REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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January 12, 2024

The Honorable Patricia Guerrero, Chief Justice of California, and the Honorable Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: *The Bakersfield Californian v. Superior Court* (Nov. 7, 2023, No. F086308) 96 Cal.App.5th 1228, Letter of Amici Curiae the Reporters Committee for Freedom of the Press and 23 Media Organizations in Support of Petitioner's Request for Depublication

To the Honorable Chief Justice and Associate Justices:

The Reporters Committee for Freedom of the Press ("Reporters Committee") and the 23 media organizations listed below (hereafter "amici curiae") respectfully submit this letter pursuant to California Rule of Court 8.1125(b), in support of Petitioner Bakersfield Californian's request for depublication of the opinion of the Fifth Appellate District of the California Court of Appeal (the "Court of Appeal") in *The Bakersfield Californian v. Superior Court* (2023) 96 Cal.App.5th 1228 [315 Cal.Rptr.3d 51] (the "Opinion").

I. INTEREST OF AMICI CURIAE

The Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The other signatories to this letter are organizations that gather and report the news in California or work on behalf of the press.

Journalists regularly and necessarily rely on information obtained from sources to keep the public informed. Compelled disclosure of journalists' communications and other work product chills the flow of information between the press and their sources. As a representative of the news media, the Reporters Committee has a strong interest in ensuring that the provisions of article I, section 2, subdivision (b) of the California Constitution and Section 1070 of the Evidence Code (collectively, the "Shield Law") are interpreted and applied in a manner that safeguards the work of the news media, consistent with the purpose of those provisions.

Amici curiae agree with the arguments set forth in Petitioner's letter, at pp. 4–8, filed on January 8, 2024, in support of depublication. Amici write to emphasize the importance of robust protections against compelled

disclosure of journalistic work product and the serious ramifications the Opinion, if published, could have for reporters throughout the State of California.

II. WHY THE OPINION SHOULD BE DEPUBLISHED

Although "[t]here are no fixed criteria for depublication," this Court will consider, among other factors, whether the Court of Appeal's decision was "wrong on a significant point" or whether it "could lead to unanticipated misuse as precedent [citation]." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group rev. 2023) ¶ 11:180.1.) Here, as explained by Petitioner, the Opinion improperly shifted the burden to the newspaper to prove that its constitutional rights should not be overcome. As the California Supreme Court has concluded, even when the party seeking disclosure of unpublished newsgathering material is a criminal defendant, the burden rests on that party to show that nondisclosure would deprive him of his federal constitutional right to a fair trial. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 808 [268 Cal.Rptr. 753].) Among the things the defendant must show is "a *reasonable possibility* the information will materially assist his defense." (*Ibid.*) For that reason alone, the Court of Appeal's Opinion should be depublished.

Further, and in addition to the arguments advanced by Petitioner, the Opinion should be depublished because of its chilling effect on newsgathering about criminal matters. By providing precedent for allowing prosecutors and criminal defendants to use journalists to further criminal investigative efforts, the Opinion could have far-reaching consequences for reporting and dam the free flow of information to Californians about matters of the utmost public concern.

A. Depublication is warranted given the Opinion's potential to chill reporting.

Article I, section 2, subdivision (b) of the California Constitution and Section 1070 of the Evidence Code, together, protect journalists from forced disclosure of their communications and other work product in order to "safeguard the free flow of information from the news media to the public, 'one of the most fundamental cornerstones assuring freedom in America' [citation]." (*In re Willon* (1996) 47 Cal.App.4th 1080, 1091 [55 Cal.Rptr.2d 245].) As a published decision approving the enforcement of a subpoena requiring Petitioner to disclose journalistic work product reflecting communications with a source, the Opinion would undercut the purpose of the Shield Law by chilling future newsgathering, especially with respect to criminal matters.

The Opinion is dismissive of the concerns that animate the Shield Law, including that compelled disclosure of a journalist's communications will deter criminal defendants from speaking to reporters. (See Opinion at p. 1270 ["We agree with [defendant's] observation that defendants who are willing to grant jailhouse interviews without conditions are presumably aware that whatever they say 'is fair game to be published'"].) But journalism relies on candor between reporters and sources willing to speak to them about matters of public concern, including sources connected to criminal matters.

Courts have long recognized the risk that subpoenas directed to the press will stifle reporting by chilling these vital reporter-source communications. (See *Zerilli v. Smith* (D.C. Cir. 1981) 656 F.2d 705, 711 ["[J]ournalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant"]; *Cusumano v. Microsoft Corp.* (1st Cir. 1998) 162 F.3d 708, 714 ["Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information"]; *Gonzales v. NBC, Inc.* (2d Cir. 1998) 194 F.3d 29, 35, opn. amended 1999 [noting that the threat of compelled disclosure may cause sources to be "deterred from speaking to the press, or insist[] on remaining anonymous, because of the likelihood that they w[ill] be sucked into litigation"]; *Shoen v. Shoen* (9th Cir. 1993) 5 F.3d 1289, 1295 [noting "a 'lurking and subtle threat' to the vitality of a free press if disclosure of non-confidential information 'becomes routine and casually, if not cavalierly, compelled' [citation]"].) By concluding that criminal defendants should presume all information they divulge to a journalist is subject to compelled disclosure, the Opinion, in effect, is precedent for a judicially created exception to the Shield Law for reporters' communications with sources who are criminal defendants. (Opinion at p. 1270.)

The public interest is not served by deterring criminal defendants from speaking to the press in the future, for fear their published statements—and even speculation about possible off-the-record statements—will provoke fishing expeditions for information that goes against their penal interests. It is not a given that individuals facing criminal jeopardy will speak with journalists. But newsworthy information relevant to the public may be obtained from such individuals when they do. To obtain such information, journalists sometimes must assure their sources confidentiality and have the freedom to have off-the-record conversations. (See *Gonzales*, *supra*, 194 F.3d at pp. 34–36.) Safeguarding that freedom protects the public's interest in receiving information about the criminal justice system. This Opinion does not take these important considerations into account.[1]

B. Depublication is warranted because the Opinion approves prosecutors' and criminal defendants' use of the press as an investigative tool.

To effectively perform its constitutionally recognized role in a democratic society, the press must not only be independent, but also be perceived as independent. (See *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 571–72 [100 S.Ct. 2814, 65 L.Ed.2d 973] ["To work effectively, it is important that society's criminal process 'satisfy the appearance of justice' [citation]"]; *Gonzales*, *supra*, 194 F.3d at p. 35 [acknowledging

[1] The compelled disclosure of journalists' communications and work product also stymies the free flow of information to the public by increasing the likelihood that news organizations will self-censor in order to avoid the cost and distraction of litigation. Journalists may hesitate to investigate newsworthy matters of public interest—such as a high-profile murder case—to avoid an inevitable subpoena fight. Likewise, news organizations may be reluctant to publish "any information they fear would excite the interest of current or prospective litigants." (*United States v. Marcos* (S.D.N.Y., June 1, 1990, No. SSSS 87 CR 598) 1990 WL 74521, at p. *2.)

"the symbolic harm of making journalists appear to be an investigative arm of . . . the government" and emphasizing the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters [citation]".) The more closely journalists and news organizations are associated with the compelled disclosure of their work product and communications with sources at the behest of the state, criminal defendants, or civil litigants, the less they will be trusted, and the less access they will have to people, places, and events that urgently call for independent coverage. These considerations undergird the Shield Law. (See *Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 27–28 [201 Cal.Rptr. 207] ["The Legislature's 1978 resolution proposing elevation of the protection to the level of a constitutional mandate, and the electorate's adoption of that proposition in 1980, clearly manifest the intent to afford newspersons the highest level of protection under state law"].) The Opinion disregards their importance and, for that reason too, should be depublished.

For these reasons and those set forth by Petitioner, amici curiae respectfully urge the Court to depublish the Opinion.

Respectfully submitted,

/s/ Katie Townsend

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On behalf of:
California News Publishers Association
Californians Aware
CalMatters
The Center for Investigative Reporting (d/b/a Reveal)
Cityside Journalism Initiative
E.W. Scripps Company (ABC 23 News KERO-TV)
Embarcadero Media
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MediaNews Group Inc.
National Press Club
National Press Club Journalism Institute
The NewsGuild-Communications Workers of America Local 39213
The NewsGuild-Communications Workers of America Local 39521 (d/b/a Pacific Media Workers Guild)
Nexstar Media Inc.
Open Vallejo
Sonoma Media Investments (The Press Democrat, The Petaluma Argus-Courier, The Sonoma Index-Tribune, The Sonoma Gazette, La Prensa Sonoma
TEGNA (KFMB-San Diego and KXTV-Sacramento)

PROOF OF SERVICE

I, Katie Townsend, 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 Street NW, Suite 1020, Washington, D.C. 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

On January 12, 2024, I caused the foregoing document to be served: **Letter of Amici Curiae the Reporters Committee for Freedom of the Press and 23 Media Organizations in Support of Petitioner's Request for Depublication**, as follows:

[x] By TrueFiling electronic delivery:

All counsel of record in *The Bakersfield Californian v. Superior Court of Kern County* (S283323).

[x] By mail:

California Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

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 12th day of January, 2024, in Washington, D.C.

By: */s/ Katie Townsend*

Katie Townsend
Counsel for Amici Curiae