cloth-cased shot, the use of such cloth-cased shot fell short of deadly force because it was not reasonably expected that force to kill].)

In other words, when it comes to deciding if a specific use of force was, for example, deadly force, it would not matter whether the suspect actually died or not. What matters is whether, at the time such force was used, under the totality of the circumstances then known to the officer using such force, it was reasonably foreseeable that such force was substantially likely to cause death or serious bodily injury (a.k.a. GBI). (*Id.*) Thus, when categorizing a level of force, and determining which rule of law applies to when an officer may use such force, for a use force which, typically, is not reasonably foreseeable to cause death (*e.g.*, a punch to the arm), and is thus classified as "non-deadly force," the fact that such force, in some specific incident, does in fact cause death, under controlling law, such deadly result does not transform that non-deadly force into deadly force. (*Id.*)

By contrast, in the 2019+ revisions to the CPRA, creating narrow exceptions to the law enforcement investigatory records exemption, Respondent concedes that the language for determining what records are disclosable is outcome-determinative. In other words, contrary to how levels of force are determined by foreseeability of outcomes, CPRA disclosability is determined by actuality of outcomes. Thus, where a typical K-9 dog bite is categorized, and the reasonableness of its deployment would be adjudged by rules of law identifying it, as non-deadly-intermediate force [Opp. to Mtn. for Judgment at 9:18-10:8], under CPRA law, if a specific deployment of the non-deadly force of a K-9 dog bite, in some specific instance, did cause death, then Respondent concedes that CPRA would require the disclosure of the law enforcement investigatory records of that "non-deadly force" K9 deployment that caused such death. Thus, Respondent concedes that, in order to meet its CPRA disclosure duties here, a fact-specific examination of the potentially-responsive records is required.

However, where (as here) the actual records show no CPRA-disclosable (excepted) force, then the exceptions do *not* apply, and such police investigatory records remain exempt.

2. Pursuant to the Proper Narrow Definition of GBI, Respondent Determined the K-9 Use of Force Reports and Accidental Bite Reports Were Exempt from Disclosure.

As discussed in Respondent's Opposition and above, while the entirety of the K-9 Use of Force Reports and Accidental Bite Reports were exempt from disclosure under the police investigatory records exemptions and there were no applicable exceptions, Respondent chose to produce redacted versions: in the spirit of providing *some* of the information sought by Petitioner – *i.e.* the date of the incidents, the general location of the incidents, and other general investigatory details. [*See generally* Griffin Decl., Exh. 2 at pp. 96-896.]

(a) The Only Information Redacted From Police Records Disclosed-Produced In This Case Was Exempt Information.

Of note, the redactions consisted of *investigative analysis* of the use of force or accidental bite incidents (subject to the police investigatory records exemption), and identifying information of citizens and non-primary officers (subject to the policy records exemption and privacy

exemptions). [Abdulla Decl. at ¶¶9-10; *see generally* Griffin Decl., Exh. 2 at pp. 96-896.] In other words, while some exempt information was voluntarily disclosed to Petitioner, the remaining information on those same records – that was withheld by redaction – remained exempt as investigatory records: including the names of citizens, incident witnesses, non-primary officers, and incident narrative/investigative analysis. (*See Rodriguez, supra*, at p. 1270; *see also* Gov. Code § 7923.625(c).)

3. For The Responsive-But-Withheld Records, None Involved Any Use Of Force Where Such Force Caused Death Or The Proper Definition Of GBI.

The Court also inquired as to whether the Respondent made a specific factual determination that the records at issue fell under the exemption, rather than a categorical or general designation: and the answer is that the Respondent examined each of the responsive records individually to determine if the factual scenario at issue therein might trigger the exception that would make such records CPRA-disclosable – and none were found to be non-exempt. To elaborate, in determining that all responsive records to Petitioner's CPRA Request Nos. 7-12 – dealing with K-9 Use of Force Reports and Accidental Bite Reports – were exempt from disclosure, Petitioner evaluated such records on a case-by-case, particularized basis. [Abdulla Decl. at ¶8.] Specifically, each responsive incident record was analyzed to determine if the K-9 use of force or accidental bite resulted in GBI (as defined above) or death. [*Id.*] During this analysis, Respondent determined that no responsive records dealt with an incident where police force caused GBI or death; and, thus, all such responsive records were determined to be exempt from disclosure. [*Id.*; *see, e.g.*, Griffin Decl. Exh. 2 at p. 302 (stating "no injury" sustained by citizen); *id.* at pp. 199, 212, 260, 280, 353, 400, 412, 442, 452, 471, 522, 559, 569 (stating injuries sustained by citizen were "minor" ; *id.* at pp. 111, 163, 188, 251, 270, 280, 353, 363, 380, 471, 489, 569 (stating injuries sustained by citizen were "moderate").]

4. In Camera Review Of The Unredacted Records Is Unnecessary Because The Redacted Information Was Only Exempt If The Entire K-9 Record Could Have Been Exempt.

The Court also inquired as to whether it should review the withheld records, and/or the unredacted versions of the produced-disclosed records, *in camera*, in order to determine if the

information withheld was exempt/non-disclosable or excepted/disclosable. The Court is not required to engage in such a time-intensive inquiry where, as here, Respondent assures the Court that the only records withheld, and the only information withheld-by-redaction, were exempt records under Respondent's understanding of the proper (narrow) definition of the GBI exception. Indeed, the Court is not only entitled to rely upon the Respondent's representation of such, but the law presumes that – barring evidence produced by Petitioner to the contrary – the Respondent acted in good faith in evaluating whether its responsive public records were disclosable or not under the CPRA. (*American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 85 ["Government agencies are, of course, entitled to a presumption that they have reasonably and in good faith complied with the obligation to disclose responsive information."].)

Thus, while Respondent produced redacted records pursuant to its ability to voluntarily and knowingly disclose certain information through limited waiver of an exemption, all responsive records were exempt form disclosure in their *entirety*. [Abdulla Decl. at ¶9.]

As a result, because all responsive records were exempt under the CPRA, and no exceptions to such exemption applied, the information not redacted in the disclosed records was provided based on Respondent's limited waiver of the investigatory records exemption as to that specific un-redacted information. [*Id.* at ¶9.] In other words, because the redactions were not made on the basis of a specific privilege, but pursuant to Respondent's interpretation of the CPRA that the investigatory records exemption is applicable to K-9 Use of Force Reports and Accidental Bite Reports where the use of force did not result in GBI or death, *in camera* review to determine if the redactions would be appropriate is unnecessary: either the responsive documents are exempt in their entirety or they are not. However, if the Court does find *in camera* review to be appropriate, Respondent remains willing to present the unredacted and withheld records. [*See* Opp. to Mtn. for Judgment at p. 17 (§4(C)(1)).]

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5. CONCLUSION.

For the foregoing reasons and those discussed in Respondent's Opposition, Respondent respectfully requests that the Court Deny Petitioner's motion in its entirety, including denying attorneys' fees, and enter judgment in Respondents' favor.

DATED: March 7, 2025

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: Abigail McLaughlin

TONY M. SAIN
ABIGAIL J. R. McLAUGHLIN
Attorneys for Respondent,
CITY OF FRESNO

CALIFORNIA STATE COURT PROOF OF SERVICE
ACLU v. City of Fresno, et al.
FCSC Case No. 24CEG01635; Client Matter No. 54986-05

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, CA 90071.

On March 7, 2025, I served true copies of the following document(s): RESPONDENT'S SUPPLEMENTAL BRIEF REGARDING OPPOSITION TO MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

☒ (BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent from e-mail address Corinne.Taylor@lewisbrisbois.com to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on March 7, 2025, at Los Angeles, California.

/s/ Corinne Taylor
Corinne Taylor

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Nicolas Hidalgo, Esq. AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC. 39 Drumm Street San Francisco, CA 94111 Telephone: 415.621.2493 Facsimile: 415.255.1478 Email: nhidalgo@aclunc.org	Attorneys for Petitioner AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a non-profit corporation
Stephanie Padilla, Esq. AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA, INC. 1313 West Eighth Street Los Angeles, CA 90017 Telephone: 213.977.5232 Facsimile: 213.201.7878 Email: SPadilla@aclusocal.org bcalagui@aclunc.org	Attorneys for Petitioner AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a non-profit corporation