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SUPREME COURT CASE NO. S252445

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA Deputy

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER,

PLAINTIFF AND RESPONDENT

v.

CITY OF HAYWARD, ET AL.,

DEFENDANTS AND APPELLANTS.

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

Reversing a Judgment of the Superior Court of Alameda County
Case No. RG15785743, Honorable Evelio Grillo

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF
NATIONAL LAWYERS GUILD, SAN FRANCISCO
BAY AREA CHAPTER**

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APPLICATION TO FILE AMICUS CURIAE BRIEF

As the preamble to the California Public Records Act declares: “Access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” Gov. Code § 6250. Amici curiae believe they can assist the Court in resolving this case by presenting the views of community-based organizations and legal aid providers who rely on the CPRA to protect the rights and interests of their constituents and clients. For this reason, the following amici curiae respectfully request leave, pursuant to California Rule of Court 8.520(f), to file the accompanying brief in support of Plaintiff and Respondent National Lawyers Guild, San Francisco Bay Area Chapter:

Coalition on Homelessness is a San Francisco-based grassroots nonprofit that advocates with and for homeless people and frontline service providers to help build permanent solutions to homelessness and protect the human rights of those forced to remain on the streets.

The Lawyers’ Committee for Civil Rights of the San Francisco Bay Area is a nonprofit working to protect and

promote the rights of people of color, immigrants, and low-income people in California through free legal aid, impact litigation, and policy advocacy.

Legal Aid Foundation of Los Angeles is a nonprofit law firm that helps protect and advance the rights of the most underserved in Los Angeles County through direct legal services, systemic litigation, self-help clinics, and technical assistance to community organizations.

Legal Services for Prisoners with Children organizes communities impacted by the criminal justice system and advocates to release incarcerated people, to restore human and civil rights, and to reunify families and communities.

Western Center on Law & Poverty advocates on behalf of low-income Californians to advance access to housing, health, public benefits, jobs and justice.

Western Regional Advocacy Project is a coalition of community groups that lobbies for smarter, representative, and accountable public policy that protects those most in need rather than punishing them for their circumstances.

This application is timely made within 30 days of the filing of the reply brief on the merits. Cal. R. Ct. 8.520(f)(2). Amici's counsel has examined the briefs on file in this case, are familiar with the issues involved and the scope of their presentation, and do not seek to duplicate that briefing. No party or party's counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. Other than the amici curiae, their members, or their counsel, no person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

Dated: May 31, 2019

WESTERN CENTER ON LAW & POVERTY

By: _____



RICHARD A. ROTHSCHILD
Attorney for Amici Curiae

COALITION ON HOMELESSNESS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE
SAN FRANCISCO BAY AREA
LEGAL AID FOUNDATION OF LOS ANGELES
LEGAL SERVICES FOR PRISONERS WITH CHILDREN
WESTERN CENTER ON LAW & POVERTY
WESTERN REGIONAL ADVOCACY PROJECT

**AMICUS CURIAE BRIEF IN SUPPORT OF NATIONAL
LAWYERS GUILD, SAN FRANCISCO
BAY AREA CHAPTER**

Introduction

Amici organize with homeless people, communities of color, and low-income individuals, and advocate for them at the state and local level. They rely on the California Public Records Act to investigate government policies and practices, and to hold public agencies accountable. Amici operate with limited resources and would be adversely affected by a judgment that could force them to bear the costs of redactions to public records. Based on decades of experience advocating for their constituents and clients, amici are uniquely positioned to assess the impact of the legal issues presented in this case. This Court should reverse the Court of Appeal's judgment and preserve the public's "fundamental and necessary right" to access information "concerning the conduct of the people's business." Gov. Code § 6250.

Background

- A. With limited exceptions that do not apply here, the CPRA only allows public agencies to charge for direct costs of duplication.**

The CPRA provides that public agencies may only charge for "the direct costs of duplication" when responding to requests for copies of disclosable records unless there is an applicable statutory fee. Gov. Code § 6253(b). The "direct costs of duplication" means simply "the cost of copying them." *North County Parents Organization v. Department of Education*, 23

Cal.App.4th 144, 147 (1994). Under established precedent, the “direct costs of duplication” do not include the labor costs of responding to requests or redacting portions of records. *See id.*

The Act sets out certain distinctions regarding when and how agencies must provide copies of electronically stored public records. Gov. Code § 6253.9. In general, however, it guarantees that, as with all other records, “[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).

Government Code section 6253.9(b) offers a limited exception to this guarantee. The requester may nevertheless bear “the cost of programming and computer services necessary to produce a copy of the [electronic] record” when “[t]he request would require data compilation, extraction, or programming to produce the record.” Gov. Code § 6253.9(b).

B. The Court of Appeal construed the term “extraction” to include the cost of redacting electronic records.

The legal question posed in the Petition for Review is the proper scope of § 6253.9(b)’s exception and, more specifically, the meaning of the term “extraction” as used here and for electronic records generally. The Guile requested copies of electronically stored video files created by police body-worn cameras. The City then sought to recoup the cost of editing out allegedly exempt material from the otherwise disclosable video files. The Guild brought this suit to determine whether section 6253.9(b) allowed the City to recover these costs.

The Court of Appeal concluded that the language of the statute was “unclear” as to whether the term “extraction” should include “any act of removing or taking out material from an electronic record in anticipation of its production (including exempt material) or, as the Guild insists, only removing or taking out ‘data’ for the purpose of constructing or generating a previously nonexistent record.” Slip Opinion at 10.

The Court of Appeal ultimately concluded that section 6253.9(b) allowed the City to recoup the cost of “constructing” this copy, “including the cost of special computer services and programming . . . used to extract exempt material from these recordings.” Order Modifying Op. and Denying Rehearing at 2.

C. Public agencies are already relying on the Court of Appeal’s decision to charge for the cost of redacting electronic public records.

Public agencies are already relying on the Court of Appeal’s decision to charge the public for an agency’s costs of reviewing and redacting electronic records requested under the CPRA. And, as shown in the example below, agencies have also begun to expand the holding of the Court of Appeal’s decision and apply it to other types of electronic records, like emails and their attachments.

In the City of Los Angeles, CPRA requests submitted through the City’s online portal receive the following warning if the word “emails” is typed into the request box:

Requesters submitting CPRA requests on or after March 1, 2019, involving the production of emails

(including any attachments) from the Los Angeles Police Department (LAPD) will be charged for staff time expended to review responsive records to determine the existence of exempt information and to redact exempt information from emails. This cost recovery policy is implemented in accordance with California Government Code §6253.9(b)(2) and *National Lawyers Guild v. City of Hayward*, 27 Cal. App. 5th 937 (2018). . . . LAPD will not produce any copies of emails and attachments until payment has been received.

Available at: <https://recordsrequest.lacity.org/requests/new>. Aside from the LAPD, this online form is also used for requests submitted to the City Clerk, Fire Department, Controller, City Administrative Officer, General Services, Public Works (Street Lighting), Council District 3 (Bob Blumenfield), Council District 4 (David E. Ryu), Council District 5 (Paul Koretz). *Id.*

Argument

I. The Court of Appeal’s misinterpretation of the CPRA conflicts with the California Constitution’s right of access to information and allows government agencies to charge the public to view electronically-stored documents.

The Court of Appeal’s interpretation of section 6253.9(b) implicates public access to a broad swath of records, not just police videos. Public agencies increasingly store most, if not all, of their records electronically. In general, these files – whether they are data sets, text, images, or videos – can only be redacted using computer programs. The Court of Appeal’s reasoning sets out a path for public agencies to attempt to transfer the cost of any and all electronic redactions to the requester. This risk is not

hypothetical as demonstrated by the City of Los Angeles' reliance on the appellate decision to charge the public for review and redaction of emails and their attachments. *See, supra*, Background, Sec. C.

As the preamble to the CPRA declares: "Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov. Code § 6250. The Court of Appeal's interpretation of section 6253.9(b) improperly casts aside this purpose and gives insufficient weight to the guarantee of public access enshrined in the California Constitution. Specifically, Article I, Section 3(b) of the California Constitution provides that a statute "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." When, as here, a provision of the CPRA is ambiguous, this "constitutional imperative" should guide courts to an interpretation that favors public access. *See City of San Jose v. Superior Court* 2 Cal.5th 282, 292 (2016).

Amici, and their constituents and clients, rely on the affordable access to electronic records guaranteed by the CPRA. For small organizations with limited budgets, the Act is a crucial tool to give voice to the needs and interests of underserved communities. Some of the undersigned groups have no lawyers or professional lobbyists on staff. Their clients and constituents have very little access to power or information maintained by the government. The CPRA is often the only way to ensure that

officials respond to their inquiries. If required to pay hundreds or thousands of dollars for responsive documents, the CPRA will be functionally unavailable to them. Amici's experiences highlight the stakes of this dispute and show why "the people's right of access" should resolve any ambiguity in the statute's plain language.

II. Reduced access to electronically-stored information will reduce government transparency on issues of public concern and limit the amici's ability to protect their members' and clients' interests.

Advocacy groups around the state and across the political spectrum use the CPRA to make government policies and practices more transparent. Similarly, amici rely on the Act to gather information about public actions that directly affect their constituents. For example, this year Legal Services for Prisoners with Children submitted CPRA requests to more than ten voting registrars' offices to investigate whether voter eligibility laws were being properly executed. This produced hundreds of pages of records, many of which had to be redacted because they included information related to individual criminal records.

Similarly, Coalition on Homelessness uses CPRA requests to investigate how the enforcement of "quality of life" offenses impacts its constituents. Through these requests, the Coalition has obtained voluminous records from public agencies, including electronic copies of redacted dispatch logs, policy guidelines, and, crucially, citations created and stored as digital files. In order to obtain these same citations from the Superior Court, the

Coalition would have had to request each file individually. It therefore relied on CPRA requests to grasp the scale and scope of the issue. Western Regional Advocacy Project and its member organizations have made similar CPRA requests to police departments throughout the state. These requests have been essential to the one of the organization's key goals – to investigate and inform the public about the police practices in communities of color and with respect to people living on the streets.

Finally, attorneys with the Legal Aid Foundation of Los Angeles routinely request reports from the Los Angeles Housing and Community Investment Department and the Department of Public Health. These records, including habitability complaints, are maintained and produced electronically and often include redactions of identifying information. If forced to cover the costs of redaction, the Legal Aid Foundation of Los Angeles would be limited in its ability to identify housing trends and hold private landlords and public housing authorities accountable for the conditions in their buildings.

III. Recent victories to change public policies would not have been possible without access to electronically-stored government records.

The transparency and access to information guaranteed by the CPRA empower amici to advocate for public policies that respond to their constituents needs. For example, Coalition on Homelessness recently submitted a CPRA request for records related to a partnership between the San Francisco Police

Department and the San Francisco Department of Public Works to conduct sweeps of encampments. The first production alone totaled over 300 pages and included electronic copies of redacted police records and property logs. These documents ultimately helped the Coalition advocate for changes to the City's policies, including changes that would prevent the loss of homeless people's property and increase encampment safety.

Lawyers' Committee for Civil Rights also used a CPRA request to obtain records related to Oakland Housing Authority police detentions of residents and their guests. These requests have already led to the production of over eight thousand records, including thousands of redacted electronic incident reports, and production is not complete. By sharing some of these records with local officials, Lawyers' Committee and its community partners successfully persuaded the Oakland City Council to repeal an unconstitutional loitering ordinance that was being enforced against housing authority residents.

CPRA requests were also crucial to Lawyers' Committee for Civil Rights' and Western Center on Law & Poverty's groundbreaking investigation into how public agencies used driver's license suspensions to collect unpaid traffic court debt. These requests directly informed a series of reports produced by the Back on the Road California Coalition shedding light on these practices. They also provided the basis for litigation challenging driver's license suspension practices. Ultimately, the Legislature changed the law and eliminated license suspensions based on

drivers' failures to pay their traffic fines. Both organizations are now part of a coalition conducting a similar investigation into government-authorized vehicle tows. They have already received thousands of electronic documents from more than twenty local government agencies in response to CPRA requests.

IV. Private citizens and non-profits like amici will not have access to public records if they have to pay for redactions to electronically-stored government information.

Amici operate with limited budgets and could not afford to use the CPRA for the advocacy described above if forced to bear the cost of redactions. For example, in the last year, Western Regional Advocacy Project submitted five CPRA requests and received hundreds of pages of documents related to public-private partnerships through Business Improvement Districts. Some of these records were exempt or partially exempt, so production and redaction were resource-intensive. Western Regional Advocacy Project could not have paid even small amounts for these records, which are vitally important to its advocacy. WRAP, an organization founded by formerly homeless people, has an annual budget of only \$184,000, only two full-time staff members, and is funded almost exclusively by small donors. Similarly, Coalition on Homelessness, which has submitted dozens of CPRA requests in the past ten years, has a staff of only seven full-time employees, none of whom earn more than \$35,000. It simply would not be possible for these organizations to access public

records if doing so required them to pay hundreds or thousands of dollars.

Every one of the non-profit amici organizations is faced with an overwhelming need for its work. Every one of them budgets and allocates its limited funds very carefully. For these organizations, even \$200 is a significant expenditure. For many groups, the \$3,000 charged to the National Lawyers Guild in this case would be prohibitive.

From their decades of experience working in community coalitions in California, amici know that countless other community groups in California similarly rely on affordable access to public records to provide meaningful advocacy on limited budgets.

Conclusion

The Court of Appeal's interpretation of the CPRA gives insufficient weight to the guarantee of public access embedded in Article I, Section 3(b) of the California Constitution. The Act's distribution of costs plays an essential role in preserving the public's "fundamental and necessary right" to access information "concerning the conduct of the people's business." Gov. Code § 6250. To ensure that this guarantee keeps pace with technological change, amici respectfully urge the Court to reverse the Court of Appeal's judgment.

Dated: May 31, 2019

WESTERN CENTER ON LAW & POVERTY

By: _____

RICHARD A. ROTHSCHILD
Attorney for Amici Curiae

COALITION ON HOMELESSNESS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE
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WESTERN CENTER ON LAW & POVERTY
WESTERN REGIONAL ADVOCACY PROJECT

CERTIFICATE OF COMPLIANCE

I certify that this Amicus Curiae Application and Brief uses
a 13-point Century Schoolbook font and contains 2,274 words.

Dated: May 31, 2019

WESTERN CENTER ON LAW & POVERTY

By: _____



RICHARD A. ROTHSCHILD

PROOF OF SERVICE

*National Lawyers Guild, San Francisco Bay Area Chapter
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Appeal No. A149328
Superior Court No. RG15785743
California Supreme Court No. S252445*

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 3701 Wilshire Blvd., Suite 208, Los Angeles, CA 90010.

On May 31, 2019 I served the following document described as:

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BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF
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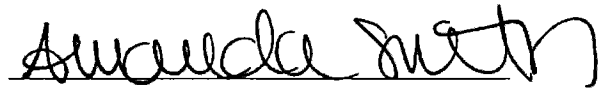
[X] By Electronic Mail – I caused such document to be electronically transmitted to the offices of the addressee(s) listed above, using the above e-mail address, prior to 5:00 p.m. on the date specified above.

[X] By United States Postal Service - I placed a true copy thereof enclosed in a sealed envelope and deposited such envelope in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 31, 2019 at Los Angeles, California.

A handwritten signature in black ink, appearing to read "Amanda Smith", written over a horizontal line.

Amanda Smith