No. S252445

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL LAWYERS GUILD,
SAN FRANCISCO BAY AREA CHAPTER,
Plaintiff and Respondent,

vs.

CITY OF HAYWARD, et al.,
Defendants and Appellants.

Application to File Amicus Curiae Brief and Amicus Curiae Brief in Support of Plaintiff and Respondent, National Lawyers Guild, San Francisco Bay Area Chapter

After Decision by the Court of Appeal
First Appellate District, Division Three, Case No. A149328

Alameda County Superior Court, Case No. RG15-785743
(Hon. Evelio Grillo)

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Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, the Northern California Chapter of the Society of Professional Journalists ("SPJ NorCal") and the Pacific Media Workers Guild (The NewsGuild-Communications Workers of America Local 39521, AFL-CIO; "the Guild") respectfully request leave to file the attached brief in support of Plaintiff and Respondent, National Lawyers Guild, San Francisco Bay Area Chapter. Amici urge reversal of the Court of Appeal's opinion below, which gave inadequate weight to the constitutional right of access and which leaves those with fewer financial resources without equal access to justice. Although freelancers, journalists at small or nonprofit media organizations, and student journalists play an increasingly important role in holding the government accountable through sunshine laws such as the California Public Records Act (CPRA), the Court of Appeal's opinion threatens to cut off this important work by making it unaffordable.

INTERESTS OF AMICI

I. SPJ NORCAL.

SPJ NorCal works to support journalists throughout Northern California by engaging in, among other things, public advocacy and educational outreach to working journalists and journalism students, and by hosting two annual awards ceremonies to celebrate local journalists' achievements. It is a chapter of the national Society of Professional

Journalists ("SPJ"), the nation's most broad-based journalism organization. SPJ NorCal has joined amicus curiae briefs in appeals under the CPRA and the Ralph M. Brown Act before, including *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608 (*San Jose*). Recently, SPJ NorCal's Freedom of Information Committee showed leadership by quickly condemning a law enforcement raid on freelance journalist Bryan Carmody, in an apparent attempt to identify a confidential source who provided a police report detailing the death of former San Francisco Public Defender Jeff Adachi. SPJ NorCal also joined The First Amendment Coalition and the Reporters Committee for Freedom of the Press in moving to unseal court records pertaining to the warrants that purportedly authorized the raid on Carmody and his property.

SPJ NorCal seeks to underscore the importance of the Court of Appeal's decision to freelancers, journalists at small or nonprofit media organizations, and student journalists. SPJ NorCal's members include many full-time journalists at mainstream publications. However, its membership also includes freelancers, journalists at small or nonprofit media organizations, and student journalists. These "non-institutional" journalists typically lack the financial resources of larger media organizations. (See, e.g., Jones, *Litigation, Legislation, and Democracy in A Post-Newspaper America* (2011) 68 Wash. & Lee L.Rev. 557, 617, 619–21 ["The individuals who are sometimes derisively referred to as 'pajama

bloggers' or 'jammie surfers' do not ordinarily have financial resources of any significance, and referring to them as independent journalists (a term that is more accurate in at least some subset of the cases) does not change this financial equation"]; Stevenson, *A Presumption Against Regulation: Why Political Blogs Should Be (Mostly) Left Alone* (2007) 13 B.U. J. Sci. & Tech. L. 74, 88 ["Unlike traditional media entities, bloggers have few financial resources."].) The CPRA's statutory limitations on fees help to even the playing field for non-institutional journalists, which in turn enables more in-depth investigative reporting and increases the number of contributions to the marketplace of ideas.

II. THE GUILD.

The Guild is a union representing communications professionals, including staff, freelance and student journalists, primarily in Northern California, Hawaii and Nevada. The Guild provides programs and services that help members secure sufficient remuneration and working conditions conducive to doing their jobs. Especially for journalists, those working conditions include the ability to obtain public records in timely fashion and at non-prohibitive cost; the cost consideration is significant particularly for freelancers with their limited operating budgets.

The Guild's programs and services include advocacy for government transparency (a.k.a. "sunshine"), an essential component of democracy. Recently, the Guild joined with SPJ NorCal and other sunshine-advocacy

and public-interest organizations in opposing a San Francisco City Charter amendment that includes a provision allowing the Board of Supervisors to tamper with the San Francisco Sunshine Ordinance (San Francisco Admin. Code, ch. 67) that the voters passed in November, 1999. The Guild also spoke out against the law enforcement raid on Carmody, calling for a probe into the activities of the police. (See Knee, *Raid on SF journalist criticized as trampling First Amendment* (May 23, 2019) <http://mediaworkers.org/raid-on-sf-journalist-criticized-as-trampling-first-amendment/> [last visited 5/30/19].) Both the Guild and SPJ NorCal joined dozens of media organizations, led by the Reporters Committee for Freedom of the Press, in a request for leave to file an amicus letter urging the San Francisco Superior Court to order the return of Carmody's work product and newsgathering equipment.

The Guild again takes up the cause of sunshine by joining this amicus brief.

III. CONCLUSION.

The California Legislature and the voters have consistently affirmed the importance of the right of access. (See, e.g., Cal. Const., art. I, § 3, subd. (b); Gov. Code, § 6250; see also Stats. 2018, ch. 988, eff. Jan. 1, 2019 (SB 1421).) This includes the Legislature's enactment of increasingly stringent restrictions on fees for copies of public records. (See *North County Parents Organization v. Department of Education* (1994) 23

Cal.App.4th 144, 146-48 [reviewing legislative changes to language of the CPRA's copy fee provision, former Government Code section 6257 (now codified at section 6253(b))].) These repeated affirmations of the public policy in favor of the right of access demonstrate the Legislature's and voters' intent that the policy in favor of access outweighs the financial burden on local agencies in the overwhelming majority of situations. Local agencies should not be permitted to use routine redactions to electronic records as a vehicle to recover their labor costs, at the expense of transparency.

For the reasons set forth above, SPJ NorCal and the Guild respectfully request that the Court grant them leave to file the attached amicus brief.[1]

Dated: May 31, 2019

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[1] No person or entity other than amici and their counsel authored the attached brief or made any monetary contribution to its preparation.

AMICUS BRIEF

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

The Court of Appeal incorrectly interpreted Government Code section 6253.9(b)(2) to allow a local agency to charge exorbitant fees for reviewing and redacting electronic public records before disclosing them. (See *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2018) 27 Cal.App.5th 937, 952, as modified on denial of rehg. (Oct. 26, 2018) (*National Lawyers Guild*).) The Court of Appeal's decision threatens to cut off access to electronic public records for journalists who lack institutional funding – such as journalists at nonprofit news organizations, freelancers, student journalists, and bloggers – whenever a public agency unilaterally asserts that the records contain exempt material that must be redacted. The cost issue goes to the heart of the efficacy of the CPRA. Construing section 6253.9 broadly to allow fees for time spent on redaction creates a new type of "digital divide"[2] in which only the wealthy and powerful can wield the Public Records Act and the constitutional right

[2] The term "digital divide" refers to "the economic, educational, and social inequalities between those who have computers and online access and those who do not." (See Definition of digital divide, Merriam-Webster.com <https://www.merriam-webster.com/dictionary/digital%20divide> [last visited 5/30/19]; see also Lyz Lenz, *Iowa: Rural broadband, and the unknown costs of the digital divide*, Columbia Journalism Rev. (Oct. 15, 2018) <https://www.cjr.org/special_report/midterms-2018-iowa-rural-broadband.php/> ["If an informed electorate is a vital part of our democracy, then we cheapen it by making access to information a privilege rather than a right."] [last visited 5/30/19].)

of access to hold the government accountable. It would also render moot the Legislature's careful balancing of the right of access and the right of privacy in SB 1421, a recently enacted law providing greater access to police records, by allowing de facto denials in the form of inflated demands for fees.

The Court of Appeal's decision also fails to honor the interpretive mandate of article I, section 3(b)(2) of the California Constitution. That section requires any statute, including Government Code section 6253.9(b)(2), to be "broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (See Cal. Const., art. I, § 3, subd. (b)(2).) The Court of Appeal's opinion in this case acknowledged the constitutional rule, but failed to apply it. (See *National Lawyers Guild*, *supra*, 27 Cal.App.5th at pp. 945-52.)

II. THE COURT OF APPEAL MISINTERPRETED GOVERNMENT CODE SECTION 6253.9(b), WITH GRAVE CONSEQUENCES FOR FREELANCE WRITERS, BLOGGERS, STUDENT JOURNALISTS, AND THE PUBLIC.

The CPRA generally provides that public agencies shall make copies of public records "promptly available to any person upon payment of fees covering *direct costs of duplication*, or a statutory fee if applicable." (See Gov. Code, § 6253, subd. (b), emphasis added.)

Government Code section 6253.9 contains additional fee provisions for records in electronic format. Section 6253.9, subdivision (a)(2) begins

by affirming the general principle, that "[t]he cost of duplication shall be *limited to the direct cost of producing a copy* of a record in an electronic format." (Gov. Code, § 6253.9(a)(2), emphasis added.) Subdivision (b)(2) goes on to provide for additional cost recovery in specified circumstances, as follows in relevant part:

> Notwithstanding paragraph (2) of subdivision (a), the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when ... [t]he request would require data compilation, *extraction*, or programming to produce the record.

(Gov. Code, § 6253.9, subd. (b)(2), emphasis added.)

In *National Lawyers Guild*, the parties' dispute focused on whether "extraction" "'means [reducing] a record by taking out information that is exempt from public disclosure.'" (See *National Lawyers Guild, supra*, 27 Cal.App.5th at pp. 947 [quoting the NLG's argument].) The Court of Appeal held the term "extraction" did allow the City to recover its expenses (see *id.* at pp. 951-52), the vast majority of which were for staff time spent redacting material the City claimed was exempt from disclosure. (See *id.* at pp. 942-43.)

The Court of Appeal's interpretation is unsupported by the plain language of the CPRA and its legislative history. Section 6253.9(b)(2) does not expressly refer to "redaction" and nothing in that section or the surrounding sections suggests the term "extraction" refers to the routine

task of removing exempt information from an existing record. (See Gov. Code, § 6253.9, subd. (b)(2); see generally Gov. Code, § 6250, et seq.; see also *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 174-75 [examining legislative history of section 6253.9 and observing no changes appeared to have been made in response to criticism that it would require significant staff time to redact nondisclosable information].)

Moreover, the term "extraction" must be interpreted in the context in which it appears. (See *Sierra Club*, *supra*, 57 Cal.4th at p. 168 [because Government Code section 6254.9 "refers to 'computer mapping systems' as a species of 'computer software,' the term 'computer mapping systems' should be construed in light of the meaning of 'computer software.'"].) Here, data "extraction" is sandwiched between data "compilation" and data "programming," phrases commonly understood to refer to some step in the process of transforming machine-readable data into a human-readable "record." In context, the term "extraction" cannot reasonably be expanded to include redaction of material claimed to be exempt.

Even if the Court were to find section 6253.9(b)'s language ambiguous, the Court may consider other aids to interpretation, including but not limited to, public policy. (See *San Jose*, *supra*, 2 Cal.5th at pp.

616-17.)[3] Here, the practical effect of the Court of Appeal's ruling will be to cut off access for independent writers who lack the financial backing of a traditional news agency, such as freelancers, bloggers, and student journalists, upon whom the public has come to depend for news and information. Such a result contravenes the "strong public policy of the people's right to information concerning the people's business," (*id.* at p. 617 [quoting *Sierra Club*, *supra*, 57 Cal.4th at p. 166, internal quotation marks omitted]), and allows public agencies to disseminate unchecked their own self-serving defenses of questionable law enforcement conduct.

A. The Public and Traditional Media Rely on Freelancers, Bloggers, Small and Nonprofit Media Organizations, and Student Journalists to Effectuate the Right of Access to Writings of Public Officials.

"As technology evolves, individuals increasingly access their news through a variety of non-traditional sources." (Giordano, Comment, *Protecting the Free Flow of Information: Federal Shield Laws in the Digital Age* (2014) 23 CommLaw Conspectus 191, 191.) "Independent news outlets, bloggers, freelance reporters, and student journalists are now important sources of online information." (*Id.*)

Likewise, "as traditional outlets have adapted to changing circumstances and challenging economics, student journalists have pla a

[3] The parties' briefs on the merits extensively discuss the statutory interpretation issues, including the legislative history of section 6253.9. (See NLG's Opening Brief at pp. 28-55; Reply Brief at pp. 7-32.)

vital role in meeting their communities' needs for news and information." (Peters, Belmas, and Bobkowski, *A Paper Shield? Whether State Privilege Protection Apply to Student Journalists* (2017) 27 Fordham Intell. Prop. Media & Ent. L.J. 763, 766-67.) Institutional news sources facing growing demand for 24-7 news coverage also increasingly "rely on freelancers that operate at their own expense." (See Grossman, Note, *All the News That's Worth the Risk: Improving Protection for Freelance Journalists in War Zones* (2017) 40 B.C. Int'l & Comp. L.Rev. 141, 147.)

Freelancers, bloggers, small and nonprofit media organizations, and student journalists regularly exercise the right of access to provide information to the public. The following are examples of important public records-based work by non-traditional media organizations:

- In a 2018 article, freelance journalist Michael Toren revealed how funds for the "Free City" program, a two-year pilot program that would allow students at City College of San Francisco to attend for free, had been stalled due to a series of bureaucratic missteps. (See Toren, *Prop. W Funds have yet to reach City College*, The Guardsman (Feb. 21 – Mar. 6, 2018), pp. 1-2 <https://issuu.com/theguardsmanonline/docs/issue03.2-working-bw> [last visited 5/30/19.) Through public records requests, Toren obtained communications between the City and County of San Francisco and City College of San Francisco showing San Francisco had serious concerns about how the College's invoices had been calculated. (See *id.*)

- Kym Kemp, who owns and operates a blog covering Humboldt and Mendocino counties, wrote a series of posts on drivers who said Rohnert Park police pulled them over and then seized their marijuana and cash. Further investigation, including a CPRA request for an incident report, revealed numerous irregularities with the stops. The officers were placed on administrative leave after Ms.

Kemp's articles were posted. (Kemp, *Rohnert Park Police Officers Being Investigated Following Two Incidents Where Humboldt County Cannabis Was Seized Under Suspicious Circumstances*, Redheaded Blackbelt (Apr. 26, 2018) <http://kymkemp.com/2018/04/26/rohnert-park-police-officers-being-investigated-following-two-incidents-where-humboldt-county-cannabis-was-seized-under-suspicious-circumstances/> [last visited 5/30/19].)

- As a series of layoffs made her a contract writer, investigative journalist Karen Dillon collaborated with KSHB-TV reporter Melissa Yeager on a three-part series called *The Dark State*, which drew attention to problems caused by restrictions on access to criminal records in Kansas. (See Lee, *This Kansas City reporter was laid off twice in a year—but her work has just helped change a state law*, Columbia Journalism Rev. (July 2, 2014) <https://archives.cjr.org/united_states_project/karen_dillon_kansas_city_journalist_police_records.php> [last visited 5/30/19].) Dillon's work was credited for helping to change Kansas law to "open[] up probable-cause affidavits for search and arrest warrants to the media and the public on request." (See *id.*)

- Students from the UC Berkeley Graduate School of Journalism New Media Program gathered data on every traffic stop that the Fresno Police Department made in 2016, as well as jail booking and release data from January 2017 to February 2018, through requests made under the CPRA. In combination with other public data, they used the data from their public records requests to publish a searching analysis of racial disparities in traffic stops, school suspensions, and jails in the City of Fresno, including interactive maps, charts, historic images, and audio-visual content. (Thebault & Fuller, *'Justice For Who?'*, Unequal From Birth <https://unequalfrombirth.com/revised/justiceforwho/> [link to data and summary of methodology at <https://reisthebault.github.io/unequal_from_birth/justice/>] [last visited 5/30/19].)

- In 2016, student members of a SPJ chapter at Central Michigan University conducted a FOIA audit of the state's 15 public universities. (Clark, *How 'the public is priced out of public records' by Michigan universities*, Columbia Journalism Rev. (Apr. 5, 2016) <https://www.cjr.org/united_states_project/how_the_public_is_priced_out_of_public_records_by_michigan_universities.php> [last visited 5/30/19].) They sought "a year's worth of information on expenses from the university presidents and governing boards, and

also police reports on campus sexual assaults," in an effort to compare how the universities responded to the requests. (*Id.*) The total price tag demanded to fulfill the students' requests exceeded $20,000. (*Id.*)

- In a 2015 article published in San Francisco State University's student newspaper, reporter Brian Grabianowski used public records to shine a light on the University's reliance on furniture made by California Prison Industry Authority, a company that profits from the labor of California prison inmates. (See Grabianowski, *Rehabilitation program leads campus debate over prison labor*, Golden Gate Xpress (Oct. 27, 2015) <http://goldengatexpress.org/2015/10/27/rehabilitation-program-leads-campus-debate-over-prison-labor/> [last visited 5/30/19].)

If the Court of Appeal's opinion stands, and the cost of public information goes up, stories like these will become increasingly unaffordable.

B. Freelance Writers, Bloggers, and Student Journalists Lack the Resources of Traditional Media Sources.

Historically, traditional news media associations played a major role in both the passage and enforcement of open records laws, thereby ensuring the right of access for all. (See Jones, *supra*, 68 Wash. & Lee L.Rev. at pp. 598–611; see also *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 572-73 (plurality) ["Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public"].) As newspapers and traditional media companies have gone under or consolidated, independent writers and small press have taken on an

important role in newsgathering, but they often lack the financial resources that made it possible for traditional news media to enforce public records laws effectively. (See Jones, *supra*, 68 Wash. & Lee L.Rev. at pp. 612-13, 617, 619–21; Stevenson, *supra*, 13 B.U. J. Sci. & Tech. L. at p. 88.)

For example, freelance war reporters in Syria made as little as seventy dollars per article. (See Grossman, *supra*, 40 B.C. Int'l & Comp. L.Rev. at pp. 147-48, fn. 57-58 [citing Francesca Borri, *Woman's work: The twisted reality of an Italian freelancer in Syria*, Columbia Journalism Rev. <http://www.cjr.org/feature/womans_work.php?page=all>].) In an online rates database maintained on the web site, The Freelancer, freelancers reported rates ranging from several thousand dollars per project to as little as $.01 per word. (See Rates Database, The Freelancer by Contently <https://contently.net/rates-database/rates/> [last visited 5/30/19].) Student journalists may or not be paid at all.

C. If the Court of Appeal's Ruling Stands, Public Agency Fees for Personnel Time Spent Redacting Exempt Material from Existing Public Records Often Will Exceed the Payment for the Job.

The Court of Appeal's decision denies a "fundamental and necessary right of *every person in the state*" (Gov. Code, § 6250, italics added) to those who cannot afford to scale the $3,000 wall erected between them and the information they are legally entitled to receive. It is not uncommon for government agencies to hide public documents behind exorbitant prices.

The following reported examples are illustrative:

- The Commonwealth of Massachusetts Executive Office of Public Safety and Security Department of Corrections estimated the cost to produce "Use of Force Reports" dating back to January 1, 2008 to be over $312,000.00. (The Commonwealth of Mass. Exec. Office of Pub. Safety & Sec. Dept. of Corr., letter to George LeVines, Assignment Editor, MuckRock News, Sept. 27, 2013 <https://cdn.muckrock.com/foia_files/MuckRock.LeVines.UOF.9.27.13.pdf> [last visited 5/30/19].) Costs to redact accounted for over ninety percent, $283,168.00, of the total. (See *id.*)

- A South Carolina non-profit "shelled out more than $4,000 for reports that shed light on the spending habits of 5th Circuit Solicitor Dan Johnson, who had spent taxpayer dollars on his own brother to deejay at an office Christmas party." (Knapp, *South Carolina law was aimed at dropping price of public records. But is it paying off?*, The Post and Courier (March 15, 2018) <https://www.postandcourier.com/news/south-carolina-law-was-aimed-at-dropping-price-of-public/article_3929c8b4-2160-11e8-94da-bb05d92a6975.html> [last visited 5/30/19].)

- Portland, Oregon "Mayor Ted Wheeler's office asked for $3,189 for a set of emails between six staffers" that "would shed light on the city of Portland's response to street protests." (Shepherd, *Portland City Hall is Hiding Police Tactics Behind Huge Public Records Fees*, Willamette Week (Oct. 11, 2017) <https://www.wweek.com/city/2017/10/11/portland-city-hall-is-hiding-police-tactics-behind-huge-public-records-fees/> [last visited on 5/30/19].)

This shows how quickly and easily the cost of records can eclipse any expected payment from the typical job. The Court of Appeal's ruling potentially affects any electronic record that a public agency unilaterally determines must be redacted. Such records could become unaffordable for all but the most well-heeled requesters. A sharp increase in costs disproportionately affects small and nonprofit publications, such as the

independent news website Mission Local, which focuses on local issues (law enforcement accountability, local history, housing, and jobs) in a specific neighborhood (the Mission in San Francisco). (See Mission Local <https://missionlocal.org/> [last visited 5/30/19].) If less wealthy newsgatherers are denied access, they cannot serve as government watchdogs on the issues that are most relevant to their communities.

D. The Court of Appeal's Ruling Renders Illusory SB 1421's Promise of Increased Access to Records of Peace Officer Misconduct, by Ensuring Only Those with Deep Pockets Can Afford to Make and Enforce Requests.

In September, 2018, the Governor approved SB 1421, which amended Sections 832.7 and 832.8 of the Penal Code to increase public access to records of police officer misconduct, under certain specified circumstances. (Stats. 2018, ch. 988, §§ 2 and 3, eff. Jan. 1, 2019.) Among other things, SB 1421 reversed decades of secrecy over records of officer-involved shootings and other serious uses of force, as follows:

> (b)(1) Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code):
>
> > (A) A record relating to the report, investigation, or findings of any of the following:
> >
> > > (i) An incident involving the discharge of a firearm at a person by a peace officer or

> custodial officer.
>
> (ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.

(Pen. Code, § 832.7, subd. (b)(1)(A)(i)-(ii);[4] see also Vice News, *Police Shooting Records Are Now Public In California — And Cops Are Fighting It*, HBO (Mar. 18, 2019) <https://www.youtube.com/watch?v=-ioFwjjWUQA> [last visited 5/30/19].)

As is relevant here, "audio, and video evidence" are specifically enumerated in the list of items subject to release under the new law. (See Pen. Code, § 832.7, subd. (b)(2).) In addition, the statute specifically authorizes redaction of records under the following circumstances:

> An agency shall redact a record disclosed pursuant to this section only for any of the following purposes:
>
> > (A) To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.
> >
> > (B) To preserve the anonymity of complainants and witnesses.
> >
> > (C) To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly

[4] Records subject to release under this subdivision may be delayed during an "active criminal or administrative investigation," in accordance with other conditions imposed by the statute. (See Pen. Code, § 832.7, subd. (b)(7).)

> outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.
>
> (D) Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.

(*Id.*, § 832.7, subd. (b)(5)(A)-(D).)

When it approved SB 1421, the Legislature specifically affirmed both the public's right to know about serious police misconduct, and the importance of transparency to public safety:

> *The public has a right to know all about serious police misconduct*, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, *undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.*

(Stats. 2018, ch. 988, § 1, subd. (b) eff. Jan. 1, 2019, emphasis added.) At the same time, the Legislature anticipated that responsive records – including audio and video recordings – may require redaction to protect legitimate privacy and safety interests. (See Pen. Code, § 832.7, subd. (b)(5)(A)-(D).)

The Legislature's careful balancing of these interests, and SB 1421's promise of increased transparency, would be rendered moot if agencies could easily thwart access by demanding thousands of dollars in fees to

redact responsive electronic records. Yet, early reports show that agencies are attempting to do just that:

- On or about May 17, 2019, the City of Fremont gave independent journalist Darwin BondGraham an estimate of $13,041.92 to redact video footage of two incidents on April 9, 2017, and May 29, 2017, in response to his request under SB 1421. (See May 17, 2019 letter from City of Fremont to Mr. Darwin BondGraham <https://drive.google.com/file/d/1xWOTYlBxxrzj7v0EWYZyWsksxjWzTVVb/view?usp=sharing> [last visited 5/30/19].)

- In response to a request by KTVU for records under SB 1421, the City of Burlingame demanded $3,258.40 to cover the cost of redacting responsive audio and video records. (See Fernandez, *Burlingame charging more than $3,000 to fulfill public records request over fired officer*, KTVU News (Feb. 14, 2019) <http://www.ktvu.com/news/burlingame-charging-more-than-3-000-to-fulfill-public-records-request-over-fired-officer> [last visited 5/30/19].) The City cited the Court of Appeal opinion in this case in support of its demand. (*Id.*)

- In response to a request by KPBS for records under SB 1421, the San Diego Sheriff's Department initially demanded a whopping $354,524.22 to review and redact records in 48 use of force cases. (Mento, *Sheriff's Department Says It'll Cost $354K To Provide Police Records*, KPBS News (Feb. 13, 2019) <https://www.kpbs.org/news/2019/feb/13/sheriffs-department-say-itll-cost-least-354k-provi/> [last visited 5/30/19].) As above, the Sheriff's Department cited the Court of Appeal opinion in this case in support of its initial demand. (See *id.*)

- In response to a request under SB 1421 by a mother whose son was killed by police, the City of Anaheim originally demanded a $3,000 deposit. (See Fernandez, *California city charging $3,000 deposit to mother seeking records after son killed by police*, KTVU News (Feb. 14, 2019) <http://www.ktvu.com/news/california-city-charging-3-000-deposit-to-mother-seeking-records-after-son-killed-by-police> [last visited 5/30/19].) Incredibly, the spokesperson for the City of Anaheim stated that "the first person to request the information would be charged the most, and then 'subsequent requesters would only have to pay smaller fees' directly related to creating copies." (*Id.*) "Like Burlingame, the city of Anaheim cited the court case,

> National Lawyers Guild v. Hayward, as the basis for the decision to charge 'extraction costs onto the requesting party.'" (*Id.*)

Estimates such as those reported above have a chilling effect on lawful requests. Such high fees are simply out of reach for independent journalists, families impacted by police violence, and members of the public alike. Even if some of these initial fee demands were eventually waived or negotiated down,[5] inflated initial demands still serve to deter legitimate requests.

In addition, rather than simply releasing the raw video footage of use of force incidents, some departments have released highly edited versions, complete with audio voiceovers, accelerated or decelerated video footage, or written explanations of police conduct, leading one commentator to observe that the City of Fremont's process had "'become a Hollywood production.'" (See Peele & Geha, *Fremont police release six officer-involved shooting videos*, East Bay Times (May 8, 2019) <https://www.eastbaytimes.com/2019/05/08/fremont-police-release-six-officer-involved-shooting-videos/> [last visited 5/30/19].) In Fremont's case, the police department released edited footage of the same two 2017 incidents for which it demanded that Mr. BondGraham pay over

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[5] (See, e.g., Fernandez, *Interactive map: Who is releasing police personnel files under new law, and who is not*, KTVU News (May 27, 2019) <http://www.ktvu.com/news/ktvu-local-news/interactive-map-who-is-releasing-police-personnel-files-under-new-law-and-who-is-not> [entry for San Diego Sheriff] [last visited 5/30/19].)

$13,000.00. (See City of Fremont Police, *Officer Involved Shootings*, <https://www.fremontpolice.org/index.aspx?NID=420> ["Incident Video" links dated April 9, 2017 at <https://www.youtube.com/watch?v=Xba9xh4gaaA&feature=youtu.be>, and May 29, 2017 at <https://www.youtube.com/watch?v=LVweoyA1C2o&feature=youtu.be>, sign-in required] [last visited 5/30/19].)

Similarly, a "Community Briefing" video prepared by the Richmond police paints a very different picture of an officer-involved shooting resulting in a death than other news coverage of the same incident. (Compare Richard Perez, Community Briefing, <https://www.youtube.com/watch?v=jBzjz7YHwvc&feature=youtu.be&app=desktop> [edited surveillance video and cell phone video from a police shooting, accompanied by police explanation of the shooting], with Villalon, *Richmond police used excessive force against man killed by officers, citizen board says*, KTVU News (May 3, 2018) <http://www.ktvu.com/news/richmond-police-used-excessive-force-against-man-killed-by-officers-citizen-board-says> [last visited 5/30/19].)

The CPRA and SB 1421 are important checks on an agency's ability to craft and edit its narrative in a manner that strips away the context leading up to the use of deadly force, and misleads the public. But, they cannot serve this function if agencies are allowed to demand exorbitant fees for raw video footage or other electronic records.

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III. THE CALIFORNIA CONSTITUTION REQUIRES POTENTIAL AMBIGUITIES IN THE CPRA TO BE RESOLVED IN FAVOR OF THE PEOPLE'S RIGHT OF ACCESS.

"In 2004, California voters approved Proposition 59, which amended the state Constitution to provide a right of access to public records." (*Sierra Club*, *supra*, 57 Cal.4th at p. 166.) Proposition 59 also added a constitutional rule of interpretation specific to statutes affecting the right of access: "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."[6] (Cal. Const., art. I, § 3, subd. (b)(2).)

As this Court has acknowledged, under this rule, "to the extent that legislative intent is ambiguous, the California Constitution requires us to 'broadly construe[]' the PRA to the extent 'it furthers the people's right of access' and to 'narrowly construe[]' the PRA to the extent 'it limits the right of access.'" (*Sierra Club*, *supra*, 57 Cal.4th at p. 166; see also *San Jose*, *supra*, 2 Cal.5th at p. 617.)

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[6] The statute in question, Government Code section 6253.9, was enacted in 2000, and therefore was in effect on the effective date of Proposition 59. (See Stats. 2000, ch. 982, § 2, p. 7142 [added by Assem. Bill No. 2799 (1999-2000 Reg. Sess.)] <https://clerk.assembly.ca.gov/content/statutes-and-amendments-codes-2000?archive_type=statutes> ["Statute Chapters" link for "Volume 5," "Regular Session"] [last visited 5/30/19].)

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A. The CPRA's Fee Provisions Are Subject to Proposition 59's Interpretive Mandate, because the Amount of the Fees Determines "Access to Information Concerning the Conduct of the People's Business."

There can be no doubt that Proposition 59 applies to section 6253.9's cost provisions, because those provisions limit the right of access. (Cf. *North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144, 148 ["A reduction in copy fee permits 'greater access' to records"]; cf. also *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 281-82, 285 ["Indeed, the statutory scheme before us is all the more invidious because its practical effect is to deny to poor women the right of choice guaranteed to the rich."].) In a case considering whether the City of Milwaukee could charge for staff time spent redacting personal information from incident summaries contained in police reports, the Supreme Court of Wisconsin made clear that high fees interfere with accessibility:

> This case is not about a direct denial of public access to records, but the issue in the present case directly implicates the accessibility of government records. The greater the fee imposed on a requester of a public record, the less likely the requester will be willing and able to successfully make a record request. Thus, the imposition of fees *limits and may even serve to deny access* to government records.

(See *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 5

[815 N.W.2d 367, 370-71], emphasis added.)[7]

B. Despite Recognizing Potential Ambiguity in Government Code Section 6253.9(b), the Court of Appeal Limited the Right of Access to Otherwise Disclosable Records by Construing "Extraction" Broadly.

The Court of Appeal found "no clear answer in the statutory text to the parties' dispute" over the meaning of the word "extraction." (See *National Lawyers Guild, supra*, 27 Cal.App.5th at p. 948.) Despite initially acknowledging article 1, section 3(b) of the California Constitution (see *id.* at pp. 945-46), the Court of Appeal failed to reconcile the rule with its conclusion. (See *id.* at pp. 948-52 [relying on legislative history without addressing Proposition 59's interpretive rule].)

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[7] (But cf. *California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1451-52 [analyzing statutory fees under Government Code section 27366, not the CPRA].) The statutory scheme at issue in *Stanislaus* differs from the CPRA, and the Court of Appeal's decision in *Stanislaus* is therefore materially distinguishable, in two critical ways: (1) county recorders "*shall*" charge the fees set forth in Government Code section 27360 et seq., whereas the CPRA does not specifically *require* public agencies to charge any fee; (2) the CPRA contains procedural protections for requesters, such as deadlines by which agencies must respond and attorney fee-shifting provisions, that Government Code section 27360 et seq. does not. (Compare Gov. Code, § 6250, et seq., with Gov. Code, § 27360, et seq.) In addition, the analysis in *Stanislaus* is simply wrong in the CPRA context. High fees uniformly reduce accessibility, by making public information less affordable (or unaffordable), giving agencies a tool to hide non-exempt information they deem sensitive or embarrassing, and deterring those of lesser means from pursuing requests. (See *Milwaukee Journal Sentinel supra*, 2012 WI 65, ¶¶ 5, 40 [815 N.W.2d 367, 370-71, 375-76]; see also *San Jose, supra*, 2 Cal.5th at 625-27 ["Open access to government records is essential to *verify* that government officials are acting responsibly and held accountable to the public they serve."], italics in original.)

Had the Court properly applied article I, section 3(b), it would have had to interpret the term "extraction" narrowly. A narrow construction does not allow agencies to charge additional fees any time they decide an electronic record must be redacted, which routinely occurs. The Court of Appeal also failed to reconcile its legislative history analysis with this Court's contrary discussion in *Sierra Club*. (Compare *id.* at p. 951, fn.9, with *Sierra Club*, *supra*, 57 Cal.4th at p. 174-75 [noting agency concerns that section 6253.9 would require "significant amounts of staff time to redact nondisclosable information," yet observing, "[t]he Legislature does not appear to have adopted any amendments in response to this concern"].)

The Court of Appeal did not use the proper methodology, and therefore broadly construed section 6253.9's fee provisions to defeat the right of access. To the extent section 6253.9(b)(2) is ambiguous, as in *Sierra Club*, "[a]ny remaining doubt about the proper interpretation" should have been "dispelled by the interpretive rule in article I, section 3, subdivision (b)(2), of the California Constitution," *in favor of the right of access*. (See *Sierra Club*, *supra*, 57 Cal.4th at pp. 175-76.) The Court now has the opportunity to evaluate the public policy implications of allowing agencies to charge exorbitant fees for information that is presumed public, using the constitutionally required methodology. For the reasons stated above, the public policy considerations require that the Court of Appeal's opinion be reversed.

IV. CONCLUSION

If the Court of Appeal's opinion stands, public agencies may effectively deny access to an increasing number of public records by simply pricing journalists with fewer financial resources out of the marketplace of ideas. Agencies can more easily block access to information they deem sensitive, by demanding exorbitant fees for information they in their sole discretion decide is exempt and must be redacted. High fees widen the gap in access to justice between rich and poor, and exacerbate economic inequality. This result subverts the will of the Legislature and the voters.

The Legislature intended agencies to bear the cost of compliance with laws protecting the right of access, except for the direct cost of reproduction, and certain costs associated with electronic records under the limited circumstances described in section 6253.9. (See Gov. Code, §§ 6253, subd. (b), 6253.9, subd. (b)(2).) The Court of Appeal's opinion must be reversed in order to give effect to the Legislature's intent, and the will of the voters in making the right of access a matter of constitutional importance.

Dated: May 31, 2019

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CERTIFICATE REGARDING WORD COUNT

I, Christine Peek, counsel for amici curiae, hereby certify pursuant to Rule 8.204, subdivision (c)(1) of the California Rules of Court that the word count for this brief is 6164 words, exclusive of material not required to be counted, according to Microsoft Word 2013, the program used to generate the brief.

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Christine E. Peek

CHRISTINE PEEK

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