

1 Saira Hussain (SBN 300326)  
2 Cara Gagliano (SBN 308639)  
3 Adam Schwartz (SBN 309491)  
4 Electronic Frontier Foundation  
5 815 Eddy Street  
6 San Francisco, California 94109  
7 Tel.: (415) 436-9333  
8 Fax: (415) 439-9993  
9 Email: saira@eff.org

10 *Attorneys for Plaintiffs Catalin Voss,*  
11 *Yun Hong, Kristen Bell, and Nicholas McKeown*

**ELECTRONICALLY  
FILED**

*Superior Court of California,  
County of San Francisco*

**06/12/2020**  
**Clerk of the Court**  
BY: ERNALYN BURA  
Deputy Clerk

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**SUPERIOR COURT OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN FRANCISCO**

CATALIN VOSS, )  
YUN HONG, )  
KRISTEN BELL, and )  
NICHOLAS MCKEOWN, )  
Plaintiffs, )  
v. )  
CALIFORNIA DEPARTMENT OF )  
CORRECTIONS AND REHABILITATION, )  
Defendant. )

Case No.: CPF-20-517117

**MEMORANDUM IN SUPPORT OF  
PETITION FOR PEREMPTORY WRIT  
OF MANDATE, OR ALTERNATIVELY,  
FOR AN ALTERNATIVE WRIT OF  
MANDATE, TO ENFORCE THE  
CALIFORNIA PUBLIC RECORDS ACT**

Judge: Hon. Ethan P. Schulman

Hearing: June 24, 2020 at 9:30 a.m.

Department: 302

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF AUTHORITIES ..... 3

INTRODUCTION..... 6

FACTS ..... 7

PROCEDURAL HISTORY ..... 8

ARGUMENT ..... 10

I. Race and ethnicity of individuals seeking parole is not exempt under § 6254(c)..... 11

    A. The public interest in disclosure is strong. .... 11

    B. The public interest in non-disclosure is weak..... 14

II. Race and ethnicity of individuals seeking parole is not exempt under § 6254(k)..... 15

III. CDCR possesses records of race and ethnicity information that are public by law..... 15

IV. This Court should prohibit CDCR from denying future requests for the race and ethnicity of individuals seeking parole..... 16

CONCLUSION ..... 16

TABLE OF AUTHORITIES

Cases

ACLU of N. Cal. v. Superior Court, 202 Cal. App. 4th 55 (2011)... 10, 11, 13, 14
ACLU v. CDCR, No. CPF-16-515083 (Cal. Super. Ct. Oct. 14, 2016) ... 6, 15
Associated Press v. U.S. Dep't of Def., 462 F. Supp. 2d 573 (S.D.N.Y. 2006) ... 15
Brodheim v. CDCR, No. CPF-20-516978 (Cal. Super. Ct. filed Jan. 7, 2020)... 6
BRV, Inc. v. Superior Court, 143 Cal. App. 4th 742 (2006)... 11, 14
City of Del Norte v. City of Crescent City, 71 Cal. App. 4th 965 (1999)... 16
City of Santa Clara v. Superior Court, 171 Cal. App. 4th 119 (2009)... 16
Green v. Obledo, 29 Cal. 3d 126 (1981) ... 16
In re Carr, 38 Cal. App. 4th 209 (1995)... 14
In re Morales, 212 Cal. App. 4th 1410 (2013)... 13
In re Palmer, 238 Cal. Rptr. 3d 59 (Ct. App. 2018) ... 8
In re Palmer, 33 Cal. App. 5th 1199 (Cal. 2019) ... 8
Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319 (2007) ... 11
Johnson v. California, 543 U.S. 499 (2005) ... 12, 13

1 *Lissner v. U.S. Customs Serv.*,  
2 241 F.3d 1220 (9th Cir. 2001)..... 14, 15  
3 *People v. King*,  
4 82 Cal. App. 4th 1363 (2000)..... 14  
5 *Powers v. City of Richmond*,  
6 10 Cal. 4th 85 (1995)..... 9  
7 *San Gabriel Tribune v. Superior Court*,  
8 143 Cal. App. 3d 762 (1983)..... 11  
9 *Weaver v. Superior Court*,  
10 224 Cal. App. 4th 746 (2014)..... 15  
11 *Young v. Gness*,  
12 7 Cal. 3d 18 (1972)..... 16  
13  
14 **Statutes**  
15 Cal. Code Regs., tit. 15, § 3261.2(e) ..... 15  
16 Cal. Code Regs., tit. 15, § 3269.1(6)(b)(1)-(3) ..... 14  
17 Cal. Code Regs., tit. 15, § 3269(a) ..... 14  
18 Code of Civ. Pro. § 1087 ..... 10  
19 Gov. Code § 6250..... 10  
20 Gov. Code § 6253(a) ..... 10  
21 Gov. Code § 6254(c) ..... 11, 16  
22 Gov. Code § 6254(k) ..... 11, 15  
23 Gov. Code § 6255(b) ..... 11  
24 Gov. Code § 6258..... 9  
25 Penal Code § 3042..... 16  
26  
27 **Other Authorities**  
28 Cal. Dep't of Corr. & Rehab., Department Operations Manual ..... 14  
Edward E. Rhine et al., *The Future of Parole Release*, 46 Crime & Just. 279 (2017)..... 13  
Elizabeth Jones, *The Profitability of Racism: Discriminatory Design in the Carceral State*, 57 U.  
Louisville L. Rev. 61 (2018)..... 12

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America’s Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 11 *Nw. U. L. Rev.* 1625 (2017) ..... 12

Maggie Astor, *Quandary for 2020 Democrats: Which Criminal Justice Changes Get Priority?*, *N.Y. Times* (Mar. 3, 2020) ..... 12

Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, *N.Y. Times* (Dec. 4, 2016) ..... 12

Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) ..... 12

***Constitutional Provisions***

Cal. Const., Art. I, § 3(b)(1) ..... 10

## INTRODUCTION

1  
2 This suit seeks to enforce a request under the California Public Records Act (CPRA)  
3 against the California Department of Corrections and Rehabilitation (CDCR) for records  
4 providing the race and ethnicity of individuals who appeared for parole consideration before the  
5 State's Board of Parole Hearings from 2002 to 2019. Plaintiffs are a team of researchers at  
6 Stanford University and University of Oregon School of Law who are attempting to study  
7 California parole suitability determinations using machine-learning methods. Their ultimate goal  
8 is to develop a machine-learning platform that can identify parole denials that may have been  
9 influenced by improper factors as potential candidates for reconsideration. In order for this  
10 platform to work, Plaintiffs need race and ethnicity information about individuals who have been  
11 considered for parole. *See* Ex. A (Verified Petition) at ¶ 2.

12 CDCR refuses to release this information, claiming disclosure would cause an  
13 unwarranted invasion of privacy. But this Court rejected the same argument in *ACLU v. CDCR*,  
14 No. CPF-16-515083 (Cal. Super. Ct. Oct. 14, 2016). To prevail, CDCR must demonstrate that  
15 the privacy interests in withholding this information clearly outweigh the public interest in  
16 releasing it. CDCR cannot do so, because the public has a compelling interest in knowing  
17 whether CDCR's parole-release decisions are affected by bias, which outweighs any privacy  
18 interests involved.

19 This case (*Voss*) is related to *Brodheim v. CDCR*, No. CPF-20-516978 (Cal. Super. Ct.  
20 filed Jan. 7, 2020). The *Voss* and *Brodheim* cases both are (i) pending in this Court, (ii) against  
21 CDCR, (iii) pursuant to the CPRA, (iv) in pursuit of records showing the race and ethnicity of  
22 individuals who have sought parole, (v) by means of a writ of mandate. Mr. Brodheim filed his  
23 verified petition on January 7, 2020 (Ex. B) and his supporting memorandum on March 6, 2020  
24 (Ex. C). CDCR has leave to respond on June 11, 2020, and Brodheim has leave to reply on June  
25 17, 2020. Brodheim's motion for a peremptory writ of mandate is scheduled for a hearing before  
26 this Court on June 24, 2020.

27 The *Voss* plaintiffs seek to dispose of their related petition for peremptory writ of  
28 mandate on the same schedule as the *Brodheim* plaintiff. To further this approach, the *Voss*

1 plaintiffs seek leave to join the *Brodheim* plaintiff’s March 6 memorandum. Also, they are  
2 prepared to file a reply brief on June 17, and to participate in the hearing on June 24. This  
3 approach will conserve judicial and party resources. In the alternative, the *Voss* plaintiffs seek a  
4 hearing date of June 24 to address their application for an alternative writ of mandate.

## 5 6 7 **FACTS**

8 Plaintiffs Catalin Voss, Yun Hong, and Nicholas McKeown are California residents.  
9 They are, respectively, a PhD student in Computer Science at Stanford University, a PhD  
10 candidate in Management Sciences and Engineering at Stanford University, and a Professor of  
11 Computer Science and Electrical Engineering at Stanford University. *See Ex. A (Verified*  
12 *Petition)* at ¶¶ 5, 6, 8. Plaintiff Kristen Bell is an Oregon resident and an Assistant Professor at  
13 University of Oregon School of Law. *Id.* at ¶ 7.

14 Plaintiffs seek CDCR records identifying the race and ethnicity of individuals who  
15 appeared before the Board of Parole Hearings. Plaintiffs need these records to conduct a study of  
16 California parole suitability determinations, with the ultimate goal of developing a machine-  
17 learning platform that can recognize patterns in parole determinations and identify parole denials  
18 that may have been influenced by improper factors as potential candidates for reconsideration.  
19 Plaintiffs will also develop a statistical model of how the California parole decision-making  
20 process works. This will help Plaintiffs, government decision makers, and the public at large  
21 develop a better understanding of the current process, and in doing so may assist in evaluating  
22 potential reforms. Plaintiffs’ work must account for many factors, including the race and  
23 ethnicity of the individuals who sought parole. *See Ex. A (Verified Petition)* at ¶ 18.

24 One of the Plaintiffs, Dr. Bell, previously conducted research on parole determinations  
25 for people sentenced to life terms in California prisons for crimes they committed as juveniles. In  
26 2015, Dr. Bell requested—and eventually received—various categories of records from CDCR,  
27 including race and ethnicity data. She then performed a quantitative analysis of 426 parole  
28 hearing transcripts and measured (i) the extent to which legitimate suitability criteria explained  
differences in the decisions, and (ii) the extent to which the remaining variability was attributable

1 to illegitimate factors. Among other conclusions, Dr. Bell found that race and other illegitimate  
2 factors accounted for a considerable degree of variability in those parole decisions. Dr. Bell  
3 published this research in the *Harvard Civil Rights-Civil Liberties Law Review*. Her findings  
4 have been cited in two California Court of Appeal opinions. *See In re Palmer*, 238 Cal. Rptr. 3d  
5 59, 70 n.5, 73 n.8 (Ct. App. 2018), *review granted and depublication ordered*, 433 P.3d 1 (Cal.  
6 2019), *review dismissed*, No. S252145 (Cal. Apr. 30, 2020); *In re Palmer*, 33 Cal. App. 5th  
7 1199, 1213 n.11, *review granted*, 445 P.3d 1004 (Cal. 2019). *See* Ex. A (Verified Petition) at  
8 ¶¶ 19–20.

9 Plaintiffs now seek to expand on Dr. Bell’s study by using machine-learning tools to  
10 analyze a set of parole determinations that is orders of magnitude larger—roughly 50,000  
11 decisions. Plaintiffs will thereby create a tool that can assist in remedying problems the analysis  
12 identifies, both by detecting anomalous decisions and suggesting they be reconsidered, and by  
13 bringing to light any systemic concerns. *See* Ex. A (Verified Petition) at ¶ 21.

14 In September 2018, Plaintiffs submitted to CDCR their CPRA request for the race and  
15 ethnicity data of individuals who sought parole from 2002 through 2018. *See* Ex. A (Verified  
16 Petition) at ¶¶ 22–23. Plaintiffs renewed this request in January 2019, *id.* at ¶ 25, and CDCR  
17 denied it in March 2019, *id.* at ¶ 26. Plaintiffs again renewed their request in January 2020, *id.* at  
18 ¶ 28,<sup>1</sup> and CDCR again denied it later that month, *id.* at ¶ 29. Plaintiffs tried once more in  
19 February 2020, *id.* at ¶ 30, but CDCR has never disclosed the requested data, *id.* at ¶ 31.

## 20 PROCEDURAL HISTORY

21  
22 CDCR has been on notice of this suit for three weeks. Plaintiffs unsuccessfully attempted  
23 to file their verified petition for writ of mandate ordering CDCR to comply with the CPRA on  
24 May 20, 2020. That day, Plaintiffs sent an electronic copy of their petition to CDCR’s general  
25 counsel, Jennifer Neill. *See* Ex. D.<sup>2</sup>

26 \_\_\_\_\_  
27 <sup>1</sup> This request expanded the date range for the data sought to include hearings held through  
November 30, 2019.

28 <sup>2</sup> Plaintiffs did not find out until June 9, 2020, that their initial attempt at filing was unsuccessful.



1           Then on June 3, 2020, plaintiff’s counsel in the *Brodheim* case, Michael Risher, sent  
2 CDCR’s counsel in that case, Michael Lagrama of the California Department of Justice, an email  
3 advising that he had learned of the *Voss* case, that the *Voss* and *Brodheim* cases are related, and  
4 that Mr. Risher would be filing a notice of related case under Rule 3.300. Ex. E. Mr. Risher  
5 attached to this email a copy of the *Voss* petition and asked whether Mr. Lagrama would accept  
6 electronic service of the petition. Mr. Risher further proposed having both cases heard on June  
7 24, the date already set in the *Brodheim* case, in light of the extension and delays in that case and  
8 the statutory requirement to promptly decide CPRA cases. *Id.*; *see also* Cal. Gov. Code § 6258.  
9 Mr. Risher advised that the *Voss* plaintiffs wish to join the *Brodheim* plaintiff’s motion of March  
10 6, without submitting separate opening papers other than their verified petition. Ex. E. On June 4,  
11 Mr. Lagrama responded that he did not have authority to accept or waive service for the *Voss*  
12 petition. *See* Ex. F. On June 5, *Voss* counsel responded to Mr. Lagrama’s email and asked for  
13 clarification whether Mr. Lagrama lacked authority to accept service for the *Voss* petition  
14 because CDCR had instructed him not to or because he was not handling the matter. Ex. G. *Voss*  
15 counsel copied on the email CDCR’s general counsel and another Deputy Attorney General, Jay  
16 Russell, who earlier had been designated by CDCR as its representative regarding the *Voss*  
17 plaintiffs’ CPRA request. *Id.* That same day, Mr. Lagrama responded that CDCR would not  
18 accept electronic service of the *Voss* petition and did not accept the proposal in Mr. Risher’s June  
19 3 email. Ex. H.

20           On June 10, 2020, Plaintiffs filed their verified petition for writ of mandate ordering  
21 CDCR to comply with the CPRA. Ex. A. (Verified Petition). That day, Plaintiffs sent an  
22 electronic copy of their petition to CDCR’s general counsel and the three Deputy Attorneys  
23 General who were included on Mr. Lagrama’s June 5 email. *See* Ex. I. CDCR was personally  
24 served with the petition and summons on the following day, June 11. Ex. J.

25           Mandate lies to compel the government to comply with the CPRA. Gov. Code § 6258. To  
26 ensure timely disclosure of public records, the Court must set “hearings in these proceedings . . .  
27 with the object of securing a decision as to these matters at the earliest possible time.” *Id.* *See*  
28 *Powers v. City of Richmond*, 10 Cal. 4th 85, 118 (1995) (George, C.J., concurring) (the

1 “timeliness of disclosure often is of crucial importance in actions brought under the Public  
2 Records Act”).

3 Writs of mandate may be either alternative or peremptory. Code Civ. Proc. § 1087. An  
4 alternative writ commands the respondent to do an act or to show cause why it need not do so.  
5 *Id.* The peremptory writ simply commands the respondent to act. *Id.*

6 Because the dispositive issue in both cases is the same, the *Voss* plaintiffs now seek to  
7 dispose of their petition for peremptory writ of mandate in tandem with the *Brodheim* plaintiff’s  
8 petition. The *Voss* plaintiffs ask this Court for leave to join the *Brodheim* plaintiff’s March 6  
9 memorandum (Ex. C), to file a reply brief on June 17, and to participate in the hearing on June  
10 24. In the alternative, the *Voss* plaintiffs seek an alternative writ of mandate. In support thereof,  
11 they submit this memorandum.<sup>3</sup>

### 12 ARGUMENT

13  
14 In California, “information concerning the conduct of the people’s business is a  
15 fundamental and necessary right of every person.” Gov. Code § 6250. *See also* Cal. Const., Art.  
16 I, § 3(b)(1). The CPRA thus requires the government to release all requested records unless it can  
17 demonstrate that they are exempt from disclosure. *ACLU of N. Cal. v. Superior Court*, 202 Cal.  
18 App. 4th 55, 66–67 (2011). “Since disclosure is favored, all exemptions are narrowly construed.  
19 The agency opposing disclosure bears the burden of proving that an exemption applies.” *Id.* at  
20 67. If documents contain both exempt and non-exempt material, the government must redact the  
21 exempt material and release the rest. Gov. Code § 6253(a). A court must set the times for  
22 responsive pleadings and hearing “with the object of securing a decision as to these matters at the  
23 earliest possible time.” Gov. Code § 6258.

---

24  
25  
26 <sup>3</sup> The *Voss* plaintiffs also bring a First Amendment claim against CDCR, because the agency  
27 withheld the disputed information based on the *Voss* plaintiffs’ viewpoint. See Ex. A (Verified  
28 Petition) at ¶¶ 32–43, 47–49. The *Voss* plaintiffs respectfully suggest that this Court hold this  
First Amendment claim in abeyance, pending resolution of the CPRA issue presented by the  
related *Voss* and *Brodheim* cases.

1 Here, CDCR asserted that the disputed information—the race and ethnicity of individuals  
2 seeking parole between 2002 and 2019—is exempt from disclosure pursuant to CPRA  
3 exemptions 6254(c) and (k). *See* Ex. A (Verified Petition) at ¶ 29. In fact, CDCR cannot show  
4 that either exemption applies, so CDCR must disclose this information.

5 **I. Race and ethnicity of individuals seeking parole is not exempt under § 6254(c).**

6 Government Code section 6254(c) permits the government to withhold “[p]ersonnel,  
7 medical, or similar files, the disclosure of which would constitute an unwarranted invasion of  
8 personal privacy.” The purpose of this exemption is “to protect information of a highly personal  
9 nature which is on file with a public agency.” *San Gabriel Tribune v. Superior Court*,  
10 143 Cal. App. 3d 762, 777 (1983) (quotation mark omitted). This exemption “requires [courts] to  
11 balance two competing interests . . . —the public’s interest in disclosure and the individual’s  
12 interest in personal privacy.” *Int’l Fed’n of Prof’l & Tech. Eng’rs, Local 21, AFL-CIO v.*  
13 *Superior Court*, 42 Cal. 4th 319, 329–30 (2007). The standard under section 6254(c) is  
14 “essentially the same” as under the catch-all balancing test of section 6255(b), which requires the  
15 government to show that “the public interest served by not disclosing the record clearly  
16 outweighs the public interest served by disclosure.” *BRV, Inc. v. Superior Court*, 143 Cal. App.  
17 4th 742, 755 (2006) (quoting Government Code section 6255(a)). Section 6254(c) thus places  
18 “the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the  
19 side of confidentiality.” *ACLU of N. Cal.*, 202 Cal. App. 4th at 68 (quotation mark omitted).

20 **A. The public interest in disclosure is strong.**

21 The public interest in disclosure of the disputed information is very strong. Plaintiffs are  
22 a team of researchers at Stanford University and University of Oregon School of Law who are  
23 attempting to study California parole suitability determinations using machine-learning methods.  
24 Their ultimate goal is to develop a machine-learning platform that can identify parole denials that  
25 may have been influenced by improper factors as potential candidates for reconsideration. In  
26 order for this platform to work, Plaintiffs need race and ethnicity information about individuals  
27 who have been considered for parole. *See* Ex. A (Verified Petition) at ¶ 2.  
28

1 The public has a strong interest in being able to learn whether CDCR’s decisions about  
2 parole suitability are infected by racial bias, either implicit or explicit. “[P]ublic respect for our  
3 system of justice is undermined when the system discriminates based on race.” *Johnson v.*  
4 *California*, 543 U.S. 499, 511 (2005). Questions surrounding racial disparities in the criminal  
5 justice system are the topic of fierce debate in California and nationally.<sup>4</sup> In a recent survey, five  
6 leading candidates for the Democratic nomination for President “all spoke about criminal justice  
7 as a matter of racial justice, and most said that was the primary reason they supported an  
8 overhaul.” See Maggie Astor, *Quandary for 2020 Democrats: Which Criminal Justice Changes*  
9 *Get Priority?*, N.Y. Times (Mar. 3, 2020).<sup>5</sup> A 2017 study by the Public Policy Institute of  
10 California found that “[t]wo-thirds of [California] residents (66%) say that blacks and other  
11 minorities do not receive treatment equal to whites in the criminal justice system—up from 55  
12 percent in January 2015. Today, 90 percent of African Americans express this view, as do solid  
13 majorities of Latinos, whites, and Californians in other racial/ethnic groups.” Mark Baldassare et  
14 al., *Californians & Their Government*, at 5 (Pub. Policy Inst. of Cal. 2017).<sup>6</sup>

15 Major newspapers have helped to focus public attention on the problem. For example, in  
16 2016, the New York Times reviewed nearly 14,000 parole decisions from 2013 to 2016 and  
17 found a “clear” “pattern of racial inequity,” even taking “into account such factors as an inmate’s  
18 crime, age, race and previous stints in state prison.” Michael Winerip et al., *For Blacks Facing*  
19 *Parole in New York State, Signs of a Broken System*, N.Y. Times (Dec. 4, 2016).<sup>7</sup> See also, e.g.,  
20 Evan Sernoffsky, *DA Chesa Boudin sets new policies on SF police stops, gang enhancements*,

21 \_\_\_\_\_  
22 <sup>4</sup> See also Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of*  
23 *Colorblindness* (2010); Elizabeth Jones, *The Profitability of Racism: Discriminatory Design in*  
24 *the Carceral State*, 57 U. Louisville L. Rev. 61 (2018); Jonathan Simon, *Racing Abnormality,*  
*Normalizing Race: The Origins of America’s Peculiar Carceral State and Its Prospects for*  
*Democratic Transformation Today*, 11 Nw. U. L. Rev. 1625 (2017).

25 <sup>5</sup> Available at [https://www.nytimes.com/2020/03/02/us/politics/Criminal-justice-2020-](https://www.nytimes.com/2020/03/02/us/politics/Criminal-justice-2020-Democrats.html)  
26 [Democrats.html](https://www.nytimes.com/2020/03/02/us/politics/Criminal-justice-2020-Democrats.html). All websites last visited on June 11, 2020.

27 <sup>6</sup> Available at [https://www.ppic.org/content/pubs/survey/S\\_317MBS.pdf](https://www.ppic.org/content/pubs/survey/S_317MBS.pdf).

28 <sup>7</sup> Available at [https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-](https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html)  
[race.html](https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html).

(cont’d)

1 *three strikes*, S.F. Chronicle (Feb. 28, 2020) (quoting the San Francisco District Attorney as  
2 stating that “Racial bias in the criminal justice system is something we need to address if we’re  
3 going to restore trust and confidence in the system . . . .”).<sup>8</sup> This public attention in itself  
4 demonstrates the public interest in knowing whether CDCR’s parole decisions are affected by  
5 the parole candidate’s race. *See ACLU of N. Cal.*, 202 Cal. App. 4th at 71.

6 This interest is particularly acute because the California prison system has a history of  
7 race discrimination, which led the U.S. Supreme Court to hold that CDCR’s “unwritten policy of  
8 racially segregating prisoners” was subject to strict scrutiny under the Equal Protection Clause.  
9 *Johnson v. California*, 543 U.S. 499, 502 (2005). Eight years after that seminal decision, a  
10 California appeals court found that CDCR had failed to comply with the resulting court order.  
11 *See In re Morales*, 212 Cal. App. 4th 1410, 1412 (2013) (upholding an order requiring CDCR to  
12 stop discriminating based on race and explaining that “Pelican Bay [State Prison] racially  
13 segregate[d] prisoners and, during extended periods of perceived threatened violence, denie[d]  
14 family visits, work assignments, yard exercise, religious services and other privileges to  
15 prisoners of one race while granting those same privileges to prisoners of other races.”).

16 Even more specifically, Plaintiff Dr. Bell’s analysis of CDCR data showed a disturbing  
17 pattern of racial disparities in parole decisions from 2014 and 2015: “Black candidates face[d]  
18 significantly lower prospects of parole,” even after accounting for 17 potentially confounding  
19 factors. *See Ex. A (Verified Petition)*, at Ex. 1 thereto (Dr. Bell’s article), at 525. Current data are  
20 needed to determine whether this is still the case. Current data will also help determine whether  
21 new methods for determining parole suitability—such as risk-assessment tools—have a positive  
22 or negative effect on racial disparities in release rates. *See Edward E. Rhine et al., The Future of*  
23 *Parole Release*, 46 *Crime & Just.* 279, 281 (2017) (noting the need to research this question).

24 In sum, the public has a very strong interest in knowing whether CDCR is discriminating  
25 on the basis of race or ethnicity in its parole determinations.

26  
27  
28 <sup>8</sup> Available at <https://www.sfchronicle.com/crime/article/San-Francisco-DA-Chesa-Boudin-sets-new-policies-15091160.php>.

1           **B.       The public interest in non-disclosure is weak.**

2           Faced with these strong public interests in disclosure, CDCR cannot meet its burden of  
3 showing a “clear overbalance on the side of confidentiality.” *ACLU of N. Cal.*, 202 Cal. App. 4th  
4 at 68 (quotation mark omitted). *See also BRV*, 143 Cal. App. 4th at 755 (the government must  
5 show that the interests in non-disclosure “clearly outweigh[.]” the interests in disclosure).

6           CDCR classifies inmates by race. *See* Cal. Code Regs., tit. 15, §§ 3269(a),  
7 3269.1(6)(b)(1)–(3); CDCR Department Operations Manual at 474–75, § 54055.1 *et seq.*<sup>9</sup>  
8 CDCR’s own Department Operations Manual (DOM) states that an inmate’s race is not exempt  
9 from disclosure as a public record. DOM at 35–36, § 13030.23.3. This same information may be  
10 found in at least some parole hearing transcripts, which are indisputably open to public  
11 inspection under Penal Code § 3042(b). *See* Gagliano Decl. ¶ 9.

12           Moreover, while imprisonment does not extinguish an individual’s fundamental human  
13 right to privacy, courts commonly hold that imprisonment can reduce it. *See, e.g., People v.*  
14 *King*, 82 Cal. App. 4th 1363, 1374 (2000).

15           An instructive case is *Lissner v. U.S. Customs Serv.*, 241 F.3d 1220, 1224 (9th Cir.  
16 2001).<sup>10</sup> The plaintiff sought information from one law enforcement agency about its arrest of  
17 two officers from another law enforcement agency, including the ethnicity of the arrested  
18 officers (among other physical descriptors). *Id.* at 1221–22. The defendant refused to disclose  
19 this information, arguing that doing so would constitute an unwarranted invasion of the personal  
20 privacy of the arrested officers. *Id.* at 1222. The Ninth Circuit rejected this argument, holding  
21 that “the public interest in disclosing the sought-after information clearly outweighs the privacy  
22 interests of [the arrested officers].” *Id.* at 1223. The court reasoned there is “a cognizable public  
23 interest” in disclosure of “information which sheds light on the propriety” of the agency’s  
24

---

25 <sup>9</sup> Available at [https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2020/03/2020-](https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2020/03/2020-DOM-02.27.20.pdf)  
26 *DOM-02.27.20.pdf*. The CDCR Operations Manual “reflects the actual practices” of the agency.  
*In re Carr*, 38 Cal. App. 4th 209, 213 (1995).

27 <sup>10</sup> “[F]ederal judicial interpretations of the FOIA may be used in construing the PRA . . . .”  
28 *ACLU of N. Cal.*, 202 Cal. App. 4th at 79.

(cont’d)

1 actions. *Id.* This outweighed any privacy interests, “particularly because the officers’ identities  
2 ha[d] already been released” by the agency. *Id.* at 1224. Here, as in *Lissner*, CDCR has released  
3 the names of individuals seeking parole. *See* Ex. A (Verified Petition) at ¶ 24. *See also* Cal.  
4 Dep’t of Corr. & Rehab., Parole Suitability Hearing Results (listing names of individuals who  
5 have been considered for parole suitability).<sup>11</sup>

6 Thus, whatever interest individuals seeking parole may have in non-disclosure of their  
7 race or ethnicity does not clearly outweigh the strong public interest in disclosure of this  
8 information. *See ACLU*, No. CPF-16-515083 (“CDCR has not shown that disclosure would  
9 violate the inmates’ privacy interest”). *Cf. Associated Press v. U.S. Dep’t of Def.*, 462 F. Supp.  
10 2d 573, 577 (S.D.N.Y. 2006) (agency required to release records under FOIA showing height  
11 and weight of prisoners at Guantanamo Bay because doing so would not cause unwarranted  
12 invasion of privacy).

13 **II. Race and ethnicity of individuals seeking parole is not exempt under § 6254(k).**

14 Government Code section 6254(k) allows agencies to withhold “[r]ecords, the disclosure  
15 of which is exempted or prohibited pursuant to federal or state law.” In support of this  
16 exemption, CDCR has pointed to the California Code of Regulations, title 15, section 3261.2.  
17 *See* Ex. A (Verified Petition) at ¶¶ 26, 29. That regulation enumerates certain kinds of  
18 information about an incarcerated person (not including race or ethnicity) that an agency  
19 employee may release absent the individual’s permission. Cal. Code Regs., tit. 15, § 3261.2(e).

20 But as this Court has previously explained, “the fact that CDCR has not included race . . .  
21 as inmate information that can be released by an employee [under this regulation] is not  
22 controlling on the issue of disclosure under the CPRA.” *See ACLU*, No. CPF-16-515083.

23 **III. CDCR possesses records of race and ethnicity information that are public by law.**

24 A government agency cannot withhold copies of records that are publicly available in  
25 court files. *Weaver v. Superior Court*, 224 Cal. App. 4th 746, 749–50 (2014) (district attorney  
26 was required to disclose his copies of “court documents” whose originals were filed in the  
27

28 <sup>11</sup> Available at <https://www.cdcr.ca.gov/bph/parole-suitability-hearing-results/>.

1 superior court). CDCR possesses court records showing the race and ethnicity of many, if not all,  
2 of the individuals for whom plaintiffs are requesting this information. It also possesses hearing  
3 transcripts containing this same information that must be made available under Penal Code  
4 § 3042. *See* Gagliano Decl. ¶ 9. It has absolutely no basis for failing to disclose these records.

5 **IV. This Court should prohibit CDCR from denying future requests for the race and**  
6 **ethnicity of individuals seeking parole.**

7 “[A]lthough as a general rule mandate will not lie in the absence of a present duty to act,  
8 the remedy may be sought when it is clear from the circumstances that the public officer does not  
9 intend to comply with his obligation when the time for performance arrives.” *Young v. Gness*, 7  
10 Cal. 3d 18, 21 n.4 (1972). Mandate may therefore issue to prohibit CDCR from denying future  
11 CPRA requests for race and ethnicity information of persons who have been considered for  
12 release on parole. *See Cty. of Santa Clara v. Superior Court*, 171 Cal. App. 4th 119 (2009)  
13 (taxpayer may sue to challenge agency’s practices that violate CPRA); *Green v. Obledo*, 29 Cal.  
14 3d 126, 143-45 (1981) (individual could “seek a writ of mandate commanding defendants to  
15 cease enforcing [a state regulation] in its entirety”). *Cf. Cty. of Del Norte v. City of Crescent City*,  
16 71 Cal. App. 4th 965, 973 (1999) (a permanent injunction “is available in a mandamus  
17 proceeding and is appropriate to restrain action which, if carried out, would be unlawful”). In  
18 light of CDCR’s refusal to abide by this Court’s past holding, this type of order is appropriate.

19 **CONCLUSION**

20 Plaintiffs seek a peremptory writ of mandate, and in the alternative, they seek an  
21 alternative writ of mandate. In furtherance of the former, Plaintiffs respectfully request this  
22 Court’s leave to join the *Brodheim* plaintiff’s memorandum of March 6, to file a reply brief on  
23 June 17, and to participate in the *Brodheim* hearing on June 24. In furtherance of the latter,  
24 Plaintiffs seek a hearing on June 24.

25 For the reasons above and in the *Brodheim* plaintiff’s memorandum of March 6, this  
26 Court should issue a peremptory writ of mandate: (1) ordering CDCR to produce the requested  
27 information regarding the race and ethnicity of individuals considered for parole between 2002  
28



1 and 2019; and (2) prohibiting CDCR from withholding records showing the race/ethnicity of  
2 persons that the Board of Parole Hearings has considered for release on parole in response to  
3 future CPRA requests.

4 In the alternative, for the reasons above, this Court should issue an alternative writ  
5 commanding CDCR to (1) provide Plaintiffs with records showing the race and/or ethnicity of all  
6 persons that the Board of Parole Hearings considered for release on parole between January 1,  
7 2002 and November 30, 2019 and (2) certify that Defendant will not withhold records showing  
8 the race/ethnicity of persons that the Board of Parole Hearings has considered for release on  
9 parole in response to future CPRA requests, or to show cause in this Court why it has refused to  
10 do so.

11 Dated: June 12, 2020

Respectfully submitted.

12 By: 

13 Saira Hussain  
14 Cara Gagliano  
15 Adam Schwartz

16 *Attorneys for Plaintiffs*  
17 *Catalin Voss, Yun Hong,*  
18 *Kristen Bell, and Nicholas McKeown*