IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NATIONAL CONFERENCE OF BLACK MAYORS, et al., Plaintiffs and Respondents, v. CHICO COMMUNITY PUBLISHING, INC., Defendant and Appellant, CITY OF SACRAMENTO, et al., Defendants and Respondents.	3d Civ. No. C083956 Sacramento County Superior Court Case No. 34201580002124 Hon. Christopher E. Krueger, Presiding

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF 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 AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT:

Pursuant to California Rule of Court 8.200(c), The Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, Californians Aware, The Center for Investigative Reporting, First Amendment Coalition, Gannett Co., Inc., Los Angeles Times Communications LLC, National Press Photographers Association, The San Diego Union-Tribune LLC, Society of Professional Journalists, and TEGNA Inc. / KXTV-TV (Sacramento) (collectively "*amici*") respectfully request leave to file the attached *amici curiae* brief in support of Appellant Chico Community Publishing, Inc. Appellant consents to the filing of the *amici curiae* brief. Plaintiffs-Respondents take no position on *Amici*'s application to file the attached brief but reserve all rights to oppose or otherwise respond to the *amici curiae* brief. Defendants-Respondents do not consent to the filing of the *amici curiae* brief.

I. INTEREST OF *AMICI*

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, Cal. Gov. Code § 6250 *et seq.* (the "CPRA" or "Act"), as a means of gathering news. *Amici* are deeply concerned about the proliferation of so-called "reverse-CPRA" lawsuits and, in particular, the denial of attorneys' fees for requesters who prevail in such lawsuits and vindicate the public's right of access to public records. *Amici* write to underscore the negative consequences that flow from reverse-CPRA actions like this one, and to emphasize that, if such actions are permitted under the Act, requesters who prevail in such actions must be able to recover all reasonable attorneys' fees they are forced to incur in such cases under the CPRA's mandatory fee-shifting provision.

Amici respectfully request that this Court grant this application 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), *amici* The Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, Californians Aware, The Center for Investigative Reporting, First Amendment Coalition, Gannett Co., Inc., Los Angeles Times Communications LLC, National Press Photographers Association, The San Diego Union-Tribune LLC, Society of Professional Journalists, and TEGNA Inc. / KXTV-TV (Sacramento), 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:

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

American Society of News Editors is a private, non-stock corporation that has no parent.

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.

The Associated Press Media Editors has no parent corporation and does not issue any stock.

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

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.

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.

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.

Los Angeles Times Communications LLC is a subsidiary of tronc, Inc., which is publicly held. Merrick Venture Management Holdings, LLC, California Capital Equity, LLC, and PRIMECAP Management Company each own 10 percent or more of tronc, Inc.'s 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.

The San Diego Union-Tribune LLC is a subsidiary of tronc, Inc., which is publicly held. Merrick Venture Management Holdings, LLC, California Capital Equity, LLC, and PRIMECAP Management Company each own 10 percent or more of tronc, Inc.'s stock.

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

TEGNA Inc. has no parent company, and no publicly-held company has a 10% or greater ownership interest in TEGNA, Inc.

Dated: January 24, 2018

/s/ *Katie Townsend*

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I. INTRODUCTION

This case illustrates the threat to the public's right of access to government records posed by so-called "reverse-CPRA actions," *i.e.*, injunctive actions filed by public agencies or third parties to prevent disclosure of public records in response to a request under the California Public Records Act, Cal. Gov. Code § 6250 *et seq.* (the "CPRA" or "Act"). Even when unsuccessful in preventing the release of public records, these lawsuits chill would-be requesters from exercising their rights under the CPRA. Reverse-CPRA actions, like this one, turn the public's presumptive right to access public records 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 undermine California's statutory scheme for the release of public records established by the Act. In a traditional CPRA action, a records requester who sues and prevails in litigation is entitled to recover her reasonable attorneys' fees and costs. The trial court's decision that is at issue in this appeal, however, denied attorneys' fees and costs to a requester who was forced to expend significant resources to vigorously and successfully advocate for the release of public records. The trial court's decision, if upheld, could deter future requesters from making records requests and taking an active role in litigation to vindicate the public's right of access to records in reverse-CPRA suits while, at the same time,

encouraging the use of reverse-CPRA actions as a mechanism to skirt the Act's mandatory fee-shifting provision. Both effects are to the detriment of members of the public and their right to know about how their government conducts public business.

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. (Cal. Gov. Code § 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 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 of disclosure and against secrecy.

Reverse-CPRA actions are antithetical to this public policy. Such lawsuits permit third parties to obstruct and delay access to records that, if disseminated, would shed light on the public's business. They promote secrecy in government by forcing government agencies to withhold records, even when the agencies agree they 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 Act.

Nothing in the CPRA either expressly or implicitly authorizes reverse-CPRA actions. The public records laws of other states that do 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 suits from being brought against requesters and requiring that requesters be notified and permitted to intervene in such suits).)

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 so wished. 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. (Cal. Gov. Code § 6253.) In general, the Act 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* an

agency from disclosing records. And while the CPRA exempts certain specified records from disclosure, most of its exemptions are permissive, not mandatory. (*See Marken v. Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250, 1262 (*Marken*).) 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* Cal. Gov. Code § 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* Cal. Gov. Code § 6254.5 (providing that a public agency waives any applicable exemption if it discloses a record).) Reverse-CPRA actions contort this statutory scheme. 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* (2002) 28 Cal.4th 419, 423 (*Filarsky*), the 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. The Court concluded that California

Government Code §§ 6258 and 6259 ("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[] 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 Appellate District, rejected attempts by a public agency to seek a declaration that it did not have to disclose certain requested 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, finding that "there is *no* provision for an action . . . to *prevent* disclosure" in the Act. (*Id.* (emphasis in original).)

Although the California Supreme Court has left open the question of whether reverse-CPRA suits brought by third parties are permissible, *see Long Beach Police Officers Ass'n v. City of Long Beach* (2014) 59 Cal.4th 59, 66, n.2 (*LBPOA*), such actions are incompatible with its holding 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—authorizes reverse-CPRA actions.

Moreover, the negative consequences that the *Filarsky* Court identified as flowing from that government-initiated reverse-CPRA action are equally applicable to reverse-CPRA actions brought by third parties. As with actions initiated by an agency, third-party reverse-CPRA actions require requesters to defend civil actions they otherwise might not have commenced. (*Id.*) Requesters often cannot passively rely on public agencies, many of which have shown themselves to be unreliable advocates for access to public records, to vigorously defend the requester's and the public's right of access in a reverse-CPRA lawsuits. Indeed, 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), a requester's and an agency's interests frequently will not be aligned.

This has been the pattern in several recent reverse-CPRA cases. For example, in *LBPOA*, a newspaper sought the names of police officers involved in certain shootings while on duty from the City of Long Beach. Fifteen days later, the city's police union filed a reverse-CPRA lawsuit to prevent the release of the records. (*LBPOA*, *supra*, 59 Cal.4th at p. 64). Though technically the defendant in the case, the city actually "aligned itself" with the police union in opposition to the disclosure of the records in the reverse-CPRA lawsuit, arguing that the records were exempted personnel records, the release of which could endanger officers and their families. (*Id.* at p. 64–65.) That left only the newspaper to defend the public's right of access and ultimately to defeat the police union's reverse-CPRA claim. (*Id*. at p. 64).

In another example, in *City of Los Angeles (Los Angeles Department of Water and Power) v. Metropolitan Water District of Southern California*, a California trial court rejected the third-party plaintiff's argument that a requester-newspaper's intervention in reverse-CPRA litigation was superfluous because the public agency holding the requested records was sufficiently aligned with the newspaper's interests. (Order, Super. Ct. Los Angeles County, Jan. 15, 2016, No. BS157056 ("*DWP*") at p. 16, appeal lodged May 13, 2017, Ct. of Appeal, 2nd District, No. B272169.) The

court noted that the public agency repeatedly dragged its feet on disclosure of the records and did not exhibit a clear intention to disclose them until well after the reverse-CPRA lawsuit was filed. (*Id.*)

Similarly, in *Marken*, the court noted the requester's "persuasive argument" that the public agency was not "adequately representing his interests" in the reverse-CPRA action, "beginning with its unauthorized delay in producing the records to permit [the third party] to file the action" and continuing with its "tepid arguments" in support of disclosure. (*Marken*, *supra,* 202 Cal.App.4th at p. 1276.)

Third-party reverse-CPRA actions also create uncertainty about the application of procedural mechanisms established by the Act to ensure that CPRA lawsuits are resolved promptly. (*See id.* at p. 1268 (noting that the issue of potential delay in reverse-CPRA actions is unclear.) Because the Legislature has not established procedures for reverse-CPRA lawsuits, 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 id.* at p. 1269.)

4. Reverse-CPRA actions give public agencies and their leaders a method to easily evade *Filarsky*'s prohibition on agency-initiated reverse-CPRA action*s*.

A public agency that does not want to disclose records to a requester—but which *Filarsky* prohibits from bringing an action for

declaratory relief—can successfully make an end-run around *Filarsky* by notifying potentially interested third parties and encouraging a third-party reverse-CPRA lawsuit. For many public records, there is a third party that could conceivably claim an interest in blocking its release to the press or public. And particularly where, as here, a potentially interested third-party is a former government official or closely aligned with the agency that receives the CPRA request, the risk of such gamesmanship is high.

For instance, in two recent cases, third-party police unions filed reverse-CPRA actions in response to CPRA requests relating to officer-involved shootings when municipalities or police departments could not. (*LBPOA*, *supra*, 59 Cal.4th at p. 64; *Pasadena Police Officers Association v. Superior Court* (2015) 240 Cal.App.4th 268, 274.) Such cases demonstrate how public employees who also hold positions in unions, professional organizations, or similar groups can use reverse-CPRA actions to bring cases that they would be barred from initiating in their official capacities under *Filarsky*.

Additionally, plaintiffs often bring reverse-CPRA cases after the public agency notifies them of the existence of a public records request, despite the fact that nothing in the CPRA requires or even provides for such notice. In this case, for example, after taking the position that the requested records might be protected from disclosure by the attorney-client privilege, the City contacted the National Conference of Black Mayors, then led by

Sacramento Mayor Kevin Johnson, which promptly sought to assert the privilege in a reverse-CPRA case. (*Nat'l Conference of Black Mayors v. City of Sacramento*, Order After Hearing Denying Motion For Attorney Fees, Super. Ct. Sacramento County, 2016, No. 26-25117 at p. 2–3.)

Similarly, in *Marken*, a teacher brought a reverse-CPRA action seeking to prevent the release of requested records relating to his reprimand for violating a policy on sexual harassment of students, after the public agency, a school district, advised the teacher of the request and went out of its way to allow him to bring his claim. (*Marken*, *supra*, 202 Cal.App.4th at p. 1254, 1265.) The district even delayed disclosing the records concerning the teacher because the teacher's attorney asked for a "one-month period prior to production of any documents to allow him to seek a judicial determination whether the documents . . . were disclosable in light of Marken's federal and state constitutional privacy rights." (*Id.* at p. 1257.); *see also LBPOA, supra*, 59 Cal.45th at p. 64 (police union brought suit after public agency to whom the request was made "informed it that, unless prohibited by a court, the City would disclose the information sought . . . .")). This type of cooperation between public agencies and the third-party plaintiffs in advance of reverse-CPRA litigation illustrates the ease with which agency officials can subtly (or not-so-subtly) encourage third-party plaintiffs to bring reverse-CPRA actions when the public agency itself cannot.

5. Reverse-CPRA litigation casts doubt on the availability of attorneys' fees for prevailing public records requesters.

Reverse-CPRA actions are also detrimental to the public's right to know because they leave requesters uncertain as to whether courts will apply the CPRA's mandatory fee-shifting provision to award a prevailing requester the entirety of her costs and reasonable attorneys' fees. California courts are split with regard to the availability of attorneys' fees for prevailing requesters in reverse-CPRA cases. Although the California Court of Appeal, Second Appellate District, has stated, 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-shifting provision, *see Marken*, *supra*, 202 Cal.App.4th at p. 1268, other courts have taken a different approach. For example, in *DWP*, the trial court awarded attorneys' fees to the prevailing newspaper requester in a third-party reverse-CPRA lawsuit, but did so pursuant to California's 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.)

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 it undoubtedly discourages requesters from requesting records in the first instance or pressing for access in reverse-CPRA litigation. (*See Filarsky*, *supra*, 28 Cal.4th at p.423.) It

creates an unfair choice for records requesters faced with a reverse-CPRA action: either intervene in litigation to argue for disclosure of records and risk having to pay attorneys' fees and costs even if you prevail, or stay on the sidelines and risk having the sought-after records withheld. This is a choice that the Legislature sought not to impose on CPRA requesters when it included a mandatory fee-shifting provision in the Act. And, if allowed to persist, this uncertainty will discourage requesters from vigorously participating in reverse-CPRA cases. (*Id.*)

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

1. The CPRA's mandatory fee-shifting provision is key to the Act's effectiveness.

"[T]he 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).) It follows, then, that when these protections and incentives are not available, or where there is added risk that fees will be denied, members of the public will be less inclined to exercise their right to obtain public records.

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. (*Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 902–03 (stating that "[w]ithout some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies [concerning access to public records] will as a practical matter frequently be unfeasible").)

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.) In other states, the financial risk of litigation can be a deterrent to records requesters. (*See* Hooper & Davis, *A Tiger with No Teeth: The Case for Fee Shifting in State Public Records Law* (2014) 79 Mo. L.Rev. 949, 967 (stating that "most [state public records laws] provide little or no incentive for plaintiffs to seek legal redress for even the most blatant violations of the law").) In contrast, in California, the CPRA's mandatory fee-shifting provision ensures that requesters who do not have the financial means to pursue CPRA lawsuits and will receive no direct or measurable financial gain by litigating for access to public records are not discouraged from litigating their right to access public records.

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 seek access to public records or participate in reverse-CPRA lawsuits. Without mandatory fee shifting, even the requester who *wins* by obtaining records in a reverse-CPRA action *loses* because of the significant financial burden of shouldering attorneys' fees and costs.

The trial court's decision in this case, if upheld, would undermine the public's incentive to participate in CPRA litigation, in instances where a third party beats the records requester to the courthouse. Facing reverse-CPRA actions without the ability to recover their fees if they prevail, many requesters will not be able to afford to participate in the litigation to defend their right of access. Yet requesters may be forced to participate in reverse-CPRA actions if named as a party or may justifiably feel that participating as an interested party is the only way to vindicate their right of access to public records. (*See* Section II.A.3, *supra* (explaining that requesters cannot rely on public agencies to defend the requesters' position in reverse-CPRA actions).) The trial court's decision puts public records further out of reach for journalists and limits the news consuming public's efforts to better understand, analyze, and critique actions of government, contrary to the purposes of the CPRA.

Consistent with Section 6259(d)'s purpose to provide incentives and protections for CPRA requesters and California courts' broad reading of this provision, as required by the California Constitution, *see* Cal. Const., art. I, § 3, subd. (b)(2), 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. To hold otherwise would eviscerate a keystone of the Act.

2. A lack of mandatory fee shifting in reverse-CPRA actions would encourage reverse-CPRA actions.

If reverse-CPRA plaintiffs are not subject to mandatory fee shifting when a records requester prevails, reverse-CPRA suits will continue to proliferate, to the detriment of requesters and the public. As explained above, *see supra* Section II.B.1, mandatory fee shifting is an important protection and incentive for records requesters. Just as important, mandatory fee shifting is an important *disincentive* to baseless claims that public records are prohibited from release. In this sense, the CPRA works like other California fee-shifting statutes, where the potential award of fees to a prevailing party is meant to prevent parties from asserting frivolous or baseless legal arguments and thus head off needless litigation. As the Court of Appeal, Second Appellate District, recognized in *Young v. Redman*, fee shifting can "help to deter 'bad faith' litigation and to preserve the

foundation upon which free access to the courts is built." ((1976) 55 Cal. App. 3d 827, 838.)

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.

Knowing that those with the greatest interest in disclosure—requesters—may not have the means to participate in CPRA litigation without mandatory fee shifting, third parties with an interest in nondisclosure, and who know they will not be liable for the requesters' fees even if they lose, will be more likely to pursue reverse-CPRA actions. They may bring such suits just to delay disclosure, even if they know they cannot succeed on the merits of their claims. In addition, public agencies will be further incentivized to find third-party CPRA plaintiffs to allow them to fight records disputes outside of the Act's mandatory fee-shifting framework.

Ultimately, the public's right of access to government records will suffer as a result of increased reverse-CPRA actions. As the Supreme

Court of California has said recently, such access promotes "openness in government [that] is essential to the functioning of a democracy." (*International Federation* 42 Cal.4th 319 at p. 328).) Though this case concerns the allocation of attorneys' fees and costs, that calculation goes to the heart of the effectiveness of the CPRA and, as a result, determines the level of access to government information afforded to California's citizens.

3. Allocating responsibility for attorneys' fees to Mayor Johnson is appropriate.

Finally, *amici* agree with Appellant that responsibility for the attorneys' fee award may be allocated to the former Mayor Johnson in his official capacity. Permitting Appellant to recover attorneys' fees from the former mayor in his official capacity will make it less likely that public officials will seek to use their positions in unions, professional organizations, or other similar nongovernmental organizations with which they are involved to engineer reverse-CPRA actions to delay or prevent the disclosure of public records.

Moreover, assigning liability for attorneys' fees to a public official in his official capacity when he brings a reverse-CPRA suit through a third-party organization will discourage public agencies from encouraging or cooperating with such reverse-CPRA lawsuits in order to evade *Filarsky*'s prohibition on agency-initiated reverse-CPRA cases. And importantly, imposing fees on former Mayor Johnson in his official capacity will

encourage the City and its officials to properly execute their duties under the CPRA. (*See* Cal. Gov. Code §§ 6253, 6253.1.)

III. CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the trial court's ruling denying plaintiffs' motion for attorneys' fees and costs.

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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 4,210 words. I have relied on the word-count function of the Microsoft Word word-processing program used to prepare this brief.

Dated: January 24, 2018

/s/ Katie Townsend
Counsel of Record

APPENDIX A: DESCRIPTION OF *AMICI*

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.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

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.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

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.

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.

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"), founded in 1977, is the nation's first nonprofit investigative journalism organization. CIR produces investigative journalism for its https://www.revealnews.org/ website, the Reveal national public radio show and podcast, and various documentary projects - often in collaboration with other newsrooms across the country.

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.

Los Angeles Times Communications LLC and The San Diego Union-Tribune, LLC are two of the largest daily newspapers in the United States. Their popular news and information websites, www.latimes.com and www.sandiegouniontribune.com, attract audiences throughout California and across the nation.

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.

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.

TEGNA Inc. owns or services (through shared service or similar agreements) 46 television stations in 38 markets, including KXTV-TV, the ABC affiliate in Sacramento.

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PROOF OF SERVICE

I, Michael Shapiro, 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 January 24, 2018, I served the foregoing documents: **Application for Leave to File *Amici Curiae* Brief and *Amici Curiae* Brief of The Reporters Committee for Freedom of the Press and 14 Media Organizations in Support of Appellant Chico Community Publishing, Inc.** as follows:

[x] By email or electronic delivery:

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[x] By United States mail: I served the attached documents by enclosing true copies of the documents in a sealed envelope with postage fully prepaid thereon. I then placed the envelope in a U.S. Postal Service mailbox in Washington, D.C., addressed as follows:

Hon. Christopher E. Krueger, Judge
Sacramento County Superior Court
720 Ninth Street, Appeals Unit Room 102
Sacramento, CA 95814-1380

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 24th of January 2018, at Washington, DC.

By: /s/ *Michael Shapiro*
Michael Shapiro