



November 2, 2018

Honorable Chief Justice Tani Cantil-Sakauye  
and the Associate Justices of the Supreme Court of California  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

**Re: *Sander v. State Bar of California***, Supreme Court Case No. S251671;  
Court of Appeal Case Nos. A150061, A150625, Letter of *Amici Curiae* the  
Reporters Committee for Freedom of the Press and 13 media organizations in  
support of the Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

Pursuant to California Rule of Court 8.500(g), *amici curiae* the Reporters  
Committee for Freedom of the Press (“RCFP”), American Society of News  
Editors, Associated Press Media Editors, Association of Alternative Newsmedia,  
Bay Area News Group, California News Publishers Association, Californians  
Aware, The Center for Investigative Reporting, Los Angeles Times  
Communications LLC, The McClatchy Company, MPA – The Association of  
Magazine Media, National Press Photographers Association, Online News  
Association, and Society of Professional Journalists submit this letter in support  
of the Petition for Review filed by Petitioners Richard Sander and the First  
Amendment Coalition (collectively, “Petitioners”).

### **I. Interest of *Amici Curiae***

The Reporters Committee for Freedom of the Press is an  
unincorporated nonprofit association. The Reporters Committee was founded  
by leading journalists and media lawyers in 1970 when the nation’s news media  
faced an unprecedented wave of government subpoenas forcing reporters to  
name confidential sources. Today, its attorneys provide *pro bono* legal  
representation, *amicus curiae* support, and other legal resources to protect First

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for purposes of identification.*

Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee has appeared as *amicus curiae* in several cases before the California Courts of Appeal concerning the California Public Records Act (CPRA), including, recently, *National Lawyers Guild, San Francisco Bay Area Chapter v. Hayward*, Case No. A149328 and *National Conference of Black Mayors v. Chico Committee Publishing, Inc.*, Case No. C083956, as well as in other important cases in this Court affecting the news media, such as *Hassell v. Bird* (2018) 5 Cal. 5th 522. Full descriptions of the other *amici* are included below as Appendix A.

## II. Why the Court Should Grant Review

### A. Data journalism relies on large data sets and informs the public of systemic issues that are otherwise difficult to highlight.

Petitioners seek access to records of the State Bar of California (the “State Bar”) containing data about applicants for the California Bar Examination from 1972 to 2008. Pet. for Review at 11. While Petitioners seek this data for research purposes, journalists, too, are increasingly reliant on access to large datasets to gather news and inform the public; indeed, there has been a surge in recent years in what is known as “data journalism.” (See Roger Yu, *Booming Market for Data-Driven Journalism*, USA TODAY (Mar. 16, 2014, 3:55 PM), <http://bit.ly/2yq2gbX>.) Advances in technology have led to a modern explosion in the amount of data collected every day. (See, e.g., Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (May 21, 2018, 12:42 AM), <http://bit.ly/2RZzR4u> (stating that 90 percent of the world’s data was created in the past two years).) Today, innovative newsrooms across the country are capitalizing on that information explosion, using computer programs to analyze large datasets to report and enhance news stories to better inform the public. (See Michael S. Malone, *The Big-Data Future Has Arrived*, WALL ST. J. (Feb. 22, 2016, 6:47 PM), <https://on.wsj.com/2q1mCDV>; Susan McGregor, *CAR Hits the Mainstream*, COLUM. J. REV. (Mar. 18, 2013),

<https://perma.cc/6QTX-7CGM>.) Some newsrooms have adapted by hiring experts in quantitative methods of data assessment, and many newsrooms have a dedicated team of data-savvy journalists. (See, e.g., Scott Klein & Ryann Grochowski Jones, *Introducing our Data Journalism Advisers*, PROPUBLICA (Sept. 11, 2018, 8:00 AM), <http://bit.ly/2OxfnSB>; Melissa Bell, *What is Data Journalism*, VOX (Feb. 4, 2015, 12:08 PM), <http://bit.ly/2PHeh3l> (describing its data journalism team’s principles).)

Access to government databases has empowered news organizations to publish articles on matters of public concern in ways that were not possible before. For instance, reporters at *California Watch* analyzed millions of anonymized Medicare patient records to uncover fraudulent Medicare reimbursements by the state’s Prime Healthcare chain in a series of articles that won the prestigious George Polk Award. (See, e.g., Lance Williams, *Prime Hospital Bills for Malnutrition, but Patient Says She Wasn’t Treated*, CAL. WATCH (Dec. 16, 2011), <https://perma.cc/AR5L-GMLZ>.) The anonymized records showed that there were “thousands of cases where Prime has aggressively billed for treating unusual conditions,” triggering inflated Medicare reimbursements compared to a more accurate and typical diagnosis. (*Id.*) For example, one of the hundreds of major complications that Prime billed for was “kwashiorkor, a dangerous form of malnutrition usually seen among starving children during African famines.” (*Id.*) *California Watch* reporters revealed that one hospital had reported only eight cases of kwashiorkor in 2008, but in the following two years, after Prime acquired the hospital, had 1,030 reported cases of the previously rare condition. (*Id.*) An article describing *California Watch*’s reporting process noted how data journalism tools allowed reporters to use data collected by the California Office of Statewide Health Planning and Development to uncover “the telltale patterns [of fraud] in a mountain of documents”—“the kind of evidence [that] would be impossible to gather from a warehouse

full of file drawers filled with millions of pieces of paper.” (Lauren Rabaino, *28 GB of Raw Data Went Into California Watch’s Award-Winning “Decoding Prime” Series*, ADWEEK (Feb. 24, 2012), <http://bit.ly/2jdcZ53>.)

Anonymized government databases have underscored systemic flaws outside of California as well. For instance, *Reveal*, from California-based The Center for Investigative Reporting, used anonymized child abuse case records from Prince William County, Virginia, to determine how many children were sexually assaulted and how the state courts treated those cases. (Tennessee Watson, *Justice Isn’t Always Done for Child Sex Abuse—I Know Firsthand*, REVEAL FROM THE CENTER FOR INVESTIGATIVE REPORTING (Aug. 11, 2016), <https://perma.cc/WDE3-ENXM>.) Reporters discovered that it was “impossible to track each case all the way through the system,” as the police, trial court, state appellate court, and state supreme court all file cases differently, with no universal tracking number or serial code. (*Id.*) Access to this anonymized data helped *Reveal* shine light on an otherwise black box component of the state’s criminal justice system.

Similar records to those Petitioners seek have helped reveal systemic unfairness in comparable situations. For example, anonymized data regarding state math exam scores and class placement of more than one million middle- and high-school students in North Carolina revealed that low-income “gifted” students were more likely to be excluded from advanced classes than higher-income students. (See Joseph Neff et al., *Why Have Thousands of Smart, Low-Income NC Students Been Excluded from Advanced Classes?*, NEWS & OBSERVER/CHARLOTTE OBSERVER (May 19, 2017), <https://perma.cc/Q4KB-X54T>.) Anonymized data was also critical in showing that word-heavy SAT math questions disproportionately disadvantaged lower-income and non-native English speakers. (Renee Dudley, *Despite Warnings, College Board Redesigned SAT In Way That May Hurt Neediest Students*,

REUTERS (Sept. 21, 2016, 2:32 PM), <https://reut.rs/2PcU88a> (explaining that around 45 percent of the 2016 SAT math questions are word heavy, in contrast to 10 percent from previous years).)

The benefits of public access to the State Bar’s information cannot be overstated. This Court has recognized the legitimate public interest in “the activities of the State Bar in administering the bar exam and the admissions process.” (*Sander v. State Bar of Cal.* (2013) 58 Cal.4th 300, 324 [314 P.3d 488, 505].) Data journalism has shown that robust databases can reveal systemic issues or inherent unfairness in government programs.

**B. The Court of Appeal’s ruling limits public access to information going forward.**

The Court of Appeal’s expansive definition of “creation,” if permitted to stand, would potentially gut public access to government data. Public access to “information concerning the conduct of the people’s business” is a protected constitutional right in California. (See Cal. Const. Art. I sec. 3(b)(1).) The CPRA further establishes the public’s right of access to information concerning the conduct of the people’s business, as it “is a fundamental and necessary right of every person in this state.” (Gov. Code § 6250.) This Court has reaffirmed this principle, stating that “[o]penness in government is essential to the functioning of a democracy. Implicit in the democratic process is the notion that government should be accountable for its actions.” (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 615 [389 P.3d 848, 852] (internal quotations omitted).) By holding that the mere manipulation of data in a preexisting database is equivalent to the “creation of a new record,” particularly when the purpose is to anonymize the data to preserve individual privacy, the Court of Appeal’s decision will place the government’s increasingly large databases beyond public reach.

If the records Petitioners seek were compiled and stored in an electronic library card catalog their request would clearly fall under the CPRA. The Court of Appeal held that government agencies “cannot be required to create a new record by changing the *substantive* content of an existing record or *replacing* existing data with *new* data[.]” (*Sander v. State Bar of Cal.* (2018) A150061 at 19 (emphasis added).) But Petitioners are not asking Respondent to create or add new information—they merely ask for data that has already been created and is already in the State Bar’s electronic database. To use the State Bar’s analogy, an electronic database is “conceptually no different than an electronic version of a large library card catalog[.]” (Answer to Pet. for Review at 19.) Petitioners’ request to collapse particular fields, such as reducing the eight ethnic categories of race to four, is no different than asking an agency to produce records that are responsive to a particular category. It is akin to making two requests for records from the library card catalog: One for the titles of all books with authors’ last names beginning with A–M, and another for N–Z, rather than a request for the titles of books for each of the 26 letters of the alphabet individually. Responding to this request does not require changing the “substantive content” of the library card catalog, nor does it replace any of the data that is in the card catalog; it merely reformats and manipulates a set of data already in library’s card catalog.

The nature of anonymizing electronic databases inevitably collapses certain categories of data into broad categories, so that data points can no longer be used to re-identify an individual whose identity has been masked. Indeed, the whole purpose of anonymization is to ensure that data is sufficiently aggregated so that a particular data point will not be linked back to a single individual. But anonymization in no way requires the creation of any *new* data. (*See Sander, supra*, A150061 at 8 (describing Petitioners’ examples of how to anonymize information of bar exam takers).) Equating this necessary process to

creating a new record, as the Court of Appeal has, suggests that the mere act of anonymization constitutes the creation of a new record—a conclusion that will eviscerate the public’s access to any large government database that includes any data about individuals.

Moreover, the holding that anonymization of government data is the creation of a new record creates perverse incentives for agencies to create databases that can evade public scrutiny. Numerous California government entities collect and maintain large databases filled with public and private information. (See, e.g., Aaron Mendelson, *License Plate Readers Capture Loads of Data. How Long Do Cops Keep It?*, KPPC (Apr. 18, 2016), <https://perma.cc/QS3S-MBM3> (explaining that California law enforcement agencies are legally authorized to collect data from automated license plate readers (ALPR) to track individual movement).) Rather than empowering researchers to use publicly gathered and publicly funded information, the Court of Appeal has instead given public agencies the blueprints for avoiding CPRA obligations. For example, one can imagine a law enforcement agency that maintains all of the data it has about any individual it gathers data on—name, license plate numbers, criminal record, zip code, birthday, tracking location, height, weight, etc.—in one database. Despite a public interest in accessing this database to identify any trends in data gathering, the Court of Appeal’s ruling defangs the CPRA as a tool for government oversight and research. Records will now either be precluded from production on privacy grounds or redacted beyond any use, as any attempt to anonymize the data will be deemed the “creat[ion]” of a “new” record. Such redactions would eliminate the ability of data journalists and the public to identify trends by looking at and analyzing interconnected factors.

Data manipulation and anonymization go hand-in-hand. As this Court recognized, data can be anonymized to acknowledge the public’s interest in government oversight and

research, while still preserving government interests in security and privacy. (*ACLU of S. Cal. v. Superior Court* (2017) 3 Cal.5th 1032, 1046–47 [400 P.3d 432, 441–42] (recognizing the public’s interest in anonymized government data).) When this Court considered the feasibility of changing license plate numbers to placeholders in *ACLU of S. Cal. v. Superior Court*, such as “1111111,” there was no concern that this manipulation would create a new government record. (*Id.* at 1046 [400 P.3d at 441].) As this Court acknowledged, data manipulation is the only way to anonymize databases while simultaneously preserving its functionality for the public. In no way does such manipulation involve the creation of a new substantive record (that is, the government need not go out and collect even a scintilla of new data), nor does it involve the replacement of some data with new data (were that the case, any aggregation of data in service of anonymization would constitute a new record).

### **III. Conclusion**

This Court has consistently been at the forefront of asserting the public’s right to access government records in light of new technologies. The legal and factual issues for which Petitioners seek review give the Court an opportunity to clarify and underscore the public’s access to government databases. *Amici curiae* respectfully urge the Court to grant review in this case and to reverse the decision of the Court of Appeal.

Respectfully submitted,

Katie Townsend  
Legal Director  
The Reporters Committee for Freedom of the Press  
*Counsel of Record for amici curiae*

## APPENDIX A

### **SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE**

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 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.

**Bay Area News Group** is operated by MediaNews Group, one of the largest newspaper companies in the United States with newspapers throughout California and the nation. The Bay Area News Group includes *The Oakland Tribune*, *The Daily Review*, *The Argus*, *San Jose Mercury News*, *Contra Costa Times*, *Marin Independent Journal*, *West County Times*, *Valley Times*, *East County Times*, *Tri-Valley Herald*, *Santa Cruz Sentinel*, *San Mateo County Times*, *Vallejo Times-Herald* and *Vacaville Reporter*, all in California.

**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 oldest nonprofit investigative newsroom. CIR produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. CIR often works in collaboration with other newsrooms across the country.

**Los Angeles Times Communications LLC** is one of the largest daily newspapers in the United States. Its popular news and information websites, [www.latimes.com](http://www.latimes.com), attracts audiences throughout California and across the nation.

**The McClatchy Company** is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

**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 news, culture, sports, lifestyle 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 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 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.

**Online News Association** (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

**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.

## APPENDIX B

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**PROOF OF SERVICE**

I, Daniel J. Jeon, declare that at the time of service, I was over 18 years of age and **not a party to this action**. I am employed in Washington, D.C. My business address is 1156 15th Street NW, Suite 1020, Washington D.C. 20005.

On November 2, 2018, I served true copies of the following document(s) described as **LETTER OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR REVIEW** on the interested parties in this action as follows:

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**BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFC) operated by ImageSoft TrueFiling (TrueFiling), I provided the document(s) listed above electronically on the TRUE FILING Website to the parties on the Service List maintained on the TRUE FILING Website for this case, or on the attached Service List. TRUE FILING is on the on-line e-service provider designated in this case. Participants in the case who are not registered TRUE FILING users will be served by mail or by other means permitted by the court rules.

**BY MAIL:** I served the attached **LETTER OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR REVIEW** by placing a copy thereof in an envelope for the addressees named hereafter, addressed to the addressees as follows:

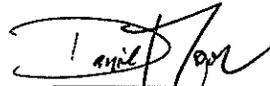
Honorable Mary E. Wiss  
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 2, 2018, at Washington, D.C.

  
\_\_\_\_\_  
Daniel J. Jeon