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.	**No. S252445** Court of Appeal No. A149328 Alameda County Superior Court, Case No. RG15-785743 (Hon. Evelio Grillo)

AFTER A DECISION OF THE Court of Appeal
FIRST APPELLATE DISTRICT
DIVISION THREE

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The City of Hayward contends there is no need for this Court to grant review because the language of Government Code section 6253.9 is clear, the term extraction means redaction with respect to charging for electronic records. We submit that when the statute and the Public Records Act are read as a whole, the terms do not mean the same thing. Agencies are only permitted to charge the costs of extraction when necessary to "produce" a record, not to take out segregable information from an existing record.

Both the City and the Court of Appeal fail to recognize that the "right of access to information" (Cal. Const. art. 1, § 3(b)(1)), is no less of a right than any other enshrined in our state Constitution. The right of access cannot simply be recited in passing and then ignored. It has practical consequences and carries a promise. That promise is put to the test in this case.

II. *DISCUSSION*

A. *This Case Affects All Electronic Records Held by Agencies in California*

The City's Answer to the Petition focuses on the police videos sought by the Lawyers Guild. But the Court of Appeal's published opinion and the statute which is the subject of the case, Gov. Code section 6253.9, applies to all electronic records held by agencies subject to the California Public Records Act. Inasmuch as practically all public agencies today hold data and records electronically, the

final resolution of the case, and interpretation of the costs provision of section 6253.9(b)(2) presents an exceptionally important issue of law.

The Court of Appeal's opinion will certainly limit access and reduce transparency by allowing agencies to shift the expense of disclosure of many electronic records to requesters. The opinion is therefore likely to restrict the practical scope of the Public Records Act whenever an agency finds reasonably segregable exempt material in a record that it believes requires "redaction." The cost of redaction will close the door to public access for most individuals and organizations because even as much or as little as $3,000 is more money than most can afford to pay for "the right of access to information concerning the conduct of the people's business" (Gov. Code § 6250), which is guaranteed by the California Constitution. Cal. Const., art. 1, section 3(b)(1).

If a record is kept electronically, then the record must ordinarily be redacted electronically. Any time an agency takes reasonably segregable information out of an existing record, it will need to do so electronically. The Court of Appeal's decision allows agencies to charge a requestor for the cost of redaction. Whether the records are in the form of text, data, spreadsheets, images, audio recordings, or video, a computer and computer program of some sort must be used to make redactions. Although it may be possible in some instances to produce a hard and fixed copy of the electronic record, such as a printout, or a picture, and redact it manually at no cost to the requester (Gov. Code § 6253(b)), the Public Records Act does not allow the

agency to present the record in that format. It requires that an electronic record be produced in "an electronic format when requested by any person[.]" Gov. Code section 6253.9(a);[1] *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165.

Therefore, some sort of computer manipulation and computer extraction will be required whenever information is removed from an existing record or database. Whether, agencies are limited in charging requesters the direct costs of duplication, as required by Gov. Code section 6253(b) and 6253.9(a)(2), or whether the agencies can charge labor costs for the extraction under section 6253.9(b)(2) presents a

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[1] Gov. Code section 6253.9(a) provides, in part:

> Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
>
> (1) The agency shall make the information available in any electronic format in which it holds the information.
>
> (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

statewide issue that both the Court of Appeal in its opinion and the City of Hayward in its Answer virtually ignore.

The news media (including freelancers, bloggers, and student journalists), community, and advocacy groups, watch dog groups, researchers, public minded citizens, among many others, have relied on the California Constitution and the Public Records Act's promise that "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 section 6250 (emphasis added); *see* Cal. Const. art. 1, section 3(b). Under the Court of Appeal decision, that "fundamental and necessary right of every person" will be limited only to those persons who can afford to pay the government's costs in redacting electronic records.

The erection of such a significant wealth-based barrier to access to electronic records, the most prevalent form of records in the "electronic age," is a sharp departure from the Public Records Act's history. The door to such access has been wide open since at least 1981, when former section 6257, the predecessor to Gov. Code section 6253(b), was amended to limit costs to the direct costs of duplication of records,[2] and since 1994 when *North County Parents*

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[2] "The original wording, adopted in 1968 (Stats.1968, ch. 1473, § 39, p. 2948), was that 'a reasonable fee' could be charged. In 1975 an amendment limited the 'reasonable fee' to not more than $.10 per page. (Stats.1975, ch. 1246, § 8, p. 3212.) An amendment in 1976 deleted 'reasonable fee' and inserted instead 'the actual cost of

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Organization for Children with Special Needs v. Department of Education (1994) 23 Cal.App.4th 144 affirmed this limitation. However, under the Court of Appeal decision in this case, the ground rules will now change in a way that favors organizations and individuals who can pay hundreds or thousands of dollars to obtain access to redacted electronic records.

Because, unless they are challenged in court proceedings, agencies have discretion to determine whether and what to redact from a record *(see CBS, Inc. v. Block* (1986) 42 Cal. 3d 646, 652),[3] they will have discretion to shift the cost burden to requesters by asserting exemptions that allow them to redact information. And if requesters cannot afford the redaction costs, they certainly will not be able to afford the litigation costs of challenging what might be an overly-broad assertion of the exemptions. The end result will be that disclosable and segregable records might never see the light of day.

The City of Hayward's Answer, however, assumes that the Legislature intended such a radical result by virtue of section

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[2](...continued)
providing the copy.' (Stats.1976, ch. 822, § 1, p. 1890.) Finally, the present version of the statute was adopted in 1981 limiting the fee to the 'direct costs of duplication.' (§ 6257.)" *North County Parents Org.*, at 147.

[3] "[E]xemptions are permissive, not mandatory. The Act endows the agency with discretionary authority to override the statutory exceptions when a dominating public interest favors disclosure." *CBS, Inc*., 42 Cal. 3d 646 at 652.

6253.9(b). This Court should decide the question of such statewide importance.

B. *The City and the Court of Appeal's Interpretive Analysis is Not Based On the Collective Intent of the Legislature and Ignores the Mandate of the California Constitution*

The City makes two principal arguments with regard to the legislative history of section 6253.9. It contends this Court's previous analysis of section 6253.9, in *Sierra Club v. Superior Court* (2015) 57 Cal. 4th 157, with respect to "redaction," can be dismissed as mere dicta. Answer at 3, 16-17, 26. It contends the legislative record regarding the term extraction is "incontrovertible," "compelling," and "irrefutable." Answer at 3, 17, 23. In the process, the City, like the Court of Appeal, fails to apply Article 1, section 3(b) to the analysis.

First, the City argues that this Court's previous analysis of section 6253.9(b) in the *Sierra Club* opinion, 57 Cal.4th at 174-174, can be ignored because the Court was addressing a different statute. The *Sierra Club* case addressed the issue whether electronic records in a GIS format were public records within the meaning of section 6254.9(a) the Public Records Act, which excluded computer software. *Id*. at 165. However, in addition of the legislative history of that statute, the Court separately reviewed and discussed the legislative history of section 6253.9(b) to "help resolve the matter[]" because it covers electronic records. *Id.* at 174.

The Court analyzed the legislative history of the same statute that is at issue here, section 6253.9(b). The Court recognized that

there had been some opposition to the bill, AB 2799, as it made its way through the legislative process because it did not, in the view of the opposition, sufficiently cover the cost of redaction and the disclosure of massive databases. But this Court concluded that: "The Legislature does not appear to have adopted any amendments in response to this concern, and documents in the Governor's Chaptered Bill File suggest that these concerns remained in effect through the final enrolled bill." *Id*. at 174-175. Thus, the Court examined the same legislative history as the Court of Appeal in this case and it found that the final legislation did not respond to concerns about the burden imposed by disclosure of electronic records. While the *Sierra Club* analysis does not discuss the issue who bears the cost of redaction, the analysis certainly says that the history of AB 2799 does not provide a basis to assume or infer one way or the other that the language of section 6253.9(b)(2), with respect to compilation, extraction, and computer programming, covered the cost of redacting electronic records.

Second, in their analysis of the legislative history of section 6253.9(b), the Answer and the Court of Appeal's opinion rely on the author's various statements, statements from outside interested parties, and enrolled bill reports. They fail to show any relevant documents that may have been read and considered by the Legislature as a body. "[T]he statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole

in adopting a piece of legislation." *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062. *See Quelimane Co. v. Stewart Title Guar. Co.* (1998) 19 Cal. 4th 26, 46, n. 9 (statements admissible if "it is reasonable to infer that all members of the Legislature considered them when voting on the proposed statute.") "If the views of particular legislators are not admissible for this purpose, then letters written to those legislators in the attempt to influence those views must also be disregarded." *Quintano*, at 1062, n.5.

Letters to individual legislators, including an author, do not show legislative intent. *Altaville Drug Store, Inc. v. Employment Dev. Dep't* (1988) 44 Cal. 3d 231, 238. Further, "it is not reasonable to infer that enrolled bill reports prepared by the executive branch for the Governor were ever read by the Legislature." *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161–1162, fn. 3. As this Court recently reiterated "we do not consider the motives or understandings of individual legislators who voted for a statute when attempting to construe it. (*Ross v. RagingWire Telecommunications, Inc*. (2008) 42 Cal.4th 920, 931, 70 Cal.Rptr.3d 382, 174 P.3d 200.) This is true even when the legislator who authored the bill purports to offer an opinion. This rule exists because there is " ‘ "no guarantee ... that those who supported [the] proposal shared [the author's] view of its compass." ' " (*Id.* at p. 931, 70 Cal.Rptr.3d 382, 174 P.3d 200, quoting *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 700, 170 Cal.Rptr. 817, 621 P.2d 856.) A contrary rule would allow an individual legislator to characterize an enactment in

ways he or she might have preferred or intended but for which there was not sufficient legislative support." *California Bldg. Indus. Ass'n v. State Water Res. Control Bd.* (2018) 4 Cal. 5th 1032, 1042–43. The same is true of letters from outside parties. Their letters cannot authoritatively characterize the meaning of legislation.

The Answer cites and relies on opposition to the legislation in an effort to show that when AB 2799 was finally amended the opposition for the most part went away and therefore the amendment must have addressed exactly what the opposition sought. This leap of logic might be persuasive if it was reflected in a committee report, a report of legislative counsel, or in another form of report to the Legislature on the whole. Instead, it is reflected in statements of the author, lobbyists' statements, and enrolled reports prepared after the Legislature voted on the final bill. It ignores the reality of negotiation. Sponsors and objectors obtained some of what they wanted, but not necessarily all of what they sought. Reading an amendment to a bill to mean the objectors obtained exactly what they wanted, without regard to the language of the amendment, is unwarranted.

The Answer cites to a letter from the California Newspaper Publishers Association (Answer at 13, Opinion at 12), for the proposition that extra effort burdens are covered by section 6253.9. But the California Newspaper Publishers did not vote on the bill.[4]

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[4] In fact, the California News Publishers Association has submitted to the Court an amicus letter in support of the Lawyers

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Likewise, the reference to a letter from the California Association of Clerks and Election Officials (Answer at 13, Opinion at 12), stating that that organization supported the final bill because an amendment addressed the costs of redaction is nothing more than this organization's interpretation of the bill's language. The organization is not the Legislature or a court.

Relying on the "author's drafting §6253.9(b) and the agencies reviewing the legislation" (Answer at 14), is not a substitute for what the Legislature did or intended. When the Answer does cite and quote committee reports the language in the reports is not specific and does not address or use the word "redaction." Answer at 14-16.

Nothing in the Court of Appeal's analysis of the legislative history or the City's snippets from letters and agency bill reports shows that the Legislature meant to allow an agency to charge costs of redacting an existing record. In fact, as this Court recognized in the *Sierra Club* opinion there is nothing the legislative history that addresses redaction and the burden of disclosing existing electronic records.

What the legislative history does show, however, is that AB 2799 was intended "'to ensure quicker, more useful access to public records.'" *Sierra Club v. Superior Court*, 57 Cal.4th at 174, quoting Assem. Com. on Governmental Organization, Analysis of Assem. Bill

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[4](...continued)
Guild's position in this case, explaining the organization's position with respect to AB 2799 at the time of its passage.

2799 (1999–2000 Reg. Sess.) as introduced Feb. 28, 2000, p. 2.). Charging requesters the cost of redacting information out of existing records, as opposed to charges for "data compilation, extraction, or programming *to produce the record*" (Gov. Code § 6253.9(b)(2), will undermine the goal of making access to electronic records "quicker, [and] more useful." Nor will allowing an agency to charge to redact records fulfill the constitutional requirement that the statute "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Art. 1, section 3(b)(2).

C. *The Court of Appeal Decision Will Create a Significant and Unprecedented Barrier to Access to Electronic Records for Those Who Cannot Afford to Pay*

Because the Court of Appeal did not include the constitutional interpretive mandate in its analysis, it never addressed the important and legally relevant question of whether shifting the costs of redaction of electronic records to the requester would "further[]the people's right of access" or "limit[] the people's right of access." Cal. Const. art. I, sec 3(b)(2). The City in its Answer goes even further in its attempt to avoid this issue. While it dismisses the costs that will be involved in redacting police camera videos as "minimal" (Answer at 24), the City ignores the consequence of the Court of Appeal's ruling: it will apply to all electronic records, some of which will be more voluminous than the video requested by the Lawyers Guild. Furthermore, the City cavalierly ignores the plain fact that the $3000

cost bill in this case would be beyond the budgets of most individuals and many community and grassroots organizations.

The City's Answer obscures the obvious fact that some requesters will be denied access to disclosable electronic records because they cannot afford the redaction bill. In fact, the City makes the extraordinary claim that shifting the cost burden to the requester will "create more access" and serve the "interests of transparency." Answer at 23. This will not be the experience of persons and organizations of modest means, who had previously looked to the Public Records Act as a vehicle that fulfilled the promise that they have a constitutional right to access and that enabled them to participate in "the people's business."[5]

Those who cannot afford to assert their rights, lose their rights. *See Jameson v. Desta* (2018) 5 Cal. 5th 594 (recognizing the consequence of an inability to afford a private court reporter in a civil case). Inequality of financial means should not be the basis for denial of *constitutional and fundamental rights*, including access to electronic information.

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[5] The amicus letter submitted to the Court on November 29, 2018 on behalf of the Coalition on Homelessness, Legal Services for Prisoners with Children, Western Regional Advocacy Project, Lawyers Committee for Civil Rights of San Francisco, Legal Aid Foundation of Los Angeles and Western Center on Law & Poverty describes specific examples of how shifting the burden of redaction costs to the requester would make the PRA unaffordable to many groups and individuals of modest means who rely on it to hold government actors accountable.

IV. CONCLUSION

The Court should grant review.

December 3, 2018

Respectfully submitted,
/s/ Amitai Schwartz
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c))

The text of the foregoing Reply to Answer to Petition for Review consists of 3,136 words as counted by the Corel WordPerfect X8 word-processing program used to generate the petition.

Dated: December 3, 2018

/s/ Amitai Schwartz
Amitai Schwartz
Attorney for Respondent

PROOF OF SERVICE BY MAIL

Re: National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al., California Court of Appeal, California Supreme Court, Case No. S252445.

I, Amitai Schwartz, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the

Reply to Answer to Petition for Review

on the following, by placing a copy in an envelope addressed to the party listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid at Emeryville, California, on December 3, 2018.

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

Executed on December 3, 2018

/s/ Amitai Schwartz
Amitai Schwartz

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER v. CITY OF HAYWARD**
Case Number: **S252445**
Lower Court Case Number: **A149328**

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12/4/2018

Date

/s/Amitai Schwartz

Signature

Schwartz, Amitai (55187)

Last Name, First Name (PNum)

Law Offices of Amitai Schwartz

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