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7 Attorneys for Intervenors
8 DWIGHT AARONS; CHARLENE BELLINGER HONIG;
9 PETER L. CARR, IV; EUGENE CLARK-HERRERA;
10 FRANCISCO CORTES; REBECCA HALL;
11 ANGEL HORACEK; SARA JACKSON;
12 ANDREA LUQUETTA; XOCHITL MARGQUEZ;
13 LETITIA D. MOORE; ANTHONY J. TOLBERT;
14 ERIKA K. WOODS; AND DOE 1

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION**

15 RICHARD SANDER, JOE HICKS, and the
16 CALIFORNIA FIRST AMENDMENT
COALITION,

17 Petitioners,

18 vs.

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

21 Respondents,

Case No.: CPF-08-508880

**INTERVENORS' COMPLAINT IN
INTERVENTION FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Dept.: 305
Judge: Mary E. Wiss

Petitioner's Complaint Filed: Oct. 3, 2008
Trial Date Proposed: Dec. 7, 2015

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23 DWIGHT AARONS; CHARLENE
24 BELLINGER HONIG; PETER L. CARR,
25 IV; EUGENE CLARK-HERRERA;
26 FRANCISCO CORTES; REBECCA HALL;
27 ANGEL HORACEK; SARA JACKSON;
28 ANDREA LUQUETTA; XOCHITL
MARQUEZ; LETITIA D. MOORE;
ANTHONY J. TOLBERT; ERIKA K.
WOODS; and DOE 1,
Intervenors,

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vs.

RICHARD SANDER, JOE HICKS, and the
CALIFORNIA FIRST AMENDMENT
COALITION,

Defendants in Intervention.

///

1 By leave of Court, Intervenors Dwight Aarons; Charlene Bellinger Honig; Peter L. Carr,
2 IV; Eugene Clark-Herrera; Francisco Cortes; Rebecca Hall; Angel Horacek; Sara Jackson;
3 Andrea Luquetta; Xochitl Marquez; Letitia D. Moore; Anthony J. Tolbert; Erika K. Woods; and
4 Doe 1 (collectively, "Intervenors"), file this complaint and thereby intervene in this action.

5 Intervenors join with Respondents in opposing Petitioners' claims, alleging as follows:

6 1. On or about October 3, 2008, Petitioners Richard Sander, Joe Hicks, and
7 the California First Amendment Coalition filed the Verified Petition for Writ of Mandate, or in
8 the Alternative, Complaint for Declaratory Relief and Injunctive Relief, in the above-entitled
9 action against Respondents State Bar of California and the Board of Governors of the State Bar
10 of California. Petitioners seek an order compelling Respondents to disclose information
11 contained within personal documents and information collected by the State Bar of California
12 concerning applicants for the California Bar Examination. Respondents have appeared in this
13 action by filing an Answer on or about November 17, 2008.

14 **THE PARTIES**

15 2. Intervenors are individuals who applied to take the California Bar Exam
16 between 1972 and the present. Intervenors are alumni of law schools including Stanford Law
17 School, Berkeley School of Law (Boalt Hall), UCLA School of Law, UC Hastings College of the
18 Law, and Santa Clara University School of Law. The group of Intervenors consists of
19 predominantly persons who are African American and Latino, but also includes persons of other
20 racial backgrounds.

21 3. Intervenors are informed and believe and thereon allege that Petitioner
22 Richard Sander ("Sander") is an individual who resides in California and a professor of law at
23 the University of California Los Angeles.

24 4. Intervenors are informed and believe and thereon allege that Petitioner Joe
25 Hicks is an individual who resides in California.

26 5. Petitioner California First Amendment Coalition is incorporated under the
27 laws of the State of California and purports to be organized and existing as required by law, with
28 its principal place of business in California.

1 6. Respondent State Bar of California (“State Bar”) is a public corporation
2 within the judicial branch of the California state government.

3 7. Respondent Board of Governors of the State Bar of California (“Board of
4 Governors”) is the governing body of the State Bar.

5 **INTRODUCTION**

6 8. Intervenors seek to intervene to protect privacy and reputational interests
7 that are at the heart of the litigation between Petitioners and the State Bar. In particular, it is
8 Intervenors’ sensitive, private information that stands to be exposed if Petitioners prevail in this
9 action. Intervenors were explicitly guaranteed that the information they provided would be kept
10 confidential, and Intervenors relied on these guarantees when providing the information to the
11 State Bar. If the information were to be disclosed to Petitioners without Intervenors’ consent,
12 such disclosure would violate Intervenors’ rights to privacy under the California Constitution and
13 the Family Education and Privacy Rights Act (“FERPA”), 20 U.S.C. § 1232g, and would breach
14 Intervenors’ contractual rights to keep their personal academic and professional data private.

15 9. Petitioners contend that the State Bar and the Board of Governors are
16 required to disclose information concerning applicants for the California Bar Exam over a year
17 period. The information sought includes, among other data, law school grades, Law School
18 Admissions Test (LSAT”) scores, undergraduate grades, Bar Exam scores, and race for each of
19 the applicants. Petitioners allege that they seek this information for their personal research
20 concerning the effect of law school affirmative action admissions policies on persons of color
21 who were admitted to law school and who applied to take the California Bar Examination.
22 Sander in particular seeks this information to argue that African-American and Latino law
23 students who were admitted under affirmative action type processes to law schools, particularly
24 “upper tier” and “middle tier” law schools, were “mismatched” and perform poorly in law school
25 and on the Bar Exam, and in their professional careers.

26 10. Intervenors have a direct interest in this dispute because Intervenors’
27 private academic and professional information will be exposed if Petitioners’ request is granted.
28 Intervenors have a strong interest in preventing the public release of private academic and testing

1 information. The information at issue in this lawsuit is highly sensitive and disclosure in the
2 manner Petitioners seek would have a detrimental effect on Intervenors. Intervenors are
3 informed and believe that the risk of harm to Intervenors is especially grave because Petitioner
4 Sander intends to couple Intervenors' private data with a discussion of his "mismatch" theory,
5 which calls into question the competence of African-American and Latino applicants for the
6 California Bar Exam, and suggests that such individuals were admitted to law schools that they
7 were unqualified to attend. Moreover, the issue is not just exposure in a general sense but also
8 that the law prohibits the disclosure of this information absent Intervenors' consent, which has
9 not been sought and which they have not given.

10 11. Intervenors relied upon promises of confidentiality when they provided
11 much of the information to the State Bar that Petitioners seek. If Respondents are ordered to
12 provide the information, these promises will be broken and Intervenors' highly sensitive personal
13 information will be disclosed to members of the general public, including Petitioners, against
14 Intervenors' wishes.

15 12. Redacting information to remove individuals' names and the other
16 procedures that Petitioners propose to use will not adequately address Intervenors' privacy
17 interests, nor will it adequately protect Intervenors from being associated with inaccurate,
18 damaging, misleading, inflammatory and embarrassing representations about their academic and
19 professional credentials. The problem is that even aggregating or "anonymizing" this data does
20 not protect the Intervenors from being re-identified. This is particularly so because they are
21 members of small groups or cohorts that make their identities easily traceable. In short, the
22 removal of this information does not protect privacy.

23 13. Intervenors' privacy rights protect them against disclosure of the
24 information. Intervenors object to the disclosure of the information that Petitioners seek, and
25 respectfully request that the Court dismiss Petitioners' request, or, in the alternative, affirm the
26 carefully-made decision of the State Bar and the Board of Governors to refuse to disclose the
27 information sought by Petitioners.

28

1 **FACTS**

2 14. In connection with their applications to take the California Bar
3 Examination, Intervenors provided to the State Bar, or authorized to be provided, private
4 information concerning Intervenors' race and ethnic backgrounds, academic records,
5 standardized test scores, and other matters. Intervenors released this information to the State Bar
6 for the limited purpose of evaluating their respective eligibility for admission to the State Bar. In
7 providing this information, Intervenors received written assurances that the information would be
8 treated as confidential and used for the State Bar's internal purposes only. Based on these
9 assurances, Intervenors reasonably believed that the information would only be used in
10 accordance with these assurances and would not be released to any party outside the State Bar.

11 15. When Intervenors applied to take the Bar Exam, they signed an
12 authorization provided by the State Bar to allow the State Bar to collect their personal
13 information for the limited purpose of processing of their applications to become members of the
14 State Bar.

15 16. Also in connection with their applications to take the Bar Exam, each of
16 the Intervenors were asked to complete a voluntary survey requesting information about his or
17 her ethnic background. The preface to the survey promised that this information would be
18 treated as confidential. Absent this promise of confidentiality, many of the Intervenors would
19 not have provided this information.

20 17. Intervenors authorized their law schools to release their law school Grade
21 Point Averages ("GPA") to the State Bar for the limited purpose of evaluating their application
22 to the State Bar. In providing this information, and in keeping with the requirements of FERPA,
23 Intervenors understood that the State Bar would not disclose this information to any other party
24 without Intervenors' prior consent.

25 18. Intervenors authorized the Law School Admissions Council ("LSAC") to
26 release their LSAT scores to the State Bar for the limited purpose of evaluating their application
27 to the State Bar. In authorizing the limited release of this information, Intervenors understood
28 that the State Bar would use the information for internal purposes only.

1 19. Intervenors wish to keep the foregoing information private and do not
2 consent to its disclosure outside the State Bar.

3 20. On information and belief, Petitioners are pursuing a course of academic
4 study entitled “Project SEAPHE,” under which they seek to study the effects of what Petitioners
5 call “preferential admissions policies,” including law school admissions policies, upon people of
6 color. Petitioner Sander’s thesis is that a “mismatch effect” exists as a result of the so-called
7 “preferential admissions policies,” by which African-American, Latino, and other
8 underrepresented minority students are admitted to law schools where they purportedly are not
9 academically qualified to compete and, as a result, the students of color receive lower grades in
10 law school, pass the Bar Exam at lower rates, and are less successful in their legal careers.

11 21. On information and belief, to further their research, Petitioners have
12 submitted a series of requests to the State Bar, beginning in September 2006, and sought several
13 pieces of information from the State Bar concerning Intervenors and other applicants for the
14 California Bar Exam from 1972 to 2007 (the “Applicants”). The information Petitioners have
15 sought in their series of requests includes data on Applicants’ race, gender, undergraduate GPA,
16 LSAT score, graduating law school, matriculating law school, year of law school graduation, law
17 school GPA, date of Bar Exam(s) taken, total raw and scaled Bar Exam scores, raw and scaled
18 scores for the essay portion of the Bar Exam, raw and scaled scores for the performance test
19 portion of the Bar Exam, raw and scaled scores for the Multi-State Bar Examination (“MBE”),
20 and whether the Applicants passed the Bar Exam. Petitioners have submitted multiple requests,
21 each time modifying the exact information sought.

22 22. As currently framed, Petitioners seek disclosure of the Applicants’ race,
23 law school, transfer student status, year of law school graduation, total raw score on the first Bar
24 Exam, MBE score (raw and scaled), essay scores (raw and scaled), performance test scores (raw
25 and scaled), Bar passage, law school GP A, LSAT score, and undergraduate GPA. In fact,
26 because Petitioners request the Applicants’ scores on the Bar Exam, they seek information about
27 Applicants that even Applicants themselves cannot access.
28

1 23. Intervenors are aware that following the release of Bar Exam results, the
2 State Bar publishes statistics showing the pass rates of various groups, including statistics
3 showing pass rate by law school and pass rate by ethnic group. However, the information
4 Petitioners seek in the instant action would identify each individual by several more specific
5 variables than are identified in the information the State Bar publishes. For example, while the
6 State Bar may release one figure depicting Bar pass rates by school, and another figure depicting
7 Bar pass rates by race that groups by schools' accreditation status (*i.e.*, ABA accredited,
8 California Accredited, etc.), Petitioners seek data describing several more specific characteristics
9 by individual. As a result, the combination of variables pertaining to each individual would
10 result in a much more specific profile of each individual, and disclosure according to Petitioners'
11 request would be much more likely to expose individuals' sensitive, private information.

12 24. The State Bar's published figures are also not comparable to the
13 information requested by Petitioners because the State Bar's figures do not identify scores on the
14 Bar Exam, but merely passage and failure rates. Here, Petitioners seek individual-level Bar
15 Exam scores, a significantly more invasive request. Intervenors are aware that at times the State
16 Bar's released figures depict passage or failure rates for categories containing only a small
17 number of individuals, such that if a party reading the published figures were aware of the
18 identity of the Applicant(s) in the small group, the party could identify whether the Applicant(s)
19 passed or failed the Bar Exam. However, because the State Bar publishes the names of
20 Applicants who pass the Bar Exam, a member of the public who knows the identity of an
21 individual Applicant may already verify whether that Applicant passed the Bar Exam; the State
22 Bar's released figures in effect provide no new information. By contrast, no member of the
23 public—not even Applicants themselves—may independently verify an Applicant's score on the
24 Bar Exam.

25 25. On information and belief, Intervenors are generally aware that the State
26 Bar has itself conducted studies of bar passage rates of Applicants of different racial
27 backgrounds. However, Intervenors understand that these studies were conducted and considered
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1 internally and did not involve disclosures to third parties that would violate Applicants' limited
2 consent to disclosure of information.

3 26. On information and belief, Intervenors are generally aware that the State
4 Bar has provided information in some of the categories Petitioners now seek to the LSAC for the
5 LSAC's research purposes. Intervenors understand that prior to disclosure of private information
6 the LSAC obtained signed consents from the Applicants whose data it received.

7 27. On information and belief, Petitioners have sought and obtained
8 information from the Office of the President of the University of California ("UCOP") regarding
9 undergraduates at several University of California campuses, and that information includes
10 students' grade point averages and racial backgrounds. The decision of a separate institution
11 whether or not to provide a different set of information in response to a different request from
12 Petitioners does not control whether the State Bar is required to respond to Petitioners' request
13 here, and does not discharge the State Bar from following the law, particularly where it has
14 obtained the information pursuant to an express promise not to disclose it. In addition,
15 Petitioners' request to UCOP is distinguishable from the request here. First, given the vastly
16 greater number of students enrolled as undergraduates in the University of California system as
17 compared to the number of law school graduates taking the Bar Exam, the potential for
18 individual identification would be much greater here. In addition, Intervenors are informed and
19 believe that Petitioners' request to UCOP sought only information that is also available to the
20 students themselves. By contrast, Petitioners seek Bar Exam scores, which are not even
21 available to Applicants themselves. Further, Intervenors are informed and believe that UCOP
22 was unwilling to identify African American and Latino students in separate groups, opting
23 instead to categorize all such students under the less-specific label of "underrepresented
24 minorities," and also refused to comply with Petitioners' request in several other respects.
25 Moreover, there are Intervenors and members of the group whose information is sought by
26 Petitioners who were not graduates of any public university.

27 28. The State Bar and the Board of Governors have declined to release the
28 information Petitioners seek.

1 29. On information and belief, during the period the State Bar was considering
2 Petitioners' request for information, many individuals, including Applicants whose private data
3 was subject to disclosure, provided written comments opposing disclosure of the requested
4 information to Petitioners. Accordingly, Intervenors believe that many additional Applicants
5 also object to the disclosure of their personal information to Petitioners.

6 **MANDATORY INTERVENTION—CODE CIV. PROC. § 387(b)**

7 30. Intervenors incorporate by reference paragraphs 1 through 29 above.

8 31. As shown by the facts alleged above, Intervenors have a right to intervene
9 in this action because Intervenors have an interest in the transaction that is the subject of the
10 pending case, Intervenors' ability to protect their interests may be impaired or impeded by the
11 disposition of this case in their absence, Intervenors' interests are not adequately represented by
12 the existing parties in this action, and Intervenors have made timely application to intervene.

13 **PERMISSIVE INTERVENTION—CODE CIV. PROC. § 387(a)**

14 32. Intervenors incorporate by reference paragraphs 1 through 31 above.

15 33. As shown by the facts alleged above, Intervenors should be permitted to
16 intervene because Intervenors have a direct and significant interest in this lawsuit, Intervenors'
17 inclusion will not enlarge the scope of this lawsuit, Intervenors' need to intervene outweighs the
18 current parties' right to litigate on their own terms, and Intervenors have made timely application
19 to intervene.

20 **DISCLOSURE OF THE DATA SOUGHT BY PETITIONERS WOULD VIOLATE**
21 **INTERVENORS' PRIVACY RIGHTS UNDER ARTICLE I, SECTION 1 OF THE**
22 **CALIFORNIA CONSTITUTION**

23 34. Intervenors incorporate by reference paragraphs 1 through 33 above.

24 35. Disclosure of the information Petitioners seek would violate Intervenors'
25 privacy rights under Article I, section 1 of the California Constitution.

26 36. A cause of action for invasion of privacy has three elements: "(1) a
27 Legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances;
28 and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill v. Nat'l Collegiate*

1 *Athletic Ass 'n* (1994) 7 Cal.4th 1, 35, 39–40. All three criteria are met here. Further, Intervenors’
2 privacy rights outweigh any countervailing interest Petitioners have in obtaining the information.

3 37. “A particular class of information is private when well-established social
4 norms recognize the need to maximize individual control over its dissemination and use to
5 prevent unjustified embarrassment or indignity.” *Id.* at 35.

6 38. The information sought here has long been recognized as private.
7 Petitioners seek disclosure of Applicants' undergraduate and law school academic records;
8 academic records are “normally recognized as warranting protection from disclosure.” (*Pantos*
9 *v. City & Cnty. of San Francisco* (1984) 151 Cal.App.3d 258, 264.) In *Porten v. University of*
10 *San Francisco* (1976) 64 Cal. App. 3d 825, the plaintiff alleged that his university violated his
11 constitutional right to privacy by disclosing his grades from his previous university to the State
12 Scholarship and Loan Commission. Recognizing that the allegedly disclosed information was
13 protected by the right of privacy, the court found that the plaintiff stated a *prima facie* claim of
14 violation of the state constitutional right to privacy. (*Id.* at 832.) The privacy of academic
15 information is also recognized by and strictly protected by federal law under FERPA, as set forth
16 below.

17 39. Individuals’ LSAT and Bar Exam scores are likewise private. Individuals’
18 personnel records are protected by the right of privacy. (*Harding Lawson Assocs. v. Super. Ct.*
19 (1992) 10 Cal.App.4th 7, 10.) LSAT and Bar Exam scores, which measure academic and
20 professional ability, are akin to both private academic records and personnel records (such as
21 performance evaluations) and are thus protected by the right of privacy. That this information
22 has been recognized as private cannot be open to serious dispute, as the State Bar restricts access
23 to Bar Exam scores to such a high degree that Applicants themselves may not even access this
24 information. (Rules of the State Bar of California, Rule 4.62 [Cal. State Bar].)

25 40. Intervenors had, and continue to have, a reasonable expectation that the
26 information Petitioners seek will remain confidential because they were explicitly guaranteed
27 that the information they provided would be kept confidential. In *Hill*, the Supreme Court found
28 that one factor that may diminish an individual’s reasonable expectation of privacy is whether

1 the individual has had advance notice of the potential privacy invasion and the opportunity to
2 consent. (*See Hill*, 7 Cal.4th at 42.) Here, not only did Intervenors receive no advance notice
3 and opportunity to consent to disclosure, they were expressly promised the opposite. Intervenors
4 provided their private information to the State Bar in reliance on these promises.

5 41. Intervenors are informed and believe that the State Bar suggested that
6 Petitioners obtain written consent to disclosure from the Applicants, but that Petitioners rejected
7 this notion.

8 42. Intervenors' reasonable expectation of privacy is not diminished by the
9 fact that they provided the information at issue to the State Bar, an arm of the California
10 Supreme Court. "Courts do have the inherent power to control their own records to ... protect the
11 public from injury." (*Pantos*, 151 Cal.App.3d at 262.) In *Pantos*, questionnaires completed by
12 prospective jurors and containing private information were not subject to public disclosure. In
13 finding that a member of the public did not have the right to access the jury questionnaires for
14 research purposes, the court noted that the questionnaires were not historically disclosed to the
15 public and that the jury commissioner had represented to the prospective jurors that the
16 information provided would be treated as confidential. (*Id.* at 263.) Similarly, individuals'
17 academic records and LSAT and Bar Exam scores have not been historically disclosed to
18 members of the public without advanced consent, and the State Bar assured Intervenors that this
19 information, as well as the voluntarily-provided racial information, would not be disclosed.

20 43. Disclosure in the manner Petitioners seek would constitute a serious
21 invasion of Intervenors' privacy rights. It is well-established that private information disclosed
22 for one purpose may not be disclosed for another purpose without individuals' consent. In
23 creating the constitutionally-protected right to privacy, the proponents of the amendment stated,
24 "[t]he right of privacy ... prevents government and business interests from collecting and
25 stockpiling unnecessary information about us and from misusing information gathered for one
26 purpose in order to serve other purposes or to embarrass us." (*Hill*, 7 Cal.4th at 17.) As part of
27 this guarantee, the constitutional right to privacy protects against "the improper use of
28 information properly obtained for a specific purpose, for example, the use of it for another

1 purpose or the disclosure of it to some third party.” (*Porten*, 64 Cal.App.3d at 830; *see also*
2 *Urbaniakv. Newton* (1991) 226 Cal.App.3d 1128, 1138; *Payton v. City of Santa Clara* (1982)
3 132 Cal.App.3d 152, 154.) Intervenors provided their private information to the State Bar for the
4 limited purpose of applying to become members. Petitioners’ request for, and proposed use of,
5 the information sought is inconsistent with the conditions under which Intervenors provided the
6 information at issue, and the information cannot and should not be disclosed without Intervenors’
7 consent.

8 44. Petitioners incorrectly contend that there is no privacy violation because
9 they do not seek disclosure of the Applicants’ names and propose certain other measures to
10 decrease the risk of identification, such as requesting that data not be produced in “cell sizes”
11 that are smaller than five individuals. Petitioners’ proposed protective measures are insufficient
12 to ensure that private information may not be traced to individuals. Several Applicants have
13 already protested that they would be individually identifiable, even with the safeguards
14 Petitioners propose, in large part because the numbers of individuals comprising the groups
15 Petitioners seek to study are small. For example, among the Intervenors are African-American
16 attorneys who were part of cohorts of fewer than ten in their graduating law school class. While
17 the combination of one or two variables may not necessarily identify an individual, the
18 combination of several variables in the manner Petitioners seek creates a real risk that individual
19 identities could be discovered. FPCO, the agency charged with interpreting FERPA, has
20 recognized that a student’s identity can be easily traceable in the release of aggregated,
21 anonymous, or de-identified data, even where the identity is revealed only through a combination
22 of a series of requests. There is also the risk others may mistakenly attribute one individual’s
23 data to another person, drawing incorrect conclusions about a person’s academic credentials and
24 test scores. Intervenors are also concerned that such risks could have harmful effects on current
25 law students who are members of underrepresented minorities. This is precisely the harm that
26 FERPA seeks to prevent.

27 45. The risk that individuals may be identifiable is amplified here because the
28 proposed recipient of the data, Dr. Stephen Klein, has through his past work accessed additional

1 data from the State Bar. As Petitioners admit, Dr. Klein “has had access to the bar examination
2 records collected and maintained by the State Bar, and has conducted numerous studies and
3 prepared numerous reports based on these records over the years.” (Petition, at ¶ 19.)
4 Intervenors do not suggest that Petitioners have any intention of taking advantage of Dr. Klein's
5 prior knowledge to improperly circumvent the privacy measures they propose. However, it
6 cannot be disputed that Dr. Klein has knowledge about Applicants from his prior work that
7 others simply do not, and that this information could be used, even unintentionally, in
8 combination with the information Petitioners now seek, to identify individuals.

9 46. Moreover, even if Petitioners' proposed methods were sufficient to
10 maintain the individual Applicants' anonymity so that specific data could not be attributed to
11 individuals, such a fact would not be sufficient to protect Applicants' privacy interests.
12 Petitioners' proposal to limit “cell sizes” to five or more is insufficient to alleviate this concern
13 because a cell of five individuals will still permit the exposure of average figures that could be
14 unfairly and inaccurately generalized to very small groups of individuals. For example, a
15 statement such as “80 percent of graduates of an elite private law school who are African
16 American passed the Bar Exam with only a point to spare,” would be permissible under the
17 privacy measures Petitioners suggest. As a result, it may be possible for Petitioners or the public
18 to draw negative generalizations about a given group—regardless of size—as a whole, or about the
19 majority of the members of the group, that may be inaccurate for a particular individual. Further,
20 the members of the public most likely to have background information that would enable them to
21 deduce information about individual Applicants—such as former classmates and colleagues who
22 are aware of the identities of members of these small cohorts—may, for professional reasons, be
23 the people Intervenors most wish to prevent from learning this private information.

24 47. This is not a hypothetical concern. In a September 26, 2007 *Los Angeles*
25 *Times* op-ed, Sander asserted that 2005 graduates of “one selective California law school” who
26 were the beneficiaries of “large preferences” in admissions failed the Bar Exam at ten times the
27 rate of their classmates. Since in his work Sander has identified African-American students as
28 the principal beneficiaries of “preferences” and since he teaches at what has been characterized

1 as a selective California law school, the logical inference drawn by a reasonable reader is that
2 Sander referred to the 13 African-American students who graduated from UCLA that year.
3 Whether or not individual members of this cohort were among the group who failed the bar on
4 the first attempt, the aspersion has been cast on them as members of the group. Petitioners’
5 assertion that there is no risk of injury is belied by the way in which Sander has already made
6 certain claimed assertions.

7 48. This risk is especially great when one considers that Petitioners seek not
8 only pass-fail information but Bar Exam scores. The State Bar represents to Applicants that the
9 Bar Exam is a “pass-fail” test. This is because the State Bar has determined that all successful
10 applicants are equally qualified to practice law in California, and should not be treated
11 differently simply because they received a higher or lower passing score. As a result, Applicants
12 prepare with the objective of achieving a *passing* score on the Bar Exam, not achieving a high
13 score. To measure Applicants’ test performance on a different scale after the fact, and to
14 represent to the public that these scores suggest something about Applicants’ abilities that they
15 do not, would subvert Applicants’ fundamental assumptions in preparing for the Bar Exam. In
16 fact, given the binary pass-fail structure, it would seem optimal for an Applicant to achieve the
17 minimum passing score, because such a result would be maximally efficient - devotion of the
18 minimum time and effort necessary to achieve a passing score. Such a *post hoc* disclosure of
19 scores could also unfairly prejudice individuals who developed a course of study for the Bar
20 Exam while balancing competing obligations, such as working or childcare.

21 49. Further, even if Petitioners could adequately demonstrate that the risk of
22 disclosing information traceable to an individual is very low, such a showing does not
23 necessarily entitle them to disclosure. “A privacy interest does not need to be violated before it
24 can be acknowledged.” (*Planned Parenthood Golden Gate v. Superior Court* (2000) 83
25 Cal.App.4th 347, 363 [refusing to disclose names and addresses of employees of Planned
26 Parenthood].) Even in a case where the potential for abuse is low, disclosure is not proper if the
27 potential risks of disclosure are great. (*See id.* at 369.) Here, there is great potential harm that
28 could result from identification of Intervenors. Intervenors have devoted considerable time and

1 effort to building their professional reputations, and the discovery of links between data and
2 individuals, or erroneous linking of one individual to data pertaining to another individual, could
3 unfairly threaten Intervenors’ professional reputations and opportunities for career advancement.
4 For example, if a client or employer were able to deduce that an individual passed the Bar
5 Examination by a narrow margin (though the Bar Exam has been held out to its takers as merely
6 a “pass-fail” test), or even that the individual was a member of a small cohort where the majority
7 of members passed by a narrow margin, potential clients or employers may question that
8 individual's professional competence, conclude that the individual is not capable of handling
9 complex assignments, and award the work to others as a result. Not only may these members of
10 the public draw inappropriate conclusions, they may also do so in reliance on stale information,
11 as Petitioners seek information dating back to 1972.

12 50. Intervenors are aware that Petitioners have claimed that the State Bar
13 cannot make public records into private records by promising Applicants that the information
14 will be maintained as confidential. However, as discussed above, merely because records are
15 maintained by an arm of a court does not necessarily render those records public information.
16 Also, in so arguing, Petitioners overlook that some of the information they seek—including the
17 information on race—was provided voluntarily by the Applicants in reliance on these promises.

18 51. With respect to personnel records, which are comparable to the
19 professional data sought here, “California courts have generally concluded that the public
20 interest in preserving confidential information outweighs the interest of a private litigant in
21 obtaining the confidential information.” (*Harding Lawson Assocs.*, 10 Cal.App.4th at 10.)
22 Petitioners have failed to establish a vital interest sufficient to override the public interest.

23 **DISCLOSURE OF THE DATA SOUGHT BY PETITIONERS WOULD VIOLATE**
24 **INTERVENORS’ PRIVACY RIGHTS UNDER FERPA**

25 52. Intervenors incorporate by reference paragraphs 1 through 51 above.

26 53. Disclosure of the information Petitioners seek would violate Intervenors’
27 privacy rights under FERPA, 20 U.S.C. § 1232g.
28

1 54. Under FERPA, educational institutions receiving federal funds are
2 generally prohibited from releasing students' "education records" without express written
3 consent. (20 U.S.C. § 1232g (b)(1).) Personally identifiable information under FERPA is not
4 limited to names, Social Security Numbers, birthdates, or other information that directly
5 identifies an individual. It also specifically includes information that, alone or when combined
6 with other information, could be linked to a specific individual and that would allow a reasonable
7 person within the school community to identify the individual with reasonable certainty. (34
8 C.F.R. 99.3.) Notably, “[a] student's identity may ... be ‘easily traceable’ in the release of
9 aggregated or statistical information derived from education records.” (Guidance Letter to
10 Miami University re: Disclosure of Information Making Student's Identity Easily Traceable
11 (FCPO, 1 Oct. 19, 2004), available at
12 <http://www.ed.gov/policy/gen/guid/tpco/ferpa/library/unofmiami.html>). As set forth above, the
13 information Petitioners seek would make Applicants’ identities easily traceable, and thus it does
14 not fall within the narrow exceptions to the rule of non-disclosure.

15 55. FERPA further provides that educational institutions may only disclose
16 confidential education records to third parties, such as the State Bar, upon the condition that the
17 third party may not pass on the disclosed information without the student's written consent. (20
18 U.S.C. § 1232g (b)(4)(B).) In accordance with this provision, Intervenors’ private education
19 records were disclosed to the State Bar on the condition that the information would not be passed
20 on without Intervenors’ consent; thus, if the State Bar were to disclose the data to Petitioners
21 without Intervenors’ consent, the disclosure would violate FERPA.

22 56. If disclosure is ordered, Petitioners will suffer damages, as set forth above.

23 **INTERVENORS HAVE A CONTRACTUAL RIGHT TO KEEP THE REQUESTED**
24 **INFORMATION PRIVATE**

25 57. Intervenors incorporate by reference paragraphs 1 through 56 above.

26 58. As alleged above, Intervenors entered into written agreements with the
27 State Bar that promised that the information Intervenors provided would be kept confidential and
28

1 not disclosed outside the State Bar. Intervenors provided the information sought in reliance on
2 these promises of confidentiality.

3 59. On information and belief, Petitioners are aware that the State Bar
4 promised that the information Intervenors provided would remain confidential.

5 60. As stated above, if disclosure of the information Petitioners seek is
6 ordered, such an order would breach Intervenors' rights under the agreements to maintain the
7 confidentiality of the information they provided. Petitioners' proposed protective measures do
8 not prevent breach of Intervenors' contractual rights to maintain the confidentiality of the
9 information provided.

10 61. If disclosure is ordered, Intervenors will suffer damage as set forth above.

11 **FIRST CAUSE OF ACTION**
12 **(Declaratory Relief, Against Petitioners)**

13 62. Intervenors incorporate by reference paragraphs 1 through 61 above.

14 63. An actual controversy has arisen and now exists relating to the rights and
15 the duties of the parties in that Petitioners contend that they are entitled to obtain disclosure of
16 Intervenors' sensitive, private information from the State Bar, and Intervenors deny this
17 contention and object to Petitioners' efforts.

18 64. Intervenors desire a judicial determination of their rights and a declaration
19 that Petitioners are not entitled to obtain disclosure of the information they seek via this action.

20 65. A judicial declaration is necessary and appropriate at this time so that
21 Intervenors may be assured that their privacy rights will not be violated and that their contractual
22 right to maintain the confidentiality of the information provided to the State Bar will be upheld.
23 Absent a judicial determination, Intervenors' right to guard against disclosure of their sensitive,
24 private information remains at risk.

25 **SECOND CAUSE OF ACTION**
26 **(Injunctive Relief, Against Petitioners)**

27 66. Intervenors incorporate by reference paragraphs 1 through 65 above.
28

1 67. If Petitioners' request for disclosure is granted, Intervenors will suffer
2 irreparable injury in that sensitive, private information will be disclosed against their wishes and
3 in violation of their right to privacy.

4 68. Intervenors have no adequate or speedy remedy at law as it will be
5 impossible for Intervenors to determine the precise nature and amount of damages that will result
6 from the violation of their privacy rights.

7 WHEREFORE, Intervenors pray for judgment as follows:

8 1. For a declaration providing that Petitioners are not entitled to obtain
9 disclosure from the State Bar of the information they seek concerning Intervenors;

10 2. For issuance of injunctive relief restraining and enjoining Petitioners from
11 obtaining the information that they seek concerning Intervenors from the State Bar;

12 3. That the Petition, and each purported cause of action therein, be dismissed
13 with prejudice;

14 4. That Petitioners' request for disclosure of information and other relief be
15 denied;

16 5. That judgment be entered against Petitioners;

17 and

18 6. For such other relief as the Court deems just.

19
20 Dated: January 5, 2015

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