IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 8

JANET E. BURKLE, Appellant and Petitioner,	2d Civil No. B179751
vs.	Los Angeles County Superior Court Case No. BC390479 Hon. Roy L. Paul, Judge Hon. Stephen M. Lachs (Ret.), Judge Pro Tempore
RONALD W. BURKLE, Respondent.	

OPPOSITION OF INTERVENORS LOS ANGELES TIMES COMMUNICATIONS LLC, THE ASSOCIATED PRESS, AND CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION TO RESPONDENT RONALD W. BURKLE'S APPLICATION TO SEAL COURT RECORDS

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1.

SUMMARY OF ARGUMENT

As the California Supreme Court made clear in the palimony/fraud trial of celebrities Clint Eastwood and Sondra Locke, the First Amendment to the United States Constitution and the common law provide a presumptive right of public and press access to civil court proceedings and documents. NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1187, 1208 & n.25; 1211 n.27, 1218-19 (1999).[1] These rights do not disappear merely because the proceedings involve wealthy, powerful public figures; to the contrary, the public's interest in ensuring that equal treatment is given in such cases arguably is even stronger.

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[1] It is clear that the press has standing to object to sealing and closure orders. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n.25 (1982) (under First Amendment, "representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion" from judicial proceeding); NBC Subsidiary, 20 Cal. 4th at 1217 n. 36 (same). See also Cal. R. Ct. 12.5(f)(2) ("[a]ny person or entity may serve and file a motion, application or petition in the reviewing court to unseal a record"); Cal. R. Ct. 243.2(h)(2) ("a party or member of the public may move, apply, petition ... to unseal a court record").

Based on this irrefutable authority, Los Angeles County Superior Court Roy L. Paul granted intervenor status in this matter to non-party press organizations Los Angeles Times Communications LLC (dba Los Angeles Times) and The Associated Press ("Press Organizations" or "Intervenors") for purposes of opposing respondent Ronald W. Burkle's application to seal court records and to challenge the constitutionality of California Family Code § 2024.6. (Press Appendix ("PA") at 75.) Based on this same authority, California Newspaper Publishers Association, a trade association representing about 500 newspapers, including intervenor Los Angeles Times, hereby requests permission to join the Press Organizations.

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Furthermore, the presumptive openness that applies to civil court proceedings and records includes disputes involving personal relationships – as in the Eastwood/Locke trial in NBC Subsidiary – as well as those involving personal financial matters, as in the case at hand. Indeed, even before NBC Subsidiary, California courts recognized that divorce proceedings and records were presumptively open to the public and press. See, e.g., Green v. Uccelli, 207 Cal. App. 3d 1112, 1120 (1989) ("[t]he contents of the file of a divorce proceeding are historically and presumptively a matter of public record"; divorcing parties are "entering a public forum which … result[s] in public disclosure of private facts") (quotations and citations omitted); In re Marriage of Lechowick, 65 Cal. App. 4th 1406, 1414 (1998) ("in general, court files in family law cases should be treated no differently than the court files in any other cases for purposes of considering the appropriateness of granting a motion to seal any of those files"); In re Shortridge, 99 Cal. 526, 530-31 (1893) (vacating contempt order against reporter for reporting about closed divorce proceeding; declaring that "[i]n this country it is a first principle that the people have the right to know what is done in their courts"). See also Estate of Hearst, 67 Cal. App. 3d 777, 783-84 (1977) (recognizing common law right of access to probate court records over objection of prominent Hearst family, which asserted fears of terrorism, kidnapping, and other violence). Under these authorities and California's tradition of open

divorce proceedings and records, the public and press have a presumptive right of access, under the First Amendment and common law, to these divorce proceedings and records.

Despite this well-established right of public access, respondent Ronald W. Burkle has asked two Los Angeles County Superior Court judges and this Court to issue a blanket sealing order to remove from public scrutiny records that have been available in the Superior Court files for the past year. These documents include the Post-Marital Agreement between Ronald and Janet Burkle, related legal briefs, declarations, trial exhibits, and the court reporter's ten-volume transcript of the trial proceedings.

Mr. Burkle, a public figure who is one of the world's richest men and the largest political donor to the Democratic Party, is relying on a new, hastily-enacted secrecy statute, Family Code § 2024.6, which appears on its face to require the court to automatically seal records in a divorce proceeding upon request if the record discloses a party's financial assets and "location" of those assets.[2] Relying on this new secrecy statute, this Court and the courts below have sealed numerous court records – including records that Los Angeles County Superior Court Judge Roy L. Paul

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[2] This new statute was signed into law as "urgency legislation" by Governor Arnold Schwarzenegger on June 7, 2004 – just months after the trial court denied Mr. Burkle's previous request to seal divorce court records containing financial information, and shortly after Mr. Burkle and his companies donated $147,800 to the governor's political committees and the State Democratic Party. (PA at 38, 48.)

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previously refused to seal because Mr. Burkle could not satisfy the First Amendment requirements for sealing.

As interpreted and applied by the trial court, Family Code § 2024.6 is facially unconstitutional because it requires courts to seal public court records without providing for the threshold inquiries or document-by-document analysis required by the First Amendment. The United States Supreme Court has struck down similarly overbroad statutes as unconstitutional infringements on the public's right of access to traditionally open court records and proceedings. See, e.g., Globe Newspaper, 457 U.S. at 609-611 (holding unconstitutional a Massachusetts statute that required trial courts to automatically exclude the public and press from criminal trials during the testimony of minor sex crime victims). This same analysis makes clear that a blanket sealing requirement for divorce court records and proceedings – which have long been open to the public in California – is unconstitutional. (See Section 3, infra.)

Because Family Code § 2024.6 is unconstitutional, Mr. Burkle must satisfy the test for sealing required by the First Amendment and California Rule of Court 12.5. But as discussed below, Mr. Burkle has not and cannot demonstrate that a compelling interest justifies the broad closure and sealing order, nor can he overcome the presumptive public right of access

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to these court proceedings or records.[3] Consequently, his request for a broad sealing order should be denied.[4]

2.

STATEMENT OF FACTS

The Burkles' divorce proceedings began on June 13, 2003, when petitioner Janet Burkle filed a Dissolution of Marriage Petition against

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[3] Mr. Burkle's reliance on the sealing order issued by Pro Tem Los Angeles County Superior Court Judge Stephen Lachs to justify his request to seal court records in this Court is unavailing. Judge Lachs' order was based on Section 2024.6, which is unconstitutional. Moreover, Judge Lachs had no jurisdiction to decide Mr. Burkle's application to seal court records. California Rule of Court 244(g) required Mr. Burkle to file sealing applications with the presiding judge – in this case, Judge Paul. Because the motion made to Judge Lachs was improper, his order is void and cannot provide a basis for the pending motion to this Court.

[4] The United States Supreme Court has instructed that even temporary sealing orders are subject to close scrutiny. See, e.g., Elrod v. Burns, 427 U.S. 347, 373 (1976) ("[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury"); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560-61 (1976) ("the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly"); Associated Press v. District Court, 705 F.2d 1143, 1145-47 (9th Cir. 1983) (vacating trial court's blanket order sealing pretrial briefs filed in high-profile criminal trial of automaker John DeLorean, even though the order sealed the documents for only 48 hours, because "even though the restraint is limited in time ... effect of the order is a total restraint on the public's first amendment right of access"). See also NBC Subsidiary, 20 Cal. 4th at 1221 (instructing that orders denying public access to court proceedings, even if only temporarily, "are subject to exacting First Amendment scrutiny") (citations and quotations omitted). As in the cases cited above, any further delay in unsealing of court records – which have been open to the public for the past year – without meeting the substantive and procedural requirements announced by the United States Supreme Court and the California Supreme Court in NBC Subsidiary violates the constitutional right of public access to court proceedings and records.

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respondent Ronald Burkle in Los Angeles County Superior Court. The proceedings have focused largely on the validity of the couple's 1997 Post-Marital Agreement and on a dispute about the custody of their child. The Post-Marital Agreement – which has been in a public court file for the past year – requires the divorce and custody dispute to be decided by a privately compensated retired judge.

The Honorable Judge Roy Paul was assigned by the presiding judge to oversee the divorce proceedings, and Judge Paul assigned the case to a retired jurist, Hon. Judge Stephen Lachs, who was sworn in as a temporary judge pursuant to California Rule of Court 244. Judge Lachs' fee is being paid by Mr. Burkle. Mrs. Burkle is contesting the validity of the agreement, including the provision requiring their divorce proceedings to be decided by a privately compensated retired judge.

Earlier this year, Mr. Burkle filed a motion asking Judge Paul to seal a variety of documents, including the couple's Post-Marital Agreement, any document quoting the Post-Marital Agreement, any document containing account balance information, and documents related to the couple's minor child and custody issues. Judge Paul issued an eight-page order on March 13, 2004 that denied Mr. Burkle's broad sealing order request, and instead sealed only bank names and account numbers and limited identifying information about the couple's child (e.g., the name of his school). (PA at 27-35.) Judge Paul analyzed the motion under California Rule of Court

243.1, and the constitutional and common law right of public access to judicial records, and found that Mr. Burkle could not show a compelling interest in sealing the entire agreement or his financial account balance information. (PA at 32-34.) Judge Paul concluded that "[t]he Burkles ... are considered to be of high public interest," noting that Mr. Burkle is "one of the wealthiest men in the world, ... known as the largest contributor to the Democratic Party in the United States and his net worth, as analyzed by Forbes Magazine, ranks him as 111th on the Forbes 400 with net worth in excess of $2 Billion." (Id. at 31.)[5]

On April 1, 2004, just a few weeks after Judge Paul rejected Mr. Burkle's blanket sealing request, Senate President Pro Tem John Burton, a powerful Democrat, asked fellow Democratic Assemblywoman Christine Kehoe to insert an amendment in a pending bill related to court employees, according to the legislative history and news reports. (PA at 48-49, 69-74.) Senator Burton's amendment to AB 782 sought to amend the Family Code to require courts to seal a wide variety of divorce court

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[5] Mr. Burkle also has elevated his public profile by holding two highly publicized political fund-raisers that raised $3 million for Democratic presidential candidate John Kerry last year at the Burkle estates in La Jolla and Beverly Hills, where reporters were invited to attend. (PA at 41, 45-46.) Moreover, Mr. Burkle's investment companies are among the 416 private investment firms hired by the California Public Employees' Retirement System (CalPERS) to manage $13.5 billion in public pension benefits for 1.4 million state employees, retirees, and their families. (PA at 76-81.)

records upon request. Despite the fact that similar bills had been unsuccessful in previous years, AB 782 was rushed through the legislative process before being approved unanimously in both houses.[6] On June 7, 2004, Gov. Arnold Schwarzenegger signed the bill into law with an "urgency" clause, making Family Code § 2024.6 effective immediately. (PA at 48.) Coincidentally, public donation records disclose that on March 1, 2004, just one month before the divorce records amendment was added to AB 782, Mr. Burkle and his companies donated $121,200 to the Governor's political committees and $26,600 to the state Democratic party. (PA at 38.)

Taken literally, the new statute would reverse more than a century of open divorce proceedings and documents in California, ostensibly to protect against identity theft and kidnappings.[7] Family Code § 2024.6(a) provides that, upon the request of one party, the court is <u>required</u> to seal any court document that "lists the parties' assets and liabilities and provides the

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[6] The California Newspaper Publishers Association had opposed the measure in the Legislature, warning that it would "do nothing short of creating a system of secret justice in family courts" by requiring the sealing of court records "without regard to whether or not the record's disclosure would actually harm the litigant." (PA at 60-61.)

[7] Notwithstanding these supposed justifications, the statute's legislative history is notably bereft of any suggestion that California suddenly had been besieged by kidnappings or identity theft resulting from access to divorce records, let alone that emergency action to prevent these heinous crimes was required.

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location or identifying information about those assets and liabilities," without any analysis or input from the other party or the public. Cal. Fam. Code § 2024.6(a). The statute places the burden on the party seeking public access to show "good cause" to support unsealing of the records. Id.

Meanwhile, in the ongoing Burkle divorce proceedings, Judge Lachs held a bifurcated trial on the validity of the Post-Marital Agreement and on December 6, 2004, entered an order finding the agreement valid. A few days later, on December 10, 2004, Mrs. Burkle filed a motion in this Court seeking leave to immediately appeal Judge Lachs' order.

Ten days after Mrs. Burkle filed her motion for leave to appeal in this Court, Mr. Burkle renewed his bid to seal his divorce court records that had been in the public court file for the past year. On December 20, 2004, relying on Family Code § 2024.6, Mr. Burkle filed an ex parte application with Judge Lachs, asking for the sealing of over 20 trial exhibits – including the Post-Marital Agreement – and asking for the entire 10-volume reporter's transcript of the trial to be sealed. (Exhibit A to Petitioner Janet Burkle's Petition for Writ of Mandate ("Writ").) Judge Lachs granted the application and sealed the exhibits, Post-Marital Agreement, and trial transcripts. (Exhibit C to Writ.)

The following day, on December 21, 2004, Mr. Burkle filed an ex parte application with Judge Paul that asked for the sealing of various legal briefs and exhibits filed with Judge Paul, including a Motion for Summary

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Adjudication and the Post-Marital Agreement. (Exhibit D to Writ.) The application also asked for the sealing of "future" pleadings. (Id. at 4.)[8] The non-party Press Organizations appeared at the December 21 hearing and were granted leave to intervene for the limited purposes of opposing the application to seal and challenging the constitutionality of Section 2024.6. (PA at 75.) Judge Paul expressed concern that Section 2024.6 eliminated his ability to weigh the constitutional right of public access to court records and reduced his judicial authority to a ministerial act, but concluded that the statute required him to seal the court records, pending a hearing scheduled for February 18, 2005. (PA at 75.)

On December 21, 2004, Mr. Burkle also filed an application with this Court to seal the Post-Marital Agreement, which was filed with this Court as an exhibit to Mrs. Burkle's pending motion for leave to appeal. Mr. Burkle again relied on Section 2024.6, and also relied on Judge Lachs' December 20 sealing order. On December 21, 2004, this Court issued an order sealing the Post-Marital Agreement and also sealing Mrs. Burkle's entire pending motion for leave to appeal and other attached exhibits. (PA at 75.) Mr. Burkle's application to this Court also was filed under seal.

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[8] (Exhibit D to Writ at 4.) Remarkably, in his request, Mr. Burkle sought to seal entire legal briefs simply because they contained a street address. (Exhibit D to Writ at 5-10.) According to Mr. Burkle's counsel, Family Code § 2024.6 does not permit the redaction of documents, and instead requires that entire pleadings be sealed if any part of the document falls within the scope of Section 2024.6. (Exhibit D to Writ at 14, ¶ 6.)

3.

THIS COURT SHOULD FIND THAT FAMILY CODE § 2024.6 IS UNCONSTITUTIONAL.

In determining whether Family Code § 2024.6 violates the First Amendment to the United States Constitution, this Court first must determine whether a "qualified First Amendment right of public access" attaches to divorce judicial proceeding and records. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-9 (1986) ("Press-Enterprise II"); Globe Newspaper, 457 U.S. at 9. Where, as here, a presumptive right of access under the First Amendment applies, a blanket sealing or closure statute like Section 2024.6 is unconstitutional unless it "is necessitated by a compelling government interest, and is narrowly tailored to serve that interest." Globe Newspaper, 457 U.S. at 607.

As discussed below, the records and proceedings in divorce cases like this one clearly fall within the public's presumptive right of access under the First Amendment, and the blanket sealing requirement under Section 2024.6 is neither justified nor narrowly tailored. Consequently, this Court should find the statute is unconstitutional. Id. at 607-611.

A. Both Constitutional And Common Law Rights Of Access Apply To Divorce Court Records And Proceedings.

In evaluating whether the First Amendment right of public access applies to particular court records or proceedings, the United States

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Supreme Court has adopted a two-part "experience and logic" test. First, the court must evaluate "whether the place and process have historically been open to the press and general public." Second, the court must determine "whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise II, 478 U.S. at 8; see also Globe Newspaper, 457 U.S. at 605-06. Both prerequisites easily are satisfied here.

1. Divorce Proceedings And Records Historically Have Been Open To The Public And Press.

It is well established throughout the United States that civil court proceedings are presumptively open to the public and press. As the Supreme Court has noted, "[f]or many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so 'that the truth may be discovered in civil as well as criminal matters.'" Gannett Co. v. DePasquale, 443 U.S. 368, 386, n. 15 (1979) (citing Remarks upon Mr. Cornish's Trial, 11 How.St.Tr. 455, 460) (emphasis added). This tradition of openness "is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial." Richmond Newspapers v. Virginia, 448 U.S. 555, 569 (1980).

In his concurring opinion in Richmond Newspapers, Justice Stewart concluded that the fundamental principle of public access applies regardless

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of whether the court proceedings and documents are criminal or civil in nature. Richmond Newspapers, 448 U.S. at 580 n.17 (Stewart, J., concurring) ("the First and Fourteenth Amendments clearly give the press and public a right of access to trial themselves, civil as well as criminal"); see also id. at 580 n.17 (Burger, J.C., plurality opinion) (noting that "historically both civil and criminal trials have been presumptively open"). Numerous federal and state courts subsequently have agreed. See, e.g., Grove Fresh Distribs. Inc v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994) (recognizing First Amendment right of access to civil proceedings and records); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (finding First Amendment standard applies to documents filed in connection with a summary judgment motion in a civil case); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1066 (3d Cir. 1984) (concluding that the analysis of Richmond Newspapers applies equally to civil cases); Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n, 710 F.2d 1165, 1181 (6th Cir. 1983) (vacating the district court's sealing of all documents filed in a civil action based on First Amendment and common law right of access); Doe v. Santa Fe Indep. Sch. Dist., 933 F. Supp. 647 (S.D. Tex. 1996) (recognizing First Amendment right to attend civil trials).

In addition to the First Amendment access rights to judicial proceedings and records, the United States Supreme Court has recognized

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that the public and the press have a common law "right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications, 435 U.S. 589, 597-98 (1978). California courts similarly have held that the common law protects the public's right of access to court records. Estate of Hearst, 67 Cal. App. 3d at 784 (rejecting blanket sealing orders for a wealthy family's probate file, noting that "traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals").

In NBC Subsidiary, the California Supreme Court recognized that the First Amendment provides "broad access rights to judicial hearings and records ... both in criminal and civil cases," and that "civil litigation documents filed in court as a basis for adjudication" are presumptively open to the public under the First Amendment. 20 Cal. 4th at 1208 n. 25.[9] The Court relied on well-established authority in upholding a First Amendment presumption of public and press access to civil proceedings and records, even those involving actor Eastwood's acrimonious palimony

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[9] In the wake of NBC Subsidiary, the Judicial Council amended California Rules of Court 243.1, 243.2, and 12.5 to codify the First Amendment requirements for presumptively open court records. Rule 243.1(c) provides that "unless confidentiality is required by law, court records are presumed to be open." Rule 243.2(a) provides that a trial court "must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties."

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and fraud battle with his former girlfriend, Sondra Locke. Emphasizing that a "trial court is a public governmental institution," the Court found that "[l]itigants certainly anticipate, upon submitting their disputes for resolution in a public court, before a state-appointed or publicly elected judge, that the proceedings in their case will be adjudicated to the public." Id. at 1211. Thus, "an individual ... involved as a party to a civil case is entitled to a fair trial, not a private one." Id. Moreover, as the Court explained, "the public has an interest, in all civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases." Id. at 1210.

Particularly instructive here, the NBC Subsidiary Court noted that an earlier decision by a California Court of Appeal had not gone far enough in recognizing the First Amendment right of public access to family court proceedings and records when it vacated a blanket order closing divorce court proceedings and sealing records. The Supreme Court noted that in In re Lechowick, 65 Cal. App. 4th 1406, the Court of Appeal had relied solely on Family Code § 214, which allows limited closure of portions of family law proceedings, but should have "take[n] into account rules of procedure

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and substance set out in … cases construing the First Amendment" right of access to judicial proceedings. NBC Subsidiary, 20 Cal. 4th at 1195 n.11.[10]

Indeed, more than a century ago, the California Supreme Court condemned the punishment of a newspaper reporter who had published an account of a divorce court proceeding that was closed by the trial court. In re Shortridge, 99 Cal. at 530-31. In that case, the Court held that the contempt order issued against the reporter violated the state's constitutional free speech protections. "In this country it is a first principle that the people have a right to know what is done in their courts," the Court explained, and "the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the

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[10] Family Code § 214 provides that "the court, may, when it considers it necessary in the interests of justice and the persons involved, direct the trial of any issue of fact joined in a proceeding under this code to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel." However, as the California Supreme Court observed in NBC Subsidiary, this statute allows for an issue-by-issue analysis, and therefore can be applied in a manner consistent with constitutional mandates. Thus, as the Court of Appeal noted in In re Lechowick, Family Code § 214 "is not a device by which a court may close to the public all proceedings in a given family law matter"; rather it requires the party seeking closure to make "a showing of particularized need by the moving party." In re Lechowick, 65 Cal. App. 4th at 1415. This is dramatically different from the application of Family Code § 2024.6; as Mr. Burkle asserts, this new statute appears to remove all discretion from the court, and "requires" automatic sealing. (Exhibit D to Writ at 16.) Thus, Section 2024.6 directly violates the Supreme Court's instruction that any closure or sealing orders in divorce cases must meet the First Amendment standard for closure. NBC Subsidiary, 20 Cal. 4th at 1195 n.11.

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proceedings of public tribunals that is consistent with truth and decency are regarded as essential to public trust." In re Shortridge, 99 Cal. at 530-31.

As the Court of Appeal subsequently explained in Green, 207 Cal. App. 3d at 1120, divorce court files and proceedings are "'historically and presumptively' a matter of public record." The appellate court thus cautioned that any individual who files an action for marital dissolution in superior court in California "should ... realize[]" that they are "entering a public forum which would result in public disclosure of private facts." Id.

Similarly, probate proceedings and records, which also deal with the division of family property and financial assets, historically have been open in California. More than two decades ago, the Court of Appeal ordered disclosure of the Hearst family probate files, despite the Hearst family's protestations about safety concerns in light of the kidnapping of heiress Patricia Hearst. Estate of Hearst, 67 Cal. App. 3d at 783-84. As the California Supreme Court later observed in NBC Subsidiary, in citing the Estate of Hearst decision approvingly, "'when individuals employ the public powers of state courts to accomplish private ends, they do so in full knowledge of the possibly disadvantageous circumstance that the documents and records filed will be open to public inspection,'" and must "'take the good with the bad, knowing that with public protection comes public knowledge' of otherwise private facts." NBC Subsidiary, 20 Cal.

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4th at 1211 n.27, quoting Estate of Hearst, 67 Cal. App. 3d 777, 783-84 (ellipses omitted).

As these authorities demonstrate, civil proceedings and records dealing with personal disputes – including divorce proceedings – are historically open in California, clearly satisfying the "experience" test of Press-Enterprise II and Globe Newspaper. This tradition of open divorce proceedings and records is "significant in constitutional terms not only because 'the Constitution carries the gloss of history,' but also because 'a tradition of accessibility implies the favorable judgment of experience.'" Globe Newspaper, 457 U.S. at 605, quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980). Thus, the first prong of the United States Supreme Court's two-pronged test under the First Amendment is satisfied.

2. Public Access Plays A Significant Positive Role In Divorce Proceedings.

The presumptive right of access to divorce proceedings and records, like the rights of public access generally, "plays a particularly significant role in the functioning of the judicial process and the government as a whole." Globe Newspaper, 457 U.S. at 606. As the United States Supreme Court explained in Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) ("Press-Enterprise I"), "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards

of fairness are being observed," and this openness enhances both the "basic fairness" of the proceeding and "the appearance of fairness so essential to public confidence in the system."

Similarly, in NBC Subsidiary, the California Supreme Court strongly rejected the trial court's assertion that "there is nothing of concern to the public [in the Eastwood-Locke trial] 'beyond the fact that two famous people are involved in a private dispute.'" 20 Cal. 4th at 1210. "[W]e disagree with respondent's premise: We believe that the public has an interest, in all civil cases, in observing and assessing the performance of its judicial system, and that interest strongly supports a general right of access in ordinary civil cases." Id.

The NBC Subsidiary Court cited with approval language from Estate of Hearst, observing that "the public has a legitimate interest in access to ... court documents.... If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism." NBC Subsidiary, 20 Cal. 4th at 1211 n.28, quoting Estate of Hearst, 67 Cal. App. 3d at 777. The California Supreme Court went on to note that "traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals." NBC Subsidiary, 20 Cal. 4th at 1211 n.28, quoting Estate of Hearst, 67 Cal. App. 3d at 784.

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These principles apply equally to court proceedings and records involving divorce and custody proceedings, where the value of public oversight cannot be seriously disputed. Approximately 1 million people file for divorce in the United State annually, according to the latest statistics by the U.S. Census Bureau. In California, an estimated 160,000 men and women file for divorce in California each year.[11] More than 100,000 California children are affected by divorce proceedings annually, and an average of 84,000 child custody cases are mediated each year. Id. Marital dissolution proceedings often involve some of the state's most pressing criminal, social, and economic issues, including the division of community property, financial child support, parental fitness, and child custody disputes. The trial court proceedings and subsequent appellate court decisions do not decide merely "private disputes" between family members, but create law that governs families, and reflects changing perceptions of the roles, relationships, and responsibilities of married and co-habiting couples who ultimately seek divorce. See, e.g., Marvin v. Marvin, 18 Cal. 3d 660 (1976) (in palimony lawsuit, deciding as a matter of first impression that courts must enforce contracts between cohabiting couples, even if not

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[11] These statistics come from the U.S. Census Bureau website and the California Judicial Council annual reports, available at http:www.census.gov, http://www.courtinfo.ca.gov/presscenter/ataglance.htm and http://www.courtinfo.ca.gov/reference/3_stats.htm.

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legally married; discussing facts of case); In re Marriage of LaMusga, 32 Cal. 4th 1072, 1078 (2004) (announcing new rules for deciding "move-away" child custody cases when one divorced parent with physical custody of children seeks to move to another state; discussing facts of case); In re Marriage of Norviel, 102 Cal. App. 4th 1152 (2002) (outlining rules for determining date of marital separation to determine division of community property; discussing facts of case).

Just as with criminal or other types of civil proceedings, public scrutiny of divorce proceedings and records inevitably "enhances the quality and safeguards the integrity of the factfinding process, with benefits both to the [parties] and to society as a whole." Globe Newspaper, 457 U.S. at 606. Moreover, public and press access to divorce proceedings and records similarly "permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government." Id. The need for public oversight is especially acute here, where one of the parties is politically and financially powerful, and has been accused by his wife of hiding financial assets and misrepresenting his marital status to avoid sharing tens of millions of dollars in community property.[12]

[12] Furthermore, these principles do not apply differently here even though Judge Lachs, who has been assigned to preside over the divorce proceedings, is a private judge paid by Mr. Burkle, and is only temporarily sworn in as a Superior Court judge. The rules require that Judge Lachs'

Thus, as with criminal trials, "the institutional value of open" divorce cases "is recognized in both logic and experience." Id. The presumptive First Amendment right of access therefore attaches to divorce court proceedings and records.

Accordingly, the burden falls on Mr. Burkle to demonstrate that Section 2024.6 furthers a "compelling governmental interest" and that the statute "is narrowly tailored to serve that interest." Globe Newspaper, 457 U.S. at 607. For the reasons stated below, Mr. Burkle cannot satisfy this test.

B. The Blanket Sealing Provision Contained In Section 2024.6 Is Facially Unconstitutional Because It Is Not Narrowly Tailored And Is Not Justified By A Compelling State Interest.

As discussed above, once the First Amendment's presumptive right of access is found to apply, a statute mandating closure or sealing can only survive constitutional challenge if it is both narrowly tailored and justified by a compelling state interest. (See Section 3, infra.) In Globe Newspaper, a case directly on point, the Supreme Court struck down as unconstitutional a Massachusetts statute that required trial courts to automatically exclude the public and press from any criminal trial during the testimony of

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proceedings be subject to the same public access requirements as any other court proceeding. See Cal. R. Ct. 244(e)-(g).

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underage sex crime victims. 457 U.S. at 610. Although the Supreme Court recognized that the state had a compelling interest in protecting the well-being of minors who report sex crimes, it held that the blanket closure order was not "narrowly tailored" to protect that interest because it did not permit a trial court to "determine on a case-by-base whether closure is necessary to protect the welfare of a minor victim." Id. at 608. As the Court explained, "as compelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." Id. at 607-608. The Court also noted that, in the case before it, the trial court might have decided, after evaluating the factors of the individual case, "that closure might well have been unnecessary." Id. at 609. The Court noted that the "names of the minor victims were already in the public record." Id. at 608. "In short, [the statute] cannot be viewed a narrowly tailored means of accommodating the State's asserted interest" because the governmental interest "could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure." Id. at 609.[13]

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[13] The Court also expressed skepticism about the state's second asserted interest – "the encouragement of minor victims of sex crimes to come forward and provide accurate testimony." Id. The Court concluded that the state provided no empirical support for the claim that more minor sex crime victims would come forward and report their victimization if their testimony was held in secret and that the public and press would be able to

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The Supreme Court's analysis in Globe Newspaper makes clear that Section 2024.6 is unconstitutional. Like the Massachusetts statute struck down in Globe Newspaper, Section 2024.6 ignores the long tradition of public access to divorce proceedings and records in California, and the considerable value that public oversight affords to the public, the parties, and the judicial system itself.

Family Code § 2024.6(a) provides that "[u]pon request by a party to a petition for dissolution of marriage, nullity of marriage, or legal separation, the court shall order a pleading that lists the parties' financial assets and liabilities and provides the location or identifying information about those assets and liabilities sealed." The statute defines "pleading" very broadly: "a document that sets forth or declares the parties' assets and liabilities, income and expenses, a marital settlement agreement that lists and identifies the parties' assets and liabilities, or any document filed with the court incidental to the declaration or agreement that lists and identifies

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obtain information about their identities and testimony from other sources, including "the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony." Id. The Court also noted that the state's interest in encouraging crime victims to testify could be used to close all criminal trials, because "[s]urely it cannot be suggested that minor victims of sex crimes are the only crime victims who, because of the publicity attendant to criminal trials, are reluctant to come forward and testify." Id. at 610 (emphasis in original). The Court held that the blanket ban on public access did not allow for "[p]ublic scrutiny" of the trial, which "enhances the quality and safeguards the integrity of the factfinding process." Id. at 606.

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financial information." Cal. Fam. Code § 2024(c). The party requesting sealing can do so with an ex parte application. Cal. Fam. Code § 2024.6(a). A party seeking unsealing of any document sealed under Section 2024.6 has the burden of demonstrating "good cause," which reverses the burden that the First Amendment and common law places on the party seeking sealing. Cal. Fam. Code § 2024.6(a). The statute also provides that "[n]othing in this section precludes a party to a proceeding described in this section from using any document or information contained in a sealed pleading in any manner that is not otherwise prohibited by law." Cal. Fam. Code § 2024.6(f). The bill's author assured the Legislature that this provision permits parties in the divorce proceeding to make sealed documents "public by giving a copy to the local newspaper; nothing in this bill can prevent that from happening." (PA at 54.)

The statute clearly is not narrowly tailored; as with the Massachusetts statute, it prohibits courts from engaging in a document-by-document analysis to determine whether secrecy is necessary or whether limited redactions would adequately protect the state interests. Instead, merely upon the demand by one party, the statute permits the wholesale sealing of records that otherwise would be open to public scrutiny.

Moreover, the statute's asserted state interests are speculative and defy common sense. According to the legislative history of the statute cited by Mr. Burkle, the secrecy provision was rationalized by "concerns about

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identity theft, stalking, kidnapping of the divorcing couple's children, theft of artworks and other property, and other finance-related crimes…." (Exhibit D to Writ at 16, citing Legislative History, PA at 66.) But like the Massachusetts statute, no empirical data was presented by the author of Section 2024.6 or anyone else in the Legislature to support these speculative claims of harm arising from public court documents. Instead, the bill's author recited only anecdotal examples of "stolen identities" and of "undue media publicity about divorcing couples with substantial assets," without linking either to publicly-available divorce records. (PA at 66.)

For these and other reasons, the California Newspaper Publishers Association urged the Legislature to reject the bill, warning that the measure "not only threatens the actual fairness of the family justice courts, it virtually eliminates the public's ability to determine for itself whether justice is being done in a particular case." (PA at 60.) As the newspaper association observed, "[t]he courts need not merely be fair, they must be perceived as fair." (Id.) The association noted that the bill "could create an environment in which economically, politically, and legally powerful litigants whose pleadings would automatically be sealed would be able to take advantage of weaker parties." (Id.)

In light of the sparse legislative record justifying this draconian action, California's asserted state interests are, like the Massachusetts statute in Globe Newspaper, "open to serious question as a matter of logic

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and common sense." 457 U.S. at 610. The California Legislature did not address the fact that similar financial information is available in a wide variety of other court documents in ordinary civil litigation, nor did it consider using an alternative method to protect specific financial information, such as redacting bank account numbers and home addresses. The Legislature also offered no empirical evidence that identity thieves are using divorce court records for their crimes, or that the children of divorcing couples have been targeted for kidnappings based on public information contained in their divorce files.[14] Instead, the statute appears to have been rushed through the legislative process.

Thus, Family Code § 2024.6 fails to meet the threshold requirement that it be justified by a compelling state interest.

Moreover, even if there was such a compelling interest – which there is not – the statute is not narrowly tailored to protect those interests.

According to the statute's broad language, a party may merely mention financial asset information in any court record and then demand

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[14] Indeed, the suggestion that the Burkle's child would be a target of kidnappers based on the disclosure of the couple's Post-Marital Agreement is preposterous. It is no secret that Mr. Burkle is an exceedingly wealthy man; countless newspaper and magazine articles have reported that fact, and his holdings have been detailed in numerous public filings and documents. (PA at 21, 25-26, 38, 41-47, 76-81.) Consequently, neither the Post-Marital Agreement nor the other documents that Mr. Burkle wants to keep from public scrutiny has any bearing on either identity theft or the threat of kidnappings.

that the court seal the record in its entirety. The court would be required to grant the sealing request. This provision places control over court records solely in the hands of the litigants, not the court. Such overbroad provisions invite widespread abuse by litigants and their counsel who may wish to avoid public scrutiny of certain divorce proceedings.

On its face, the statute is not narrowly tailored because it prohibits courts from conducting a document-by-document analysis or weighing the need for secrecy against the benefits of public access. Just as in Globe Newspaper, much of the information that Mr. Burkle seeks to seal has been in the public record; the Post-Marital Agreement and other court records that Mr. Burkle seeks to seal have been in the public court record for the past year, and the bifurcated trial on the validity of the Post-Marital Agreement was conducted by Judge Lachs without any restriction on public access. Furthermore, Mr. Burkle's financial worth and the source of his wealth already are well known, due in large part to Mr. Burkle's numerous public SEC filings and media reports about his financial activities and political fundraising and donations. (PA at 21, 25-26, 38, 41-47, 76-81.) If the courts below and this Court evaluate the facts of this case, "closure might well [be] deemed unnecessary." Globe Newspaper, 457 U.S. at 609. Indeed, Judge Paul's prior limited sealing order is precisely the kind of "narrow tailoring" that the Supreme Court held is required; but under

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Mr. Burkle's interpretation of Section 2024.6, redacting or selective sealing of records is not permitted.

Because Section 2024.6 is not narrowly tailored, it is flatly unconstitutional and cannot be used as a basis to seal any court record in the courts below and this Court. For this reason, this Court should reject Mr. Burkle's application to seal records in this court based on Section 2024.6, and should vacate the sealing orders in the courts below that are based on Section 2024.6. The Court should consider Mr. Burkle's sealing request based on the sealing rules required under the First Amendment, the common law, and Rules of Court 12.5(e) and 243.1(c)-(e).

C. Section 2024.6 Is Unconstitutional As Applied.

This Court also has grounds to find that Section 2024.6 is unconstitutional as applied in this case. Section 2024.6 must be construed in accordance with the requirements of the First Amendment.[15] In NBC Subsidiary, the Court instructed that any judicial interpretation of Family

[15] On November 2, Californians voted to amend the California Constitution, declaring that "[t]he people have the right of access to information concerning the conduct of the people's business" and that any "statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be … narrowly construed if it limits the right of access." Cal. Const., Art. I, § 3(b)(1), (b)(2). Because the conduct of judicial proceedings is "the conduct of the people's business," the public has a presumptive right of access to all judicial proceedings and documents under this new amendment. The amendment also requires this Court to narrowly construe Section 2024.6 (which was in effect at the time that the voters amended the Constitution) to permit maximum public access.

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Code § 214, which allows courts to close some divorce proceedings under certain circumstances, must "take into account rules of procedure and substance … [in accordance with] the First Amendment [.]" 20 Cal. 4th at 1206 n.11. Similarly, the Court also held that California Code of Civil Procedure § 124, which requires that "the sittings of every court shall be public," must be interpreted in a manner consistent with the access requirements under the First Amendment, and therefore could not be read in a way that would permit trial courts to restrict public access that otherwise would be constitutionally mandated. Id. at 1192 n.8, 1197. Cf. Press-Enterprise II, 478 U.S. at 12-13 (holding that California Supreme Court incorrectly relied on a state statute in determining whether public and press should be excluded from preliminary hearing and instructing the trial court to "consider the First Amendment right of access to criminal proceedings").

Any attempt to construe Section 2024.6 consistently with the First Amendment requires this Court to conduct the analysis described in NBC Subsidiary and Rules 243.1(c)-(e) and 12.5(e)(6). As recognized by these authorities, the First Amendment requires a document-by-document analysis, and requires that any sealing or closure order be limited only to those portions of documents where there is a demonstrated compelling interest in secrecy that overcomes the presumptive right of public access. Such an evaluation is likely to result in an order, like Judge Paul's original

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order below, that only limited redactions of specific identifying information, such as bank account numbers, is necessary.

4.

BECAUSE MR. BURKLE HAS NOT AND CANNOT MEET HIS BURDEN OF DEMONSTRATING THAT A BLANKET SEALING ORDER IS JUSTIFIED, THE TRIAL COURT'S ORDERS AND THIS COURT'S SEALING ORDER SHOULD BE VACATED.

Under NBC Subsidiary, and Rules of Court 243.1(d) and 12.5(e)(6), court records may not be sealed absent a finding: (1) that an overriding interest supports sealing; (2) that a substantial probability exists that the interest will be prejudiced absent sealing; (3) that the sealing is narrowly tailored to serve the overriding interest; and (4) that no less restrictive means exist to achieve the identified overriding interest. 20 Cal. 4th at 1218-19; Cal. Rules of Ct. 243.1(d), 12.5(e)(6).

Courts have recognized that any closure order must be supported by specific factual findings, and by a detailed discussion of what interest is being protected and why less restrictive alternatives do not adequately protect that interest. See NBC Subsidiary, 20 Cal. 4th at 1225. California Rule of Court 243.1(e)(1) affirms that any sealing order "must (i) specifically set forth the [1] facts that support the [2] findings, and (ii) direct the sealing of only those documents and pages [3], or, if reasonably

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practicable, portions of those documents and pages [4] that contain the material that needs to be placed under seal."

Applying these principles to the case at hand, this Court should find that the trial court's sealing orders were improper, and should vacate its own sealing order.

A. This Court Must Conduct An Independent Review Of Whether Mr. Burkle's Sealing Application Satisfies The First Amendment And Rule 12.5.

This Court should conduct its own evaluation of the sealing orders, and is not bound by the sealing order of the courts below. First, as discussed above, the courts below relied primarily on Section 2024.6, which is unconstitutional. (See Section 3, supra.) Second, even if the sealing orders below were not invalid, this Court is entitled to conduct an "independent review" of any request to file court records under seal in an appellate or writ proceeding, even if the records were sealed by the trial court. Huffy Corp. v. Superior Court, 112 Cal. App. 4th 97 (2003). In Huffy, the Second Appellate District (Division 5) conducted an independent review of a petitioner's request to file over 2,000 pages of trial court records under seal, even though the records were sealed by a stipulated order entered by the trial court. As this Court explained, "[b]ecause these are records maintained by the clerk of this court, we engage in independent review of this matter." Id. at 105.

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Indeed, when the Supreme Court reaffirmed in NBC Subsidiary that the First Amendment creates a "presumption of access" to any "documents or records of ... proceedings [that] are filed with the court or are used in a judicial proceeding," it did not state that the constitutional right of public access is lessened when a record is filed with a reviewing court. 20 Cal. 4th at 1208 & n.25. To ensure both trial and appellate courts vindicate this constitutional right of public access, the California Judicial Council adopted Rules of Court 243.1, 243.2, and 12.5. Rule 12.5(e)(6) provides that the reviewing court "may order a record filed under seal only if it makes the findings required by rule 243.1(d)-(e)."

Under these constitutional requirements, no trial or appellate court may issue a sealing order unless it "expressly finds" that:

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

Cal. R. Ct. 243.1(d), 12.5(e)(6); see also NBC Subsidiary, 20 Cal. 4th at 1217-1218; Huffy, 112 Cal. App. 4th at 102 n.2; Universal City Studios v.

Superior Court, 110 Cal. App. 4th 1273, 1279 (2003); In re Providian Credit Card Cases, 96 Cal. App. 4th 292, 297-98 (2002).

To satisfy the NBC Subsidiary test, trial and appellate courts must identify a specific interest that requires protection, and must establish that there is a "substantial probability that the interest will be prejudiced absent sealing." Universal City Studios, 110 Cal. App. 4th at 1283; Cal. R. Ct. 243.1(d); 12.5(e)(6). Courts must make specific "factual findings" that sealing is necessary. Cal. R. Ct. 243.1(d)-(e), 12.5(e)(6); Huffy, 112 Cal. App. 4th at 102 n.2.

To enable the court to conduct a proper review, the rules require the party seeking sealing to file a noticed motion and submit a "declaration containing facts sufficient to justify the sealing" of documents in an appellate court. Cal. R. Ct. 12.5(e)(2) (emphasis added). The party seeking sealing of a court record "must lodge the record" to be sealed, absent a showing of good cause. Id.

A slightly different procedure is required where a litigant seeks to file previously sealed trial court records under seal in an appellate court. In this instance, the "sealed record must be filed under seal in the reviewing court unless the court orders otherwise," along with any trial court motions related to sealing, and the trial court's sealing order. Cal. R. Ct. 12.5(c). If a party opposes the sealing, or the reviewing court proposes to unseal the record on its own motion, the reviewing court conducts an "independent

review" of whether the sealed trial court record must be kept secret after it is filed in the reviewing court. Huffy, 112 Cal. App. 4th at 105. Because the reviewing court is deciding whether its own records (which "are records maintained by the clerk of this court") should be sealed, this review is a "different question" than deciding whether a trial court's order sealing its own records was correct. Id.

Furthermore, blanket sealing orders are presumptively invalid. Any sealing order must be "narrowly tailored" and "direct the sealing of only those documents and pages – or, if reasonably practicable, portions of those documents and pages – that contain the material that needs to be placed under seal." Cal. R. Ct. 243.1(d)(4), 243.1(e)(1),12.5(e)(6).

As discussed in the following sections, Mr. Burkle's request for a blanket sealing order of his Post-Marital Agreement plainly fails to satisfy the stringent procedural and substantive requirements of NBC Subsidiary and the Rules of Court, and therefore must be rejected.

B. Mr. Burkle Cannot Show That Sealing Is Necessary To Protect A Compelling Interest.

In the order issued before the passage of Section 2024.6, Judge Paul correctly recognized that Mr. Burkle could not overcome the public's presumptive right of access to court records that reflect his personal wealth, including the Post-Marital Agreement. (PA at 27-35.) As Judge Paul noted in his March 14, 2004 order denying Mr. Burkle's request to seal the Post-

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Marital Agreement in its entirety, the Burkles are "of high public interest" because of Mr. Burkle's considerable wealth and influence in political circles. (PA at 31.) Furthermore, Mr. Burkle's financial worth and the source of his wealth already are well known, due in large part to Mr. Burkle's numerous public SEC filings and media reports about his financial activities. (PA at 21, 25-26, 76-81.) Mr. Burkle also invited public scrutiny by donating large sums to high-profile political candidates and hosting political fundraisers at two of his homes for Democratic presidential candidate John Kerry. (PA at 38, 41, 45-47.) Having thrust his financial and political activities into the public realm, Mr. Burkle cannot now complain that he requires complete secrecy.

After Judge Paul denied Mr. Burkle's sealing request earlier this year, the Post-Marital Agreement was filed in a public court file. Judge Lachs held a public trial on the validity of the agreement, and the court reporter's transcripts were not ordered sealed. Because he voluntarily thrust himself into the public eye, and because the Post-Marital Agreement and related documents have been in the public file for the past year, Mr. Burkle simply cannot demonstrate that permanent sealing all of these divorce court records – including the Post-Marital Agreement and related pleadings <u>in their entirety</u> – is necessary to protect a compelling interest.

To the extent that this Court still concludes that limited redactions, such as bank account numbers, are necessary to protect a compelling

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interest that overcomes the public right of access to court documents, any such redactions should be narrowly applied to satisfy the constitutional requirements identified above.

C. Mr. Burkle Should Not Be Granted Special Treatment Due To His Considerable Political Influence And Wealth.

Numerous decisions confirm that a litigant's wealth, celebrity, or influence cannot override the public's right of access to court records and court proceedings. In short, there is no "celebrity" exception to the First Amendment. As the Second Circuit Court of Appeals recently concluded in the criminal trial of Martha Stewart, "[t]he mere fact of intense media coverage of a celebrity defendant, without further compelling justification, is simply not enough to justify closure." ABC, Inc. v. Stewart, 360 F.3d 90, 106 (2d Cir. 2004). See also NBC Subsidiary, 20 Cal. 4th at 1222 (same for palimony/fraud trial of celebrities Eastwood and Locke); Estate of Hearst, 67 Cal. App. 3d 777, 783-84 (same for probate files of wealthy and influential Hearst family).

To the contrary, the fact that Mr. Burkle is one of the wealthiest men in the world, was described by the trial court as the largest contributor to the Democratic Party in the United States, and donated $147,800 to both the state Democratic Party and the Republican governor, who sponsored and signed legislation, respectively, that directly benefited him, all weighs strongly in favor of public access to Mr. Burkle's divorce proceedings and

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files. Where, as here, the interests of wealthy and powerful individuals are involved, public scrutiny of the judicial process is even more important. Closed proceedings in such situations give rise to the unfortunate perception of special justice for the rich and well connected. This perception has a profoundly corrosive effect on our judicial system as well as our other democratic institutions.

Public oversight is especially important in this case, where Mrs. Burkle alleges that Mr. Burkle hid marital assets and coerced her into signing a Post-Marital Agreement that requires her divorce litigation to be decided by a privately paid judge who operates outside of the public courthouse. This case demands a minimal amount of secrecy and a maximum amount of openness.

5.

JUDGE LACHS' SEALING ORDER INDEPENDENTLY IS INVALID BECAUSE HE LACKED JURISDICTION TO ACT ON A MOTION TO SEAL COURT RECORDS.

Mr. Burkle relies on Judge Lachs' sealing order to support his application to seal the Post-Marital Agreement that has been filed as an exhibit in this Court. But Judge Lachs' sealing order is invalid, not only because it relies on an unconstitutional statute, but also because he lacked jurisdiction to hear the sealing application.

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Pursuant to stipulation of the Burkles under California Rule of Court 244, Judge Lachs was sworn in as a "privately compensated temporary judge" to hear the Burkle's divorce litigation. Also pursuant to stipulation and Rule 244(h), Judge Lachs is being paid by Mr. Burkle. Rule 244(g) expressly states that any "motion to seal records in a cause before a privately compensated temporary judge must be served and filed and must be heard by the presiding judge or a judge designated by the presiding judge." Cal. R. Ct 244(g). In this case, Judge Paul is the presiding judge, and therefore is the only judge who has jurisdiction to hear sealing motions. But Mr. Burkle filed his motion to seal trial court exhibits, including the Post-Marital Agreement and trial transcripts, in Mr. Lachs' court, not Judge Paul's. Because Rule 244(g) required any sealing motions to be made before the presiding judge or his or her designee, Judge Lachs lacked jurisdiction to hear Mr. Burkle's sealing application. Thus, to the extent that Mr. Burkle relies on Judge Lachs' sealing order for his application to seal court records in this Court, Mr. Burkle's sealing application has no merit.[16]

[16] Judge Lachs' sealing order also should be deemed void for the additional reason that his appointment is unconstitutional. Although the California Constitution allows pro tem judges by stipulation (Art. 6, § 21) ("[o]n stipulation of the parties the court may order a cause to be tried by a temporary state judge who is member of the State Bar, sworn and empowered to act until final determination of the cause"), it says nothing about private pay, and other sections of the Constitution make clear that judges sitting as courts of record are prohibited from receiving private

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6.

CONCLUSION

As the California Supreme Court recognized more than 100 years ago, public oversight of the courts – including divorce proceedings – is essential in a democracy. In re Shortridge, 99 Cal. at 530. As the court explained, "the sovereign will of the people is the paramount idea; and the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency, are regarded as essential to the public welfare." Id.

Based on this historical and constitutional principle of public and press access to court proceedings and records, the Press Organizations request that this Court declare Family Code § 2024.6 facially unconstitutional, deny Mr. Burkle's sealing application, and order the

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compensation. See Art. 6, § 17 ("[a] judicial officer may not receive fines or fees for personal use"); Art. 6, § 19 ("[t]he Legislature shall prescribe compensation for judges of courts of record"); Art. 6, § 20 ("[t]he Legislature shall provide for retirement, with reasonable allowance, of judges of courts of record for age or disability"). California Rule of Court 244(h) provides that retired judges who are sworn in as temporary Superior Court judges to preside over an entire trial can be "compensated by the parties" so long as "the parties agree in writing on a rate of compensation to be paid by the parties." Pursuant to Rule 244(h), Judge Lachs has been sworn in to preside over the Burkle divorce as the court of record, and is being paid by Mr. Burkle. But because the Constitution expressly forbids judges sitting as the court of record to be compensated by private parties, Judge Lachs' sealing order is void.

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courts below to vacate their sealing orders based on Section 2024.6. If allowed to stand, the statute will end decades of open divorce court proceedings and records, and inevitably will benefit the wealthy and politically powerful by allowing them to shield their actions from public view.

The Press Organizations also request that this Court deny Mr. Burkle's application to seal court records, even if he relies on the First Amendment and Rule 12.5(e). To the extent that these court records may contain bank account numbers and the names of banks, and to the extent that there is a compelling need to keep this information secret that overrides the public right of access this Court should redact only that specific information. Sealing court records solely to protect Mr. Burkle from embarrassment or media attention is not an adequate ground for a blanket sealing order.

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Making these records available to the public is not only required by the First Amendment and the Rules of Court, it is essential to ensuring public confidence in the fairness of the judicial system.

Dated: January 5, 2005

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