# No. B272169

COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

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**CITY OF LOS ANGELES, et al.**

*Petitioners/Appellants,*

v.

**METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,**

*Defendant/Respondent,*

**SAN DIEGO UNION-TRIBUNE, LLC**

*Respondent and Cross-Appellant.*

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Appeal from a Fee Award
The Superior Court for the County of Los Angeles
Hon. James C. Chalfant, Judge
Superior Court No. BS157056

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## UNION-TRIBUNE'S COMBINED REPLY BRIEF

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE SECOND APPELLATE DISTRICT COURT OF APPEAL FOR THE STATE OF CALIFORNIA, DIVISION EIGHT:

Respondent/Cross-Appellant The San Diego Union-Tribune, LLC (the "Union-Tribune") respectfully submits its combined Reply Brief to the (1) Combined Respondent's/Reply Brief filed by Appellant/Cross-Respondent City of Los Angeles' Department of Water and Power ("LADWP") ("LADWP RB"); (2) Combined Respondents'/Reply Brief filed by Appellants/Cross-Respondents Foothill, West Basin, and Upper San Gabriel Municipal Water Districts (collectively, the "Intervening Water Districts") ("Districts' RB)[1]; and (3) the Corrected Respondent's Brief filed by Cross-Respondent Metropolitan Water District of Southern California ("Metropolitan" or "MWD") ("MWD RB").

## I. Introduction.

In sharp contrast to their Opening Briefs, LADWP and the Intervening Water Districts have abandoned their central argument: that *Adoption of Joshua S.* (2008) 42 Cal.4th 945 ("*Joshua S.*"), precludes the Union-Tribune from recovering attorneys' fees in this reverse-CPRA case where they sought to keep secret information critical to the public's oversight of government spending of more than $300 million of public money on a controversial turf replacement rebate program. (See 15 CT 3520; 20 CT 4714.)

Initially, these public agencies claimed they were merely advocating for purely private interests and therefore, were not the types of parties against whom awards of Section 1021.5 fees were

[1] LADWP and the Intervening Water Districts are also collectively referred to as "Appellants."

proper, citing *Joshua S.* (*See id.*) Then this Court decided *Pasadena Police Officers Ass'n v. City of Pasadena* (2018) 22 Cal.App.5th 147 ("*PPOA*"), holding that *Joshua S.* does not bar public records requesters from recovering attorneys' fees when they prevail in compelling disclosure of public records. The Court explained that that reverse-CPRA plaintiffs were not merely advocating for private interests, but against the public interest in disclosure. (*Id.* at 165-166.). In the wake of *PPOA*, LADWP and the Intervening Water Districts appear to have abandoned their claims based on *Joshua S.* Rather than dismissing their appeals, however, these Water Districts are now trying to re-argue the merits of the case. Their arguments seeking to avoid attorneys' fees are as meritless as the original arguments and directly contradict the findings of fact that this court made on the merits of this case, which were not appealed.

The Intervening Water Districts argue that this case should be reviewed *de novo*. However, the record shows that the trial court used Code of Civil Procedure Section 1021.5 ("Section 1021.5) as the basis for fees and based its decision squarely on that criteria. (See 20 CT 4709-4710 [setting out Section 1021.5 criteria] and 4714-4715 [reiterating and applying the Section 1021.5 criteria].) While the question of whether the trial court applied the correct standard is reviewed *de novo*, whether it applied the standard properly to this case is reviewed for abuse of discretion. *Wohlgemuth v. Caterpillar Inc.* (2012) 207 Cal.App.4th 1252, 1258. *See further* Sect. II. A., *infra*.

The questions Appellant's ask this court to review fall under the highly deferential abuse of discretion standard, which cannot be met given the trial court's factual findings on the merits, which may not be relitigated here. *Slayton v. Pomona Unified School Dist.*

(1984) 161 Cal.App.3d 538, 547 ["reargument of the substantive issues on which they lost in the trial court and which are not reviewable by this court, because [the agency] failed to appeal"]; *Building a Better Redondo Beach, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 868 [unless the merits have been properly appealed, they may not be challenged on an appeal from the fee award]. *See further* Sect. II. C., *infra*.

The most significant of these claims is that the Union-Tribune protected no significant right and the litigation conferred no significant benefit. The trial court's ruling on the merits does not support these claims. The Water Districts attempted to prevent public disclosure of important public information regarding MWD's turf replacement rebate program. They argued against disclosure of the identities of individuals, businesses, and public entities that received public funds in exchange for replacing grass with artificial turf or other drought tolerant landscaping. They also argued that the street addresses of the installations should be secret. The Water Districts would have been successful but for the efforts of the Union-Tribune. (20 CT 4715 ["it was Union's tenacious advocacy that ensured all of the relevant information was released"].)

The trial court correctly found that the Union-Tribune's advocacy vindicated the principles underlying the CPRA, "a fundamental right of citizenship." (20 CT 4714.) Advocating for and protecting the right of access also furthers a constitutional right. The California Constitution provides that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Art. I, Section 3(b)(1). "This is sufficient to demonstrate

that Union enforced an important right affecting the public interest" and "[f]or the same reason…conferred a significant benefit on the public." (20 CT 4714.) "Union and others will be able to monitor the Turf's Program's alleged success and excesses, something that could not be completely done without the names and addresses." (20 CT 4714; see also 15 CT 3521-3525.) These factors conclusively establish the Union-Tribune's entitlement to fees. *Woodland Hills Residents Assn.,* 23 Cal.3d at 935, quoting *Press* v. *Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318. That Appellants do not find this information to be "important" demonstrates their fundamental misunderstanding of the CPRA, which protects the public's right to verify, not simply to uncover wrongdoing, and directly contradicts the trial court's findings. *See further* Sect. II. B., *infra*.

The Intervening Water Districts also argue that the Union-Tribune was not a "successful party." However, as this Court made clear in *PPOA*, in awarding Section 1021.5 fees in a reverse-CPRA case, if a party is deemed a "prevailing party" under the CPRA's standard, they are also a successful party for purposes of Section 1021.5. *PPOA*, 22 Cal.App.5th at 168 ["Plaintiff has prevailed within the meaning of the PRA when he or she files an action that 'results in defendant releasing a copy of a previously withheld document.'"] The Court ruled in the Union-Tribune's favor entirely, disclosing all of the records that the Union-Tribune advocated for and the Water Districts advocated against. (16 CT 3622.) Contrary to LADWP's arguments, the theory on which the trial court made its ruling does not undermine the Union-Tribune's right to fees. "A party need not prevail on every claim presented in an action in order to be considered a successful party within the meaning of the section." *Id.* at 846. Moreover, while LADWP argues that the Union-Tribune's

arguments regarding standing were unnecessary, the trial court determined that the Union-Tribune had every right to make them. "Although Intervenors are correct that Union made the case more complicated than necessary with unfounded allegations of collusion, that advocacy ensured the result of the case." (20 CT 4715-4716.) "Union was entitled to make its collusion allegation and take discovery, even if it did not bear fruit. Though not the purported architects, Intervenor Utilities would have benefited from any collusion between DWP and MWD to stop production of names and addresses." (20 CT 4715-4716.)

Nor can Appellants avoid liability by claiming they are like amicus, that they were not in a position to fulfill the records request, or that they brought this action in good faith on behalf of their customers. Appellants were plaintiffs seeking to affirmatively stop the disclosure of public records, including arguing that they were co-owners of for purposes of standing. (15 CT 3506-3507.) They may not now disavow that admission because it is inconvenient for purposes of fee liability. They did not just advocate for privacy rights, they advocated to expand withholdings based on privacy for residents, businesses, and public entities in ways that are not currently recognized by our courts, and directly sought to diminish the public's right to verify how government funds are spent. Stopping this effort was just the type of advocacy that Section 1021.5 fees were intended to further. *See further* Sects. II. D. – E., *infra*.

While necessary, the Union-Tribune's advocacy should not have been necessary. The only reason that the Union-Tribune was forced into litigation was because of this court's decision in *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal.App.4th 1250. Cases in its wake have demonstrated, in direct

contradiction to its assumption, that reverse-CPRA cases are undermining the fundamental protections and incentives that the California Supreme Court was determined to protect in its decision in *Filarsky v. Superior Court* (2002) 28 Cal.4th 419. Because *Marken* allegedly conferred standing on LADWP and the Intervening Water Districts to bring a reverse-CPRA lawsuit even though the Legislature never endorsed such a procedure, it is proper for the Court to reconsider it here. *Assoc'd Builders & Contractors, Inc. v. S. F. Airports Comm'n* (1999) 21 C4th 352, 361–363 [lack of standing can be raised at any time in the proceeding, even for first time on appeal].) *See further* Sect. III, *infra*.

As to MWD's claims that the trial court should not re-apportion the award, the Union-Tribune does not ask it to, nor does it need to do so. This Court should uphold the fee award if it were proper on any theory. As set out in the Union-Tribune's opening brief, and further below, the trial court could have awarded all fees against any of the parties, and should generally make the award jointly and severally liable so as not to undermine the purpose of Section 1021.5 by making collection more difficult. *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 837-838. However, the Union-Tribune would not have an issue if the entire award is upheld here with apportionment, which would allow the Court not to reach the questions on joint-and-several liability. *See further* Sect. IV, *infra*.

Finally, the Union-Tribune ask this Court to overturn the limited portion of the trial court's fee award where it inexplicably deviated from the lodestar method. The trial court made no finding that the 46.9 hours spent on the three 15-page replies to three oppositions filed by LADWP, the Intervening Water Districts and

MWD was unnecessary or unreasonable. The indiscriminate reduction does not comply with the lodestar method and should be reversed. *Press v. Lucky Stores,* 34 Cal.3d at 324 ["If there is no reasonable connection between the lodestar figure and the fee ultimately awarded, the fee does not conform to the objectives established in *Serrano III*, and may not be upheld."] *See further* Sect. V., *infra*.

## II. LADWP And The Intervening Water Districts Have Not Demonstrated That The Trial Court's Determination That The Union-Tribune Met The Criteria For An Award of Fees Under Section 1021.5 Amounts To Abuse Of Discretion.

### A. The Question Of Whether The Trial Court Applied The Correct Standard Is Reviewed *De Novo*; Whether It Applied It Properly Is Reviewed For Abuse Of Discretion.

From the outset, Appellants misstate the standard of review, which is not *de novo*, as they argue. "A trial court decision on entitlement to attorney fees under CCP 1021.5 is reviewed under the abuse of discretion standard." *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578. "Whether a plaintiff has proved each of the three prerequisites for [a §1021.5] award of trial fees is a question best decided by the trial court." *Planned Parenthood, Inc. v. Aakhus* (1993) 14 Cal.App.4th 162, 170. Reversal is only appropriate if no reasonable basis exists for the decision (*Baggett v. Gates* (1982) 32 Cal.3d 128, 143) or if it is based on an erroneous legal standard (*Braude v. Automobile Club* (1986) 178 Cal.App.3d 994, 1014).

Here, the court set out and applied the correct standard for an award of fees under Section 1021.5 in its ruling. (20 CT 4709-4710

[setting out Section 1021.5 criteria] and 4714-4715 [reiterating and applying the Section 1021.5 criteria].) On this point, there can be no question.

"Union is clearly a successful party against DWP and Intervenor Utilities. Union sought disclosure of the names and addresses of the Turf Program recipients, and DWP and Intervenor Utilities unsuccessfully fought to prevent disclosure. The court denied DWP's Petition, and granted judgment ordering disclosure of the requested information." (20 CT 4714.) The court found that the Union-Tribune demonstrated "that recipient names and addresses were important to monitoring the Turf Program" and vindicated the principles underlying the CPRA, the guiding principle of which is access to information, which is "a fundamental right of citizenship." (20 CT 4714.) "This is sufficient to demonstrate that Union enforced an important right affecting the public interest" and "[f]or the same reason…conferred a significant benefit on the public." (20 CT 4714.) "Union and others will be able to monitor the Turf's Program's alleged success and excesses, something that could not be completely done without the names and addresses." (20 CT 4714; *see also* 15 CT 3521-3525.)

While the question of whether the trial court applied the correct standard is reviewed *de novo*, whether it applied the standard properly to this case is reviewed for abuse of discretion. *Wohlgemuth v. Caterpillar Inc.* (2012) 207 Cal.App.4th 1252, 1258. Here, LADWP and the Intervening Water Districts do not complain that the trial court used erroneous criteria in determining the fee award. Instead, they complain about how the trial court applied the 1021.5 criteria to the facts. Review of the trial court's application of Section 1021.5 standards to this case is not

subject to *de novo* review, but the highly deferential standard set out above.

Nor can Appellants advantageously shift to a *de novo* standard merely by claiming that the trial court's findings do not meet the "legal definition" of key terms in the statute, such as whether the Union-Tribune meets the legal definition as a "successful party," whether the right meets the legal definition of "important right," whether they were "opposing parties," or whether the litigation conferred a "significant benefit."

Instead, the Court owes deference to the trial court's factual findings that the statutory requirements are satisfied. *Connerly*, 37 Cal.4th at 1175; *see also PPOA*, 22 Cal.App.5th at 167, *quoting Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App.4th 538, 544 ["[w]e defer to the trial court's factual findings so long as they are supported by substantial evidence, and determine whether, under those facts, the court abused its discretion. If there is no evidence to support the court's findings, then an abuse of discretion has occurred."]

The Intervening Water Districts argued that *Serrano v. Stefan Merli Plastering*[2] *(2011)* 52 Cal.4th 1018, 1020-1021, supports *de novo* review. Contrary to the Intervening Water Districts' arguments, the *Serrano* Court noted that the normal standard of review is abuse of discretion. The question it reviewed *de novo* in *Serrano* was the application of *Joshua S.,* 42 Cal.4th 945. *Id.* While Appellants' original argument that a reverse CPRA plaintiff should not be liable for attorneys' fees under Section 1021.5 may have been

[2] The Water Districts cite to *Serrano,* 52 Cal.App.4th at 1020-1021. The correct cite is actually 52 Cal.4th and the pincite they refer to is a headnote, not the actual decision.

a question of law subject to *de novo* review, this Court has already answered that question in *PPOA*, 22 Cal.App.5th at 160, 164-165 [stating that under either *de novo* or an abuse of discretion standard, the trial court erred by claiming *Joshua S.* precluded fee recovery in reverse-CPRA cases]. LADWP and the Intervening Water Districts have abandoned their *Joshua S.* arguments in the wake of the decision by this Court in *PPOA*, 22 Cal.App.5th at 167. The only remaining issues that they raise involve applying the Section 1021.5 criteria to the facts of this case as the trial court set them out in ruling on the merits, which was undisputed and therefore is the law of the case. *Slayton v. Pomona Unified School Dist.* (1984) 161 Cal.App.3d 538, 547 ["reargument of the substantive issues on which they lost in the trial court and which are not reviewable by this court, because [the agency] failed to appeal"]; *Building a Better Redondo Beach, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 868 [unless the merits have been properly appealed, they may not be challenged on an appeal from the fee award].

To overturn the overturn the court's ruling, LADWP and the Intervening Water Districts have the burden to show that "there has been a prejudicial abuse of discretion" and "'the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice....'" *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1291, quoting *Baggett* v. *Gates, supra,* 32 Cal.3d at 143. They have not met this stringent standard, nor could they based on the record in this case.

### B. The Union-Tribune Protected the Constitutional Right of Access, which is a Significant Benefit to the Public.

The claims by LADWP (LADWP RB, at 11-12) and the Intervening Water Districts (Districts' RB, at 11, 24-28) that the Union-Tribune's actions did not protect an important right or confer a significant benefit are flat out wrong.

The Water Districts attempted to prevent public disclosure of important public information regarding MWD's turf rebate program. They argued against disclosure of the identities of individuals, business, and public entities that received public funds in exchange for replacing grass with artificial turf or other drought tolerant landscaping. They also argued that the street addresses of the installations should be secret. The Water Districts would have been successful but for the efforts of the Union-Tribune.

Solely because of the Union-Tribune's advocacy, the trial court properly found that the public has a right to know exactly how MWD spent the public's money – a decision that Appellants did not contest on appeal. The trial court found that disclosure of the identities of rebate recipients and the installation addresses protected the ability of both the press and the public to evaluate the effectiveness of the program and understand the government's spending on a costly rebate program. (15 CT 3520; 20 CT 4714.) It also stopped Appellants from reversing long-standing CPRA principles, which require disclosure of information about those who contract with the government, and it prevented them from expanding privacy rights to businesses and public entities. (15 CT 3519; RT 928-929.)

Appellants make much ado about what could or could not be ultimately gleaned from the records and whether the Union-Tribune published articles using the information that it obtained.

These claims are factually inaccurate. The Union-Tribune published information about the program using the information it had obtained after it successfully argued to narrow the broad temporary restraining order sought by LADWP which would have halted disclosure of names and service addresses of all the participants, not just LADWP's customers. (RT 11-14; 20 CT 4711, 4715.) Later, after the trial court's decision on the merits, the Union-Tribune's sister paper, the Los Angeles Times, also published stories about who received rebates from LADWP, information only obtained as a result of the disclosure of records.[3] The Union-Tribune republished this information on its website as well.[4]

The focus of Appellants' claims are also misplaced. In determining the importance of the particular rights vindicated, "courts should generally realistically assess the significance of that right in terms of its relationship to the achievement of fundamental legislative goals." *Woodland Hills Residents Assn., Inc.*

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[3] http://www.latimes.com/local/lanow/la-me-ln-turf-rebate-data-release-with-exceptions-20160225-story.html. Publication in The Times made sense since the Union-Tribune had already successfully stopped LADWP from obstructing access to the San Diego records by opposing the scope of the initial temporary restraining order. (RT 11-14; 20 CT 4711, 4715.) Thus, the records released after the trial court's ruling on the merits disclosed LADWP's records, which pertained to Los Angeles residents who voluntarily sought the rebate benefit from the government in exchange for installing drought-resistant landscaping.

[4] http://www.sandiegouniontribune.com/news/watchdog/sdut-turf-grant-judgment-2016feb25-story.html;

*v. City Council* (1979) 23 Cal.3d 917, 936 ("*Woodland Hills Residents Assn.*")

In *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 835 ("*Friends of the Trails*"), the court explained in response to similar arguments about the alleged unimportance of the decision upholding the public's right of way to a small blocked easement, "the measure of the benefit of maintaining public access to a trail segment is, obviously, far more than the mere segment viewed in isolation." Here, too, the benefit is far greater than the myopic view taken by LADWP or by the Intervening Water Districts.

The Union-Tribune intervened to secure the records at issue, but, more importantly, to vindicate and protect the public's right of access to names and amounts of money disbursed by the government in voluntary rebate programs like the turf replacement program at issue here. The trial court correctly found that the Union-Tribune's advocacy vindicated the principles underlying the CPRA, "a fundamental right of citizenship." (20 CT 4714.) Advocating for and protecting the right of access also furthers a constitutional right. The California Constitution provides that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Art. I, Section 3(b)(1). "This is sufficient to demonstrate that Union enforced an important right affecting the public interest" and "[f]or the same reason…conferred a significant benefit on the public." (20 CT 4714.) "Union and others will be able to monitor the Turf's Program's alleged success and excesses, something that could not be completely done without the names and addresses." (20 CT 4714; see also 15 CT 3521-3525.)

It is the vindication of this important right that confers a significant benefit on the public and conclusively establishes the Union-Tribune's entitlement to fees. "'The determination that the public policy vindicated is one of constitutional stature . . . establishes the first of the . . . elements requisite to the award (*i.e.*, the relative societal importance of the public policy vindicated).'" *Woodland Hills Residents Assn.,* 23 Cal.3d at 935, quoting *Press* v. *Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318. *See also Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 229 [the fundamental constitutional stature of the rights vindicated "establish beyond question that an 'important right' has been enforced"]; *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 393–396 [finding right was important simply because legislature expressly said so].

LADWP (LADWP RB, at 12, 16-20) and the Intervening Water Districts' arguments (Districts' RB, at 25-27) that the information disclosed in this case was not similar to the disclosures they deem "important," like the report of a police shooting at issue in *PPOA,* 22 Cal.App.5th 147 or the allegations of sexual misconduct at issue in *Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250, are irrelevant and demonstrate a fundamental misunderstanding of the purpose and goal of the California Public Records Act.[5] The Intervening Water Districts argue that the

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[5] Like the Intervening Water Agencies (Districts' RB, at 24-30), the third party in *Marken* also tried to argue that the requested information was not important, but the courts rejected his claims. *Marken*, 202 Cal. App. 4th at 1274. In that case, Santa Monica high school teacher Marken claimed his misconduct was not "substantial," and attempted to characterize it as "probably on the lowest end of the spectrum" in terms of allegations of sexual harassment. *Id.* The court found this position to be unpersuasive,

disclosure of the records in this case did not impugn the turf rebate program. (Districts' RB, at 28-32 [arguing program did not act as an "injustice" and was not a "gimmick"].)

"The core purposes of the CPRA are to prevent secrecy in government and to contribute significantly to the public understanding of government activities." *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 223. The CPRA declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov't Code § 6250. Records that related to the conduct of the public's business are presumptively open. *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 336-337 ("*International Federation*"); *Sander v. State Bar* (2013) 58 Cal.4th 300, 323. As the California Supreme Court stated in *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651-52, "implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability,

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compelling disclosure of the records reflecting his violations of school policy because "Marken occupies a position of trust and responsibility as a classroom teacher, and the public has a legitimate interest in knowing whether and how the District enforces its sexual harassment policy." *Id.* at 1275. In *PPOA*, 22 Cal. App. 5th at 156, the third-party union did not contest the trial court's finding that release of the consultant's report on the shooting of an unarmed 17-year-old conferred an important benefit on the public. The union sought to deny fee recovery based on *Joshua S.*, collateral estoppel and a claim that the CPRA provided the exclusive basis for fee recovery in cases involving public records, but lost on all these issues. *Id.* at 160-166.

individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process .... Maximum disclosure of the conduct of governmental operations was to be promoted by the Act." The broad definition of public records "is designed to protect the public's need to be informed regarding the actions of government .... Indeed, secrecy is 'antithetical to a democratic system of government of the people, by the people [and] for the people.'" *Cal. State Univ., Fresno Ass'n v. Superior Court* (2001) 90 Cal. App. 4th 810, 833-824 ("*CSU Fresno Ass'n*")

Under these principles, the focus is not necessarily on the significance of the record obtained, but on protecting the ability of any member of the public to access any disclosable public record for any reason.[6] Even if it were, the trial court conclusively found that the disclosure of the records at issue *was* important: "The gravity of the task to be illuminated [by disclosure of the names and addresses] is significant -- the Turf Program's spending of at least $370 million in public agency funds." (15 CT 3520.) The trial court was following

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[6] For similar reasons, the identity of the requester or the reason the public records are requested are irrelevant. *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 832 [the focus is not on "the identity of the CPRA requestor or the use he or she intends to make of the document"]; *State Board of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1190 [CPRA "imposes no limits upon who may seek information or what he may do with it"]; Gov't Code § 6257.5 ["This chapter does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure"]. This principle necessarily means that the Water Districts' arguments about what the Union-Tribune did with the information after it received it are irrelevant.

the many California decisions emphasizing the significant public interest in records that illuminate how the government is spending public money. *E.g., International Federation,* 42 Cal.4th at 334, *citing San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955 ["[i]t is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds."]; *CSU Fresno Ass'n* 90 Cal. App. 4th at 825 [noting the public's inherent "interest in records pertaining to [the] government's conduct in managing public revenues"].

Here, the public has a strong interest in learning about the Water Agencies' conduct in providing hundreds of millions of dollars of public money to residents who replaced grass lawns with drought-resistant landscaping. Through the names and addresses, the press was able to provide the public with specific examples of large turf rebate recipients and foster a debate about the propriety and effectiveness of a $370 million government incentive program. (15 CT 3520-3525.)

The Intervening Water Agencies also make internally inconsistent arguments. At one point, they attack the Union-Tribune for supposedly not focusing on "the water agencies' inner processes, policies, or findings." (Districts' ROB, at 25.) A few pages later, they castigate the Union-Tribune for making "objections" that "go to the structure and prerequisites of the program" – that the program "failed to exclude households above a certain outcome or those that employ a public servant." (Districts' ROB, at 31.) They cannot have it both ways. Either the Union-Tribune did or did not focus on what they perceive as important.

The reality is that the records obtained by the Union-Tribune highlighted for the public the results caused by how the Water Agencies devised the rebate program – that individuals in high-income areas such as Brentwood, Malibu and Rancho Santa Fe gained $25,000, $30,000, even $70,000 in rebates.[7] This reporting reflects on the structure and prerequisites of the rebate program, which raises questions about the underlying policies pursued by the Water Agencies and their lack of oversight of public money.[8] (12 CT 2794-2824; 17 CT 3867-3872.)

The Intervening Water Districts' claims (Districts' RB, at 31-32) about the Los Angeles City Controller are not supported by the record, either. The Controller's report did criticize the turf rebate program. The Controller found that money spent for rebates on items such as high-efficiency appliances created a water savings five times higher than the turf rebate program, as the Los Angeles Times reported. (12 CT 2797-2796; 2829.) The audit found that "DWP does not adequately prioritize water conservation projects based on which are the most effective" and called the LADWP's turf rebate program "largely a gimmick – a device intended to attract attention and publicity." (12 CT 2828-2829; 15 CT 4713.)

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[7] https://www.latimes.com/local/lanow/la-me-ln-turf-rebate-data-release-with-exceptions-20160225-story.html

[8] As the Union-Tribune reported, Gordon Hess of San Diego's citizen oversight committee for water issues said at a meeting on May 18, 2015: "I looked at the restrictions on this program, and all you basically have to do is send in a request and a picture and they'll send you a check. There's very little oversight." (12 CT 2822.) It wasn't just citizens – the water agency in San Diego, the San Diego County Water Authority, also expressed concerns about the setup of the program, as did the Los Angeles Controller. (12 CT 2823.) The records obtained by the Union-Tribune contributed to and informed the public discussion about the program.

Contrary to the Intervening Water Agencies' claims (Districts' RB, at 31-32), the news media did report on the Controller's statement at a news conference that the turf rebate program "had value as a gimmick that ... probably spurred a heightened awareness." (12 CT 2794.) But the Water Agencies omit his very next remark, as reported by the Los Angeles Times: "It's the job of my office to look at return on investment." (12 CT 2794.) The obvious implication of that statement is that the Controller was concerned about the return on investment from spending tens of millions of LADWP money for turf replacement rebates, concerns which the Controller found to be heightened given LADWP's lack of transparency regarding the program. (12 CT 2830.) Given the Controller's concerns in the audit about the cost-effectiveness of the turf rebate program, the trial court was well within its broad discretion to cite to the Controller's audit as part of finding in favor of public access to the requested names and addresses of turf rebate recipients (and ruling on the attorneys' fees question that the Union-Tribune conferred a significant benefit on the public by compelling release of that information). (15 CT 3520; 20 CT 4714.)

LADWP and the Intervening Water Agencies also try to avoid fees by claiming they were merely seeking to represent the interests of residents who received the rebates and not "institutional" interests, which in their view diminished the importance of the lawsuit. (LADWP RB, at 19 ["DWP simply stood in the shoes of its members"]; Districts' RB, at 10 ["Districts intervened simply to advocate the interests of their ratepayers"], 24-25 [Water Agencies trying to distinguish their interests from an "institutional one"].) These claims are faulty for three reasons.

First, LADWP and the Intervening Water Agencies produced no evidence that these residents wanted to assert such privacy interests. No such residents intervened and asserted privacy interests throughout the litigation. Even after the Los Angeles Police Protective League informed its members that it was concerned about release of names, addresses and amounts of turf rebates, none of the 29 Los Angeles police officers sought to challenge keeping that information from becoming public. Nor did the city or county attorneys who received turf rebates. (See RT 1812-1813.)

Second, LADWP and the Intervening Water Districts are public agencies representing institutional interests and not just private ones. LADWP and the Intervening Agencies would have forestalled, if not blunted, some of the criticisms about the turf rebate programs had they succeeded in keeping secret the names, amounts, and addresses of those who received turf replacement rebates. They also would have avoided the administrative burdens of having to produce this data to the Union-Tribune and the public if the court had agreed with them.

Third, LADWP and the Intervening Water Districts try to downplay the relief they requested by claiming they were only trying to withhold names and addresses of turf rebate recipients in connections with the amounts of funding they received, while in *PPOA* the union and two officers were trying to keep secret consultant reports on police shootings. (LADWP RB, at 19-20; Districts' RB at 25-28) Contrary to their argument, in both *PPOA* and here, the parties were seeking permission to engage in *per se* withholdings of categories of public records – names, addresses in connection with amounts of money in voluntary incentive programs

here; the consultant reports in *PPOA*.[9] The Union-Tribune won an important victory for the public by defeating the agencies' efforts to weaken the CPRA and broaden privacy exemptions to include the identities of those who receive monies through government incentive programs such as the turf replacement program.

Also, CPRA disclosures are not limited to full reports about public agency misconduct, as they contend. The relevant analogous cases to the information sought here (names and addresses of those who voluntarily sought and obtained money from the government in an incentive program) would be the many California decisions detailed in the merits briefing granting disclosure of names and addresses in connection with voluntary activities or spending of public funds. *E.g.*, *CBS, Inc. v. Block*, 42 Cal.3d at 652-653 [names and address of gun permit applicants are public]; *Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 613 [names of vendors hired by the State Controller and amounts disbursed for goods and services]; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 777 [name of contractor over contractor's privacy objection in connection with financial statements used to evaluate a

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[9] LADWP argued for broad relief, claiming that "[t]his case is about whether or not the government should freely give out bits and pieces of information about regular, private citizens, at the whimsy [sic] of the government employee who happened to receive the request that day, simply because it can." (1 CT 194.) It claimed that "too many people receive government money" and there is nothing special about this rebate" (1 CT 191.) It then sought broad relief, claiming that "Code § 6254.16 Exempts All Government Agencies From Releasing Names or Addresses of Public Utility Customers." (1 CT 187.) At the TRO hearing, LADWP broadened its request and sought to keep secret the data of not just their customers but also other water agency customers whose agencies were part of MWD. (RT 11-14; 20 CT 4711, 4715.)

waste collection rate increase agreed to by city and contractor]; *CSU Fresno Ass'n v. Superior* Court, 90 Cal.App.4th at 833-835 [names of persons who purchased luxury suites from a school]; *International Federation*, 42 Cal.4th at 333-334 [names and salaries of public employees]; *Uribe v. Howie* (1971) 19 Cal.App.3d 194, 199-200 [names of pesticide operators, locations and names of field owners where pesticides were applied, chemicals used, crops to which they are applied, and related information].

Disclosure of names and salaries of public employees would not in many cases reveal misconduct by government officials. Nor would identities of parties who contract with the government and amounts of the contracts reveal any wrongdoing necessarily. Yet those records are public as part of California's policy to maximize transparency and prevent "corruption, incompetence, inefficiency, prejudice, and favoritism." *International Federation*, 42 Cal. 4th at 333. Likewise, disclosure of the names, addresses and amounts of rebates disbursed by MWD conferred a significant benefit on the public because it contributed to the discussion and debate about the utility and effectiveness of MWD's $370 million turf replacement incentive program.

Finally, the CPRA does not require a demonstration of "injustice" to justify the disclosure of information, a subjective standard that would be unworkable in practice. *See Connell*, 56 Cal.App.4th at 617 ["While [a state officer] may assert the public has no interest in these records because she is performing her task properly..., this is akin to asking that we allow her 'to exercise absolute discretion, shielded from public accountability' in the operations of her office.... However, the public interest demands the ability to verify."] Instead, by ensuring access to all public

information, except for the narrowly construed exemptions, it ensures accountability and public verification. *Id.*

Did the turf rebate program provide an undue benefit to wealthy individuals, corporations, golf courses, and public agencies? Did the design of the program work as an injustice to lower income people by giving government benefits without regard to ability to pay for turf removal? Was there favoritism in the way the program was put together or administered? Did the City Attorney's receipt of funds from the program factor into his office's decision to initiate this reverse-CPRA lawsuit or create a conflict of interest because he was listed as lead counsel without disclosing his interest to the court? Thanks to the Union-Tribune's advocacy, the public has information about the program which will inform the debate regarding those questions.

### C. The Arguments Against Fees Are An Improper Reargument of the Trial Court's Unchallenged Ruling on the Merits.

LADWP and the Intervening Water Districts' arguments are an improper "reargument of the substantive issues on which they lost in the trial court and which are not reviewable by this court, because [the agency] failed to appeal." *Slayton v. Pomona Unified School Dist.*, 161 Cal.App.3d at 547. Unless the merits have been properly appealed, they may not be challenged on an appeal from the fee award. *See Building a Better Redondo Beach, Inc.,* 203 Cal.App.4th 852, 868 [an appeal from a fee award does not entitle the appellant to challenge an unappealed merits order]; *Center for Biological Diversity v. Marina Point Dev. Co.* (9th Cir 2009) 560 F.3d 903, 915 [referencing numerous decisions in nearly all circuits

and the United States Supreme Court to reach a finding that the "weight of authority strongly indicates" that "the court will not, and cannot, review the merits of the underlying dispute for the purpose of determining whether an award of attorneys fees was proper"]; *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 223 [review of order awarding fees does not resurrect a stale appeal of the judgment]; *Sokolow v. County of San Mateo* (1989) 213 Cal.App.d 231, 246 [fee award must be consistent with the unappealed merits ruling].

Appellants did not appeal the trial court's ruling on the merits, and are now bound by those findings. Under this principle, nearly all of their remaining arguments are improper.

For example, the Intervening Water Districts argue that there was no need to "trample individual privacy to discovery the structure and results of the turf program" because "it could have and should have sought data about the design of the program directly from the agencies, without exposing the residential data of private citizens." (Districts' RB, at 25-26.) LADWP similarly argues that the names and addresses were not necessary for monitoring the program and that sufficient information about the program was already available prior to the release of information secured by the Union-Tribune's intervention. (LADWP RB, at 15-16.) It also argues that it never objected to the disclosure of "substantive information."

Both agencies argue that they were merely advocating for the privacy rights of their customers. The Intervening Water Districts argue that the information demanded by the Union-Tribune "has no connection to the inner workings of the municipal water districts or even the policies, rules, parameters, or intentions behind their turf

replacement program." (Districts' RB, at 28.) The Intervening Water Districts argue that disclosure of information about who participated in the turf program and their residential address did not serve the public interest. (Districts' RB, at 35.)

All of these claims are barred. These arguments were raised by Appellants in Opposition to disclosure of the names and addresses. The trial court squarely rejected them, finding that disclosure of the identities of the recipients and the project addresses were absolutely necessary to serve the public's interest in monitoring the spending of public funds and the effectiveness of the turf rebate replacement program – an interest long recognized and documented in case law. (15 CT 3519-3525.)

First, the trial court's decision also confirms that the case was not merely about individuals and their home addresses. The addresses at issue were the project address. (RT 928.) The trial court also rejected Appellants' privacy arguments as to corporate, public agency, and business applicants, finding that these "applicants to the Turf Program had no constitutional privacy right" and "no reasonable expectation of privacy." (15 CT 3515.)

Second, the court found that the rebate recipients' expectation of privacy was diminished. "Rebate recipients stand in the same position as other private parties doing business with the government. They voluntarily submitted their name and address to MWD in order to obtain a rebate….As a result, they had a reduced expectation of privacy in their names and addresses, and this reduced expectation…." (15 CT 3516.) It also found that the disclosure of "[p]rogram recipient names and addresses is not a serious privacy invasion." (15 CT 3518.)

Third, the trial court confirmed that much of the information made available prior to the decision on the merits was only released because of the Union-Tribune's advocacy to narrow the TRO. (15 CT 3520 ["MWD's disclosure of names and addresses from other member agencies shows that private citizens received up to $70,000 in rebate money. The public only learned of these amounts when the information became public after the court limited the TRO to DWP and the Districts"].)

Fourth, the trial court resoundingly rejected the claim made by LADWP that "the names and addresses do not shed any light on MWD's action in administering the Turf Program" and that "considerable information already has been provided." (15 CT 3522.)

> While some issues concerning the Program can be assessed based on the current state of information, the public cannot fully evaluate whether the Program was fairly administered without inefficiency or favoritism without disclosure of project addresses and names. Project addresses enable the public to verify if the money was spent for the Program purposes and names will enable the Union to verify whether preferential treatment or double-dipping occurred for individual participants.

(15 CT 3525.) Thus, LADWP's argument that it never objected to the disclosure of any substantive information is contradicted by the trial court's decision which found that the disclosure of the identities of rebate recipients and project addresses was exactly the type of substantive information that needed to be disclosed, over the very clear objections of LADWP.

Fifth, LADWP argues that their intervention was necessary because the rebate recipients did not have notice of the request. (LADWP RB, at 20-21.) They also argued that notice was necessary in

the trial court below. (15 CT 3496 [trial court summarizing LADWP's argument: "MWD's intended disclosure of DWP's customer's names and addresses violates these laws because MWD did not provide any notice to DWP's customers regarding the potential or intended disclosure of their information at the time of application to the program."].)

The trial court also explained, "DWP also wrongly characterizes [*City of Los Angeles v. Superior Court* (*Cynthia Anderson-Barker*), ("*Anderson*") (2015) 242 Cal.App.4th 475,] as a case requiring "notice as a requisite to disclosure of records." DWP Reply at 2. *Anderson* did not require notice; it held that the owner names and addresses were statutorily protected and could not be disclosed without the owner's consent. Therefore, Union is correct in stating that no CPRA case requires notice before disclosure." (15 CT 3517, n. 23.)[10]

LADWP and the Intervening Water Districts, having argued and lost on each of these points, now rely on the same arguments to undermine the trial court's fee award. Under the authorities set out above, they cannot do so.

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[10] LADWP's extensive claims about notice in the fee briefing (LADWP RB, at 10, 20-21) are unavailing, as no California case has held that notice is a prerequisite for public disclosure. In fact, Government Code section 6253.3 prohibits a third party from controlling disclosure of public records, stating that a "state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter." The California Supreme Court also has rejected any notice prerequisite, finding that applying privacy interests on a case-by-case basis for each individual employee whose salary would be disclosed "would reverse the presumption of openness in the Act." *International Federation*, 42 Cal.4th at 336-337.

### D. The Union-Tribune Was The Successful Party Against LADWP, The Intervening Water Districts, And MWD.

The terms "successful party" (used in CCP §1021.5) and "prevailing party" (used in most other fee-shifting statutes) are synonymous. *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 610; *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th at 570. Courts have taken a "broad, pragmatic view" of what constitutes a successful party. Generally, a party is successful under §1021.5 if it achieves some relief from the benchmark conditions challenged in the lawsuit. *Folsom v. Butte County Ass'n of Gov'ts* (1982) 32 Cal.3d 668, 687.

LADWP argues that the Union-Tribune conflates the requirements for a CPRA fee award, which are awarded whenever a CPRA action is successful, with the requirements of Section 1021.5, which LADWP claims applies only if the litigation meets a set of heightened requirements, including furthering the public interest. However, this Court's decision in *PPOA* undermines LADWP's argument. In that case, this Court looked to the standards set out in the CPRA and case law interpreting it to determine that in a reverse-CPRA case, if a requester succeeds in securing the records at issue for disclosure, it is a successful party. 22 Cal.App.5th at 168. "Plaintiff has prevailed within the meaning of the PRA when he or she files an action that 'results in defendant releasing a copy of a previously withheld document.'" *Id.*, quoting *Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 898. In short, if a public record is disclosed only because a plaintiff filed a suit to obtain it, the plaintiff has prevailed." *PPOA,* 22 Cal.App.5th at 169, citing *Los Angeles Times Communications v. Alameda Corridor Transp. Auth.* (2001)

88 Cal.App.4th 1381, 1391. Thus, the measure of success in disclosure of records that is standard in CPRA cases is also the standard for success in reverse-CPRA cases, according to this Court.

Nor can there be any real question that the Union-Tribune "prevailed" in this case. The Union-Tribune intervened for the express purpose of ensuring that the records that LADWP and the Intervening Water Districts wanted to keep secret – the names of rebate recipients and installation addresses – were disclosed. The Court ruled in the Union-Tribune's favor entirely, disclosing all of the records that the Water Districts sought to keep secret. (16 CT 3622.)

LADWP argues that the Union-Tribune should not receive compensation for the time spent on "unsuccessful and unnecessary collusion claims." While the Water Districts repeatedly refer to the catchy reference to "collusion claims," the claims were really about LADWP's standing. As the trial court explained, "I would have dismissed their lawsuit if they were a stalking horse for MWD because you can't file that [declaratory] relief claim if you are MWD or a [stalking] horse for MWD." (RT 2125.)

While the trial court ultimately did not agree with the Union-Tribune on its standing arguments, as the Union-Tribune explained in its opening brief, the denial of fees for unsuccessful theories is not a special circumstance to warrant the denial of fees. (*See* UT AOB/RB at III.D.) "A party need not prevail on every claim presented in an action in order to be considered a successful party within the meaning of the section." *Id.* at 846. LADWP responds, claiming that the court should deny fees for unsuccessful legal theories that "address discrete unrelated claims, are pursued in bad faith, or…are such that a reasonably competent lawyer would not

have pursued them." (LADWP RB, at 22.) Yet LADWP has made no showing to overcome the trial court's finding that such theories were reasonable.

Indeed, the trial court sided with the Union-Tribune, specifically permitting discovery into those issues over the objections of both MWD and LADWP. In response to similar claims in the fee motion, the court reiterated that "[a]lthough Intervenors are correct that Union made the case more complicated than necessary with unfounded allegations of collusion, that advocacy ensured the result of the case." (20 CT 4715-4716.) "Union was entitled to make its collusion allegation and take discovery, even if it did not bear fruit. Though not the purported architects, Intervenor Utilities would have benefited from any collusion between DWP and MWD to stop production of names and addresses." *Id.* The court also noted that "MWD unnecessarily delayed releasing the requested information to Union[-Tribune] because of the dispute with DWP, and attempted to redact the information to pacify DWP." *Id.*

Thus, the court found the questions relevant, although not ultimately persuasive, undermining any claim that the arguments were unrelated or that a competent lawyer would not have pursued them. Moreover, the trial court did specifically consider this claim in relation the Union-Tribune's request for a multiplier and cited it to support its denial of a multiplier. [20 CT 4719 ["Union was not entirely successful and its failures on the collusion, *Filarsky*, and standing issues come into play in considering a multiplier.] The same factors may not be addressed to justify both the lodestar and a lodestar adjustment. See *Ketchum v Moses* (2001) 24 Cal.4th 1122, 1138; *Building a Better Redondo Beach,* 203 Cal.App.4th 852, 874.

Nor did the loss on standing result in any diminished success on the merits. The ultimate goal of the litigation was to secure the release of the names of the turf rebate recipients and the installation addresses, and to prevent LADWP and the Water Districts from expanding the basis on which access to public records could be denied. On that goal, the Union-Tribune prevailed. How it prevailed is not a bases for rejecting its fee claim. "A lawsuit's ultimate purpose is to achieve actual relief from an opponent….if a party reaches the 'sought-after destination,' then the party 'prevails' regardless of the 'route taken.'" *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th at 571. *See also Friends of the Trails,* 78 Cal.App.4th at 835-836, *quoting Folsom v. Butte County Ass'n of Gov'ts.,* 32 Cal.3d 668, 685-68 ["The critical fact is the impact of the action, not the manner of its resolution. If the impact has been the 'enforcement of an important right affecting the public interest' and a consequent conferral of a 'significant benefit on the general public or a large class of persons' a section 1021.5 award is not barred because the case was won on a preliminary issue…"].

Similarly, LADWP's standard would require a clairvoyance that most attorneys simply do not possess. This was recognized in *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1303. In response to similar arguments, the court recognized "[l]itigation often involves a succession of attacks upon an opponent's case; indeed, the final ground of resolution may only become clear after a series of unsuccessful attacks. Compensation is ordinarily warranted even for unsuccessful forays."

The Intervening Water Districts' argument that they should not be liable for fees because they were more like amicus than a

party is also unpersuasive and is undermined by both case law and the facts of this case.

The Intervening Water Districts argue that they were not in a position to fulfill the Union-Tribune's request. But they are prohibited from making this argument on appeal. The issue was not raised in the trial court in opposition to the fee motion, and therefore, is waived on appeal. Moreover, it was the claim that they did own the records that led the trial court to rule that they had standing, despite the otherwise applicable rule that a party cannot advocate the privacy rights of third parties. (15 CT 3506-3507.) The Intervening Water Districts actually confirm this in their brief (Districts' RB, at 25 [admitting that its interest in the litigation was "the protection of the personal data of their rate payers as one of several custodians of that data"].) This admission undermines the argument that they had no control of the records.

Further, the argument has no bearing on whether the Intervening Water Districts were "opposing parties." Even if they could not have fulfilled the request, which has no factual support in the record, their intervention in the lawsuit certainly obstructed disclosure of the records at issue.

At the initial *ex parte* hearing in the case, LADWP attempted to obstruct disclosure of all records, not just those related to its own customers. (RT 11.) The court correctly found that LADWP did not have standing to argue for purported privacy rights of customers of other agencies. (RT 11.) MWD was then forced to disclose all records for non-LADWP customers. (RT 11.) To obstruct that disclosure, the Intervening Water Districts specifically intervened in a series of *ex partes* to stop the disclosure. (3 CT 716; 4 CT 900.) Had they not intentionally appeared and intervened – knowing the

full consequences of their actions – the data regarding their customers would have been released long before the end of the case and would not have been an issue. Therefore, even if they were not in a position to disclose, they were certainly in a position to decide to resist disclosure. Having chosen to do so, and sorely losing in its arguments on the merits, the Intervening Water Districts cannot claim they were merely "amici" after the bill comes due.

The only case that the Intervening Water Districts cite to support its claim that they were "like amicus" is *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169. But the question presented in that case appears to have arisen from a unique set of circumstances and is entirely different than the question posed here.

In *Connerly*, the real parties were originally *amicus curiae*, and only later, and with the encouragement of the plaintiff and the court, were named as real parties to advocate for the adverse position, which would have otherwise gone unrepresented. *Id.* at 1173-1174. The plaintiff in *Connerly* argued that the advocacy group had become a real party in interest and that real parties can be held be liable for fees under Section 1021.5. *Id.* at 1178. The court recognized that "bona fide real parties in interest with a direct interest in the litigation that differed from the general public" can be liable for Section 1021.5 fees, but found that under the unique circumstances presented, the advocacy group did not have anything greater that "a particular ideological or policy focus that motivates them to participate in certain litigation, notwithstanding the lack of a direct interest in the litigation's outcome" and was "no different in kind from that of the typical amicus curiae and no different in substance from like-minded members of the general public." *Id.* at 1178-1179.

Here, in direct contrast to *Connerly*, Appellants' advocated that they did have a direct interest in the litigation because they participated in the program, urged their customers to participate in the program, and were joint owners of the data in arguing that they had standing. (15 CT 3506).[11] They may not now deviate from this position simply to avoid fees.

Moreover, the distinction in *Connerly* between real parties and amici is completely irrelevant to the Intervening Water Districts, who are neither amici or real parties, bona fide or otherwise. Instead, they were plaintiffs. The Intervening Water Districts cite no case in which Plaintiffs were found to be "like amici," because no such case appears to exist.

One of the reasons for the Court's decision in *Connerly* was that there was a government agency who was also liable so there was no reason to saddle a private advocacy group with fees. *Connerly,* 37 Cal.4th at 1182 ["[g]iven the existence of state defendants, and their uncontroverted liability for attorney fees, making the California Business Council also liable for those fees is not necessary to fulfill that purpose."] Here, Appellants are public agencies, not private advocacy groups, and are the proper parties to pay fees given their conduct in resisting disclosure of records that are public.

Similarly, in *Friends of the Trails,* 78 Cal.App.4th at 818-819, members of the public filed a lawsuit to maintain public access to a road on private property adjacent to a canal and to quiet title to the public easement, after the property owner put up gates blocking such

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[11] While the trial court's decision on the merits merely references LADWP's ownership interest, the trial court's decision initially makes clear that it only planned to refer to LADWP as the moving party, unless necessary to distinguish the Intervening Water Districts. (15 CT 3495, fn. 1.)

access. The irrigation district was a named defendant and joined the property owner in defending the public access closure, presumably because it was opposed to sharing its easement with the public. *Id.* at 826–827. After the plaintiffs prevailed on the public access issue, the trial court awarded attorney fees against both the landowner and the irrigation district. *Id.* at 832. NID then argued against fees, claiming that it was not an opposing party and that the plaintiffs were not a "successful" party as to the district because the removal of the gate affected the landowner's property interest, not NID's. *Id.* at 835. The Court of Appeal, in upholding the attorney fee award, stressed NID's active role in the litigation – no different than the Intervening Water Districts' active role opposing disclosure here. *Id.* at 836.

Finally, in *Nestande v. Watson* (2003) 111 Cal.App.4th 232, 241, the court held that the county was not an "opposing party" to the plaintiff because it "never took any legal position in the litigation that was adverse to" the prevailing party and "did not oppose…on the merits of any legal issue." Conversely, the Intervening Water Districts joined the lawsuit here for the purpose of opposing the merits of disclosure, which was advocated by the Union-Tribune.

### E. The Motives of LADWP and the Intervening Water Districts Are Not Special Circumstances That Justify The Denial of Section 1021.5 Fees.

Once the Section 1021.5 criteria is established, fees may be denied only if the opponent can show that "special circumstances" would render an award "unjust." *See, e.g., Serrano v. Unruh (Serrano IV)* (1982) 32 Cal.3d 621, 632; *Lyons v. Chinese Hosp. Ass'n* (2006) 136 Cal.App.4th 1331, 1344. The Water Districts argue that they should not be liable for fees, asserting they were merely

advocating the privacy concerns of its own ratepayers. "Without [ ] intervention, the constitutionally protected privacy rights of District's specific set of ratepayers would have remained unrepresented." (District's RB, at 23; *see also* LADWP RB, at 13.) This argument fails for a number of reasons.

First, the alleged "good faith" of a party is not a special circumstance that can reduce a fee award. *San Bernardino Valley Audubon Soc'y v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 754 ["good faith is irrelevant"]; *Wilson v. San Luis Obispo County Democratic Central Committee* (2011) 192 Cal.App.4th 918, 926 ["that respondent may have been acting in good faith is irrelevant"]; *Schmid v. Lovette* (1984) 154 Cal.App.3d 466, 474-475 [there is no good faith exception to either the state private attorney general statute or its federal counterpart].) Because the "purpose of the award is not simply to punish the defendants but to encourage individuals injured by discrimination to seek judicial relief, and thus secure enforcement of the Act,...[t]rial courts have uniformly rejected the suggestion that they should decline to award attorney's fees because the defendant relied upon state law." (*Schmid v. Lovette* (1984) 154 Cal.App.3d 466, 474-475, *quoting Rosenfeld v. Southern Pacific Co* (9th Cir. 1975) 519 F.2d 527, 530.) This was confirmed by this Court in *PPOA*, 22 Cal.App.5th at 164. "Regardless of the officers' personal motivation in filing a reverse-PRA suit, in so doing, the officers and the PPOA plainly attempted to restrict the public's right of access to police records." Here, regardless of the motivations of LADWP and the Intervening Water Districts, they plainly attempted to restrict the public's rights of access.

It is also not accurate to say that the Appellants were merely advocating for their customer's privacy interests. Instead, they were

arguing that their customers' right of privacy outweighed the public's rights under the CPRA. Based on this claim, the Appellants argued that the records sought by the Union-Tribune and others should not be produced. This was a direct attempt to undermine the disclosure requirements of the CPRA. Had they been successful it would have constituted an expansion of privacy which would have directly undermined future disclosures of records reflecting information voluntarily submitted by individuals or entities to obtain taxpayer money. It was this interest that the Appellants obstructed and that the Union-Tribune protected.[12]

For similar reasons, this Court ruled against the officers in *PPOA*, 22 Cal.App.5th at 165. "Although section 1021.5 was not intended to impose fees on an individual seeking a judgment that determined only his or her private rights, here, a public organization sought a judgment that determined the rights of all its members. Consequently, Joshua S.'s narrow limitation on the imposition of section 1021.5 fees is inapplicable here." *Id.* (citations omitted).

While the Intervening Water Districts claim that a fee award would deter its advocacy in the future, this claim is speculative, at best. (Districts' RB, at 34.) The possibility of a fee award certainly did not deter them here. Moreover, the prospect of fee recovery does not deter agencies from denying access to public records under the CPRA, even though a fee award is mandatory in those circumstances. Here, for example, LADWP argued that its own policies mandated that the information at issue here be kept confidential. Thus, if the Union-Tribune had filed its CPRA request with LADWP, who

[12] Moreover, in addition to their alleged altruistic motives, shielding the information from disclosure would have also benefited the agencies by avoiding the scrutiny made possible by disclosure.

advocated it was a co-custodian of the information at issue, LADWP would have denied the request, despite the lawsuit and fee award that would follow.

Even if the concern were well founded, it ignores that the Appellants' arguments were ultimately against, not for, the public interest. The Intervening Water Districts are not the first public agencies to plead for a discount off fair market value of attorneys' fees (or avoid an award altogether) based on their status as government entities. Allowing such reductions, the court has warned, "would also incentivize governmental entities to negligently or deliberately run up a claimant's attorneys' fees, without any concern for consequences." *Rogel v. Lynwood Redev. Agency* (2011) 194 Cal.App.4th 1319, 1332.

## III. The Union-Tribune May Contest Appellants' Standing, Which Was Based on *Marken*, At Any Time.

The Intervening Water District's argue that the question about their lack of standing is moot and a "textbook example of a nonjusticiable issue." (Districts' RB, at 15.) They also argue that the Union-Tribune cannot request that this Court review *Marken*. (Districts' RB, at 14.) These arguments fail because whether LADWP and the Intervening Water Districts should have been permitted to bring suit based on *Marken* goes directly to the public agencies' lack of standing and underscores the need to ensure that requesters who compel disclosure of public records are awarded their attorneys' fees in reverse-CPRA actions, should this Court continue to permit them.

### A. The Supreme Court Has Stated That Marken Is Subject To Challenge.

In claiming that this Court may not review the propriety of reverse-CPRA actions brought by public agencies against another public agency (Districts' RB, at 14-19), the Intervening Water Districts ignore that the California Supreme Court recognized two years after *Marken,* 202 Cal.App.4th 1250, in *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 66, that the issue of whether the CPRA provides the "exclusive means" for litigating whether public records must be disclosed "remains open, and the Times can reassert it in any future proceedings."

This case illustrates the hollowing out of the protections for public records requesters and represents a further diminishing of the protections announced in *Filarsky,* 28 Cal.4th at 423. As explained below, allowing public agencies to sue another public agency to withhold public records upsets the protections and incentives designed to protect public records requesters by taking away control of the decision whether to litigate, encouraging and fostering delays of disclosure of public records to times when they are not newsworthy, and putting into doubt requesters' ability to recover attorneys' fees in cases where they have no financial incentive to bring litigation.

First, requesters are supposed to control the decision of whether to litigate disclosure of public records. As the Supreme Court stated, Sections 6258 and 6259 provide the "exclusive procedure in these circumstances for litigating disputes regarding a person's right to obtain disclosure of public records under the Act." *Filarsky*, 28 Cal.4th at 433. By allowing public agencies to sue another public agency to adjudicate a requester's right to obtain

public records under the Act, the trial court took away the requester's control over that decision. Once the Union-Tribune appeared at the TRO hearing to defend its rights to obtain the turf replacement rebate records for the San Diego water agency in its coverage territory, the Union-Tribune was stuck defending disclosure of records as to other water agencies that kept intervening to seek court approval for withholding public records (e.g., Foothill Municipal Water District, Upper San Gabriel Valley Municipal Water District, West Basin Municipal Water District). The Union-Tribune essentially was "required to defend lawsuits they otherwise might not initiate," which was one of the rationales cited by the California Supreme Court for prohibiting public agencies from bringing lawsuits seeking declarations that they do not have to disclose public records. *Filarsky*, 28 Cal.4th at 434.[13]

Second, the coordination between the Water Districts throughout the spring and summer of 2015 and the various petitions for TROs and requests for injunctions filed by the Water Districts thereafter impermissibly delayed disclosure of many turf replacement rebate records to the end of February 2016. In *Filarsky*, 28 Cal.4th at 429, the Supreme Court warned against allowing procedures that end up "delaying disclosure for a significant

[13] The Supreme Court concluded, "Permitting a public agency to circumvent the established special statutory procedure by filing an ordinary declaratory relief action against a person who has not yet initiated litigation 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, thus frustrating 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." *Filarsky*, 28 Cal.4th at 423.

period of time." The Court also cautioned about "thwarting the clear intent of the Legislature that the matter be resolved expeditiously." *Id.* *See also Powers v. City of Richmond* (1995) 10 Cal.4th 85, 111 (George, J. concurring) [recognizing importance of disclosing public information on a timely basis and stopping agencies from frustrating the intent of disclosure laws with delays to times when "the story was no longer newsworthy"]; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1211 [delaying public access is inconsistent "utilitarian values"]; *Elrod v. Burns* (1976) 427 U.S. 347, 373 ["The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"]; *Paradise Hills v. Procel* (1991) 235 Cal.App.3d 1528, 1538 ["deprivation of first amendment rights for even minimal periods constitutes irreparable harm"].)

Here, the record shows that MWD delayed 79 days (15 CT 3496-3498, 3502-3504, 3510-3511; 20 CT 4710) to enable its member agency, LADWP, to bring a lawsuit seeking to enjoin disclosure of the names, addresses and amounts given to participants in the turf replacement rebate program that MWD is barred from filing under *Filarsky*, 28 Cal.4th at 423, and *City of Santa Rosa v. Press Democrat* (1986) 187 Cal.App.3d 1315, 1320 [rejecting public agency's attempt to file lawsuit seeking declaration it did not have to disclose records, finding "there is *no* provision for action by the government agency or for any action to *prevent* disclosure"]. The record also shows that MWD never intended to disclose key requested information – the names of turf replacement rebate program recipients – as MWD admitted in discovery. (8 CT 1853-1856.)

Even worse, Marcia Scully, the general counsel for MWD, sent

a memo to the MWD Board of Directors and to managers of water districts within MWD – including LADWP and the Intervening Water Districts – that stated, "Metropolitan is working with LADWP to provide them with the opportunity to seek a court ruling that Metropolitan is not legally required to provide the names and specific street addresses of persons receiving rebates for turf removal." (9 CT 1919-1920.)[14] The parties claim that the trial court called their actions "proper", but in fact, while stating there was "no collusion," the trial court did find that "MWD unnecessarily delayed releasing the requested information to Union-[Tribune] because of the dispute with DWP, and attempted to redact the information to pacify DWP." (20 CT 4715.)

The record thus establishes the 79-day delay[15] caused by

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[14] While LADWP and MWD claim they are separate agencies, MWD later claimed that another damaging memo sent to LADWP's representatives and others was covered by the attorney-client privilege. Months after they were introduced by the Union-Tribune and read into the record during an *ex parte* (RF 306-308; 5 CT 1095-1096, 1122-123), one of MWD's board members submitted a declaration verifying the authenticity of the previously received and introduced memo. (8 CT 1804.) Two months later, MWD objected that the memo was "attorney-client" privileged. (15 CT 3431.) Despite it previously failing to object and that it was clearly not privileged, the Court refused to hear argument from the Union-Tribune, and excluded the memo, but made no ruling as to the remaining references to the memo in the record. Those remain properly in the record and are what the Union-Tribune referred to in its Opening Brief and in this brief. (See further UT RB/AOB, at 24, fn. 6.)

[15] In *Marken*, 202 Cal. App. 4th at 1268 n.14, the court expressed serious concern about whether a 40-day delay in disclosure of public records complied with the CPRA. Similarly in *PPOA*, 22 Cal.App.4th at 152 n.3, the court raised questions about whether the City's purposeful delay to enable the union and two officers to file a reverse-CPRA lawsuit complied with the CPRA.

LADWP and MWD before the lawsuit in the spring and summer of 2015 and then the various proceedings tying up disclosure for another almost seven months. These postponements of the public's access rights were only possible because of the availability of the legal process created by the Court allowing LADWP to demand that MWD not produce public records in response to the Union-Tribune's CPRA requests. The process went on for so long that the records ended up being disclosed only after the drought had begun to abate at the end of February 2016 – making the release less newsworthy. *See Powers*, 10 Cal.4th at 111. As the Supreme Court held in *Filarsky*, the delays caused by allowing agencies to sue regarding an agency's obligation to produce public records upset the balance of protections and incentives that the Legislature devised in the CPRA.

Third, the Supreme Court in *Filarsky* warned that allowing public agencies to sue to stop disclosure of records would interfere with the requester's right of access because, under such a procedure, "the individual would not recoup attorney fees if he or she succeeded," and therefore permitting such litigation would "eliminate important incentives and protections for individuals requesting public records." *Id*. at 28 Cal.4th at 429. In *Marken*, the Court nevertheless posited in *dicta* that a requester need not recover attorneys' fees in a reverse-CPRA case because "the requesting party may elect to allow the agency itself to defend its decision." *Marken*, 202 Cal. App. 4th at 1268.

History has not borne out that claim. In none of the appellate cases after *Marken* did an agency or third party establish that the agency was adequately defending a public records requester's

disclosure interests. For example, in *Long Beach Police Officers Assoc. v. City of Long Beach* (2014) 59 Cal.4th 59, 66-67, the City of Long Beach sided with the union in trying to keep secret names of officers involved in shootings. It was left to the intervening requester to argue that the names in connection with shootings are matters of public record in California. *Id.* at 74-75. Along the same lines, in *PPOA,* 22 Cal.App.5th at 154-155, the Court found that the City, the union and police officers had called for over-redacting parts of a consultant's report that were critical of the City's investigation. It was left to the requesters to argue against these redactions and to secure for the public access to the portions of the report that shed light on shortcomings by the City.

Similarly, here, the trial court found that MWD did not adequately defend the Union-Tribune's rights of access to the requested records. "It was not clear at the beginning of the case that MWD intended to disclose the Turf Program names and addresses," the trial court stated in its ruling on the attorneys' fees. (20 CT 4715.) "MWD also had a less compelling stake than Union[-Tribune] in ensuring that all permissible information was released to the public." (20 CT 4715.) The trial court also noted that MWD could hardly be seen as representing the Union-Tribune's interests when it "unnecessarily delayed releasing the requested information to Union[-Tribune] because of the dispute with DWP, and attempted to redact the information to pacify DWP." (20 CT 4715.) The trial court recognized that the Union-Tribune's "tenacious advocacy … ensured all of the relevant information was released." (20 CT 4715.)

The experience here and in the other cases shows that the *Marken* Court was mistaken in thinking that public agencies would be able to adequately represent the interests of public records

requesters in litigation about an agency's disclosure obligations. If the Court is going to allow these reverse-CPRA cases to continue, the Court should make clear that requesters can recover attorneys' fees in cases about access to public records, regardless of how the case is denominated or who has beaten whom to the courthouse doors.

The Court also should recognize that requesters are not subject to a different standard for obtaining attorneys' fees depending on whether the requester filed a CPRA lawsuit or the issue came before the court some other way (*e.g.*, protective order, reverse-CPRA case). There is no principled reason to require mandatory recovery of reasonable attorneys' fees in a CPRA case but then, as LADWP (LADWP RB, at 11) and Intervening Water Districts (Districts' RB, at 33) contend, to require a higher or discretionary standard for other cases where the same result was obtained. Regardless of how the issue came before the court, if a requester succeeds in compelling access to a withheld public record, the requester is supposed to recover attorneys' fees as part of furthering California's "objective of increasing freedom of information." *Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 902. Allowing public agencies to avoid attorneys' fees by claiming that records releases are not "significant" or "important" would reverse this important protection conferred by the Legislature as part of protecting requesters' rights of access to public records.

Finally, despite the claim in *Marken* that this judicially created procedure was needed to protect the rights of third parties to assert exemptions to the CPRA, these reverse-CPRA cases have not resulted in more withholdings or more redactions. The Water Districts cannot point to a single appellate case in the seven years since *Marken* when a public agency or third party succeeded in stopping

public disclosure through a reverse-CPRA lawsuit. They did not stop the teacher's sexual harassment disciplinary records from coming out in *Marken*, 202 Cal.App.4th at 1275-1276. They did not succeed in keeping confidential the names of Long Beach officers involved in shootings during a five-year period in *Long Beach Police Officers Assoc.*, 59 Cal.App.4th at 74-75. They did not prevent release of the consultant's report on the shooting of a teenager in *PPOA*, 22 Cal.App.5th at 154-155. They did not block release of the emails on Sacramento Mayor Kevin Johnson's controversial takeover of the National Conference of Black Mayors in *National Conference of Black Mayors v. Chico Community Publishing, Inc.*, (2018) 25 Cal.App.5th 570. They did not convince the appellate courts that public agencies do not have to release SB 1421 police misconduct records from before January 1, 2019. *Walnut Creek Police Officers Assoc. v. City of Walnut Creek* (2019) 33 Cal.App.5th 940, 941-942. They did not prevail in their privacy claims about the turf replacement rebate records in this case.[16]

What the third parties and public agencies have done is delayed newsworthy information in dozens of cases for many months

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[16] It is also untrue that third parties lack protections without the right to bring reverse-CPRA actions. They have the ability to sue a public agency for invasion of privacy or invasion of their rights in the event that an agency wrongfully releases records that are not public. *See City of Santa Rosa*, 187 Cal.App.3d at 1322-1323 (rejecting claim that petitioner would not have a remedy without a reverse-CPRA lawsuit, and finding that claim undermined by the availability of an invasion of privacy tort suit for damages if disclosure by a public agency truly violated privacy rights). The course of the past seven years demonstrates that there is little reason to presume that agencies are likely to wrongfully release records that are by law confidential. While the government is chastised often for too much secrecy, it has seldom been argued that government discloses too much information to the public.

at a time, and run up the litigation costs and expenses for public records requesters who now have to fight off lawsuits from third parties and even public agencies to secure access to public records. The Legislature never endorsed this aberrant process in any provision in California law providing that parties other than requesters could seek judicial relief regarding a requester's right to obtain or inspect public records under the CPRA. *See Filarsky*, 28 Cal.4th at 433 ["We conclude that in enacting sections 6258 and 6259, the Legislature specified the exclusive procedure in these circumstances for litigating disputes regarding a person's right to obtain disclosure of public records under the Act"].

In the absence of action by the Legislature, the Court never should have engaged in judicially legislating[17] a procedure that upsets the unique CPRA statutory scheme that the Legislature created to support requesters and ensure maximum public access to public records. This Court has an opportunity to fix the problem by recognizing that the trial court should not have allowed LADWP and

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[17] *E.g.*, *Los Angeles County Metropolitan Transp. Auth. v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1113 ["Our role here is to interpret the statute[s] [as they are written], not to establish policy. The latter role is for the Legislature"], *quoting Carrisales v. Dep't of Corrections* (1999) 21 Cal.4th 1132, 1140; *California Teachers Ass'n v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632-633 [stating that "[i]t cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. 'This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed'"], *quoting Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal.361, 365; *Thomas v. City of Richmond* (1995) 9 Cal.4th 1154, 1165 ["It is not for us to substitute our public policy judgment for that of the Legislature"].

the Intervening Water Districts to sue their fellow agency, MWD, to stop disclosure of the requested records.

LADWP's claims that a bill passed in Sacramento last year supports the presumption that the Legislature agrees with *Marken* are incorrect. (LADWP RB, at 27, fn. 3.) In SB 1244, the Legislature did not amend California law to allow for reverse-CPRA actions. Senator Wieckowski introduced a bill to protect records requesters in completely different circumstances where records are released by an agency inadvertently, and an agency sues for their return. (*See* Assembly Judiciary Committee Analysis (05/07/18, p.4), available at http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1244.) The Legislature sought to clarify that the CPRA does not permit an agency to ever seek fees under the CPRA. (*Id.*, p. 1.) After concerns were raised about some of the language, the Legislature amended the bill to make clear it was not precluding requesters from recovering fees in other circumstances where requesters had successfully compelled disclosure of records:

> The bill in print arguably creates an ambiguity that could be interpreted to impose a limitation on public access, which is contrary to the stated intent of the bill (to clarify that the Legislature intends for the CPRA's mandatory fee-shifting provision to protect a "requester" who successfully litigates to further the public's right of access, regardless of the requester's position on the case caption). The wording of the bill in print could be interpreted to limit the public's right of access in the so-called "reverse-CPRA action," a judicial creation that has allowed a third party to pursue an action to enjoin the disclosure of public records. The propriety of these actions remains an open question. To ensure that the bill is properly interpreted to further the public's right of access, the author has agreed to the following clarifying amendment, saying that "Nothing in this section shall be construed to limit a requester's right to obtain fees pursuant to this section or any other law."

*Id.* The same analysis notes that related legislation – SB 657 (Bates, 2017-2018) – would have specifically authorized a third party to file a reverse-CPRA actions. SB 657 did not become law; SB 1244 as amended did. Therefore, LADWP is wrong to claim that the Legislature endorsed reverse-CPRA actions when it has never done so.[18]

### B. LADWP And The Intervening Agencies Lack Standing To Sue For Perceived Privacy Violations On Behalf Of Third Parties.

As explained in the Union-Tribune's Opening/Respondent's Brief, the question of standing may be raised at any time in the proceeding. *Drake v. Pinkham* (2013) 217 Cal.App.4th 400, 407. Standing is a jurisdictional issue that "goes to the existence of a cause of action." *Parker v. Bowron* (1953) 40 Cal.2d 344, 351. Lack of standing can be raised at any time in the proceeding, even for first time on appeal. *Assoc'd Builders & Contractors, Inc. v. S. F. Airports Comm'n* (1999) 21 Cal.4th 352, 361–369.

Here, the Union-Tribune cross-appealed, arguing, in pertinent part, that the Water Districts never had standing, a point it repeatedly made throughout the trial court proceedings. Thus, the issue is properly before this Court. If there were any question, doubts are resolved in favor of the right to appeal. *Vitatech Int'l, Inc. v. Sporn* (2017) 16 Cal.App.5th 796, 804.

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[18] The Assembly Judiciary Analysis shows that the Legislature is aware that reverse-CPRA lawsuits are judicially created and that the propriety of them remains an open question that the California Supreme Court has not decided. *See Long Beach Police Officers Association*, 59 Cal.4th at 66 n.2.

Additionally, while standing can be raised at any time, and could not be moot, as this issue is ongoing, when an action involves a matter of continuing public interest that is likely to recur, a court may exercise an inherent discretion to resolve that issue, even if an event occurring during the pendency of the appeal normally would render the matter moot. *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 746-747. Another exception exists when, despite the happening of a subsequent event, material questions remain for the court's determination. *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541. This exception has been applied to declaratory relief actions on the basis that the court must do complete justice once jurisdiction has been assumed. *Id.* at 541–542.

Here, the Court should resolve the standing issues because these questions are recurring in many cases. Contrary to the arguments by the LADWP, the Intervening Water Districts, and MWD, reverse-CPRA cases continue to be a considerable problem in the state. For example, in 2018, the Legislature passed SB 1421 providing access to records regarding serious police misconduct, officer-involved shootings, and other uses of force by law enforcement officers in California. In response, public law enforcement unions deluged public records requesters by filing approximately 20 lawsuits throughout the state.[19] Despite the fact

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[19] *E.g.*, *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (Los Angeles County Case No. 19STCP00166; Second District Court of Appeal Case No. B295936; California Supreme Court Case No. S254485); *Walnut Creek Police Officers' Association, et al. v. City of Walnut Creek, et al.; Antioch Police Officers' Association, et al. v. City of Antioch, et al.; Concord Police Association, et al. v. City of Concord, et al.; Contra Costa County Deputy Sheriffs' Association, et al. v. County of Contra Costa, et al.;*

that the lawsuits were unsuccessful, as all reverse-CPRA cases considered by the appellate courts have been, disclosures of important records were still delayed and obstructed – the exact opposite of the CPRA's mandate. Gov't Code 6253(d) ["Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records."] These suits have raised significant concerns about the reverse-CPRA lawsuits' effects on the public's constitutional rights of access.[20]

Here, LADWP lacks standing because it is not an individual third party, but a public agency – a member agency of MWD. In analogous contexts, courts have held that a member of a legislative body cannot sue that body because it has no "beneficial interest." In

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*Martinez Police Officers' Association, et al. v. City of Martinez, et al.; Richmond Police Officers' Association, et al. v. City of Richmond, et al.* (Contra Costa County Case Nos. N19-0109, N19-0170, N19-0166, N19-0097, N19-0167, N19-0169); *Walnut Creek Police Officers' Assn. v. City of Walnut Creek* (2019) 33 Cal.App.5th 940; *Association of Orange County Deputy Sheriffs v. County of Orange, et al.*, (Orange County Case No. 30-2019-01043706); *Los Angeles Police Protective League v. City of Los Angeles* (Los Angeles County Case No. 18STC903495); *Riverside Sheriffs Association v. County of Riverside, et al. (*Riverside County Case No. RIC1900789); *San Bernardino County Sheriff's Employee's Benefit Association v. County of San Bernardino, et al.*, San Bernardino County Case No. CIVDS1900429; *Santa Barbara County Deputy Sheriffs' Association v. County of Santa Barbara, et al.* (Santa Barbara County Case No. 19CV00504); *San Bernardino County Sheriff's Employee's Benefit Association v. County of San Bernardino, et al.* (Cal. Supreme Court Case No. S253115; petition and the request to stay denied on 1/2/19.

[20] See https://www.mercurynews.com/2017/06/30/peele-milpitas-reverse-public-records-case-shows-why-practice-is-wrong/ and https://www.rcfp.org/how-reverse-cpra-lawsuits-harm-the-publics-right-to-know/.

*Carsten v. Psychology Examining Committee* (1980) 27 Cal.3d 793, a case of first impression, the California Supreme Court held that a member of the Psychology Examining Committee of the state Board of Medical Quality Assurance could not file a writ forcing the Board's compliance with certain provisions of Business and Professions Code. Carsten sued after the Board had adopted regulations in violation of Business and Professions Code – over her dissenting vote. The court concluded that Carsten had no "beneficial interest" to establish standing to seek the writ of mandate. *Id.* at 807. More recently, in *Holbrook v. City of Santa Monica (*2006) 144 Cal.App.4th 1242, the Second District extended the holding in *Carsten* to a Brown Act enforcement action brought by two city council members. The Court cited many of the "persuasive legal and policy reasons" offered by the Supreme Court in *Carsten* to conclude that the council members lacked standing, as they are, in effect, suing themselves. *Id.* at 1257.

Additionally, the Court found that these lawsuits, or even the threat of these lawsuits, would inflict damage upon the process of government by pitting board members against each other and open the floodgates of litigation for any dissident board member who failed to persuade his or her colleagues. *Id.* at 1257-58. This case presents those same concerns. The Water Districts are member agencies of the "defendant/respondent," MWD. They are, in effect, suing themselves. They appoint 8 of the 38 seats on MWD's governing Board, the ultimate decision-making body for MWD. (8 CT 1857-1859.) The Board has authority to decide whether to disclose public records. (9 CT 1922-1925.) Allowing this litigation to

proceed usurps that authority.[21] Moreover, this case has already created the conflict between the Board that *Carsten* and *Holbrook* envisioned, with one MWD board member testifying in support of the Union-Tribune against MWD. (8 CT 1804.)

LADWP argues it did not file this case in its capacity as a member of the MWD board and that LADWP and MWD are separate agencies. (LADWP RB, at 32.) But in *Carsten* and *Holbrook*, the plaintiffs were obviously separate legal entities from the Board on which they sat, and neither filed suit in their capacity as a board member. That did not change the court's analysis in finding that the plaintiffs lacked standing to bring the lawsuits.

Additionally, LADWP and the Intervening Water Districts brought suit, allegedly defending the privacy of their customers. *Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th 808, 821, prohibits

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[21] Most of the exemptions set forth in the CPRA are permissive (absent very limited exceptions not present in this case.) As explained in *Marken*, 202 Cal.App.4th at 1262 ("*Marken*"), exemptions "allow nondisclosure but to not prohibit disclosure. [Citiations] Indeed, the penultimate sentence of section 6254 provides, '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* § 6253, subd. (e) ["[e]xcept as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter"].)" Therefore, even if the information requested by the Union-Tribune was subject to an exemption (which it is not), the public agency may choose to disclose it. The decision to waive an exemption is an exercise of discretion. Therefore, the Water Districts, as member agencies of MWD, cannot enjoin MWD's decision to waive any claim of exemption because doing so would be forcing MWD to exercise its discretion in a particular manner.

such a result. There, the Court stated that the right of privacy is a personal one; an agency or association cannot assert privacy rights on behalf of others. *Accord Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62 [family members could not bring privacy suit against newspaper that published obituary revealing decedent's criminal conviction]. *See further Roberts v. Gulf Oil Corp.* (1983) 147 Cal.App.3d 770, 790–793 [California's "constitutional [privacy] provision simply does not apply to corporations. The provision protects the privacy rights of *people*."] [Emphasis in original.]

In response, LADWP argues that it is akin to an employer or a holder of a privilege and may pursue perceived violations of its customers' right to privacy on that basis.[22] But the cases it cites merely permit an agency who receives confidential information to refuse to disclose it. Here, LADWP was not the recipient of the rebate application – MWD was. (15 CT 3516). None of the cases LADWP relies upon purports to allow an affirmative lawsuit based on violations of another person's privacy.

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[22] LADWP relies on a quote from *ALADS*, 239 Cal.App.4th at 821, inferring that the right to privacy also belonged to LASD, as the employer. (LADWP RB, at 43-44.) LADWP also purports to quote from *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 657, but no such quote appears in the decision. Instead, the decision merely provides that a bank may resist efforts at compelled disclosure of the information that its customers have provided it confidentially. *Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 932 is similar, finding that the recipient of privileged information about a patient may assert the privilege in a defense capacity, saying nothing about asserting it in an affirmative lawsuit.

## IV. The Trial Court's Apportionment Should Be Upheld In This Case Because It Does Not Prejudice The Union-Tribune, But Can Be Reapportioned If Necessary Because Of The Union-Tribune's Protective Cross-Appeal.

### A. The Trial Court's Award Should Stand.

Contrary to MWD's arguments, the Union-Tribune does not ask this court to affirmatively reapportion the trial court's award. Except for the improper reduction in fees, as discussed below, the trial court's decision to apportion between the parties, using both the CPRA and Section 1021.5, served no injustice, assuming that the Union-Tribune can collect the full award.

In the trial court, the Union-Tribune argued just as it does on appeal – that it should be awarded its reasonable fees under both the CPRA and Section 1021.5 with an eye toward making it whole, rather than the distribution of the award. "While there may be circumstances where apportionment would contravene the protections of the CPRA and § 1021.5 because of solvency or collection issues, such circumstances do not arise in this case. Assuming the Court decides to grant the fee request in full, the Union-Tribune has no objection if the Court decides to apportion fees between MWD, LADWP, and the Intervening Water Agencies, if and as this Court sees fit." (Motion to Augment the Record, at 4812.) The Union-Tribune reiterated this position during the hearing on the motion for attorneys' fees. In responding to LADWP's objections, the Court asked counsel for the UT, "[d]o you agree that that would be a fair apportionment?" to which counsel responded "I agree in these circumstances." (RT 2121.)

Obviously, had the Court asked if the Union-Tribune would agree to apportionment if the Union-Tribune would actually collect less than ten percent of that award, the answer would have obviously been different. Under these circumstances, there is no "invited error." For any doubts that exist about the appellant's intentions in entering into an agreement for judgment, those doubts will likely to be resolved in favor of the appellant's right to appeal. *Lee v Brown* (1976) 18 Cal.3d 110, 113; *Estate of Hart* (1962) 204 Cal.App.2d 634.

The Union-Tribune did not seek for the award to be apportioned between the parties. The Union-Tribune argued exactly the opposite – that all parties should be jointly and severally liable for the fees under both the CPRA and Section 1021.5. Agreeing that collecting a certain amount from each party is non-objectionable inherently assumes payment from each party. However, once LADWP and the Intervening Water District's filed their appeal and the collection of the bulk of the fee award was called into question, the circumstances underlying the conditional agreement changed.[23] A party is well within its rights to file a protective or conditional appeal under such circumstances. While a party may not agree with all aspects of a trial court's ruling, it may still ultimately prevail, as

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[23] It is important to note when Appellants filed this appeal, there had been no decision about how fees were to be awarded in a reverse-CPRA case. Thus, it was important to ensure that all parties remained in the action so that a decision modifying the trial court's decision could be collected by the Union-Tribune under whatever theory this Court . Nor does the Union-Tribune intend to punish MWD through this appeal. The Union-Tribune has also made it clear to MWD that should the award stand on appeal, that it intends to collect any fees on appeal from LADWP and the Intervening Water Districts, as MWD did not necessitate this appeal and clearly agreed to pay the portion it was allocated by the trial court.

Union-Tribune did here.[24] "[W]here several persons are affected by a judgment, the reviewing court will make no determination detrimental to the rights of those who have not been brought into the appeal." *Gonzales v. R. J. Novick Constr. Co., Inc.* (1978) 20 Cal.3d 798, 806, *quoting American Enterprise, Inc. v. Van Winkle* (1952) 39 Cal.2d 210, 218. However, by filing a cross-appeal, the prevailing party preserves its right to challenge the other aspects of the trial court rulings if the Court of Appeal reverses or modifies the judgment. *E.g. Gonzales v. R. J. Novick Constr. Co.*, 20 Cal.3d at 804-806; *SCI Cal. Funeral Servs., Inc. v. Five Bridges Found.* (2012) 203 Cal.App.4th 549 , 562; *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 798.[25]

While this Court's decision in *Pasadena* confirms that the trial court's fee award was proper, there was no way to know that would be the case at the time this appeal was filed. In fact, prior to Pasadena, there had been on decision on how and under what theories fees could be awarded in a reverse-CPRA case. Were this Court to determine that the Union-Tribune was entitled to its fees,

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[24] See, e.g. *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560. Plaintiff challenged a housing development on several CEQA grounds. The trial court found for Plaintiff's on one ground, but rejected the other two. The City appealed, but Plaintiffs did not. The appellate court then found for the City on its appeal, but would not address the grounds not raised by Plaintiffs because it had not filed a cross-appeal.

[25] See also 1 MB Practice Guide: CA Civil Appeals and Writs 5.18 (2019) ["There may be reason to file a protective cross appeal in cases not involving post-judgment motions. In any case where a respondent on appeal has prevailed on only some of its claims it should consider whether it is appropriate to file a cross appeal to address the grounds on which it did not prevail. Failure to file a cross appeal will preclude a respondent from obtaining affirmative relief on claims on which it did not prevail."]

but under another theory, for example, finding that the Union-Tribune was entitled to its full amount of fees under the CPRA against MWD, but not to Section 1021.5 fees against the Appellants, the only way to ensure the Union-Tribune's ability to be collect all its fee award was to ensure that all parties remained in this action.

### B. If This Court Were To Reverse The Trial Court's Order, It Can And Should Award Fees To The Union-Tribune Under Both The CPRA And Section 1021.5, And Those Fees Should Be Jointly And Severally Liable Among All The Parties.

While this Court need not reach this question unless it were to disturb the basis on which the trial court ordered fees, if this Court were to reassess the basis on which fees were awarded in this case, it could order any of the parties to pay all of the fees on any theory. As the Union-Tribune set out below and in its combined Opening/Respondent's Brief, the trial court could have awarded all fees against MWD under the CPRA or could have awarded all fees against LADWP and the Intervening Water Districts under either the CPRA or Section 1021.5. Moreover, the award should be jointly and severally against all parties.

#### 1. An Award In a Reverse-CPRA Case Should Be Jointly and Severally Liable Against All Opposing Parties.

The goal of an award of fees under the CPRA and Section 1021.5 are similar.

As the California Supreme Court explained in *Filarsky*, 28 Cal.4th at 431, the CPRA's attorney fee provision is a crucial incentive for members of the public to file actions to compel the disclosure of public records. It "contemplates that the public agency always will pay any costs and attorney fees should the plaintiff

prevail." *Filarsky*, 28 Cal.4th at 431. See also *Community Youth Ath. Ctr. v. City of National City* (2013) 220 Cal.App.4th 1385, 1447 ["section 6259 should be interpreted in light of 'the overall remedial purpose of the [CPRA] to broaden access to public records'"]; *City of Santa Rosa*, 187 Cal.App.3d at 1322 [the mandatory fee award serves to advance these policies and to discourage agencies from delaying or denying the release of public records.]

Section 1021.5 has a similar goal:

> In the complex society in which we live it frequently occurs that citizens in great numbers and across a broad spectrum have interests in common. These, while of enormous significance to the society as a whole, do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts. One solution...is the award of substantial attorneys' fees to those public-interest litigants and their attorneys (whether private attorneys acting pro bono or members of 'public interest' law firms) who are successful in such cases, to the end that support may be provided for the representation of interests of similar character in future litigation.

*Serrano v. Priest* (1977) 20 Cal.3d 25, 44.

The Court followed this reasoning in *PPOA*, 22 Cal.App.5th at 163-166. In reviewing whether the Los Angeles Times was a successful party, the court relied on the standards for prevailing under the CPRA as the basis for finding that the Times was entitled to fees under Section 1021.5. *Id.*

However, in cases involving more than one opposing party, apportioning the award as to the prevailing party can work as an injustice, ultimately undermining the purpose of fee awards in both statutes. "[T]here are two aspects of such an 'apportionment.' One is liability between the different opposing parties and the successful party. The other is responsibility for contribution or indemnity

between opposing parties. As to the first aspect, we disavow the notion that, as a general matter, opposing parties are entitled to an apportionment of their liability under [Section] 1021.5 as to the successful party." *Friends of the Trails*, 78 Cal.App.4th at 837-838. "When an obligation is imposed on several persons it is presumed to be joint. (§ 1431.) Treating the [fee award]as joint is consistent with the purposes of that statute. If the obligation is apportioned in the sense that it is not joint the successful party faces greater difficulty in collection of the judgment for attorney's fees and some of the attorney's fees will not be recoverable if any opposing party is insolvent." *Id*. at 838 [favoring contribution between parties when one has satisfied more than its share].

The prejudice to the prevailing party by dictating how much can be collected from any particular opposing party is evident in this case. Had the award been jointly and severally liable, the Union-Tribune could have collected from MWD, leaving the other parties to fight among themselves as to who was responsible for what portion.

**2. MWD Could Be Required To Pay The Entire Fee Award.**

The trial court was not required to limit MWD's liability to just a portion of the award, a fact explicitly recognized by the trial court. "I could have easily have said full CPRA attorneys fees to Ms. Aviles. MWD to pay for them all, right? Because CPRA attorneys fees are mandatory. There is no requirement I cut them off or apportion them. I could have awarded that and called it a day. I did not think that was the fair thing to do. I concocted this allocation and this sort of mixture of 1021.5 and CPRA." (RT 2128.)

This was a correct statement of the CPRA's fee shifting provision, which is based on strict liability. It "contemplates that the public

agency always will pay any costs and attorney fees should the plaintiff prevail." *Filarsky*, 28 Cal.4th at 431. Any other result, as this court has previously emphasized, "would chill efforts to enforce the public right to information." *Los Angeles Times Comm. LLC v. Alameda Corridor Transp. Auth.*, 88 Cal.App.4th at 1392; s*ee also Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 399; *Los Angeles Times, supra*, 112 Cal.App.4th at 1333-34. This standard must be maintained to protect the "clear legislative objective to promote disclosure" and protect record requesters. *City of Santa Rosa*, 187 Cal.App.3d at 1322. A public agency can avoid the CPRA's mandates such as fee-shifting only by releasing the records. *Filarsky*, 28 Cal. 4th at 426-428. MWD did not do so.

But MWD did not decide to release records in response the Union-Tribune's CPRA request. In fact, it affirmatively redacted the names and addresses in its initial production. MWD's conduct led the court to determine that it did not always intend to disclose. (20 CT 4715 ["It was not clear at the beginning of the case that MWD intended to disclose the Turf Program names and addresses"]; 15 CT 3511)[26] Thus, when the Union-Tribune successfully forced the release of the records MWD had affirmatively withheld, an award of

[26] It was confirmed during discovery that MWD never intended to release the names of rebate participants – a crucial portion of the information at issue. Metropolitan's PMK testified that "[Metropolitan] didn't see the necessity to provide names in order to verify how the public money was used." (8 CT 1855.)

fees was proper. Fees could have also been awarded against MWD under Section 1021.5.[27]

Asking this court to make such an award if the trial court's award is vacated is not dependent on the standing arguments, as MWD alleges.[28] (MWD RB, at 17-21.) Naturally, standing arguments relate to the Plaintiff's ability to maintain an action, not MWD's status as a defendant. Moreover, the "findings" that MWD alleges prohibit this from the ruling on the merits, are legal conclusions, not finding of facts. For example, MWD argues that the trial court's finding that there was "no collusion" is a conclusion, not a factual finding. Nor did the Court find MWD's interactions with LADWP to be "proper," as MWD claims. Instead, the trial court found that MWD did not improperly allow LADWP to control the disclosure of records, which the Union-Tribune argued violated the CPRA. However, this had no effect on the trial court's determination that MWD did not always intend on disclosing the records at issue and had unnecessarily delayed in disclosing the requested records,

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[27] Fee awards under Section §1021.5 may be combined with awards based on other statutes or theories, even where narrower fee-shifting statutes apply. Pearl, Cal. Attorney Fee Awards (Cont. Ed. Bar) § 3.11 (citing *Green v Obledo* (1984) 161 Cal.App.3d 678, 685 [awarding fees under 42 U.S.C. 1988 and § 1021.5]; *K.M. v Tustin Unified Sch. Dist.* (C.D. Cal. 2015) 78 F.Supp.3d 1289, 1299 [noting in dictum availability of administrative fees under CCP §1021.5 to support award under Unruh Act (Civ. Code §52(a)) and Americans with Disabilities Act]; *Coles v City of Oakland* (N.D. Cal., Jan. 4, 2007, No. C03–2961 TEH) [fees awarded under both 42 USC §1988 and CCP §1021.5]; *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 872 (Rev. and Tax Code § 19717 not exclusive source of fees.)

[28] Even if it were, as discussed in reference to standing above, it can be raised at any time.

enabling LADWP to file the injunction lawsuit. On those bases, the trial court awarded fees against MWD.[29]

### 3. The Water Districts Could Have Been Required To Pay The Entire Fee Award.

LADWP argues that they could not have been held to pay fees under the CPRA.[30] For several reasons, these claims fail.

First, they argue that "MWD – not DWP – is the agency in possession of the records requested."[31] However, the CPRA clearly does not limit its reach to records in an agency's possession. *See* Gov't. Code § 6252 [definition of public records includes any writing "prepared, owned, used, or retained" that relates to the conduct of the public's business"]; see also *Anderson-Barker v. Superior Court* (2019) 31 Cal.App.5th 528, 538 [whether a record is a public record "involves a 'distinct inquiry" from whether the agency is in possession of that record'"]; *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 623–624 [finding that agency must search for public records not in its possession]; *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 709 [setting out constructive possession of public records].

Second, Appellants' argued they had standing because they were "co-owners" of the data. (15 CT 3506-3507.) They could have

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[29] Much of this evidence was gained during discovery, which is yet another reason why LADWP's arguments that fees should be reduced fails. The discovery ultimately ensured that the Union-Tribune was able to establish the intent to not fully disclose, leading to the trial court's award of fees against MWD.

[30] Intervenors make no such argument on appeal.

[31] Intervenors similarly argue that they "were not in a position to fulfill Tribune's request." (Districts' RB, at 23.)

easily ensured that the Union-Tribune received access to the information they sought. LADWP's objection and litigation was the sole reason that MWD denied releasing the records in the first place. Had LADWP removed its objection, there would have theoretically been no impediment to disclosure.

Third, LADWP argues that its reverse-CPRA lawsuit did not "arise" under the CPRA and therefore, an award of fees under the CPRA is improper. This argument puts form over function. The question is the same in both a reverse-CPRA lawsuit as it is in a traditional CPRA lawsuit – are the records required to be released under the CPRA? (See further UT AOB/RB, at 70-74.)

LADWP relies on statements from *Marken* and *National Conference of Black Mayors*, but the procedural differences here make the dicta in *Marken* and the holding in *National Conference of Black Mayors* of little value.

Here, the reverse-CPRA plaintiffs are public agencies who owned the information at issue. This is distinct from both *Marken* and *National Conference of Black Mayors*.

As opposed to both *Marken* and *National Conference of Black Mayors*, the Union-Tribune did file an affirmative CPRA lawsuit – a lawsuit that LADWP answered. (See *National Conference of Black Mayors*, at 583; 8 CT 1758.)

LADWP also points to a statement in both *Marken* and *National Conference of Black Mayors* that the Union-Tribune's participation was "purely voluntary" because the requester can rely on the public agency to assert the requester's right[s]." (LADWP RB, at 36, citing National Conference of Black Mayors, at 585.) But the trial court expressly found that the Union-Tribune could not have relied on MWD to protect its interests, undermining the

presumptions in both cases. (20 CT 4715; 15 CT 3511.) Moreover, a CPRA action is also "purely voluntary," so any attempted distinction on that basis is without practical difference. In either case, if the requester wants the records, it must become involved in litigation.

Fee recovery was not before the Court in *Marken*, and Section 1021.5 fee issues were not addressed in that case. The statement about fees in *Marken*, 202 Cal.App.4th at 1268, is therefore, dicta. *Marken* also did not consider this situation, where one public agency withheld the requested information at issue (names and addresses), encouraged another agency to file reverse-CPRA litigation, and the party suing and parties intervening in efforts to stop disclosure claimed they were co-owners of the records.

In both *Marken* and *National Conference of Black Mayors*, the public agency who owned the records decided to disclose records and a third party attempted to block the release. Here, MWD decided to redact the records in response to the CPRA request, and the trial court found it was unclear whether it intended to disclose. It delayed to ensure LADWP could bring this reverse-CPRA lawsuit. Moreover, Appellants, who the court found co-owned the records, chose not to disclose the records.

LADWP acknowledges that *National Conference of Black Mayors v. Chico Community Publishing, Inc.* (2018) 25 Cal.App.5th 570, 578, found that the requester "could not seek CPRA fees against the mayor because he was not acting in his "public official" capacity. There is no such concern of an award here, as LADWP and the Intervening Water Districts were clearly acting in their official capacities.

Finally, the decision in *National Conference of Black Mayors* has no bearing on the propriety of the fee award against Appellants

under Section 1021.5. (25 Cal.App.5th 570, 587 n.7.) As the court explicitly found, "a requester could get fees under Section 1021.5," which is the basis on which the trial court awarded fees here. (*Id.*)

The Intervening Water Districts argue that *PPOA* affirmed "the validity of the union's reverse-PRA action. (Int. p. 20.) But *PPOA* never took up the question of the propriety of reverse-CPRA lawsuits, only whether the award was correct. Furthermore, the reverse-CPRA plaintiffs in *PPOA* were private parties, not public agencies. Nor was the requester in *Pasadena* seeking fees under the CPRA against the reverse-CPRA plaintiffs.

Instead, this case is much more similar to *Fontana v. Villegas-Banuelos* (1999) 74 Cal.App.4th 1249, 1253, where the court held that the proceedings were the functional equivalent of a CPRA action. "Because the proceeding in this case was the functional equivalent of a proceeding to compel production of the unedited tapes under the Public Records Act and appellant was the prevailing party in the proceeding, he is entitled to recover attorney's fees despite the fact that he was not denominated 'plaintiff' in the action." (*Id.*) The Court in *National Conference of Black Mayors* distinguished *Fontana* because, unlike in *Fontana*, "the City intended to disclose the requested records" and therefore, "the newspaper did not act like the type of plaintiff contemplated by the Act (i.e., one seeking disclosure of public records the public agency refuses to disclose)." *Id.* at 578. However, that distinction is not present here.[32]

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[32] *Filarsky* only barred the procedure at issue in *Fontana*, not the award of fees, either under either the CPRA or Section 1021.5, much like *Marken* addressed only the reverse-CPRA procedure, not the question of a fee award. *Filarsky*, 28 Cal.4th at 430 ["the only issue on appeal in that matter, however, was the defendant's entitlement

### 4. Fees Could Be Awarded Against All Parties Under Either Theory Because the affirmative CPRA Action and the Reverse-CPRA Action Are Intertwined.

Independently, the trial court could have awarded all the fees under the CPRA or Section 1021.5 because a fee award may compensate the party for work in other proceedings that are "inexplicibly intertwined" with the proceeding in which the fee request is being made.

In *Wallace v. Consumers Coop. of Berkeley* (1985) 170 Cal.App.3d 836, 847, the court held that a "trial court may, in its discretion, determine that time reasonably expended on an action includes time spent on other separate but closely related court proceedings." *See also Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 971–972; *Children's Hosp. and Medical Center v. Bont* (2002) 97 Cal. App. 4th 740, 779; *Ramon v. County of Santa Clara* (2009) 173 Cal.App.4th 915, 924 [finding that legal services incurred in responding to amicus brief were useful and necessary]. In *Wallace*, 170 Cal.App.3d at 847,the trial court awarded fees for work done in connection with a related administrative action, finding that the "legal services performed in those proceedings were both useful and necessary to the ultimate resolution of the action, and directly contributed to that resolution," and the Court of Appeal affirmed.

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to attorney fees and costs, and the decision did not consider the propriety of the public agency's initiation of an action for a protective order to preclude disclosure of the public records pursuant to the defendant's request under the Act."]

Fees would have been properly awarded here under the same analysis. At the heart of the reverse-CPRA case, this Court decided whether the CPRA required disclosure of the documents requested by the Union-Tribune. This same analysis was necessary as to MWD since a court could never grant a writ petition ordering disclosure of records if the Court had not made the prerequisite finding that records at issue are both disclosable public records and not subject to any exemptions. The advocacy against MWD in the CPRA case and the defense against LADWP and the Intervening Water Agencies' quest for secrecy in the reverse-CPRA case are two sides of the same coin. Therefore, the trial court could have awarded all fees against MWD under the CPRA, including work done to defeat the reverse-CPRA. Conversely, the trial court could have awarded all the fees against LADWP and the Intervening Water Districts under Section 1021.5 since the work to compel the records was made necessary by the Appellants' reverse-CPRA actions.

### 5. Clarifying That The Trial Court Should Award Fees Under A Combination Of The CPRA And Section 1021.5 To A Successful Requester In A Reverse CPRA Case, With An Eye Toward Making The Requester Whole, Serves The Interests That The CPRA, Section 1021.5, And The Constitutional Right Of Access Were Designed To Protect.

A broad interpretation of a prevailing CPRA requester's right to recover fees in reverse-CPRA cases is consistent with the policies behind both the CPRA and the private attorney general statute. Therefore, the particular designation of a party on the caption should not be the focus. *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1302 [in regards to a validation action, the court found that the

"core" of the action is a declaration of rights between disputing parties and the application of section 1021.5 does not turn upon the form or initiation of the litigation]. Instead, the focus of the award should be firmly to further the purpose of the CPRA.

The CPRA's goal is to ensure that a requester is always compensated for successful advocating for disclosure. *Filarsky*, 28 Cal.4th at 431; Gov't. Code § 6259(d). Awarding fees in furtherance of the goals of the CPRA complies with the broad construction required by the California Constitution. Art. I, Sect. 3(b) ["A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."]

Finally, by confirming that the vindication of the CPRA confers an important right and substantial benefit, this Court furthers the goal of Section 1021.5, by ensuring recovery of attorneys' fees to litigants who successful advocate on behalf of the public. *Friends of the Trails*, 78 Cal.App.4th at 836-837 [the "purpose of Code of Civil Procedure section 1021.5 is to encourage suits which meet its criteria, where an alternative reading would "require a potential plaintiff to face expensive litigation of the merits of the public right claim against an opponent with great resources while having no assurance that the same resources that had to be overcome would be available for recompense"].

## V. The Trial Court Erred In Refusing To Compensate The Union-Tribune The Time Spent Replying to the Oppositions To Its Fee Motion.

As the opposing parties and the Union-Tribune recognize, a trial court has wide discretion regarding the amount of attorneys'

fees it awards. However, that discretion does not permit a court to deviate from the lodestar method in its calculation or simply cut hours from the calculation even though those hours were both reasonable and necessary. *Press v. Lucky Stores, Inc.*, 34 Cal.3d at 322 [noting the inherent discretion of the trial court in setting attorney fees, but emphasizing that because the determination of the lodestar figures is so fundamental to arriving at an objectively reasonable amount, "the exercise of that discretion must be based on the lodestar adjustment method"]; *Hanna v. Mercedes-Benz USA, LLC* (June 18, 2019, No. B283776) __Cal.App.5th__ ["[w]hile the trial court has broad discretion to increase or reduce the proposed lodestar amount based on the various factors identified in case law, including the complexity of the case and the results achieved, the court's analysis must begin with the "actual time expended, determined by the court to have been reasonably incurred"].) "Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.

The trial court initially correctly applied the lodestar method. (20 CT 4716.) The trial court found that the counsel's hourly rate was reasonable. (20 CT 4717.) The Court then found the number of hours reasonable. (20 CT 4717 [while large, the "case required considerable effort" and "counsel was forced to appear for multiple ex parte hearings, research novel issues of law, and conduct discovery"].) The Court then addressed and rejected the specific claims regarding the time spent for discovery and on standing issues [the so-called "collusion fees"] and arguments regarding block billing. This determination was proper.

It is well established that when "challenging attorney fees as excessive because too many hours of work are claimed, it is the burden of the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice." *Premier Med. Mgmt. Sys., Inc. v. California Ins. Guar. Ass'n* (2008) 163 Cal.App.4th 550, 564; *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 488 (following *Premier*).

Unfortunately, the court then inexplicably deviated from the lodestar method in a footnote, where it declined to "add the additional $18,525.50 incurred by [the Union-Tribune]" for the work spent on its three replies to the three oppositions filed to its single fee motion. (20 CT 4718.) This reduction was clearly not based on the lodestar calculation, and was therefore erroneous.

The lodestar figure must begin by determining the "hours reasonably worked by each person entitled to compensation." S*errano v. Priest* (1977) 20 Cal.3d 25, 48; *Serrano IV,* 32 Cal.3d at 639. The California Supreme Court has repeatedly ruled that an award of attorneys' fees should "include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim." *Serrano IV*, 32 Cal.3d at 639; *Center for Biological Diversity v. County of San Bernardino (Nursery Prods., LLC)* (2010) 185 Cal.App.4th 866, 897 ["attorney fee awards under section 1021.5 'should be fully compensatory'"]; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1175 ["attorney who takes such a case can anticipate receiving full compensation for every hour spent litigating a claim"].)

Thus, to deduct the 46.9 hours Union-Tribune's counsel spent on the three 15-page oppositions, the trial court would either have to find that the number of hours were not reasonable or that "filing the reply briefs were not reasonably necessary work." *See Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th at 1284 [hours are reasonable if they were expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter]; *Moore v. Jas. H. Matthews & Co.* (9th Cir 1982) 682 F.2d 830, 839 [successful attorneys entitled to be compensated for "every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest"].

Yet, the trial court did neither. It reduced the award without any objection to the number of hours spent on the replies by any of the parties. It did not raise any of its own concerns that a number of hours spent (46.9 hours responding to three 15-page oppositions) was excessive. It reduced the award without any finding that filing the reply briefs were unreasonable and were not the type of litigation activity that is billed routinely to fee-paying clients.

The indiscriminate reduction does not comply with the loadstar method and should be reversed.[33] *Press v. Lucky Stores,* 34

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[33] The Intervening Water Districts argue that the trial court "justified [the] modest reduction by primarily taking account of the fact that the Tribune's replies were submitted after the due date, and that aspects of its replies failed to comply with the court's minimum font requirement." This is completely fictional, which is likely why it has no citation to the record. (Districts' RB, p. 7.) Nor is such an argument supported by any case law. No objection was made by the parties at the time of the hearing on the motion for fees, nor could it have been, as the reply briefs were served on the day they were due.

Cal.3d at 324 ["If there is no reasonable connection between the lodestar figure and the fee ultimately awarded, the fee does not conform to the objectives established in *Serrano III*, and may not be upheld."]

Nor was the reduction proper under the other theories asserted by the Intervening Water Districts or LADWP.

The Intervening Water Districts' argue that the Union-Tribune's "block billing" justified the reduction, a contention squarely analyzed and rejected by the trial court. (20 CT 4718.) Nor were the objections regarding "block billing" made as to the reply briefs. (20 CT 4718.) Because time records are not required under California law, there is no required level of detail that counsel must achieve. *PLCM Group, Inc. v. Drexler,* 22 Cal.4th at 1098 (quoting *Serrano IV*, 32 Cal.3d at 642) ["We do not want 'a [trial] court, in setting an attorney's fee, [to] become enmeshed in a meticulous analysis of every detailed facet of the professional representation'"]. Therefore, California courts have noted that so-called "block billing" is not objectionable *per se*, especially if there is no need to apportion out compensable from non-compensable work. *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 830; *Christian Research Institute* (2008) 165 Cal.App.4th 1315,1325, *See also* Pearl, Cal. Attorney Fee Awards (Cont. Ed. Bar), § 9.84 ["block billing is

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While no explanation or request for relief was necessary, as the trial court accepted the briefs (20 CT 4705 ["the court has read and considered the moving papers, oppositions, **and replies**" (emphasis added)]; see also 20 CT 4705, fn. 1 ["the court has exercised its discretion to consider the replies"]), had counsel needed to address the issue, it would have explained that the delay was caused by an unexpected problem with the attorney service, who was unable to deliver the documents before the 4:30 p.m. filing deadline, but did deliver them directly to the courtroom first thing the next morning.

commonly used and …simply reflects the interrelated nature of many tasks performed during a day"].)

LADWP argues that the three separate replies were unnecessary. This argument was not raised in the trial court, is ludicrous on its face, and directly contravenes the California Supreme Court's decision in *Serrano IV*. Three separate replies were necessitated by three separate oppositions (to the single fee motion that Union-Tribune filed). Moreover, hours spent on the fee claim are *per se* recoverable. *Serrano IV,* 32 Cal.3d 621, 639. To deny fees for fee-related services would permit the fee to "vary with the nature of the opposition," observing that a defendant "cannot litigate [a fee motion] tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *Id*. at 638.

As there is no legal basis on which to refuse to award fees for hours spent on replying to oppositions to the Union-Tribune's successful fee motion, and therefore, the reduction must be reverse.

## IV. CONCLUSION.

For all the reasons set forth above and in the Union-Tribune's Opening/Respondent's Brief, it urges this Court to uphold the trial court's award and apportionment of fees, reversing only the limited portion of the opinion that denies the Union-Tribune its reasonable hours for work spent replying to the three oppositions to its fee motion.

DATED: July 5, 2019

Respectfully submitted,

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**CERTIFICATE OF WORD COUNT**
**(Cal. Rules of Court, rule 8.204(c))**

I, Kelly Aviles, am appellate counsel in this matter and I hereby certify, pursuant to Rule 8.204(c)(1), (3), and Rule 8.216(b) of the California Rules of Court, that this combined Reply Brief contains 22,118 words, including footnotes, according to the Microsoft Word, the computer program count used to produce this brief.

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