IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

PASADENA POLICE OFFICERS ASSOCIATION (PPOA), OFFICER MATTHEW GRIFFIN, OFFICER JEFFREY NEWLEN, Plaintiff-Respondents, vs. CITY OF PASADENA Defendant-Respondent LOS ANGELES TIMES COMMUNICATIONS, LLC, Intervenor-Appellant	2d Civ. No. B275566 Los Angeles Superior court Case No. BC 556464 Hon. James C. Chalfant, Presiding

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF THE CALIFORNIA NEWS PUBLISHERS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND 14 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANT

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE OF DIVISION ONE OF THE SECOND DISTRCT COURT OF APPEAL:

Pursuant to California Rule of Court 8.200(c), the California News Publishers Association, the Reporters Committee for Freedom of the Press, The Associated Press, Association of Alternative Newsmedia, Californians Aware, The Center for Investigative Reporting, The E.W. Scripps Company, First Amendment Coalition, Gannett Co., Inc., MPA – The Association of Magazine Media, The National Press Club, National Press Photographers Association, News & Review, News Media Alliance, Sacramento Bee, and Society of Professional Journalists respectfully request leave to file the attached brief as *amici curiae* in support of Appellant, Los Angeles Times Communications, LLC.

I. INTEREST OF AMICI CURIAE

Amici seek leave to file this brief because this case presents issues of significant concern to the news media. Members of the news media frequently make requests for public records under the California Public Records Act (the "CPRA" or "Act") as a means of gathering news. This case could have broad consequences for all public records requesters in California, including members of the press. In particular, *amici* are concerned about the impact of so-called "reverse-CPRA" lawsuits

generally, and the denial of attorneys' fees for requesters who prevail in such lawsuits, on the public's right of access to government records. *Amici* write to highlight the negative consequences of allowing reverse-CPRA actions and to emphasize that, if such actions are permitted, CPRA requesters who prevail in such actions must be able to recover their full reasonable attorneys' fees under the CPRA's mandatory fee-shifting provision and/or California's private attorney general statute, Code of Civil Procedure section 1021.5. *Amici* respectfully request that this Court accept and file the attached *amici curiae* brief.

No party or counsel for any party, other than counsel for *amici*, authored this brief in whole or in part or funded the preparation of this brief.

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(e)(1) and (2), *amicus curiae* the California News Publishers Association, the Reporters Committee for Freedom of the Press, The Associated Press, Association of Alternative Newsmedia, Californians Aware, The Center for Investigative Reporting, The E.W. Scripps Company, First Amendment Coalition, Gannett Co., Inc., MPA – The Association of Magazine Media, The National Press Club, National Press Photographers Association, News & Review, News Media Alliance, Sacramento Bee, and Society of Professional Journalists, by and through their undersigned counsel, certify that the following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

California News Publishers Association is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

Californians Aware is a nonprofit organization with no parent corporation and no stock.

The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company holds 10% or more of its stock.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

News & Review's parent corporation, Chico Community Publishing, Inc., is privately owned. The von Kaenel-Redmond Revocable Trust 2007 and Valentina Flynn each own 10 percent or more of Chico Community Publishing, Inc.'s stock.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

Society of Professional Journalists is a non-stock corporation with no parent company.

Dated: July 17, 2017

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I. INTRODUCTION

This appeal illustrates the damaging effect of so-called "reverse-CPRA actions" on the public's right of access to government records guaranteed by the California Constitution and the California Public Records Act (the "CPRA" or "Act"). Reverse-CPRA actions, like this one, turn the public's presumptive right to access records of government agencies on its head and upset the careful balance of incentives and protections established by the Legislature to ensure meaningful public access to government information. Reverse-CPRA actions are contrary to both the language and intent of the CPRA and undermine the Act's fundamental purpose; they are not specifically authorized by California law. Yet, even assuming, *arguendo*, that such actions should be permitted in certain circumstances, CPRA requesters must be afforded the same protections in reverse-CPRA actions that they are entitled to in any other action brought under the CPRA, including the right to recover the entirety of their attorneys' fees when they prevail.

The California Supreme Court has never recognized the availability of reverse-CPRA actions under California law. In the five years since this Court held that one was permissible, however, it has become clear that they pose an existential threat to the CPRA. Reverse-CPRA actions imperil the public's ability to obtain timely access to records of government by allowing third parties to obstruct and delay the release of public records

requested under the Act, even in cases when a responding agency agrees with the requester that the records should be released. Moreover, in many cases, reverse-CPRA plaintiffs argue that the procedural protections put in place by the Legislature to encourage requesters to vindicate their rights of access to records under the Act—such as the mandatory award of attorneys' fees to requesters who prevail in litigation, Government Code section 6259(d)[1]—are unavailable in reverse-CPRA actions.

Here, appellant Los Angeles Times Communications, LLC ("The Times") engaged in a protracted—and ultimately successful—fight to obtain disclosure under the CPRA of government records of the utmost importance to the public. Yet contrary to the language and purpose of the Act, the trial court below awarded The Times only a fraction of the attorneys' fees it was forced to expend in vindicating the public's right of access. This decision undermines a core feature of the CPRA and if affirmed will undoubtedly discourage future requesters from pursuing access to government records with the same vigilance shown by The Times, contrary to the purpose of the Act.

When a requester prevails in litigation concerning access to public records she or he requested under the CPRA, the CPRA's mandatory

[1] Hereinafter, all statutory references are to the Government Code unless otherwise indicated.

attorneys' fee award provision must apply, regardless of how the requester is identified in the case's caption. Alternatively, the private attorney general statute, Code of Civil Procedure, section 1021.5, should be applied to allow requesters like The Times to recoup the full amount of their reasonable attorneys' fees incurred in vindicating the public's right of access. Reverse-CPRA actions, if permitted at all, must afford requesters the incentives and protections established by the Legislature in the CPRA. For the reasons set forth herein, *amici*[2] respectfully urge this Court to reverse.

II. ARGUMENT

A. Reverse-CPRA actions are contrary to California law.

1. Reverse-CPRA actions undermine the purpose of both the CPRA and the right of access guaranteed by the California Constitution.

Both the CPRA and the California Constitution establish the public's right of access to information concerning the conduct of the people's business. (Section 6250; Cal. Const., art. I, § 3, subd. (b)(1).) Californians have long recognized that "[o]penness in government is essential to the functioning of a democracy." (*Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328 (*International*

[2] A full description of *amici* is provided in Appendix A.

Federation).) If left to operate in darkness, those in power can mask ineffective policies, bad practices, corruption, waste, fraud, and abuse.

Access to public records "'permits checks against the arbitrary exercise of official power and secrecy in the political process.'" (*Id.* at p. 329 (quoting *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651).) The CPRA and the California constitutional right of access to public records prevent government from operating in secret and encourage public officials to provide transparency which the public demands. Both provisions evince a strong public policy in favor disclosure and against secrecy.

Reverse-CPRA actions are antithetical to this public policy. Reverse-CPRA lawsuits inhibit disclosure of public records by permitting third parties to obstruct and delay access to public records that shed light on the public's business. They promote secrecy in government by forcing government agencies to withhold records that the agencies may agree must be disclosed under the Act. In sum, reverse-CPRA actions are irreconcilable with the public policy of openness and transparency that are at the heart of the CPRA.

2. Reverse-CPRA actions are not authorized by the plain language of the CPRA.

Nothing in the CPRA either expressly or implicitly authorizes reverse-CPRA actions. The public records laws of other states that recognize such third-party actions, in contrast, specifically provide for

them. (*See, e.g.*, Wash. Rev. Code § 42.56.540 (permitting "a person who is named in [a public] record or to whom the record specifically pertains" to petition the superior court to enjoin public examination of the record); Tex. Gov't Code Ann. § 552.325 (permitting "[a] governmental body, officer for public information, or other person or entity" to file suit "seeking to withhold information from a requestor").) In these states, the legislatures have laid out the procedures to be used and specific protections for requesters whose requests spur a reverse public records act suit. (*See, e.g.*, Wash. Rev. Code § 42.56.540 (establishing procedures for notification of third parties to whom a requested record pertains and the standard for review for actions for injunctions brought by third parties); Tex. Gov't Code Ann. § 552.325 (prohibiting reverse public records act lawsuits from being brought against requesters and requiring that requesters be notified and permitted to intervene in such lawsuits).) Unlike states in which reverse public records act lawsuits are explicitly allowed, the California Legislature has taken no steps to allow or approve reverse-CPRA actions. The California Legislature could amend the CPRA to provide for reverse-CPRA actions, as other states have done, if it wished to do so. It has not.

Moreover, reverse-CPRA actions are directly contrary to the statutory scheme that the California Legislature established in the CPRA. The CPRA sets forth a basic rule requiring a state or local agency to disclose public records upon request. (Section 6253.) In general, it creates

"a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency." (*Sander v. State Bar of California* (2013) 58 Cal.4th 300, 323.) Every such record "must be disclosed unless a statutory exception is shown." (*Id*.)

In short, the Act *requires* disclosure of public records by a public agency, with a few limited, enumerated exceptions; it does not *prohibit* a public agency from disclosing records. And although the CPRA exempts certain specified records from disclosure, most of its exemptions are permissive, not mandatory. (*See Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250, 1262.) Indeed, the Act expressly contemplates that public agencies may choose to disclose records that they are not otherwise required to disclose under the CPRA. (*See* Section 6254 ("Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law."); *see also* Section 6254.5 (providing that a public agency waives any applicable exemption if it discloses a record).) Reverse-CPRA actions turn this statutory scheme on its head. Such actions often seek to prohibit public agencies from releasing records pursuant to the CPRA even when the Act does not prohibit a public agency's release of public records.

3. Reverse-CPRA actions are incompatible with California Supreme Court precedent.

Not only are reverse-CPRA actions not authorized by the Act, but they are also incompatible with precedent of the California Supreme Court.

In *Filarsky v. Superior Court*, the California Supreme Court held that the City of Manhattan Beach could not bring a declaratory relief action to determine its obligation to disclose records requested under the CPRA. ((2002) 28 Cal.4th 419, 423 (*Filarsky*).) The Court concluded that Sections 6258 and 6259 are "the *exclusive procedure* for litigating the issue of a public agency's obligation to disclose records to a member of the public" and that these provisions "do not authorize a public agency in possession of records to seek a judicial determination regarding its duty of disclosure." (*Id.*)

In so holding, the Court in *Filarsky* noted that allowing the City's suit would "circumvent the established special statutory procedure" contained in the CPRA and disrupt the balance of incentives established in the CPRA. (*Id.*) Specifically, the Court identified three potential harms that would result if it allowed the City's suit to proceed: It found that such lawsuits would "eliminate statutory protections and incentives for members of the public in seeking disclosure of public records, require them to defend civil actions they otherwise might not have commenced, and discourage them from requesting records pursuant to the Act." (*Id*.) This result, the

Court concluded, would "frustrate[e] the Legislature's purpose of furthering the fundamental right of every person in this state to have prompt access to information in the possession of public agencies." (*Id.*)

Similarly, in *City of Santa Rosa v. Press Democrat*, the Court of Appeal, First District, Division 1, rejected attempts by a public agency to seek declaratory relief stating that it did not have to disclose public records. ((1986) 187 Cal.App.3d 1315, 1320.) There, the Court noted that the Legislature, in enacting the CPRA, provided no mechanism for a government agency or third party to bring an action under the CPRA, and found that "there is *no* provision for an action . . . to *prevent* disclosure." (*Id.* at p. 1320 (emphasis in original).)

Although the California Supreme Court has left open the question of whether reverse-CPRA suits are permitted, *see Long Beach Police Officers Ass'n v. City of Long Beach* (2014) 59 Cal.4th 59, 66, n.2 ("*LBPOA*"), such actions are plainly incompatible with its decision in *Filarsky*. Nothing in Sections 6258 or 6259—which provide "the *exclusive procedure* for litigating the issue of a public agency's obligation to disclose records to a member of the public," *Filarsky*, *supra*, 28 Cal.4th at p. 423—authorize reverse-CPRA actions.

Moreover, although *Filarsky* addressed a reverse-CPRA action brought by a public agency, the negative consequences that the Court identified as resulting from that action are equally applicable to reverse-

CPRA actions brought by a third party. First, just as with reverse-CPRA actions initiated by a public agency, third-party reverse-CPRA actions require requesters to defend civil actions they otherwise might not have commenced. (*Filarsky*, *supra*, 28 Cal.4th at p. 423.)

Second, third-party reverse-CPRA actions eliminate important statutory protections and incentives for requesters. (*Id.* at p. 423.) Because the Legislature has not established procedures for reverse-CPRA lawsuits brought by third parties, it is not clear whether courts will apply the expedited procedures contained in the CPRA for determination of an agency's obligation to disclose public records, and for appellate review by writ of mandate, in a reverse-CPRA lawsuit. (*See Marken*, *supra*, 202 Cal.App.4th at p. 1269.) In addition, parties are left uncertain as to whether courts will apply the CPRA's mandatory fee-shifting provision in a reverse-CPRA action to award a prevailing requester the entirety of her costs and reasonable attorneys' fees. (*See* Section 6259(d); *Marken*, *supra*, 202 Cal.App.4th at 1268 (stating, in *dicta,* that a requester who participates in a reverse-CPRA lawsuit would not be entitled to attorneys' fees under the CPRA's mandatory fee provision).) This uncertainty undermines the Legislature's intent to guarantee that requesters vindicating the right of access to public records in court will be made whole if they prevail and will undoubtedly discourage requesters from pressing for access in reverse-CPRA litigation. Indeed, uncertain as to whether they will be

exposed to reverse-CPRA litigation and unprotected by the provisions of the CPRA, members of the public may be discouraged from requesting records in the first instance. (*See Filarsky*, *supra*, 28 Cal.4th at p. 423.)

The disincentives created by third-party reverse-CPRA actions cannot be cured by the claim that a requester's "active participation" in the litigation is not required because she or he can "elect to allow the agency to defend its decision" to release records. (*Marken*, *supra*, 202 Cal.App.4th at p. 1268). Even an agency that recognizes that it must release public records under the CPRA may be unwilling to invest the time and resources needed to robustly defend that position in court. In addition, because access to public records "makes it possible for members of the public to expose corruption, incompetence, inefficiency, prejudice, and favoritism," (*International Federation*, *supra*, 42 Cal.4th at p. 333) (quotation omitted), the requester's and the agency's interests generally will not be aligned. In some cases, the public agency defending a reverse-CPRA action may actually wish to withhold the requested records and will not actually be adverse to the third-party plaintiff. Indeed, examples of such cases abound. (*See, e.g., LBPOA*, *supra*, 59 Cal.4th at p. 64 (explaining that the defendant city "aligned itself" with the "third-party" plaintiff opposing disclosure of requested records in a reverse-CPRA lawsuit); *Marken, supra,* 202 Cal.App.4th at p. 1276 (noting the requester's "persuasive argument" that the public agency was not "adequately representing his interests" in

reverse-CPRA action "beginning with its unauthorized delay in producing the records to permit [a third party] to file the action" and continuing with its "tepid arguments" in support of disclosure). Accordingly, requesters cannot rely on public agencies to vigorously represent their interests in reverse-CPRA actions.

What is more, when brought by current or former employees of public agencies, third-party reverse-CPRA actions can easily be used to make an end-run around *Filarsky* and bring *precisely* the type of lawsuit that *Filarsky* prohibits. For example, a public agency barred from bringing a reverse-CPRA action itself under *Filarsky* may be able to work with a current or former employee of the agency to bring a third-party reverse-CPRA action in the employee's name. The public agency could then seek to withhold requested records through this "third-party" reverse-CPRA lawsuit.

4. Reverse-CPRA litigation has a record of undermining public access to government information.

Several recent cases in California courts demonstrate how reverse-CPRA actions have upset the careful balance between public access and personal privacy established by the CPRA and the California Constitution and undermined the public's ability to access government information. Reverse-CPRA actions have delayed the release of public records, provided a blueprint for agencies to evade *Filarsky*'s prohibition on agency-initiated

reverse-CPRA actions, and prevented requesters from recouping significant attorneys' fees expended in such actions.

Reverse-CPRA cases have caused lengthy delays in the release of important and newsworthy public records. For example, in *City of Los Angeles (Los Angeles Department of Water and Power) v. Metropolitan Water District of Southern California*, a reporter for The San Diego Union-Tribune ("the Union-Tribune") made a CPRA request to the Metropolitan Water District ("MWD") for records related to MWD's Turf Replacement Rebate Program, which provided about $370 million in public money for the replacement of lawn and grass with drought-resistant landscapes. (Order, Super. Ct. Los Angeles County, 2016, No. BS157056 ("*DWP*"), appeal lodged May 13, 2017, Ct. of Appeal, 2nd District, No. B272169.) The Los Angeles Department of Water and Power ("DWP") filed suit against MWD to prevent the disclosure of the requested records. (*Id.* at p. 1.) The Superior Court eventually denied DWP's petition, ordered that the records be produced, and awarded the Union-Tribune its attorneys' fees. (*Id.* at p. 33, Tentative Decision on Motion for Attorney's Fees and Costs: Granted in Significant Part, *DWP*, *supra*, at p. 15.). However, because of DWP's reverse-CPRA lawsuit, the newspaper's access to the records it needed to scrutinize the taxpayer-funded program was delayed for approximately eight months, until after the program had ceased. (*See* Order, *DWP*, *supra*, at p. 1.)

Similarly, in *Rozanski v. Camarillo Health Care District*, a local newspaper sought disclosure, pursuant to the CPRA, of certain voicemails and emails of the former Chief Executive Officer of a public agency whom the agency had publicly accused of misconduct. (*See* Verified Complaint and Petition for Writ of Mandate, Super. Ct. Ventura County, 2016, No. 56-2016-00489673-CU-WM-VTA ("*Rozanski*")). After the agency notified the CEO of the CPRA request, she brought a reverse-CPRA action. (*Id.* at p. 7.) It took more than five months for the issue to be resolved by the trial court, which issued an order permitting disclosure of almost all of the records sought. (*See* Final Judgment, *Rozanski*.)

In another reverse-CPRA case, *Los Cerritos Community Newspaper Group v. Water Replenishment District of Southern California*, a newspaper requested a copy of the settlement agreement entered into by an attorney and government agency regarding a billing dispute. (Order, Super. Ct., Los Angeles County, 2016, Nos. BS160594, BS160827). The settlement agreement contained a confidentiality clause, and the attorney filed a reverse-CPRA action to prevent its release. (*Id.* at p. 3.) The trial court eventually ordered disclosure of the records sought, but only after nearly a year had elapsed since the filing of the request.

These cases demonstrate the "additional delay" in the disclosure of public records caused by reverse-CPRA actions, contrary to the purposes of the CPRA. (*See Marken, supra,* 202 Cal.App.4th at p. 1268.) Such

delays erode the newsworthy nature of the records sought and inhibit the public's access to information concerning the conduct of the public's business. (*See Powers v. City of Richmond* (1995) 10 Cal.4th 85, 111; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1335.)

Reverse-CPRA cases also provide agencies with the opportunity to evade the prohibition in *Filarsky* on agency-initiated reverse-CPRA actions. For example, in *DWP*, the Union-Tribune argued that the third-party reverse-CPRA petitioner, DWP, was acting as a "stalking horse for MWD's litigation effort—in effect, enabling MWD to seek declaratory relief that is foreclosed by *Filarsky*." (*DWP*, *supra*, No. BS157056, at p. 14.) Although the court ultimately rejected this argument, *id.* at p. 16, *DWP* demonstrates how reverse-CPRA cases could be manipulated to allow agencies to make an end-run around *Filarsky*.

Finally, different California courts have reached different decisions regarding the availability of attorneys' fees to prevailing requesters in reverse-CPRA cases, creating uncertainty and discouraging requesters from vigorously participating in reverse-CPRA cases and, potentially, from filing CPRA requests in the first instance. (*See Filarsky*, *supra*, 28 Cal.4th at p. 423.) In *National Conference of Black Mayors, Kevin Johnson v. City of Sacramento, Sacramento News & Review*, the superior court declined to award the Sacramento News and Review ("SN&R") the $112,000 it incurred in defending a reverse-CPRA action, even though it gained access

to many of the records it sought through the litigation. (Order After Hearing Denying Motion For Attorney Fees, Super. Ct. Sacramento County, 2016, No. 26-25117 at p. 1, 24, appeal lodged Jan. 1, 2017, Ct. of Appeal, 3rd District, No. C083956.) SN&R has appealed the ruling. (*Id.*) In contrast, in *DWP*, the trial court awarded attorneys' fees to the Union-Tribune against third-party reverse-CPRA petitioner DWP, pursuant to the private attorney general statute. (*See* Tentative Decision on Motion for Attorney's Fees and Costs: Granted in Significant Part, *DWP*, *supra*, at p. 10–12.) These conflicting decisions have created uncertainty regarding requesters' entitlement to the recovery of fees when they prevail in litigation concerning public records.

In all of these reverse-CPRA cases, the requester ultimately obtained access to the documents it requested, but only after significant delay and, in some cases, incurring substantial legal fees that may not be reimbursed. These cases demonstrate how reverse-CPRA actions enable third parties to pursue losing efforts to block disclosure of records under the CPRA, at the expense of the public's right to know, and sometimes just to effectuate a delay in disclosure.

B. Assuming, *arguendo*, that reverse-CPRA actions are permissible under California law, they must conform to the CPRA's mandatory fee-shifting scheme.

1. Mandatory fee shifting is a critical feature of the CPRA and necessary to effectuate the Act's purpose.

The CPRA's mandatory fee-shifting provision encourages members of the public to enforce their rights under the Act by eliminating any financial disincentive to vigorously pursuing access to public records, in furtherance of the purpose of the CPRA. (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 349.) "Indeed, the very purpose of the attorney fees provision is to provide 'protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure.'" (*Galbiso v. Orosi Pub. Util. Dist.* (2008) 167 Cal.App.4th 1063, 1088 (quoting *Filarsky*, *supra*, 28 Cal.4th at p. 1392.)

In many cases, requesters do not have the financial means to pursue CPRA lawsuits and will receive no direct or measurable financial gain by litigating for access public records. Thus, "[w]ithout some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be unfeasible." (*Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 902–03 (*Belth*).)

Similarly, in many reverse-CPRA actions, requesters cannot afford to participate in the litigation to defend their right of access absent the

ability to recover their attorneys' fees. Yet requesters may be forced to participate in reverse-CPRA actions if named as a party or may feel it is necessary to participate as an interested party to vindicate their right of access to public records. *See supra* Section II.A.3 (explaining that requesters cannot rely on public agencies to defend the requesters' position in reverse-CPRA actions).

As California courts have long recognized, the Legislature provided for mandatory fee shifting in the CPRA to ensure its proper functioning; without mandatory fee shifting, requesters would struggle to fund the public records litigation necessary to vindicate their right of access. The need for mandatory fee shifting in reverse-CPRA actions is just as important to the functioning of the CPRA. Mandatory fee-shifting makes whole a requester who advances the public's right of access, regardless of the requester's place on the case caption. If courts do not allow prevailing requesters to recover attorneys' fees in reverse-CPRA actions, requesters will be significantly less likely to participate in such actions. Ultimately, the public's right of access to government records will suffer.

2. California courts have interpreted the CPRA's mandatory fee-shifting provision broadly.

Section 6259(d) provides that the court "shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to" the CPRA. The California Court of Appeal,

Fifth District, has held that this section should be interpreted "in keeping with the overall remedial purpose of the [CPRA] to broaden access to public records." (*Galbiso*, *supra*, 167 Cal.App.4th at p. 1088.) Moreover, the California Constitution requires that a statute be "broadly construed if it furthers the people's right of access." (Cal. Const., art. I, § 3, subd. (b)(2).)

Accordingly, courts of appeal across California have interpreted the meaning of the terms "plaintiff" and "prevail" in Section 6259(d) broadly. Thus, the Court of Appeal, Second District, Division 7 has held that a requester "prevails" and is entitled to attorney fees even when litigation results in disclosure of fewer than all of the documents the plaintiff sought, as long as the disclosure is not "minimal or insignificant." (*L.A. Times v. Alameda Corridor Trans. Auth.* (2001) 88 Cal.App.4th 1381, 1390–91.) The Court noted that denying attorneys' fees where the plaintiff erred with respect to the public agency's obligation to disclose some of the documents sought "would chill efforts to enforce the public right to information." (*Id.* at p. 1392.) Similarly, in *Bernardi v. County of Monterey*, the Court of Appeal, Sixth District held that "there is no requirement that the trial court make an award of attorney fees in an amount that is commensurate with or in proportion to the degree of success in the CPRA litigation." ((2008) 167 Cal.App.4th 1379, 1398.) The Court found that any such requirement would have "similar chilling effect" on efforts to obtain access to public records. (*Id.* at 1397.)

The Court of Appeal, First District, Division 5 has also held that "a plaintiff need not have obtained a court order compelling production of specific documents in order to qualify as the prevailing party." *Pac. Merch. Shipping Ass'n v. Bd. of Pilot Comm'rs* (2015) 242 Cal.App.4th 1043, 1054 (*Pac. Merch*).) For example, the Court has found that a requester is the prevailing party when litigation spurs a public agency to voluntarily release requested records, without a court order. (*Belth*, *supra*, 232 Cal.App.3d at p. 901–02.)

Furthermore, the Court of Appeal, First District, Division 5 has found that a requester is the prevailing party on the basis of a public agency's post-litigation document production. (*Pac. Merch. Shipping Ass'n v. Bd. of Pilot Commissioners* (2015) 242 Cal.App.4th 1043, 1060 (*Pac. Merch*). In *Pacific Merchant Shipping Assoc. v. Board of Pilot Commissioners*, the requester obtained a ruling through a CPRA lawsuit that the Port Agent was a state officer for purposes of the CPRA; the Port Agent subsequently released records in response to CPRA requests by the requester that were not the subject of the litigation and that the Port Agent had refused to release pre-litigation. (*Id.* at 1050, 1051–52.) The requester then moved for attorneys' fees in its existing CPRA litigation, and the Court of Appeal affirmed the trial court's award of attorneys' fees to the requester. (*Id.* at 1060.)

In addition, the Courts of Appeal for the Fourth District, Division 1 and Fifth District have held that a requester is a prevailing party in certain CPRA cases even when no records are produced because of the lawsuit at all. Thus, these Courts have held that a plaintiff who successfully challenges polices that frustrate the purpose of the CPRA, but who did not obtain any records, has prevailed for purposes of attorneys' fees. (*N. Cty. Parents Org. v. Dep't of Educ*. (1994) 23 Cal.App.4th 144, 148 (awarding attorneys' fees to requester who litigated to determine interpretation of "direct cost of duplication" under CPRA); *see also Cmty. Youth Athletic Ctr. v. City of Nat'l City* (2013) 220 Cal.App.4th 1385, 1447 (finding that requester was prevailing party even though records were not produced because they had been destroyed or lost); *Galbiso*, *supra*, 167 Cal.App.4th at 1087–88 (holding that trial court erred in failing to award attorneys' fees to plaintiff who prevailed on claim that she was denied access to *all* records "by means of preventing access to the premises [of the public agency] for the purpose of inspecting documents").)

Finally, the Court of Appeal, Fourth District, Division 2 has interpreted the CPRA's mandatory fee-shifting provision to apply even when the requester is not the plaintiff in a CPRA action. In *Fontana Police Department v. Villegas-Banuelos*, the Fontana Police Department filed a petition seeking a protective order with respect to certain tapes that Pedro Villegas-Banuelos had requested under the CPRA. ((1999) 74 Cal.App.4th

1249, 1251.) The trial court denied the police department's petition, and Villegas-Banuelos moved for attorneys' fees. (*Id.*) The trial court denied the motion, and the Court of Appeal reversed. (*Id.*) The Court held that it made no difference to the analysis of Section 6259(d) that Villegas-Banuelos was not the "plaintiff" in the suit. (*Id.* at p. 1252–53.) Rather, the Court concluded the Villegas-Banuelos was entitled to his attorneys' fees "despite the fact that he was not denominated 'plaintiff' in the action" because proceeding in the case was "the functional equivalent of a proceeding to compel production" of the records under the CPRA and Villegas-Banuelos was the prevailing party. (*Id.* at 1253.) To hold otherwise, noted the Court, "would defeat the objective of the [CPRA], which is to increase freedom of information by affording the public access to information in the possession of public agencies." (*Id.*) Thus, the Court found, "[t]he happenstance of who gets to the courthouse first should not dictate whether attorney's fees and costs should be recoverable by the prevailing party." (*Id.*)

3. A prevailing requester in a reverse-CPRA action should be entitled to recover all of its attorneys' fees.

Consistent with Section 6259(d)'s purpose to provide incentives and protections for CPRA requesters and California courts' broad reading of this provision, this Court should interpret Section 6259(d) to hold that a requester who prevails in a reverse-CPRA lawsuit is entitled to recover the

entire amount of her or his attorneys' fees. In the alternative, *amici* agree with The Times that a prevailing requester in a reverse-CPRA action should be awarded its fees pursuant to the private attorney general statute, Cal. Code Civ. Proc. Section 1021.5. To hold otherwise would erode the CPRA's strong protections for requesters and eviscerate a keystone of the Act.

In addition, *amici* agree that responsibility for The Times attorneys' fee award may be allocated among the public agency and the third-party plaintiff. Permitting requesters to recover attorneys' fees from public agencies in reverse-CPRA lawsuits will make it less likely that agencies will withhold records without justification based solely upon a third party's claim that the records should not be disclosed. Moreover, liability for attorneys' fees will discourage public agencies from attempting to delay disclosure by notifying third parties of CPRA requests or by engineering third-party reverse-CPRA cases to evade *Filarsky*'s prohibition on agency-initiated reverse-CPRA cases. And importantly, imposing fees will encourage agencies to properly execute their duties under the CPRA, including the duty to segregate, and the duty to assist requesters in locating the disclosable records that they seek. (*See* Sections 6253, 6253.1.)

Permitting requesters to recover attorneys' fees from third-party plaintiffs in reverse-CPRA lawsuits will discourage baseless and unsupported claims that public records must be withheld. In case after case

in reverse-CPRA lawsuits, California courts have ruled in favor of disclosure of public records. (*See* Section II.A.4, *supra*.) If third-party plaintiffs are not responsible for requesters' attorneys' fees, they will be more likely to bring reverse-CPRA actions to discourage or simply to delay disclosure of public records, to the detriment of the public.

III. Conclusion

For the foregoing reasons, *amici* urge this Court to reverse the trial court's ruling denying The Times' fee motion as to the Pasadena Police Officers Association and denying it in significant part with respect to the City of Pasadena.

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the attached *amicus curiae* brief was produced using 13-point Roman type, including footnotes, and contains 5,067 words. I have relied on the word count functions of the Microsoft Word word-processing program used to prepare this brief.

Dated: July 17, 2017

/s/ Katie Townsend
Counsel of Record

PROOF OF SERVICE

I, Caitlin Vogus, do hereby affirm that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above-captioned action. My business address is 1156 15th St. NW, Suite 1250, Washington, DC 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

On July 17, 2017, I served the foregoing documents: **Application for Leave to File *Amici Curiae* Brief and *Amici Curiae* Brief of the California News Publishers Association, the Reporters Committee for Freedom of the Press, and 14 Media Organizations in Support of Appellant Los Angeles Times Communications, LLC.**

as follows:

[x] UNITED STATES MAIL: On July 17, 2017, I enclosed I true and correct copy of said document in an envelope with postage fully paid for deposit in the United States Postal Service.

I placed such envelope(s) with postage thereon fully prepaid for deposit in the United States Mail following our ordinary business practices, for collecting and processing correspondence for mailing with the United States Postal Service, addressed as set forth below:

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on the 17th of July 2017, at Washington, DC.

By: Caitlin Vogus

Caitlin Vogus

APPENDIX A: DESCRIPTION OF *AMICI*

The California News Publishers Association ("CNPA") is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and news websites throughout California.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

The E.W. Scripps Company serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 34 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the

long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Gannett Co., Inc. is an international news and information company that publishes 109 daily newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

MPA – The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other

interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The Chico, Reno and Sacramento News & Review are alternative newsweeklies in California and Nevada, published online at www.newsreview.com. Their mission is to have a positive impact on their communities and make them better places to live.

The News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

The Sacramento Bee is a division of McClatchy Newspapers, Inc., a wholly-owned subsidiary of The McClatchy Company. The flagship newspaper of The McClatchy Company and the largest paper in the region, The Sacramento Bee was awarded its first Pulitzer Prize in 1935 for Public Service. Since that time, The Bee has won numerous awards, including four more Pulitzer Prizes, the most recent for feature photography in 2007.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

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