No. B272169

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

CITY OF LOS ANGELES, et al.,
Petitioner/Appellants

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,
Defendant/Respondent

SAN DIEGO UNION-TRIBUNE, LLC,
Respondent & Cross-Appellant.

APPEAL FROM A FEE AWARD
FROM THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES
Hon. James C. Chalfant
Superior Court No. BS157056

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI* BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 15 MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT AND CROSS-APPELLANT

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE SECOND APPELLATE DISTRICT, DIVISION EIGHT:

Pursuant to California Rule of Court 8.200(c), the Reporters Committee for Freedom of the Press, The Associated Press, California News Publishers Association, Californians Aware, CalMatters, Embarcadero Media, First Amendment Coalition, Gannett Co., Inc., The McClatchy Company, MediaNews Group Inc., National Press Photographers Association, The Northern California Chapter of the Society of Professional Journalists, Online News Association, Society of Professional Journalists, Tribune Media Company, and the Tully Center for Free Speech (collectively, "*amici*") respectfully request leave to file the attached brief as *amici curiae* in support of Respondent and Cross-Appellant San Diego Union-Tribune LLC. *Amici* are news media organizations and organizations who advocate on behalf of journalists and the press. Lead *amicus* the Reporters Committee for Freedom of the Press has appeared as *amicus curiae* in cases involving access to public records under state and federal law in courts across the country, including in California, as have many of the other *amici*. (*See, e.g.*, *National Lawyers Guild v. City of Hayward* (2018) 27 Cal.App.5th 937 [238 Cal.Rptr.3d

505]; *Food Media Inst. v. Argus Leader Media* (2019) 139 S. Ct. 2356; *ACLU v. CIA* (2d Cir. 2018) No. 18-2265, ECF No. 80.)

INTEREST OF *AMICI CURIAE*

As members of the news media, *amici* frequently file public records requests to gather information to keep the public informed about how the government is conducting the people's business. Accordingly, *amici* have a strong interest in ensuring that the provisions of the California Public Records Act ("CPRA" or the "Act") are interpreted and applied in a manner that facilitates prompt public access to government information.

Amici agree with Respondent and Cross-Appellant San Diego Union-Tribune LLC ("Union-Tribune") that this Court may consider the propriety of so-called "reverse-CPRA" cases in the context of this appeal, and write to emphasize that the 2012 decision of the Second Appellate District, Division Seven, in *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal.App.4th 1250, is inconsistent with the CPRA's statutory scheme and has, in the years since it was decided, substantially weakened the Act.

Marken interpreted the CPRA to permit a third-party to file a lawsuit against a government agency to prevent the disclosure of government records. Since *Marken*, reverse-CPRA actions have proliferated, forcing requesters to expend resources litigating public records cases that they did not initiate, and creating uncertainty as to their ability to recover reasonable

attorneys' fees even when their litigation efforts result in the disclosure of records. The ever-present threat of a reverse-CPRA action chills requesters' exercise of their rights under the CPRA and undermines the purpose of the Act. (*See Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 434.)

The type and extent of reverse-CPRA litigation now faced by requesters goes well beyond what the appellate court in *Marken* envisioned. The *Marken* court contemplated reverse-CPRA actions by third-parties only when necessary to prevent an agency "from acting in an unlawful manner by releasing information the disclosure of which is prohibited by law." (*Marken*, 202 Cal.App.4th at 1266.) Because it assumed reverse-CPRA actions would be limited to situations where a public agency had determined to timely disclose requested information under the Act, the *Marken* court also assumed that requesters could reasonably "elect to allow the agency itself to defend its decision" under the CPRA. (*Id.* at 1268.)

Experience has proven these assumptions wrong. Reverse-CPRA cases have been brought on the basis of CPRA's discretionary exemptions, when disclosure is not "prohibited by law." (*Id*. at 1266.) And public agencies that have not determined to disclose requested records now delay responding to CPRA requests in order to notify third-parties that those records have been requested, prompting those third-parties to seek to enjoin the responding agency from releasing them. Given the numerous examples

of cooperation and collaboration between public agencies and third-parties in reverse-CPRA litigation post-*Marken*, it is clear that, just as courts should not rely on the "optimistic presumption" that "public officials conduct official business in the public's best interest," *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 625, requesters should not be required to rely on public agencies and officials to argue vigorously on behalf of public disclosure.

For these reasons, which are discussed in more detail in the attached *amici* brief, *amici* agree with the Union-Tribune that this Court can and should reconsider and reject the reasoning of *Marken*. *Amici* respectfully request that the Court accept and file the attached *amici* brief. No party or counsel for any party, other than counsel for *amici*, authored this brief in whole or in part or funded its preparation.

Respectfully submitted,
REPORTERS COMMITTEE FOR
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AMICI BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 15 MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT AND CROSS-APPELLANT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(e)(1) and (2), *amici* the Reporters Committee for Freedom of the Press, The Associated Press, California News Publishers Association, Californians Aware, CalMatters, Embarcadero Media, First Amendment Coalition, Gannett Co., Inc., The McClatchy Company, MediaNews Group Inc., National Press Photographers Association, The Northern California Chapter of the Society of Professional Journalists, Society of Professional Journalists, Tribune Media Company, and the Tully Center for Free Speech by and through their undersigned counsel, certify that the following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

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

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

California News Publishers Association ("CNPA") is a mutual benefit corporation organized under state law for the purpose of promoting

and preserving the newspaper industry in California. No entity or person has an ownership interest of ten percent or more in CNPA.

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Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc., a publicly traded company, owns 10 percent or more of Gannett's stock.

The McClatchy Company is publicly traded on the New York Stock Exchange American under the ticker symbol MNI. Chatham Asset Management, LLC and Royce & Associates, LP both own 10% or more of the common stock of The McClatchy Company.

MediaNews Group Inc. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

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

The Northern California Society of Professional Journalists has no parent corporation and issues no stock.

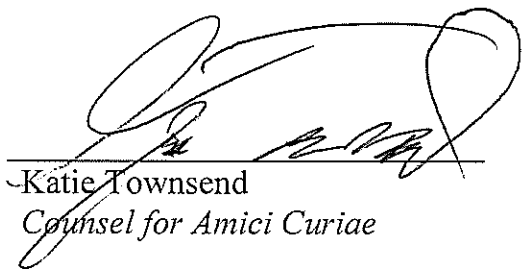
Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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

Tribune Media Company is a publicly traded company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

Dated: July 19, 2019



Katie Townsend
Counsel for Amici Curiae

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INTRODUCTION

In *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, the California Supreme Court rejected a government agency's attempt to preemptively litigate the application of certain exemptions to records requested under the California Public Records Act ("CPRA" or "the Act"). In doing so, the Court explained that permitting such reverse-CPRA litigation would "frustrate[] the purpose of the Act by discouraging requests for public records and requiring persons who make such requests to defend lawsuits they otherwise might not initiate." (*Id.* at 432.)

Though the California Supreme Court's reasoning in *Filarsky* applies fully to reverse-CPRA lawsuits brought by third-parties, the Second Appellate District, Division Seven, in *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal.App.4th 1250, nevertheless concluded that a third-party may file a lawsuit against a government agency to prevent it from disclosing government information requested under the Act. (*Id.* at 1269.) This case is one of many reverse-CPRA lawsuits that have been filed purportedly on the basis of *Marken*.

Amici are news media organizations who frequently rely on state public records laws, including the CPRA, to gather news and inform the

public.[1] *Amici* agree with Respondent and Cross-Appellant San Diego Union-Tribune LLC ("Union-Tribune") that this Court can, and should, reconsider *Marken*. (Union-Tribune Reply Br. at 15 ("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."); *see also Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 659 n.5 (explaining the First Appellate District, Division Three, as a "court of equal dignity," was "certainly free to disagree with [its] colleagues in Division One" of the First Appellate District and could "decline to follow them").) Indeed, the California Supreme Court has made clear that the question of whether reverse-CPRA actions are permissible is an open one. (*Long Beach Police Officers Ass'n v. City of Long Beach* (2014) 59 Cal.4th 59, 66 n.2 ("*LBPOA*").) Accordingly, *amici* urge this Court to reconsider *Marken* and reject its reasoning.

The proliferation of reverse-CPRA cases post-*Marken* has chipped away at the Act's effectiveness as a tool for government oversight; it has forced requesters to engage in CPRA litigation that they did not initiate and discourages members of the public from making CPRA requests in the first

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

place. This is contrary to the California Supreme Court's decision in *Filarsky* and undermines the very purpose of the Act, which was intended to be a powerful tool for government oversight that incentivizes requesters to pursue public records and deters agencies from delaying and withholding government information from the public. Moreover, as has become clear from the series of reverse-CPRA cases filed across the state in the years since it was decided, *Marken* has led to gamesmanship on the part of responding agencies and spurred reverse-CPRA litigation of a kind never intended by the *Marken* court.

For the reasons herein, *amici* urge this Court to disregard *Marken* and conclude that reverse-CPRA actions like this one are impermissible under the Act.

ARGUMENT

I. Reverse-CPRA cases are incompatible with the Act's framework and the California Supreme Court's decision in *Filarsky*.

The California Supreme Court has recognized that an open government is "essential to the functioning of a democracy," as it keeps elected officials accountable to the public and prohibits "arbitrary exercise of official power and secrecy in the political process." (*See Int'l Fed. of Prof'l & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328–29.) The public's right to access government records and

information is enshrined in the California Constitution and the CPRA. (Cal. Const., art. I, § 3; Cal. Gov. Code § 6250.)

The California Constitution declares that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of the public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I § 3, subd. (b)(1).) Because the public has an interest in *timely* access to government information, the CPRA, among other things, prohibits agencies from delaying access to public records requested under the Act. (Cal. Gov. Code § 6253(b).) The Act also provides "protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure," including mandatory awards of reasonable attorneys' fees for requesters who prevail in public records litigation. (*See Filarsky*, 28 Cal.4th at 427; Cal. Gov. Code § 6259(d).)

In *Filarsky*, the California Supreme Court recognized that the CPRA expressly and intentionally authorizes requesters—and only requesters—to initiate lawsuits concerning the withholding of records under the Act. There, the Court concluded that an agency's filing of a declaratory relief action to preemptively determine whether it was required to disclose records requested under the CPRA was improper. (*Filarsky*, 28 Cal.4th at 423.) The Court held that Government Code sections 6258 and 6259, which authorize *requesters* to file suit, provide "the *exclusive procedure* for

litigating the issue of a public agency's obligation to disclose records to a member of the public," and that allowing responding agencies to file reverse-CPRA lawsuits would "circumvent the established special statutory procedure." (*Id.* (emphasis added).)

The Court further observed that allowing these types of reverse-CPRA lawsuits would:

> [C]hill the rights of individuals to obtain disclosure of public records, require such individuals to incur fees and costs in defending civil actions they otherwise might not have initiated, and clearly thwart the Act's purpose of ensuring speedy public access to vital information regarding the government's conduct of its business. . . . Rather than promoting the goals of open government and full disclosure, such a result would be at war with the very purpose of the CPRA and would effectively discourage requests for disclosure by a member of the public or representative surrogate.

(*Id.* at 434; *see also City of Santa Rosa v. Press Democrat* (1986) 187 Cal.App.3d 1315, 1320 (holding that there is "*no* provision . . . for any action to prevent disclosure" (emphasis in original)).)

Contrary to the reasoning underlying the California Supreme Court's rejection of reverse-CPRA litigation brought by agencies, the Second Appellate District, Division Seven, nevertheless concluded that third-party reverse-CPRA actions were permissible in *Marken v. Santa Monica-Malibu Unified School District*. In that case, the Court held that a third-party may initiate a reverse-CPRA action when an agency has already made the decision to disclose certain records and the third-party believes that

disclosure "is otherwise prohibited by law." (202 Cal.App.4th at 1269.) While the California Supreme Court has not addressed whether third-party reverse-CPRA actions are permissible under the Act, *Long Beach Police Officers Ass'n v. City of Long Beach*, 59 Cal.4th at 66 n.2, *Marken* opened the door to all the dangers that *Filarsky* warned against.

A. Agencies use—or are incentivized to use—*Marken* to circumvent *Filarsky*'s prohibition on preemptive litigation.

Marken's approval of third-party reverse-CPRA actions authorized the same type of litigation prohibited by *Filarsky*, just in a slightly different form. It has allowed for the preemptive litigation of an agency's CPRA obligations and created a protracted and more complicated litigation process that denies the public prompt access to government records. (*See also infra* Part II.) Moreover, since *Marken*, agencies have worked *with* third-parties to prevent disclosure through reverse-CPRA actions, forcing requesters to step into litigation to defend the public's CPRA rights.

For example, *Pasadena Police Officers Association v. City of Pasadena* involved a CPRA request to the City of Pasadena for a copy of its independent report examining the actions of local police officers in connection with the fatal shooting of 19-year-old Kendrec McDade. ((2018) 22 Cal.App.5th 147, 151.) Instead of promptly responding to the request, as required by the Act, the City informed the Pasadena Police Officers Association ("PPOA") that it had received the request and that the PPOA

"needed to take legal action before [the City needed to respond] if it did not want to have the [City's independent] report released." (*Id.* at 152 n.3.) The City simultaneously noted that "[a]n argument has been made that the release of the OIR report would violate certain statutory and privacy rights of the involved officers." (*Id.*) As prompted by the City, the PPOA filed a reverse-CPRA action to block any portion of the report from being disclosed. (*Id.* at 153.) The Court of Appeal ultimately rejected the PPOA's argument that the entire report was a privileged personnel file and held that the vast majority of the report must be disclosed. (*Id.* at 154–55.)

Similarly, in *LBPOA*, the Los Angeles Times filed a CPRA request with the City of Long Beach for the names of police officers who had fired multiple rounds at a man who brandished a garden hose spray nozzle like a gun. (*LBPOA*, 59 Cal.4th at 64.) The Long Beach Police Officers Association ("LBPOA") filed a reverse-CPRA action seeking injunctive relief blocking disclosure, alleging that the City had informed it that the information would be released "unless prohibited by a court." (*Id.*) After the trial court issued a temporary restraining order preventing the disclosure of the names, the Los Angeles Times intervened. (*Id.* at 65.) The City then sided with the LBPOA's effort to *prevent disclosure*. (*Id.*) The California Supreme Court ultimately upheld the newspaper's right to obtain the information at issue in that case. (*Id.* at 75–76.)

The responding agencies' notification of the third-parties in *Pasadena Police Officers Association* and *LBPOA* resulted in protracted litigation in which requesters were required to intervene to defend the public's right of access to the information they requested. As these cases illustrate, the *Marken* court's assumption that "the requesting party may elect to allow the agency itself to defend its decision" to disclose requested records, and that "any active participation in the litigation would in no way be mandatory" is inconsistent with the reality that the agency's and third-party's interests are frequently—if not most often—aligned *against* public disclosure. (*Marken*, 202 Cal.App.4th at 1268.) Even in *Marken*, the Court noted the requester's "persuasive argument" that the public agency did not "adequately represent [the requester's] interests" in that reverse-CPRA action, "beginning with its unauthorized delay in producing the records to permit [the third-party] to file the action." (*Id.* at 1276 (noting also that the agency provided "tepid arguments" in support of disclosure).)

Moreover, neither the public nor the courts should be required to rely on the "optimistic presumption" that "public officials conduct official business in the public's best interest." (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 625.) "The whole purpose of CPRA is to ensure transparency in government activities." (*Id.*) The Act provides a "check[] against the arbitrary exercise of official power and secrecy in the political process." (*Int'l Fed. of Prof'l & Tech. Eng'rs*, 42 Cal.4th at 329.) Forcing

members of the public to choose between expending resources to participate in reverse-CPRA litigation they did not initiate or relying entirely on public officials to assert the public's interest in government transparency is contrary to the Act's legislative intent and case law interpreting it.

The historical backdrop of the CPRA, as well as the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), further underscore *Marken*'s mistaken assumption that a requester's "active participation" in reverse-CPRA litigation would generally be unnecessary. (*Marken*, 202 Cal.App.4th at 1268.) Public records laws like the CPRA and FOIA were enacted to reinforce the public's common law right to access government records that agencies refused to release in the first place. (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 678–79 (Mosk, J., dissenting) ("Access to and inspection of public records is a fundamental right of citizenship, existing at common law." (citations omitted)); *see also Nixon v. Warner Commc'ns, Inc.* (1978) 435 U.S. 589, 598 ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents.").) Public records laws like FOIA first came into existence because agencies repeatedly violated existing disclosure laws. (*See* H.R. Rep. No. 89-1497, at 26–27 (1966) (documenting numerous times that government officials refused to disclose clearly public information, such as

names and salaries of government employees);[2] S.R. Rep. No. 89-813, at 38 (1966) ("Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities.").[3])

Allowing reverse-CPRA lawsuits to proceed on the theory that government agencies can be expected to vigorously defend the public's right of access to government records under the Act disregards this history of government officials withholding records for self-interested reasons. Indeed, precisely because government information may "expose corruption, incompetence, inefficiency, prejudice, and favoritism," (*Int'l Fed. of Prof'l & Tech. Eng'rs*, 42 Cal.4th at 333), it is unrealistic to expect that a public agency will adequately represent the public's interest in access to government records in all reverse-CPRA cases.

B. Courts inconsistently award fees to prevailing requesters in reverse-CPRA cases, undermining the Act's fee structure and deterring requesters from intervening to defend the public's right of access.

The Legislature mandated an award of reasonable attorneys' fees to requesters who prevail in CPRA litigation. (*See* Cal. Gov. Code § 6259(d) ("The court shall award court costs and reasonable attorney's fees to the requester should the requester prevail in litigation filed pursuant to this

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2 https://perma.cc/34WE-SU65.

3 https://perma.cc/Z2EW-57KD.

section.").) Yet some courts have required requesters to shoulder the financial burden of their participation in reverse-CPRA cases, even when the court ultimately orders disclosure of the records they requested. As a result, requesters are disincentivized from intervening in reverse-CPRA lawsuits to defend their rights of access under the CPRA; even requesters who prevail in CPRA litigation and vindicate the public's right to government records may lose, given the expense of litigating. (*See* Raheem F. Hosseini, *K.J.'s Revenge*, Sacramento News & Rev. (Aug. 2, 2018), https://perma.cc/56Q3-JP2B (noting that the newspaper requester was forced to incur $100,000 in legal costs in a reverse-CPRA matter that led to records being disclosed).) This undermines the purpose of the CPRA's mandatory fee-shifting provision, and the Act's effectiveness.

The CPRA's mandatory fee-shifting provision is designed to encourage members of the press and the public "to seek judicial enforcement of their right to inspect public records subject to disclosure" whenever an agency unlawfully withholds public records, *Filarsky*, 28 Cal.4th at 427, including "in situations where [the requester] otherwise would not find it economical to sue." (*Turner v. Ass'n of Am. Medical Colleges* (2011) 193 Cal.App.4th 1047, 1060 (citation omitted).) Reverse-CPRA actions have undercut the Legislature's carefully crafted incentives structure.

A number of reverse-CPRA cases filed post-*Marken* have created uncertainty as to whether a requester who participates and prevails in reverse-CPRA litigation will be able to recover all reasonable attorneys' fees incurred in that effort. (*See, e.g.*, *Nat'l Conference of Black Mayors v. Chico Cmty. Publ'g, Inc.* (2018) 25 Cal.App.4th 570, 587 (affirming trial court's denial of attorneys' fees because the reverse-CPRA lawsuit is not a CPRA proceeding); *Pasadena Police Officers Assoc.*, 22 Cal.App.5th at 173 (awarding reduced fees).) In this case, though the trial court ordered the disclosure of the requested records, *see* Decision at 32–33 (Jan. 15, 2016), and awarded the Union-Tribune the majority of its attorneys' fees, it denied fees for work the Union-Tribune's counsel had done responding to three separate oppositions to its fees motion—work that was necessary because of the multi-party nature of this reverse-CPRA case. (*See* Tentative Decision on Mot. for Attorney's Fees & Costs[4] at 15 (awarding fees against MWD under the CPRA, and fees against intervening water districts under the private attorney general statute).)

Requesters' uncertainty as to their ability to recover the full amount of attorneys' fees expended in reverse-CPRA matters chills their willingness to intervene in such matters to advocate for public disclosure in

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[4] The trial court adopted the Tentative Decision in full. (*See* Reporter's Transcript of Proceedings (May 3, 2016) at 33–34.)

the first place—a chilling effect that the California Supreme Court in *Filarksy* warned against. (*Filarsky*, 28 Cal.4th at 434.) This uncertainty is particularly problematic for news organizations, many of which are tightening budgets in the face of economic pressures. From January 2017 to April 2018, at least 36 percent of the largest newspapers in the United States experienced layoffs; those with the highest circulations were the most likely to be affected. (*See* Elizabeth Grieco et al., *About a Third of Large U.S. Newspapers Have Suffered Layoffs Since 2017*, Pew Res. Ctr. (July 23, 2018), https://perma.cc/G9AT-ES6D (noting that 56 percent of newspapers with circulations of greater than 250,000 suffered layoffs).) In California, many newsrooms have been eliminated altogether, with more than 70 newsrooms disappearing since 2004. (*See* Penelope Muse Abernathy, *California | The Expanding News Desert*, U. of N.C. Ctr. for Innovation & Sustainability in Local Media, http://bit.ly/2JHuZxN (noting two counties in California have no local newspaper, and many with only one).) Such news organizations are unlikely to be able to pursue litigation to vindicate their CPRA rights for the benefit if the public with no guarantee they will be able to recover the full amount of their attorney's fees if they prevail.

The CPRA, through its mandatory fee-shifting provision, intended to shift the financial burdens of CPRA litigation from the prevailing requester to the party fighting against the public's interest in disclosure. (*See Turner*,

193 Cal.App.4th at 1060 (noting the Legislature enacts a fee-shifting provision to advance some public purpose).) "Without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be unfeasible." (*Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 902–03.) Moreover, fee-shifting provisions like the Act's encourage agency compliance and "help to deter 'bad faith' litigation and to preserve the foundation upon which free access to the courts is built." (*Young v. Redman* (1976) 55 Cal.App.3d 827, 838.) By approving of reverse-CPRA litigation, *Marken* undercut the policy objectives of the CPRA's mandatory fee-shifting provision. For this reason too, the Court should reconsider and reject the reasoning of *Marken*.

II. The *Marken* court did not anticipate the type of reverse-CPRA litigation that has proliferated and deprived the public of the right to timely access to government information.

Although the court in *Marken* considered reverse-CPRA actions to be "limited" in "nature," 202 Cal.App.4th at 1270, in the years since that decision, reverse-CPRA cases have proliferated with few, if any, limiting principles, and have been most effective as a tool for delaying public access to government information. Specifically, the *Marken* court anticipated that a reverse-CPRA action may be brought when a responding agency has made the decision to disclose requested information under the Act, in order to prevent the agency "from acting in an unlawful manner by releasing

information the disclosure of which is prohibited by law." (*Marken*, 202 Cal.App.4th at 1266.) Yet post-*Marken* reverse-CPRA cases are typically filed *before* an agency makes a decision to disclose requested records, *see Pasadena Police Officers Ass'n*, 22 Cal.App.5th at 152 n.3, and are often aimed at preventing a potential *discretionary* disclosure.

For example, many reverse-CPRA actions mistakenly rely on exemptions set forth in Government Code section 6254 to argue that an agency *must* withhold requested records. (*See, e.g.*, *Rozanski v. Camarillo Health Care District* (2017) Amended Verified Compl. & Pet. for Writ of Mandate, 2017 WL 10088322 (citing only discretionary exemptions under section 6254); *Williams v. City of Milpitas* (Sup. Ct. Santa Clara, 17CV310994) Final Statement of Decision at 5–9.) It is well settled, however, that section 6254's exemptions "are permissive, not mandatory." (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656; *see also Marken*, 202 Cal.App.4th at 1266 n.12 (noting section 6254's exemptions are discretionary and also citing examples of mandatory withholding statutes); Cal. Gov. Code § 6254 ("Except as provided in Sections 6254.7 and 6254.13, this chapter does not *require* the disclosure of any of the following records." (emphasis added)).)

Such meritless reverse-CPRA lawsuits, which attempt to control an agency's discretionary decision-making process, are contrary to the CPRA and California law governing mandamus. (*Common Cause v. Bd. of*

Supervisors (1989) 49 Cal.3d 432, 442 ("Mandamus will not lie to control an exercise of discretion, *i.e.*, to compel an official to exercise discretion in a particular manner."); Code of Civil Pro. § 1085(a) ("A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially *enjoins*." (emphasis added)).) Yet, while generally unsuccessful,[5] such lawsuits significantly delay public access to government information.

This case is no different. Plaintiff Los Angeles Department of Water and Power ("LADWP") argues that disclosure is improper pursuant to section 6254.16. (Jan. 15, 2016 Decision at 2.) However, as the trial court noted, below, section 6254.16 is a *discretionary* exemption. (*Id.* at 17 ("Absent certain exceptions, section 6254.16 *permits* DWP to withhold from CPRA requests its customer's utility bills, credit history, and contact information." (emphasis added)).) Disclosure is not prohibited by law, as contemplated by *Marken*. (*See Marken*, 202 Cal.App.4th at 1257, 1271 (noting that petitioners sought to prevent disclosure under section 6254 *and* provisions of the California Education Code).) Indeed, the Metropolitan

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[5] As the Union-Tribune notes, Plaintiffs and Intervenors are unable to point to a single appellate decision in favor of nondisclosure in a reverse-CPRA case. (*See* Union-Tribune Reply Br. 54–56.) *Amici* are also unaware of any such appellate decisions.

Water Department acknowledged as much when it first received the Union-Tribune's CPRA request, as it issued an internal memo stating that "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." (Reply Br. 51 (emphasis added).)

Despite this fundamental flaw, this lawsuit deprived the public of critical details regarding how the government administers its $370 million water conservation program for many months. (Jan. 15, 2016 Decision at 26.) The CPRA request was filed in May 2015; the trial court issued an order requiring disclosure in January 2016 (Union-Tribune's Combined Opening and Respondent's Br. 20, 25). This is far from consistent with CPRA's requirement that an agency make a determination within ten days of receiving the request and that records be made "promptly available" (Cal. Gov. Code § 6253).

Other cases illustrate the delays caused by reverse-CPRA litigation. (*See* Daniel Wolowicz, *Rozanski Admits to Relationship with Lawyer*, Camarillo Acorn (May 5, 2017), https://perma.cc/QDQ8-T9TN (noting that the trial court in reverse-CPRA action ordered disclosure in April 2017 regarding a November 2016 request); Nick Miller, *SN&R Prevails in Yearlong First Amendment Battle with Sacramento Mayor Kevin Johnson*, Sacramento News & Rev. (July 14, 2016), https://perma.cc/E28G-JL3M

(noting that the trial court ordered disclosure in reverse-CPRA matter in July 2017 regarding a March 2016 request).) For example, in April 2017, the First Amendment Coalition sent a CPRA request to the City of Milpitas for records relating to allegations of serious misconduct by Tom Williams, a former employee. (*See Williams*, 17CV310994 Verified Pet. (May 26, 2017) at 4.) The former employee filed a reverse-CPRA action, attempting to prevent the city from releasing any documents. (*Id.*, Final Statement of Decision at 2.) The trial court eventually ordered the release of the records in May 2018—more than one year later—holding that none of the discretionary withholding provisions of section 6254 applied. (*Id.* at 5–9.) The disclosed records revealed that Williams used city funds to pay for personal legal fees and violated City Council orders to stay away from the finance department by "aggressively question[ing]" its employees. (*See* Joseph Geha, *Separate Investigative Reports Point to Misconduct by Milpitas City Manager and Mayor*, Mercury News (June 7, 2018, 9:14 PM), https://perma.cc/4N6N-799W.) In the time it took for these records to be released, Williams had been hired by another city as its interim city manager. (*Id.*)

As the California Supreme Court warned in *Filarsky*, permitting reverse-CPRA litigation would deny "speedy public access to vital information regarding the government's conduct of its business" to the detriment of the press and the public. (*Filarsky*, 28 Cal.4th at 434.) This

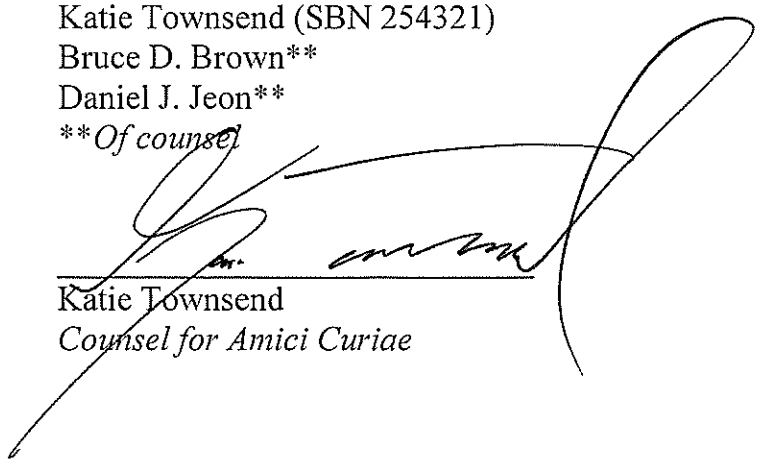
concern is consistent with well-established U.S. Supreme Court precedent recognizing that "[t]he peculiar value of news is in the spreading of it while it is fresh." (*Int'l News Servs. v. Associated Press* (1918) 248 U.S. 215, 235; *see also Neb. Press Ass'n v. Stuart* (1976) 427 U.S. 539, 561 ("[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.").) Post-*Marken* reverse-CPRA cases have made the delay warned of in *Filarsky* a reality. For that reason too, this Court should reconsider and reject the reasoning of *Marken*.

CONCLUSION

For the foregoing reasons, *amici* agree with the Union-Tribune that this Court can and should reconsider and reject the reasoning of *Marken*.

Respectfully submitted,

REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
Katie Townsend (SBN 254321)
Bruce D. Brown**
Daniel J. Jeon**
***Of counsel*



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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the attached *amicus curiae* brief was produced using 13-point Roman type, including footnotes, and contains 5,320 words. I have relied on the word-count function of the Microsoft Word word-processing program used to prepare this brief.

Dated: July 19, 2019

Katie Townsend
Counsel for Amici Curiae

APPENDIX A: DESCRIPTION OF *AMICI*

The Reporters Committee for Freedom of the Press was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today it provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

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

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public's rights to find out what citizens need to know to

be truly self-governing, and to share what they know and believe without fear or loss.

CalMatters is a nonpartisan, nonprofit journalism organization based in Sacramento, California. It covers state policy and politics, helping Californians to better understand how their government works while serving the traditional journalistic mission of bringing accountability and transparency to the state's Capitol. The work of its veteran journalists is shared, at no cost, with more than 180 media partners throughout the state.

Embarcadero Media is a Palo Alto-based 40-year-old independent and locally-owned media company that publishes the Palo Alto Weekly, Pleasanton Weekly, Mountain View Voice and Menlo Park Almanac, as well as associated websites. Its reporters regularly rely on the California Public Records Act to obtain documents from local agencies.

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

Gannett Co., Inc. is a leading news and information company which publishes USA TODAY and more than 100 local media properties. Each month more than 125 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

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

MediaNews Group Inc. publishes the Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post, the Boston Herald and the Detroit News and other community papers throughout the United States, as well as numerous related online news sites.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and

representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The Northern California Chapter of the Society of Professional Journalists ("SPJ NorCal") is dedicated to improving and protecting journalism. It is a Chapter of the national Society of Professional Journalists, the nation's most broad-based journalism organization. Founded in 1909 as Sigma Delta Chi, the Society of Professional Journalists promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects the First Amendment guarantees of freedom of speech and press. SPJ NorCal has a Freedom of Information Committee of journalists and First Amendment lawyers, which assists in its free speech and government transparency advocacy. Also, in collaboration with its Freedom of Information Committee, it hosts the annual James Madison Freedom of Information Awards and offers training to journalists on free press and access issues.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes

journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

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

Tribune Media Company ("Tribune") through its subsidiary Tribune Broadcasting Company, LLC, owns or operates 42 local television stations, reaching more than 50 million households, making it the largest independent station group in the United States, with affiliates representing all of the major over-the-air networks, including CBS, ABC, FOX, NBC, the CW, and My TV. Tribune owns and operates WGHP in Greensboro.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

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PROOF OF SERVICE

I, Daniel J. Jeon, do hereby affirm that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above-captioned action. My business address is 1156 15th St. NW, Suite 1020, Washington, DC 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

On July 19, 2019, I served the foregoing documents: **Application for Leave to File *Amici Curiae* Brief and *Amici Curiae* Brief of The Reporters Committee for Freedom of the Press and 15 Media Organizations in Support of Plaintiff and Respondent** as follows:

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

Executed on the 19th of July 2019, at Washington, D.C.

By: _____
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