IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITIZENS FOR CERES, Petitioner, vs. SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF STANSLAUS, Respondent, CITY OF CERES, BY AND THROUGH THE CITY COUNCIL, WAL-MART STORES, INC., and WAL-MART REAL ESTATE TRUST Real Parties in Interest.	Case No. F065690 (Stanislaus County Superior Court Case No. 670117)

On Appeal From the Stanislaus County Superior Court
The Honorable Hurl W. Johnson

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST CITY OF CERES, BY AND THROUGH THE CITY COUNCIL, WAL-MART STORES, INC., AND WAL-MART REAL ESTATE TRUST; PROPOSED AMICUS CURIAE BRIEF BY THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF REAL PARTIES IN INTEREST CITY OF CERES, BY AND THROUGH THE CITY COUNCIL, WAL-MART STORES, INC., AND WAL-MART REAL ESTATE TRUST

JENNIFER B. HENNING (193915)
Litigation Counsel
California State Association of Counties
1100 K Street, Suite 101
Sacramento, California 95814
Telephone: (916) 327-7535
Facsimile: (916) 443-8867

Attorney for Amicus Curiae

The California State Association of Counties ("CSAC") and the League of California Cities ("League") respectfully move this Court, pursuant to California Rules of Court, rule 8.520(f), for leave to file the attached brief in support of Real Parties in Interest City of Ceres, by and through the City Council, Wal-Mart Stores, Inc., and Wal-Mart Real Estate Trust.

INTEREST OF AMICUS CURIAE

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League of California Cities is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide

significance. The Committee has identified this case as having such significance.

CSAC and the League's member cities and counties are routinely lead agencies for development projects in this State. In that capacity, they perform the environmental review required under the California Environmental Quality Act (CEQA), which requires an understanding of a very complex statutory and regulatory scheme within an ever changing legal landscape. The process is subject to significant public scrutiny and constant threats of litigation, and as such the guidance and advice of legal counsel is critical. Therefore, cities and counties have a direct and substantial interest in the degree to which communications between agency staff and their counsel, as well as project developers, are protected by the attorney client privilege and the attorney work product doctrine.

SUBJECT OF PROPOSED AMICUS BRIEF

Counsel for CSAC and the League have reviewed the briefing already submitted in this case. Rather than repeat those arguments, the proposed amicus brief provides the agency perspective on the role of the attorney in the CEQA process. The brief also provides an argument against implied abrogation that is not presented in the party briefs, and in the alternative, brings to the court's attention relevant authority on implied repeal not already briefed by the parties. The brief also provides some history on the attorney work product doctrine and an interpretation of

Section 21167.6 that CSAC and the League believe would be helpful to the court in resolving the questions posed.

For the foregoing reasons, CSAC respectfully requests that the Court accept the accompanying amicus curiae brief.

Dated:

Respectfully submitted,

By: /s/
_____
JENNIFER B. HENNING
Attorney for Amicus Curiae
California State Association of Counties
and League of California Cities

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JENNIFER B. HENNING (193915)
Litigation Counsel
California State Association of Counties
1100 K Street, Suite 101
Sacramento, California 95814
Telephone: (916) 327-7535
Facsimile: (916) 443-8867

Attorney for Amicus Curiae

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I. INTRODUCTION.

The matter pending before this Court poses important questions in an area of local government responsibility that often involves controversy and sparks frequent litigation—the California Environmental Quality Act (CEQA). Specifically, this Court has inquired into whether the attorney-client privilege and attorney work product doctrine protect documents that might otherwise be included in the administrative record of a CEQA action, and if so, what are the standards and limitations that apply.

Successfully navigating CEQA requirements, particularly for a large or complicated project, requires engagement with a complex, evolving, and sometimes ambiguous body of law. Implementation of CEQA involves a vast array of statutory, regulatory, and case law requirements. The advice and guidance of a skilled lawyer is essential for public agencies to meet those requirements. When public agencies are properly advised on CEQA compliance, not only are they better able to avoid and defend lawsuits, but the mandate of CEQA – to give major consideration to preventing environmental damages from projects – is better met. Ultimately, such compliance also means a more thoughtfully developed project, which benefits the entire public.

It has long been established that clients are loathe to seek advice from their counsel if they know the advice is subject to disclosure. The attorney-client privilege codified in the Evidence Code is a recognition by

the State of the value of seeking legal advice, and the importance of the confidentiality of that communication. The privilege extends equally to public entities as to private parties. Similarly, the attorney work product doctrine, codified in the Code of Civil Procedure, recognizes that it is essential for a lawyer to be free to work with a certain degree of privacy.

Certainly a public agency, just as any party, must show the basic elements of the attorney-client privilege or work product doctrine in order to prevent disclosure of the privileged communications. But once those elements are shown, the documents are protected. Similarly, the privileges are not waived when shared with third parties if the elements of the common interest doctrine are established.

This Court asks important questions about the contours of the attorney-client privilege and the attorney work product and common interest doctrines, particularly in the context of modern electronic communications. But there should be no doubt that the privileges, once properly established, apply even in the context of CEQA administrative records. Nothing in the text or the policies supporting CEQA compels a contrary result, and indeed the goals of CEQA are more fully realized when public agencies are free to consult with their counsel without fear that the advice rendered will later appear in the administrative record. As such, the

California State Association of Counties (CSAC)[1] and the League of California Cities[2] urge this Court to conclude that neither the attorney-client privilege nor the attorney work product doctrine are abrogated by the administrative record requirements in CEQA.

II. THE ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT DOCTRINE ARE IMPORTANT PARTS OF THE CEQA PROCESS AND MUST BE PRESERVED.

The Petitioner's narrow reading of Public Resources Code section 21167.6[3] would discourage public agency staff from seeking legal advice during the CEQA process, which is counter to the goal of preventing environmental damage from projects. In CEQA matters, guidance from legal counsel is critical. Indeed CEQA has become exceedingly legalistic.

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[1] The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

[2] The League of California Cities is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

[3] All further statutory references are made to the Public Resources Code unless otherwise specified.

There are literally hundreds of published CEQA opinions, and the law continues to rapidly evolve as more published opinions are issued—some 28 this year alone. Complying with CEQA's legal requirements has become uniquely complex, making it unlike any other regulatory scheme that public agencies must implement. The courts carefully and closely scrutinize agencies' compliance and accept no excuses for noncompliance. As a result, attorneys must be at the very center of the process if public agencies are going to be expected to ensure that the law's complicated and continually evolving requirements are met.

A rule that attorney-client communication and attorney work product are not protected would discourage the involvement of attorneys, who are critical to this process. Such a result is not required by the statutory language or the rules of statutory interpretation, and should be rejected.

A. The attorney-client privilege is just as important in the public agency context as it is with private parties.

The fundamental purpose behind the attorney-client privilege is to protect the confidential relationship between parties and their lawyers "so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." (*Solin v. O'Melveny Myers* (2001) 89 Cal.App.4th 451, 460.) It is based on the public policy served by providing every person the right "to freely and fully confer and confide in one having knowledge in the law, and skilled in its practice, in order that the former

may have adequate advice and a proper defense." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) The privilege is a fundamental part of our justice system, and indeed has been "a hallmark of Anglo-American jurisprudence for almost 400 years." (*Ibid.*)

Public entities likewise enjoy the meaningful protection of the attorney-client privilege, both for communications between counsel and staff, as well as written communications with the entity's legislative body. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371-372; *STI Outdoor Superior Court* (2001) 91 Cal.App.4th 334, 341. See also Gov. Code, § 6254, subd. (k).) This privilege is not dependent upon the existence of pending or threatened litigation, and is entirely applicable to communications intended to assist the public entity's decision-making. (*Roberts, supra*, 5 Cal.4th at pp. 371-372.) It is as vital to public clients as it is to private clients. (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1967) 255 Cal.App.2d 1, 54.)

In the context of CEQA, these policy considerations are self-evident. CEQA is a complicated regulatory regime that requires, among other things, several stages of analysis, particular procedures, and specified findings. Projects are often controversial and lead agencies are under considerable public scrutiny regarding how CEQA is applied. In order for the necessary full and frank discussions to occur between the pubic entity and its lawyer, confidential advice must be protected. "Effective aid is

impossible if opportunity for confidential legal advice is banned." (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1967) 255 Cal.App.2d 51, 54.)

B. Confidential communications made in furtherance of the attorney-client relationship establish the privilege, regardless of the method used to transmit the communication.

The elements for establishing the attorney-client privilege are fairly well established in case law. The privilege attaches to confidential communication between an attorney and the client. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 734.) The courts do not start by evaluating the content of each communication to determine whether it is privileged. Rather, since Evidence Code section 952 defines confidential communication between a client and a lawyer as one made *in the course of* the attorney-client relationship, the proper procedure is to first determine the dominant purpose of the relationship between the client and the attorney. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 51.) "Under that approach, when the party claiming the privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney-client, the communication is protected by the privilege." (*Ibid*.)

For this reason, copies of documents, law review articles or facts attached to a communication between a lawyer and a client that would

otherwise be public are nevertheless considered subject to the privilege if they are transmitted in the course of an attorney-client relationship. (See *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 734.) "[I]t is the actual fact of the transmission which merits protection, since the discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600.)

The party claiming the privilege has the burden to establish the preliminary facts necessary to support its exercise. (*Scripps Health v. Superior Court* (2003) 109 Cal.App.4th 529, 533; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 123.) As set out above, the key fact for establishing a prima facie claim of privilege is the dominant purpose of the relationship between the lawyer and client. Once the preliminary facts are established, "the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden to establish the communication was not confidential or that the privilege does not for other reasons apply."[4] (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.)

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[4] As noted in the 1965 Law Revision Commission Comments to Evidence Code section 917 (privileges for communications made in confidence), the presumption that the communication is confidential resolves the practical problem that in order to prove the communication was made in confidence, its content would often have to be revealed. By establishing the presumption, the communication is protected once the

This court has inquired as to whether a different burden exists when the privilege is asserted for documents exchanged between the attorney and the client in which the attorney is addressed as a "cc" in an e-mail. Amici have identified no case law directly on point regarding burden under these facts, but note that there are no cases of which amici are aware establishing a special burden for any other types of communication between the attorney and the client. Electronic communications are specifically included in the privilege. (Evid. Code, § 917, subd. (b).) As mentioned above, attachments and other public facts are protected when communicated in the course of an attorney-client relationship. The focus is on the dominant relationship between the communicators, and not the method by which the message is transmitted. There is nothing in statute or case law to support a different burden for establishing the attorney-client privilege depending on how the parties are addressed in the communication. So long as the preliminary facts establishing the dominant relationship between the parties are presented, the burden rests with the challenger to prove the elements of the privilege are not met.[5]

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relationship is established, and the burden falls on the challenger to provide facts showing that the communication is not in fact confidential. (Cal. Law Revision Com. com., Deering's Ann. Evid. Code, § 917 (2012 ed).)

[5] Amici do not have access to the record in this matter, and therefore do not take a position on whether the attorney-client privilege has been properly asserted by Real Parties in Interest here. Rather, amici set forth their understanding of the general principles governing the issues presented so those principles can be applied to the facts of this case.

The cases cited by Petitioner do not refute this basic premise. In *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1504, the court merely states the not surprising fact that when employees are engaging in *non-privileged* communications, those communications do not become privileged merely by their copy or subsequent transmission to in-house or outside counsel. The converse, however, must also be true: privileged documents cannot become non-privileged merely because they were transmitted between the attorney and client using a "cc" in an email program. The cases cited by Petitioner do not established a heightened standard of proof for establishing the underlying facts to show that communications are privileged, and they certainly do not stand for the proposition that a document is per se not privileged because it was transmitted to the lawyer in the "cc" line on an email rather than the "to" line.

Petitioner notes in its Traverse that if all documents between employees of an agency are automatically protected by attorney-client privilege by merely copying the agency's attorney, employees would be able to subvert laws related to public disclosure. This argument fails to recognize that the burden is on the party asserting the privilege to first establish the attorney-client relationship. Further, the fact that it is conceivable that a rule of law could be abused does not mean that the rule does not exist, and courts should not establish standards based on ascribing

the worst motives to parties. In the context of Brown Act compliance, the court has noted that the Act "may be evaded without much practical difficulty by anyone bent upon evasion," but the court held that the local agency was still entitled to the attorney-client privilege because ultimately "'[w]e must trust to the good faith and integrity of all the departments. Power must be placed somewhere, and confidence reposed in some one.'" (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1967) 255 Cal.App.2d 51, 55-56, *quoting Myers v. English* (1858) 9 Cal. 341, 349. See also *Manteca Union High School Dist. v. City of Stockton* (1961) 197 Cal.App.2d 750, 754 ("Denial of existence of a municipal power should not be predicated solely upon suppositious evil which might conceivably result from abuse of that power.").)

C. The history of the attorney work product doctrine illustrates that it should be not be presumed superseded absent specific intent, which is not present in Section 21167.6.

The Legislature has protected attorney work product under California Code of Civil Procedure section 2018.030. (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 814.) Section 2018.030 states:

> (a) A writing that reflects an attorney's impression, conclusions, opinions, or legal research or theories is not discoverable *under any circumstances*.
> (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines the denial of discovery in preparing that party's claim or defense will result in an injustice.

(Emphasis added.)

The statute "creates for the attorney a qualified privilege against discovery of general work product and an absolute privilege against disclosure of writings containing the attorney's impressions, conclusions, opinions or legal theories." (*BP Alaska Explorations, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1250.)

"It is a fundamental rule that a statute should be construed in light of the history of the times and the conditions which prompted its enactment, and in the light of relevant court decisions existing at the time of its enactment." (*People v. Fair* (1967) 252 Cal.App.2d 890, 893; see also *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 487 [statutes "are normally construed in light of existing statutory definitions or judicial interpretations in effect at the time of the [statute's] adoption"].) Indeed, "[a]n important consideration in determining the intention of the Legislature in enacting [a statute] is the state of the law as it existed prior to the enactment – a consideration of the criticisms, if any, of alleged deficiency or inequity of existing law." (*In re Estate of Simoni* (1963) 220 Cal.App.2d 339, 341.) Here, the historical conditions that prompted the enactment of the work product doctrine, the relevant case law existing at the time of that enactment, and the legislative history establish that the doctrine is intended to apply to a wide array of attorney work product, and should not be lightly overridden.

The United States Supreme Court first recognized a privilege for work product in *Hickman v. Taylor* (1947) 329 U.S. 495. *Hickman* established that the "work" of an attorney should not be disclosed absent "adequate reasons." (*Id.* at pp. 510-512.) According to the Court, "[t]his work is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly though roughly termed . . . as 'work product of the lawyer.'" (*Id.* at p. 511.) "Were such materials open to opposing counsel on mere demand . . . [i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal professional would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." (*Ibid.*)

Ten years after *Hickman*, the California Legislature overhauled discovery by adopting the California Discovery Act. During the passage of the Act, "the question of privilege and the protection of work product was the subject of extensive discussion . . . ." (Masterson, *Discovery of Attorney's Work Product Under Section 2031 of the California Code of Civil Procedure* (1963) 10 UCLA L.Rev. 575, 580.) The relevant provision added as a result of the Discovery Act stated:

> All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall

> not be construed to change the law of this State with respect to the existence of any privilege, whether provided by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction.

(Former Code Civ. Pro., § 2016, subd. (b) [Stats. 1957, ch. 1904, § 3].)

However, the amendment did not directly address the attorney work product doctrine (see *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 131), and subsequent cases narrowed the doctrine's applicability in this State. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 401 [written and signed statements of witnesses gathered and transmitted to an attorney were not attorney work product because "the work product privilege does not exist in this state."]; *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 177-178 [films taken as part of attorney's preparation for trial were only protected from disclosure to the extent they were attorney-client privileged].)

After *Greyhound* and *Suezaki*, "work product [in California] was not protected under *Hickman*, and its protection was only available where the material sought to be produced fit under the attorney-client privilege umbrella." (*Dowden v. Superior Court, supra,* 73 Cal.App.4th at p. 132.) To correct this, the California State Bar sponsored an amendment to the Discovery Act to create a separate privilege for work product. (*Ibid.*) The Legislature "adopted the State Bar's amendment almost verbatim." (*Id.* at p. 133.) And the language of that amendment has not substantively

changed since 1963. (See Former Code Civ. Pro., § 2016, subd. (b) [Stats. 1963, ch. 1744, § 1].) Notably, the protection applies both to work created in anticipation of litigation and to work prepared by an attorney while acting in a nonlitigation capacity. (*Rumac, Inc. v. Bottomley* (1983) 143 Cal.App.3d 810, 815.)

The history behind the enactment of this statutory language illustrates that the work product doctrine is an important aspect of legal practice that has been the subject of considerable discussion and debate. Indeed, the Legislature has specifically declared its intent in adopting the work product doctrine: (1) to prevent attorneys from "taking undue advantage of their adversary's industry and efforts"; and (2) to encourage attorneys "to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases." (Code Civ. Proc., § 2018.020; *Coito v. Superior Court* (2012) 54 Cal.4th 480, 496.)

Despite this long history and clear legislative intent, Petitioner argues that Real Parties in Interest may not assert the attorney work product doctrine because it has been superseded by the administrative record requirements of CEQA. This argument must be rejected. First, as set out more fully below, the language in Section 21167.6 must be read in the context of the CEQA statute as a whole, and when so read, does not address privileged documents. Second, Petitioner makes no effort to reconcile the "notwithstanding any other provision of law" language in Section 21167.6

with California Code of Civil Procedure section 2018.030(a)'s requirement that attorney work product writings are not required to be disclosed "under any circumstances." The history of the work product statute makes clear that attorney work product writings are absolutely protected, and this Court should rule accordingly.

Petitioner also asserts that the attorney work product doctrine does not apply to any item that was not directly prepared by an attorney. This argument flatly misstates the work product doctrine. Both the absolute and qualified protections of the work product doctrine can be applied to something actually gathered or created by someone other than the attorney so long as the person asserting the protection can show the record at issue meets the statutory requirements. (*Coito v. Superior Court, supra*, 54 Cal.4th 480, 486 [concluding that witness statements recorded by an investigator working for an attorney could be protected under the attorney work product doctrine if the person asserting the doctrine can show that "disclosure would reveal the attorney's tactics, impressions, or evaluation of the case (absolute privilege) or would result in opposing counsel taking undue advantage of the attorney's industry or efforts (qualified privilege)"].

Since amici do not have a copy of the record, they take no position on whether the documents at issue in this case are entitled to protection under the work product doctrine. However, if the Real Parties in Interest can otherwise make the necessary showing, the documents should not be

denied protection merely on the ground that may have been prepared by someone other than an attorney.

D. Once the elements of the common interest doctrine are established, the doctrine applies equally to the CEQA administrative record as to all other litigation.

Evidence Code section 952 provides that information transmitted between a client and lawyer retains its privileged character if transmitted in confidence to no third persons other than those who are present to further the interest of the client in consultation. This so-called common interest doctrine is not a separate privilege, but rather is an exception to the rule that the attorney-client privilege is waived when it is shared with a third party. (*California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217, 1222.) The elements for making a claim of non-waiver under the doctrine are well established. The party asserting the waiver exception must show: "(1) the disclosure relates to a common interest of the attorneys' respective clients; (2) the disclosing attorney has a reasonable expectation that the other attorney will preserve confidentiality; and (3) the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing attorney was consulted." (*Meza v. H. Muehistein & Co., Inc.* (2009) 176 Cal.App.4th 969, 981, citing *Oxy Resources California, LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 891.)

There are strong policy reasons to apply the common interest doctrine to attorney-client privileged communications and attorney work

product shared between a public agency and a project applicant once the elements of the doctrine, including that the disclosure relates to a common interest of the parties, have been met.[6] First, as mentioned above, the involvement of attorneys in CEQA matters is critical to navigating CEQA's complicated legal and regulatory requirements. In addition, California courts have upheld the use of "applicant-drafted" environmental documents, and the cases note the recursive back-and-forth discussions between agency staff and applicant's consultants. (*Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446 (disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559); *Eureka Citizens for Responsible Gov't v. City of Eureka* (2007) 147 Cal.App.4th 357.) If such communications, even if made only after a project is approved and litigation has commenced, were found to waive the attorney-client privilege, legal counsel would effectively be excluded from this dialogue, to the public's detriment.

This reasonable and realistic approach was applied in *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217, 1222-1223, where the court concluded that there was a common interest between the county and the real party—"producing an EIR that will withstand a legal

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[6] Again, amici take no position on whether the elements of the common interest doctrine have been met by the real parties in interest in this case, but instead offer analysis on the doctrine's application in CEQA cases generally.

challenge for noncompliance." The court thus concluded that "disclosing the advice to a codefendant in the subsequent joint endeavor to defend the EIR in litigation can reasonably be said to constitute 'involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the [original] legal consultation.'" (*Ibid*, quoting *Oxy Resources California, LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 893, 899.)

A similar approach should be adopted by this Court. It recognizes the important role of attorneys in the CEQA process, and also recognizes that there is often a significant dialogue that occurs between the project applicant and the lead agency in the course of developing a project. Excluding the attorneys from that dialogue in the course of defending the project is counterproductive to the goals of CEQA.

III. CEQA DOES NOT ABROGATE THE ATTORNEY-CLIENT PRIVILEGE, OR THE ATTORNEY WORK PRODUCT OR COMMON INTEREST DOCTRINES.

This Court has requested additional information on the meaning of Section 21167.6's inclusion of the clause "[n]otwithstanding any other provision in law," and whether it should be read to limit the privileges asserted in this case. Using principles of statutory interpretation, the only fair reading of Section 21167.6 is that it does not operate to supersede the privileges.

A. The phrase "notwithstanding any other provision of law" in Section 21167.6 does not address privileged documents.

As an initial matter, the first six words of Section 21167.6 – "notwithstanding any other provision of law" – do not themselves address privileged communications. The argument that they have anything to do with privileged communication at all can only be constructed by reading the words "notwithstanding any other provision of law" in the context of a *misreading* of Section 21167.6(e)(10), which refers to, among other things, "internal agency communications." In context, and under the principle of *ejusdem generis*, the phrase "internal agency communications" does not mean non-public documents. Instead, it means communications that are publically being relied on by the decisionmaking body as evidence of CEQA *compliance*. This conclusion is further compelled when the statute is read as a whole. Section 21167.6(e)(10) commences with the phrase "Any other written materials *relevant to the respondent public agency's compliance* with this division or to its decision on the merits of the project...." (Emphasis supplied.) Internal communications and notes may be relied upon by the decisionmaking body, and thus may in some instances be part of the record. Internal communications that are not public and are not before the decisionmaking body cannot be relied on as evidence by an agency, and are not relevant to CEQA compliance. Nowhere in CEQA is a

decisionmaking body required to consider internal agency communications to reach a decision.

It is therefore unsurprising that courts have recognized that not all internal agency communications need be included in the record, both because they are not helpful in resolving CEQA claims and, relatedly, because CEQA also requires that the party preparing the record do so at reasonable cost. (See *St. Vincent's School for Boys, Catholic Charities CYO v. City of San Rafael* (2008) 161 Cal.App.4th 989, 1018-19 [faulting a petitioner for aggressively seeking internal emails]; Pub. Resources Code, § 21167.6, subd. (f) [requiring the record to be produced at reasonable cost].)

This interpretation is bolstered by a look at the history of Section 21167.6. When the "notwithstanding any other provision of law" language was drafted into Section 21167.6, that statute did not address the content of the administrative record. (Stats. 1984, ch. 1514, § 12.) As originally enacted, the statute addressed only the process and timelines for preparing the administrative record, but not its contents. The provisions addressing the contents of the record were added in 1994, and the "notwithstanding" language simply remained in place from the earlier version. (Stats. 1994, ch. 1230, § 11.) Consequently, the Petitioner's suggestion that the inclusion of this phrase in Section 21167.6 was part of a unified, deliberately created scheme to override the attorney-client privilege is not credible. The "notwithstanding any other provision of law" language in the

prefatory portion of the Section, and subdivision (e) addressing record contents, were added at different times, and addressed different aspects of record preparation (i.e., process vs. content). As such, the addition of subdivision (e)'s content requirements to the existing statute containing this language do not provide any hint that the Legislature understood the interaction between these provisions to have the dramatic effect of eliminating attorney privileges.

B. Given the fundamental nature and preferred position of the attorney-client privilege, it may not be repealed by implication, but only through explicit action of the Legislature.

There is no dispute that Section 21167.6 does not contain any explicit language stating that the attorney-client privilege is abrogated for CEQA administrative records. As such, Petitioner's argument relies on its belief that Section 21167.6 implicitly abrogates the privilege. However, given the preferred position of the attorney-client privilege in our legal system, it is not at all clear that the privilege can be abrogated by implication. In fact, the courts have found that when considering application of the attorney-client privilege, not only is implied repeal disfavored, but the court looks for "evidence of an intent on the part of the Legislature to supersede, override, or alter the operation of the attorney-client privilege in cases involving source disclosure . . . ." (*Hays v. Wood* (1979) 25 Cal.3d 772, 785 [concluding that the Political Reform Act of

1974 abrogates the attorney-client privilege].) "If the Legislature had intended to restrict a privilege of this importance, it would likely have declared that intention unmistakenly, rather than leaving it to the courts to find the restriction by inference and guesswork . . . ." (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 207 [concluding that a trustee's statutory disclosure duties under the Probate Code do not override the trustee's attorney-client privilege].)

Further, the area of privilege "is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme." (*Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 99, citing Evid. Code, § 911.) Thus courts are not free to read exceptions to the privilege into the code where they do not explicitly exist in statute. (*Roberts, supra*, 5 Cal.4th at p. 373 [courts may not imply unwritten exceptions to existing statutory privileges].)

Certainly, the Legislature is aware of how to create a clear expression of the abrogation of the attorney-client privilege. For example, Government Code section 11126 states: "For purposes of this article, all expressions of the lawyer-client privilege other than those provided in this subdivision are hereby abrogated. This subdivision is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings pursuant to this article. . . ." (Gov. Code, § 11126, subd. (e)(2) [governing state agency departments meeting on employment

issues].) A similar provision applies to open meetings of the California State University (Ed. Code, § 89307, subd. (b)(2) ["For purposes of this subdivision, all applications of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this article."].) Similar provisions are also found at Government Code sections 9029.5 and 54956.9.

Thus, this Court should reject the notion that the attorney-client privilege can be abrogated by implication, but rather should insist on explicit abrogation limiting the privilege.

C. Statutory construction rules avoid repeal by implication and require statutes be harmonized if possible.

If this Court concludes that the attorney-client privilege can be abrogated by implication, it should nevertheless conclude that such abrogation has not occurred here. The attorney-client privilege and attorney work product doctrine are fundamental and long standing components of our justice system, and there is no indication that the Legislature intended to make a spot repeal of the privileges in this context.

When confronted with a similar issue (the Brown Act demanding open meetings and the Evidence Code providing for confidential communications), the Third District Court of Appeal noted that it is "bound to maintain the integrity of both statutes if they may stand together."

(*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.2d 41, 54.) Further aiding the court was the principle that there is a presumption against repeals by implication. (*Id.* at p. 55.) Ultimately, the court concluded that the Brown Act did not abrogate the attorney-client privilege.

Similarly, the Supreme Court rejected a claim that the Brown Act repealed by implication the attorney-client privilege contained in the Public Records Act. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371-372; *STI Outdoor Superior Court* (2001) 91 Cal.App.4th 334, 378-379. See also *Sutter Sensible Planning, Inc. v. Board of Supervisors of Sutter County* (1981) 122 Cal.App.3d 813 [legal advice given to Board of Supervisors in closed session regarding CEQA compliance was protected by the attorney-client privilege].) The *Roberts* Court also found that the absence of any supportive legislative history was important in rejecting an implied repeal of the attorney-client privilege. (*Roberts, supra*, 5 Cal.4th at p. 377.)

In fact, there is a strong presumption against implied repeals, as has been articulated by the Supreme Court:

> The presumption against implied repeal is so strong that, "To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. (*Penziner v. West American Finance Co., supra*, 10 Cal.2d 160, 176.) There must be "*no possibility*" of concurrent operation. (*Hayes v. Wood* (1979) 25 Cal.3d 772, 784, italics added.) Courts have also noted

> that implied repeal should not be found unless ". . . the later provision gives *undebatable evidence* of an intent to supersede the earlier. . . ." (*Ibid.*, italics added.)

(*Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420.)

D. The policy objectives behind CEQA and the privileges are both met by harmonizing the provisions to retain the privileges.

The hurdle for overcoming the presumption against implied repeal is a high one indeed, and is one Petitioner does not meet here. Section 21167.6, subd. (e) and Evidence Code section 950 et seq., can be fully harmonized by simply refusing to infer that the Legislature intended to abolish the protections of the attorney-client privilege or attorney work product doctrine without expressly saying so. The clearest pronouncement of this principle in the CEQA administrative record context is from *California Oak Foundation v. County of Tehama* (2007) 174 Cal.App.4th 1217, in which the court stated: "Privilege is a general background limitation to disclosure requirements. Thus, enactment of a specific disclosure requirement that makes no mention of privilege, without more, is at best ambiguous concerning intent to override privilege. Ambiguity does not present an unavoidable conflict with preexisting privilege laws." (*Id.* at p. 1221.)

As a leading CEQA treatise observed (even before *California Oak Foundation* held that attorney-client communications are not to be included

in the administrative record), the provisions of Section 21167.6(e)(10) regarding the inclusion in the record of "all internal agency communications" should not be interpreted in isolation from the rest of CEQA, but should be read in harmony with pre-existing exemptions and privileges. (Remy, Thomas, Moose, & Manley, Guide to CEQA (Solano Press 11th ed. 2007), pp. 859-861, 862-864.) The treatise goes on to conclude that Section 21167 was not intended to abrogate the attorney-client privilege, and for good reason:

> [I]f the Legislature had intended such a drastic result, which would be at odds with long-standing evidentiary rules and public policies, the lawmakers would have used language that was much more clear and precise than the general statement that a record of proceedings must include "all internal agency communications…." Pub. Resources Code, § 21167.6, subd. (e)(10). The almost certain consequence of a requirement that attorneys' advice letters be disclosed to petitioners would be a dramatic reduction in the quality of legal advice received by public agencies. Such advice would be given orally, and thus would typically lack the rigor, precision, and detail associated with written legal opinions. Agencies would make more mistakes, and would violate CEQA more frequently.

(*Id.* at p. 861.)

Preserving the privilege therefore serves to increase CEQA compliance and better meets the goals of addressing the environmental impacts of projects.

In addition, preserving the attorney-client privilege and work product doctrine does not undermine the completeness of the administrative record or a challenger's ability to make a case that an agency decision is not

supported by substantial evidence. As explained above, the administrative record is complete without the privileged documents, since they are not relevant to the review undertaken by the court, namely, whether the publicly available documents concerning the project support a lead agency's determinations with substantial evidence. Indeed, reading Section 21167.6 to require disclosure of privileged communications would "require the actions of agency decision-making bodies to be judged against materials never made available to the decisionmakers." (Remy, Thomas, Moose, & Manley, Guide to CEQA (Solano Press 11th ed. 2007), p. 859.)

Based on the strong presumption against implied repeals, and that the policy objectives of CEQA, the attorney-client privilege, and the work product doctrine can be met by reconciling the statutes to preserve the privileges, this Court should reject Petitioner's argument that Section 21167.6 supersedes the attorney-client privilege and work product doctrine.

E. In other contexts, courts have found that the attorney-client privilege is preserved even where statutory language does not directly exempt the privilege from disclosure requirements.

The idea of reading the attorney-client privilege into a statutory disclosure requirement is not without precedent. Certainly, the Third District did so regarding the same provision at issue in this case. (*California Oak Foundation v. County of Tehama* (2007) 174 Cal.App.4th

1217.) But *California Oak Foundation* is not alone in reconciling confidential communications with disclosure requirements.

In *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, the court noted that the "Brown Act does not explicitly except attorney-client communications between a public agency and its counsel from the requirement that 'all meetings' be 'open and public.'" (*Id.* at p. 824.) The court nevertheless concluded that the Brown Act did not abrogate the policies expressed in the attorney-client privilege, and that the agency's governing body was therefore entitled to confer with its counsel even in the absence of actual pending litigation.

Similarly, in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, the California Supreme Court considered, among other things, whether the Public Records Act abrogated the attorney-client privilege with respect to agency opinions distributed to agency decisionmakers. The Court, relying on the significant value of the attorney-client privilege enjoyed by public agencies, concluded that despite the important purposes underlying the Public Records Act, the Legislature intended to preserve the attorney-client privilege. (*Id.* at p. 370.)

A final example was addressed by the Attorney General in considering whether the attorney-client privilege is available during a grand jury proceeding. (70 Ops.Cal.Atty.Gen. 28 (1987)). The Attorney General noted the role of the grand jury in investigating crimes and reporting upon

matters of local government. Penal Code section 921 also states that the grand jury is allowed all public records in the county. Despite the importance of the grand jury function, the Attorney General concluded that unless there is a specific statute dealing with grand jury proceedings that precludes the use of the attorney-client privilege, witnesses may claim the privilege in a grand jury proceeding, and that the work-product rule also applies. (*Id.* at pp. 30-31, 33-34.)

This Court should similarly conclude that despite the general language in Section 21167.6 requiring all records to be included in the administrative record "notwithstanding any other provision of law," the Legislature did not intend to preclude well established privileges for CEQA actions. Having an agency's complete administrative record for a project is certainly important, but no more important than the open government policies espoused in the Brown Act and Public Records Act, or the broad investigatory powers of the grand jury. The attorney-client privilege is read into those provisions, and should be permitted here too.

IV. CONCLUSION.

The attorney-client privilege and attorney work product doctrine are essential for ensuring clients seek the advice and guidance of counsel, and that counsel is free to properly prepare and respond to requests without fear of that work product's subsequent disclosure. The privileges apply equally to public agencies as to private clients. There is no question that CEQA

compliance requires significant guidance from legal counsel due to its complexities and the constant potential for litigation. The results of competent legal guidance not only further the goals of the privilege, but also the goals of CEQA itself.

In that context, the language in the Public Resources Code that Petitioner asserts supersedes the privileges should not be so interpreted. Instead, this Court should find that the privileges cannot be repealed by implication, or in the alternative, that repeals by implication are disfavored and, as has been done for the Brown Act, the Public Records Act and grand jury proceedings, conclude that the statutes can be reconciled such that the privileges apply.

Finally, this Court should conclude that the burden for establishing the facts necessary to assert the attorney-client privilege remains the same no matter the manner in which the communication is transmitted, and that once established, the privilege is not waived where a project applicant and lead agency share legal advice in furtherance of their common interest in defending a project against legal challenges.

Dated: Respectfully submitted,

By: /s/
_____
JENNIFER B. HENNING
Attorney for Amicus Curiae
California State Association of Counties
and League of California Cities

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 6,658 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ___ day of December, 2012 in Sacramento, California.

Respectfully submitted,

By: /s/
_____
JENNIFER B. HENNING
Attorney for Amicus Curiae