No. S252445

SUPREME COURT OF CALIFORNIA

**NATIONAL LAWYERS GUILD,
SAN FRANCISCO BAY AREA CHAPTER,**
Plaintiff and Respondent,

v.

CITY OF HAYWARD, et al.,
Defendants and Appellants.

After Decision by the Court of Appeal,
First Appellate District, Division Three
Case No. A149328

On Appeal from the Alameda County Superior Court
The Honorable Evelio M. Grillo
Case No. RG15785743

APPLICATION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CALIFORNIA NEWS PUBLISHERS ASSOCIATION AND FIRST AMENDMENT COALITION IN SUPPORT OF RESPONDENT NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER

*KELLI L. SAGER (State Bar No. 120162)
DAN LAIDMAN (State Bar No. 274482)
SELINA MACLAREN (State Bar No. 300001)
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017-2566
Tel.: (213) 633-6800
Fax: (213) 633-6899

Attorneys for Amici Curiae
CALIFORNIA NEWS PUBLISHERS ASSOCIATION and
FIRST AMENDMENT COALITION

No. S252445

SUPREME COURT OF CALIFORNIA

NATIONAL LAWYERS GUILD,
SAN FRANCISCO BAY AREA CHAPTER,
Plaintiff and Respondent,

v.

CITY OF HAYWARD, et al.,
Defendants and Appellants.

After Decision by the Court of Appeal,
First Appellate District, Division Three
Case No. A149328

On Appeal from the Alameda County Superior Court
The Honorable Evelio M. Grillo
Case No. RG15785743

APPLICATION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CALIFORNIA NEWS PUBLISHERS ASSOCIATION AND FIRST AMENDMENT COALITION IN SUPPORT OF RESPONDENT NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER

*KELLI L. SAGER (State Bar No. 120162)
DAN LAIDMAN (State Bar No. 274482)
SELINA MACLAREN (State Bar No. 300001)
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017-2566
Tel.: (213) 633-6800
Fax: (213) 633-6899

Attorneys for Amici Curiae
CALIFORNIA NEWS PUBLISHERS ASSOCIATION and
FIRST AMENDMENT COALITION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amici Curiae California News Publishers Association ("CNPA") and the First Amendment Coalition ("FAC") respectfully submit this Amici Curiae Brief in support of Plaintiff and Respondent National Lawyers Guild, San Francisco Bay Area Chapter ("the Lawyers Guild"). For the reasons discussed below, CNPA and FAC respectfully request that the Court reverse the decision of the Court of Appeal, and hold that when disclosing records under the California Public Records Act, Government Code § 6250 et seq. (the "CPRA"), public agencies cannot require members of the public to pay for the agencies' redaction costs regardless of the form in which a record is produced.

APPLICATION TO SUBMIT AMICI CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), CNPA and FAC respectfully request this Court's permission to submit the attached Amici Curiae Brief.

CNPA is a non-profit trade association representing more than 1,300 daily, weekly, and student newspapers and digital news media outlets in California. For well over a century, CNPA has defended the First Amendment rights of publishers to gather and disseminate – and the public to receive – news and information. Its members regularly use the CPRA in

reporting on state and local government at every level throughout California to keep their readers informed about matters of public concern. CNPA works with the Legislature on bills affecting public access, and it regularly appears as amicus curiae in CPRA cases in this Court and the courts of appeal in order to provide its perspective on the legislative process as well as the tangible, ground-level effects of the law on its members.

FAC is a non-profit, public interest organization committed to freedom of speech, more open and accountable government, and public participation in civic affairs. Founded in 1988, FAC's activities include legislative oversight of bills in California affecting access to government and free speech, free legal consultations on First Amendment issues, educational programs, and public advocacy, including extensive litigation and appellate work. FAC co-authored and sponsored Proposition 59, the Sunshine Amendment to the California State Constitution, enacted by voters in 2004. FAC's members are news organizations, law firms, libraries, civic organizations, academics, freelance journalists, bloggers, community activists, and ordinary citizens.

CNPA and FAC have a unique interest in this case, which addresses what costs government agencies can recover pursuant to Government Code § 6253.9, in responding to requests for copies of public records that are maintained and produced in electronic formats. In the case before this Court, the First Appellate District Court of Appeal held that agencies can

require records requesters to pay for the cost of redacting information that the agency claims to be exempt from disclosure – a significant departure from decades of clear case law holding that the government must bear redaction costs under the CPRA. See National Lawyers Guild v. City of Hayward, 27 Cal. App. 5th 937, 950 (2018) ("NLG"). To justify this change, the court cited excerpts from a letter to the Governor from CNPA's then-general counsel (and current executive director), Thomas W. Newton, in support of the bill that ultimately became Section 6253.9. Id.

The Court of Appeal took the unusual step of using a letter to the Governor from a trade organization to determine legislative intent. Unfortunately, the Court of Appeal focused on a few isolated excerpts from the letter, ignoring its broader context, and inaccurately concluded that CNPA agreed with its interpretation of the statute as shifting the cost of redactions to CPRA requesters. Id. It does not. To the contrary, CNPA sponsored Assembly Bill 2799 ("AB 2799") and engaged in the negotiations that led to its passage for the sole purpose of reducing the costs and burdens faced by records requesters, and thereby broadening access to public records. The Court of Appeal's misinterpretation of Section 6253.9 will have precisely the opposite result: it will dissuade journalists and other members of the public from requesting copies of public records by making the costs associated with doing so untenable.

FAC supported AB 2799 and worked with CNPA on crafting the bill's language. CNPA and FAC request permission to submit their amici brief to give this Court their first-hand perspective on the legislative process that produced Section 6253.9. CNPA and FAC also offer a unique perspective because together they were among the key supporters of 2004's Proposition 59, which amended the California Constitution to require that statutes like the California Public Records Act (including Section 6253.9) be broadly construed in a manner that furthers the public's right of access.

CNPA and FAC have a strong interest in ensuring that journalists, advocacy groups, non-profits and other members of the public can continue to keep informed of government affairs by asserting their rights under the CPRA without facing prohibitive costs. CNPA and FAC respectfully request that this Court grant their Application and consider the attached Amici Brief.[1]

---

[1] Pursuant to California Rule of Court 8.520(f)(4), CNPA and FAC advise the Court that no party or counsel for a party in the pending appeal authored the proposed amici brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae, their members, or their counsel in the pending appeal.

AMICI CURIAE BRIEF

I. SUMMARY OF ARGUMENT

CNPA sponsored the bill that became Section 6253.9 because its members were encountering frustrating hurdles when requesting public records. Before the 2000 amendment, California was one of the very few states in the United States that allowed government agencies to unilaterally decide how to produce information stored electronically in response to public records requests. Left to their own discretion, agencies routinely would print out hard copies of information in databases, charging journalists and other requesters exorbitant copying fees for information that could have been easily and cheaply transferred onto a computer disk or sent by email. As a consequence, newspapers – which were facing increasing economic pressures already – avoided making requests for electronic records, or scaled back such requests, constraining their ability to conduct the type of data-intensive journalism that has become a hallmark of modern investigative reporting.

Section 6253.9 was designed to remedy this problem, by ensuring that members of the public could access electronically-stored records without facing prohibitive costs. See, e.g., Sen. Judiciary Comm., analysis of Assem. Bill No. 2799 (1999-2000 Reg. Sess.) as amended on June 22, 2000, at comment 1, page 3 (explaining the need for AB 2799 by noting that under existing law, the "expense of copying [electronic records] in

paper format, especially when the records are voluminous, makes those public records practically inaccessible to the public").

In the decision under review, however, the Court of Appeal turned the purpose of the statute on its head, upending decades of well-established law that makes the government responsible for bearing the cost of redacting exempt information from otherwise disclosable records. See NLG, 27 Cal. App. 5th at 952. The court reached this result based on a strained and inconsistent interpretation of the legislative history of AB 2799, and by misinterpreting statements made at the time by CNPA. Id. at 950.

CNPA's position is the same now as it was in 2000: AB 2799 did not change the settled principle that public agencies are responsible for the cost of redacting information they deem to be "exempt" from public disclosure under the CPRA. The correct interpretation is apparent from reviewing the language of Section 6253.9 in harmony with the rest of the CPRA, from reviewing the entire legislative history in context, and by applying the state constitution's interpretive mandate that statutes be broadly construed to further public access.

First, as a threshold matter, the complete letter that CNPA sent to Governor Davis in support of AB 2799 paints a far different picture than the snippets cited by the Court of Appeal. See Section II.A.[2] Read in

[2] The letter, which is part of the legislative history of AB 2799, is attached as **Appendix A**. The Court of Appeal judicially noticed the

context, CNPA's letter made clear that the proposed legislation would allow agencies to recover certain limited technical costs arising from new obligations imposed by the amendment – for example, if a computer program had to be written or purchased to provide copies of electronically-stored records. It neither stated nor was intended to suggest that the bill would change any pre-existing cost obligations, such as the cost of redacting records to segregate portions deemed to be "exempt" from public disclosure. Id.

Second, the legislative history of AB 2799 is consistent with this position. See Section II.B. Nothing in that history suggests that the Legislature believed it was uprooting established law to shift the burden of paying for redactions to CPRA requesters, and there is abundant evidence to the contrary. Id. In reaching its conclusion, the Court of Appeal relied on strained inferences that misapprehend the nature of the legislative process. Id.

Third, the Court of Appeal conflated the term "extraction" in Section 6253.9 with the word "redaction" – an interpretation that has no support in the legislative history, and is contrary to the text of the CPRA and to the weight of legal authority. See Section II.C. Section 6253.9 is one of very

---

legislative history and cited the letter in its Opinion. NLG, 27 Cal. App. 5th at 949-50.

few parts of the CPRA that use the term "extraction," which is commonly understood to refer to a technical process of collating data, often by automated means, to create a compilation or report. Id. In contrast, the Legislature has more often used the words "segregate," "deletion" and "redaction" in the CPRA to refer to the act of removing a subset of "exempt" information from documents that are being provided to a CPRA requester, after the documents or materials have been "extracted" from other locations. Id. The Court of Appeal's interpretation creates an inconsistency with these provisions, as well as other provisions in the CPRA, in contravention of established principles of legislative interpretation.

Finally, if the term "extraction" in Section 6253.9 is ambiguous, as the Court of Appeal found, this Court has made clear that courts must resolve such ambiguities in the CPRA by looking to Article I, Section 3(b) of the California Constitution. Sierra Club v. Superior Court, 57 Cal. 4th 157, 175-76 (2013) (Article I, Section 3(b) is an "interpretive rule" that must be followed whenever legislative language or intent is unclear); Section III. This provision requires statutes like Section 6253.9 be interpreted in a manner that promotes public access – not restricts it. The Court of Appeal erred by treating this constitutional directive as a mere policy statement, declining to apply it in its analysis, and interpreting

Section 6253.9 in a manner that impedes public access to government records. See Section III.

The Court of Appeal's opinion presents a substantial impediment to transparency. In particular, it would frustrate the implementation of recent reform legislation enhancing public access to records regarding police shootings and use of force, the very records at issue in the opinion below. SB 1421, which amended Penal Code §§ 832.7 and 832.8, opened public access to previously confidential records involving the use of firearms, other uses of force, sexual assault and dishonesty. Among the records now subject to disclosure are audio and video recordings, which may be redacted as permitted by the statute. AB 748, which amended Government Code § 6254(f)(4), expands access to police video and audio recordings of a "critical incident," but allows for the use of "redaction technology" in limited circumstances. These reforms will be hamstrung if potential requesters are deterred by exorbitant fees for government staff time if these video and audio files are stored in a digital format, and are subject to redaction.[3]

[3] This issue is examined in more detail in the amici brief submitted by the Reporters Committee for Freedom of the Press and various media organizations in support of plaintiff/respondent (the "RCFP Brief"). CNPA and FAC agree with the RCFP Brief, and submit this separate amici brief to address the legislative history of Section 6253.9.

For all of these reasons, CNPA and FAC respectfully request that the Court reverse the decision of the Court of Appeal, and hold that public agencies cannot require members of the public to pay for redaction costs regardless of the form in which a record is maintained or produced.

II. THE LEGISLATION THAT CREATED SECTION 6253.9 DID NOT SHIFT REDACTION COSTS TO MEMBERS OF THE PUBLIC

CNPA was one of the sponsors of AB 2799, the 2000 bill that became Section 6253.9. See, e.g., AB 2799 Enrolled Bill Memorandum to Governor (Sept. 10, 2000); Assembly Committee on Governmental Organization, Report on AB 2799 at 2 (April 10, 2000) (citing CNPA, as "sponsor" of the legislation, in describing the purpose of the bill: "to ensure quicker, more useful access to public records."). CNPA was involved in every step of the legislative process, engaging in lengthy negotiations with legislators, organizations representing public agencies, and other stakeholders. Id. at 2. FAC supported AB 2799 and assisted CNPA with crafting its language, and its then-general counsel participated in legislative hearings on the bill. See Assembly Governmental Organization Committee, AB 2799 Bill Analysis Worksheet at 3 (Mar. 20, 2000); Senate Committee on the Judiciary, AB 2799 Background Information Memorandum at 2; Assembly Committee on Governmental Organization, AB 2799 Bill Analysis at 3 (Apr. 10, 2000).

Governor Gray Davis signed AB 2799 into law on September 29, 2000, after it passed by a vote of 34-0 in the Senate and 70-4 in the Assembly. See AB 2799 Final Bill History. Given their involvement, CNPA and FAC are uniquely able to address the Court of Appeal's errors in interpreting the meaning and scope of AB 2799.

A. The Court Of Appeal Misinterpreted CNPA's Position On AB 2799.

The Court of Appeal supported its erroneous interpretation of Section 6253.9 by taking the unusual step of citing to a September 8, 2000 letter to Governor Gray Davis from CNPA's then-general counsel, Thomas W. Newton (now CNPA's executive director), which was written after the legislation had passed but was still included in the legislative history of AB 2799. See NLG, 27 Cal. App. 5th at 950. Relying on a selective excerpt, the court concluded that CNPA believed that the bill would enable agencies to impose the cost of redacting "exempt" material onto records requesters. Id. That is inaccurate. To the contrary, CNPA supported AB 2799 as a means of reducing the burdens on CPRA requesters, as both the letter itself and the legislative history make clear.

First, read in its entirety, CNPA's letter demonstrates that it did not believe the bill would upend established law regarding redaction costs. Most notably, the letter does not even mention "redaction," nor does it address the process of segregating "exempt" material from public records.

See App'x A. This is noteworthy because in portions of the letter that the Court of Appeal did not reference, Mr. Newton described AB 2799 in detail: he summarized its terms, and spelled out the changes to existing law with specificity, even highlighting changes that were made to address concerns by public agencies about the prospect of making records available in electronic form. Id. at 2-3.

If CNPA had intended or understood the legislation it helped draft and was supporting to be changing existing law – shifting redaction costs from the government to the public – that would have been a substantial change in favor of public agencies. In seeking the Governor's approval, CNPA certainly would have spelled out that significant benefit with the same specificity as it did other provisions. Id. at 2-3 (detailing "protections" given to agencies, including provisions making clear that agencies would not be required to "reconstruct a record in electronic format" if it were no longer available, would not have to release records in electronic form if doing so "would jeopardize or compromise the security or integrity of the original record," and protecting agencies' "proprietary software"). Instead, the letter assumed that existing law regarding the segregation of exempt material from records being disclosed under the CPRA would not change. Id. at 3 (explaining that "nothing in the bill 'shall be construed to permit public access to records held by any agency to which access is otherwise restricted by statute'").

Second, the two references to costs in the letter, cited by the Court of Appeal expressly referred to new expenses that might result from the amendment, as distinguished from existing productions costs – such as the cost of staff time spent redacting exempt material. See NLG, 27 Cal. App. 5th at 950 (quoting 9/5/2000 Letter at 2). As Mr. Newton explained, by facilitating access to electronic records, "the bill would not place new burdens on state or local agencies ...." Letter at 2 (emphasis added). He added that the provision which would become Section 6253.9(b)(2) "guarantees the costs associated with any extra effort that might be required to make an electronic public record available shall be borne by the requester, not the state or local agency." Id. (emphasis added).

The Court of Appeal quoted these passages, but ignored key terms: "extra" and "new." See NLG, 27 Cal. App. 5th at 950.[4] CNPA's letter was careful in its language characterizing the legislation, making clear that the costs provision was limited to additional expenses arising from "extra efforts" and "new burdens" that did not exist prior to the amendment. See Letter at 2. This reflected the well-established law at the time AB 2799 was enacted, pursuant to which public agencies already were responsible

[4] In its Brief to this Court, the City of Hayward has gone even further, cherry-picking part of a single line from CNPA's letter in a highly misleading manner. See Answer Brief at 44-45.

for the cost of redacting exempt information from public records, regardless of the format of the particular records being sought.

This is, in fact, the overarching structure of the CPRA, which broadly makes government records "public," subject to limited exemptions. The Act presumes that records are public; it is the burden of the agency to demonstrate that a particular record is exempt from public disclosure. See, e.g., Sacramento County Employees' Retirement System v. Superior Court, 195 Cal. App. 4th 440, 453 (2011) ("[c]reating a general right of access subject to exemptions places the burden on an agency to show that a particular public record is exempt from disclosure").

Consequently, in keeping with this presumption, the CPRA has required from its inception that even if some information in a record is "exempt," all "reasonably segregable" portions of that record must be disclosed. See Gov't Code § 6253(a) ("[a]ny reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law"). In Northern California Police Practices Project v. Craig, 90 Cal. App. 3d 116 (1979), the Third District Court of Appeal explained that this provision places the burden on the government to redact any material deemed to be "exempt," even though it acknowledged that public agencies will incur expense as a result. Id. at 124. As the court explained, "where nonexempt materials are not inextricably intertwined with exempt materials ...

segregation is required to serve the objective of the PRA to make public records available for public inspection and copying unless a particular statute makes them exempt." Id. (Emphasis added.) The court acknowledged that "the requirement of segregation casts a tangible burden on governmental agencies," but explained that "[n]othing less will suffice, however, if the underlying legislative policy of the PRA favoring disclosure is to be implemented faithfully." Id.[5] (Emphasis added.) See also Connell v. Superior Court, 56 Cal. App. 4th 601, 607, 615 (1997) (ordering State Controller to produce records despite agency's objection that it "will incur expense and inconvenience in segregating exempt from nonexempt information").

Case law prior to 2000 left no doubt that public agencies could seek reimbursement from requesters only for the "direct costs of duplication," and not for "ancillary tasks" like segregating or redacting exempt material. North County Parents v. Department of Education, 23 Cal. App. 4th 144, 148 (1994). In North County Parents, a public agency charged records

---

[5] This Court repeatedly has cited Craig in affirming the principle that agencies bear the burden of segregating non-exempt information from public records. E.g., CBS, Inc. v. Block, 42 Cal. 3d 646, 653 (1986) ("[t]he fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document"); Commission on Peace Officer Standards & Training v. Superior Court, 42 Cal. 4th 278, 301-02 (2007) ("if material that is exempt from disclosure reasonably can be segregated from material that is not exempt, segregation is required").

requesters not only for copying documents, but also "for staff time involved in searching the records, reviewing records for information exempt from disclosure under law, and deleting such exempt information." Id. at 146. The Court of Appeal held that this was improper, explaining that the CPRA had been amended over time to omit language that had permitted agencies to charge a "reasonable fee" or even the "actual cost of providing the copy," replacing it with "the more restrictive phrase 'direct costs of duplication.'" Id. at 147-48.[6] The court held that the "direct cost of duplication is the cost of running the copy machine, and conceivably also the expense of the person operating it," and "does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted." Id. at 148.

This interpretation is consistent with the CPRA's requirement that members of the public must be allowed to **inspect** records free of charge. See 85 Ops. Cal. Atty. Gen 225 (2002) (recognizing the "public's right of access to and inspection of public records free of charge"); California Attorney General, "Summary of the California Public Records Act," pp. 4-5 ("CPRA contains no provision for a charge to be imposed in connection with the mere inspection of records"); League of California

---

[6] At the time, the language was in Government Code § 6257; it is now in Section 6253(b).

Cities, The People's Business, p. 15 (government may not "charge a fee for the requester's inspection of a record, even if staff time is expended in the inspection"). That irrefutable right under the CPRA makes the position of Defendants/Appellants even more untenable: if a journalist or member of the public has the right to "inspect" a record for free – regardless of the format in which it is kept – any cost associated with redacting the record before it is made available for "inspection" plainly must be borne by the agency, not the requester. No rational interpretation of the CPRA changes that burden if the requester seeks a copy of the record. Instead, as the North County Parents decision found, it is only the "actual cost of providing the copy" – the duplication cost – that may be assessed.

Requiring the government to bear the costs of redaction reflects the inherent information asymmetry between agencies and members of the public. Requesters do not have access to records until agencies produce them, nor do they have a way of knowing the nature or amount of information that agencies may choose to redact. See Pasadena Police Officers Assn. v. Superior Court, 240 Cal. App. 4th 268, 282-83 (2015) ("PPOA") ("[b]ecause the Report has remained sealed throughout this litigation, [the requesters] have no way to ascertain that too much information was culled from the Report"); Los Angeles Times Comm'ns LLC v. Alameda Corridor Transp. Auth., 88 Cal. App. 4th 1381, 1391-92 (2001) (CPRA requesters who obtain some, but not all, of the requested

records still are entitled to recover their fees; because requesters do not know in advance what material will be exempt, a contrary rule would discourage them from enforcing the right of access). Therefore, it would be both illogical and unfair to surprise requesters with large bills for redaction costs based on a process in which agencies determine unilaterally whether to withhold information that they allege is "exempt."

This established rule is no different for video footage, like the materials at issue here, or for other records that exist digitally or electronically, rather than in paper form. It was well-established long before Section 6253.9 was enacted in the year 2000 that the CPRA applied to such records. See Gov't Code § 6252(e) (defining "public records" to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics") (emphasis added). Indeed, for almost four decades, the Government Code has provided that audiovisual recordings of public meetings are public records that are subject to disclosure under the CPRA. See Gov't Code § 54953.5(b).[7] See also Fontana Police Dep't v. Villegas-Banuelos, 74 Cal. App. 4th 1249, 1252 (1999) (recognizing tape recordings were disclosable public records

[7] Section 54953.5 originally referred to a "tape or film record" but was amended in 1993 and 1994 to add references to "video tape." See Stats 1980 ch.1284 § 18; Amended Stats 1993 ch.1136 § 5; Stats 1994 ch.32 § 5.

under the CPRA, and allowing them to be "edited" to remove exempt material, although agency's specific redactions were deemed improper).[8]

This was the legal landscape at the time CNPA sent its letter to Governor Davis supporting AB 2799 – agencies indisputably bore the cost of segregating exempt information from otherwise non-exempt records – a/k/a "redacting" the records – regardless of the format. Consequently, when Mr. Newton wrote that AB 2799 would allow recovery for "costs associated with any extra effort" required by "new burdens" from the amendment, he plainly meant expenses arising from new obligations that were different from those that already existed, such as the agencies' obligation to bear the burden of redacting exempt material. It was CNPA's belief in 2000 that AB 2799 maintained the status quo with respect to redaction costs, and CNPA continues to believe that is the correct interpretation of the law.[9]

---

[8] The Legislature is presumed to have knowledge of existing judicial decisions and "to have enacted and amended statutes in the light of such decisions." People v. Casarez, 203 Cal. App. 4th 1173, 1182 (2012).

[9] After the enactment of Section 6253.9, courts have continued to recognize in a variety of different contexts that agencies' cost recovery under the CPRA is limited to the direct cost of duplication. E.g., Fredericks v. Superior Court, 233 Cal. App. 4th 209, 236 (2015); County of Santa Clara v. Superior Court, 170 Cal. App. 4th 1301, 1336 (2009) ("[g]enerally speaking, an agency may recover only the direct cost of duplicating a record."); Los Angeles Unified Sch. Dist. v. Superior Court, 151 Cal. App. 4th 759, 770, 776 (2007).

B. The Legislative History Underscores That AB 2799 Was Intended To Increase Access To Public Records

The complete history of the legislative effort that led to Section 6253.9 makes clear that the provision did not change the pre-existing rule that agencies are responsible for redaction costs. CNPA was a sponsor of AB 2799, and was integrally involved in drafting the bill and negotiations concerning it. The sole purpose of the legislation was to increase public access to government records in electronic formats. An interpretation that would allow agencies to shift costs to requesters if the agency chooses to redact electronic records is squarely at odds with this goal. That was never intended to be part of the bill.

1. AB 2799 Was Intended To Reduce Costs Of Obtaining Public Records That Are Maintained Electronically.

Prior to the year 2000, electronic data was subject to disclosure under the CPRA, but the format for producing that data was left up to the custodian of the records. The statutory language, enacted in 1968, stated, "Computer data shall be provided in a form determined by the agency." Gov't Code § 6253 (1968). In practice, this meant that agencies could respond to CPRA requests for records maintained on a computer or in a database by printing out mountains of paper copies, then charging the requesters for the cost of the printouts. California was one of only four states that took this approach; even before 2000, at least 36 other states

recognized that the public had a right to obtain electronically-maintained data in an electronic format, rather than in paper format.

Accordingly, one of the primary policy reasons for amending the CPRA was to reduce the cost to records requesters. Before the 2000 amendment, some agencies refused to provide electronic copies – even if doing so would be cheaper and easier to provide. As the Senate analysis for AB 2799 stated: "[I]f an agency makes a CD or disk copies of the records, a member of the public could not obtain records in that format-the public would have to buy copies made out of the printouts from the records." Sen. Judiciary Com., analysis of Assem. Bill No. 2799 (1999-2000 Reg. Sess.) as amended on June 22, 2000, at comment 1, page 3 (emphasis added). And as the law then provided, requesters had to bear the cost of paper copies, which could be substantial. See id. ("[t]he expense of copying these records in paper format, especially when the records are voluminous, makes those public records practically inaccessible to the public, according to the author and the proponents.").

AB 2799 sought to bring the CPRA into the 21st century, recognizing that technology has lowered the actual cost of sharing electronically-maintained data. As The Sacramento Bee wrote, in urging Governor Davis to sign AB 2799:

> Today, in most instances, that real cost [to produce an electronic record] would be the trivial price of a diskette or, in the case of an e-mail transfer, free. In a democracy, the

> people are the government. We own the government records; we own the institutions, whether they be public schools or prisons...To safeguard the public's right to know, Davis should sign AB 2799....

Letter from CNPA Legal Counsel Nikki Moore to the Supreme Court of California at 2 n.4 (Nov. 27, 2018). Other proponents of the bill similarly argued that because electronic records "were created [at] taxpayer expense in the first place, . . . a person seeking copies should not be gouged by the public agency for the cost of a person standing in front of a copy machine to duplicate the record when the record could quickly be copied onto a disk or accessed on the Internet." Sen. Judiciary Com., analysis of Assem. Bill No. 2799 (1999-2000 Reg. Sess.) as amended on June 22, 2000, at page 7. The interpretation and application of Section 6253.9 should be consistent with this legislative history, which demonstrates that the purpose of AB 2799 was to increase access to public records by reducing the cost of obtaining records that are maintained electronically.

2. The Court Of Appeal Misconstrued The Legislative Process That Led To Enactment Of AB 2799.

Like most pieces of legislation, AB 2799 was amended several times in response to a wide array of feedback from different legislators and interested parties. As a Senate Judiciary Committee report noted, the prospect of making records available in electronic form encountered early opposition from several public entities and associations of public entities for a variety of reasons, including security issues and concerns about the

possibility of disclosing "proprietary software." Analysis of Sen. Judiciary Comm. of Assem. Bill No. 2799 (1999-2000 Reg. Sess.) as amended on June 27, 2000, at page 8. Some groups expressed concerns about the cost of complying with the new electronic disclosure requirements. See NLG, 27 Cal. App. 5th at 949-50.

The Court of Appeal placed great weight on the fact that some of these groups dropped their opposition after the bill was amended in June 2000. Id. But the court read far too much into these developments, assuming that meant every opponent must have gotten its way. As an organization that routinely is involved in the legislative process – and that was involved directly in discussions about AB 2799 – CNPA can attest that when an opponent changes its initial position on a pending bill, that is hardly a sign that the group has obtained everything that it wanted. The legislative process involves compromise, and groups routinely drop their formal opposition to a bill if amendments address some, even if not all, of their concerns.

The isolated snippets from the legislative history cited by the Court of Appeal ignore this nuanced process. The full history of AB 2799 shows that opponents expressed concerns about the cost agencies would have to absorb for redacting electronic records even after the Section 6253.9(b) language was added in June 2000. For example, a bill analysis in July 2000, a month after the revision, noted the fiscal effect of "workload in

redacting nondisclosable electronic records from disclosable electronic records." See Concurrence in Senate Amendments, analysis of Assem. Bill No. 2799 (1999-2000 Reg. Sess.) as amended on July 6, 2000, at page 2.

Similarly, the California Environmental Protection Agency noted in a report that was signed months after the amended language that "[o]pponents claim that redacting the nondisclosable information from the electronic records stored in the State's various and complex databases could be a costly and time-consuming process." California EPA Enrolled Bill Report on AB 2799, at 5.[10] And in a letter dated July 19, 2000 – again, after the cost-shifting language cited by the Court of Appeal was added – the Chairman of the Orange County Board of Supervisors wrote to Assembly Member Shelley that the Board continued to oppose the bill because

> [c]ompliance ... could require development of a new computer program to provide non-confidential information in a report without also providing electronically the confidential information. Without that software, county employees would need to go through each record to ensure that confidential information is not included in non-confidential information. Either method would be prohibitively expensive.

Letter from Charles V. (Chuck) Smith, Chairman of the Board of Supervisors, to Assembly Member Kevin Shelley (Jul. 19, 2000).

---

[10] Notably, despite this concern, CEPA nonetheless recommended that the Governor sign the bill. Id.

The concerns expressed about the cost of "redacting" electronic records make no sense if the language in AB 2799 shifted the cost of redaction to the requester. To the contrary, this history demonstrates a common understanding among key stakeholders that the cost provision cited by the Court of Appeal did not change existing law regarding redaction costs.[11]

The Court of Appeal's decision focused primarily on one group that changed its position on the bill: the California Association of Clerks and Election Officials (CACEO) initially opposed the bill, citing concerns that included redactions costs and other issues, like the cost of "programming that may be required to comply with a request." NLG, 27 Cal. App. 5th at 950-51. The Court of Appeal described it as "telling" that CACEO withdrew its opposition after AB 2799 was amended, which the court cited as supporting its interpretation about cost-shifting for redactions. But CACEO merely shifted its position to "neutral," explaining that the bill as

---

[11] Similarly, at least one agency expressly concluded that the added language had no impact on its preexisting ability to recover costs. The Department of Motor Vehicles noted that "[s]ince existing law authorizes the department to charge a fee that is sufficient to pay actual administrative costs of producing a copy of a record (§ 1811 of the California Vehicle Code), [Section 6253.9] has no new impact on the department's operations." Department of Motor Vehicles, Enrolled Bill Report on AB 2799. Section 1811 of the California Vehicle Code is limited to the cost of copies; it does not mention the cost of redaction. Cal. Veh. Code § 1811. This further demonstrates that the added language dealt exclusively with "costs of producing a copy of a record," not redaction.

amended "addresses the costs incurred by public agencies in providing copies of electronic records under circumstances now described in the bill." Letter from Violet Varona-Lukens, Co-Chair, Clerks of the Board of Supervisors Legislative Committee, California Association of Clerks and Election Officials (Jun. 21, 2000) (emphasis added). CACEO did not mention redaction costs specifically, and the limiting language in the follow-up letter indicates that the group understood that the amendment did not address all of its original concerns.[12]

This understanding is consistent with a Senate Judiciary Committee analysis following the June 2000 amendment, which noted the change in position among some initial opponents, and characterized the amendment as providing "that a requester bear the costs of programming and computer services necessary to produce a record not otherwise readily produced, as specified." Analysis of Sen. Judiciary Comm. of Assem. Bill No. 2799 (1999-2000 Reg. Sess.) as amended on June 27, 2000, at page 2 (emphasis added). That narrow description is consistent with CNPA's understanding

---

[12] Like CACEO, other opponents shifted their positions on the bill to "neutral" after the amendments (apart from Orange County, which never dropped its opposition). See Analysis of Sen. Judiciary Comm. of Assem. Bill No. 2799 (1999-2000 Reg. Sess.) as amended on June 27, 2000, at page 8. If the amendments had been understood at the time to dramatically change the law to relieve agencies' obligation to bear redaction costs, that plainly would have been reflected in the legislative history.

of Section 6253.9 as providing limited cost-shifting solely for agencies' "extra efforts" to address technical issues arising from the amendment.

It also is consistent with the Department of Corporations' analysis of AB 2799 for the Governor, which came after the final version of the bill had passed both houses of the Legislature. See AB 2799 Enrolled Bill Report, Dep't of Corporations (Aug. 31, 2000). The Department recommended that the Governor sign the bill because it would "increase the availability of public records and reduce the cost and inconvenience associated with large volumes of paper documents." Id. at 4 (emphasis added). The same report acknowledged that Orange County still opposed the legislation because of the burden it could impose on agency staff "copying and editing records" and "determining if they are appropriate for public disclosure." Id. Thus, even the final version of the bill signed by the Governor was understood to have the effect of reducing requesters' costs while maintaining the same burden of redaction on public agencies.

In short, the legislative history, when considered in full, does not lend support to the Court of Appeal's erroneous conclusion that the bill changed decades of existing law to shift the cost of segregating exempt records onto journalists and other members of the public who seek electronically-maintained records.

C. The Statutory Term "Extraction" Does Not Mean "Redaction."

The Court of Appeal's flawed reading of the legislative history focused on a single word – the word "extraction" in Section 6253.9(b)(2) – which it interpreted as permitting an agency to charge "actual" costs, including staff time, for "redacting" electronic records. NLG, 27 Cal. App. 5th at 951-52. The text and structure of the CPRA, subsequent legal developments, and analogous case law demonstrate that this interpretation was erroneous.

First, reading Section 6259(b)(2) in the context of the entire CPRA makes clear that the Legislature used the word "extraction" as a term of art related to the technical process required to produce or create electronic records from a database – not as a synonym for "redaction" of a specific record before it is publicly disclosed. The segregation (or "redaction") of exempt material from otherwise disclosable records is a familiar practice under the CPRA referenced both in the statute itself and in numerous published appellate decisions. See Section II.A. Therefore, if AB 2799 were changing the law with respect to segregation and redaction, then "we would expect to see specific language to that effect in the statute." Int'l Federation of Prof. & Tech. Eng., Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 343 (2007).

But the Legislature did not use the word "redaction" in Section 6253.9, nor did it refer at all to the process of "segregating" exempt material from disclosable records. Instead, it used the word "extraction." Id. § 6253.9(b)(2). When a legislature uses different terms in the same statute, "it is presumed that different meanings are intended." Las Virgenes Municipal Water District v. Dorgelo, 154 Cal. App. 3d 481, 486 (1984); see also Regents of University of California v. Superior Court, 220 Cal. App. 4th 549, 565 (2013). It is "a well-recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded." Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 725 (1989); Songstad v. Superior Court, 93 Cal. App. 4th 1202, 1208-09 (2001) ("[t]he use of a term in a statute addressing a subject, and omitting that term and using a different term in a similar statute addressing a related subject, shows a different meaning was intended in the two statutes"). For the Court of Appeal to assume that "extraction" in AB 2799 meant the same thing as "redaction" violates these established principles of statutory interpretation.

Moreover, if the Legislature had intended for AB 2799 to shift redaction costs to requesters, it would have done so with express, unambiguous language. See Estate of McDill, 14 Cal. 3d 831, 837-838 (1975) (the "failure of the Legislature to change the law in a particular

respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended"). The Legislature knows how to unambiguously address cost-shifting, and has done so in other contexts. See, e.g., C.C.P. § 1021.5 (shifting attorneys' fees in certain actions in the public interest); Gov. Code § 54960.5 (fee-shifting provision in open meetings law); C.C.P. § 2031.280(e) (stating that in civil discovery, the requesting party pays the reasonable expense to "translate" electronic data into a "reasonably usable" form). If the Legislature had intended to materially change the CPRA by altering the cost burden, it would have done so expressly.

Second, further revisions to the CPRA following the 2000 amendment underscore that the Legislature did not intend the word "extraction" in Section 6253.9 to mean "segregation" or "redaction." In particular, recent actions taken by the Legislature demonstrate its familiarity with the term "redact" or "segregate" in the CPRA.

In 2018, the Legislature passed Assembly Bill No. 748, which amended the CPRA to mandate the disclosure of police video and audio footage in certain critical incidents. Assem. Bill No. 748 (2017-2018). Again, the Legislature included specific language about redactions: the agency may "use redaction technology, including blurring or distorting images or audio, to obscure those specific portions of the recording." Gov't Code § 6254(f)(4)(B)(i). The word "extraction" was never used in passing

this law, nor does the legislative record say anything about cost-shifting for redactions. To the contrary, the Senate Appropriations Committee noted that the bill's fiscal impact could include "costs in the aggregate to local law enforcement agencies to review video and audio recordings, [and] redact when appropriate and possible, ..." Sen. Com. On. Appropriations, Analysis of Assem. Bill No. 748 (2017-2018 Reg. Sess.) as amended July 3, 2018.[13]

Conversely, the term "extraction" appears only twice in the CPRA; both references were added by AB 2799. In addition to Section 6253.9(b)(2), which refers to "data compilation, extraction, or programming to produce the record," Section 6253(c)(4) states that delayed access to records may be permitted when there is a "need to compile data, to write programming language or a computer program, or to construct a computer report to extract data." (Emphasis added.) When reading Section 6253(c)(4) and Section 6253.9(b)(2) in harmony, as is required,[14] it is clear

---

[13] See also Assem. Bill No. 459 (2017-2018) (amending the CPRA, Gov't Code § 6254.4.5(b)(2), to prevent the disclosure of certain audio and video footage involving sexual or domestic violence unless privacy interests can be properly protected by "redacting," "obscuring," and "distorting" the footage); Cal. Pen. Code 832.7(b)(5)-(6) (2018 amendments making certain police personnel records disclosable and specifying that an agency shall "redact" certain information, and may "redact" other information). These amendments do not suggest that the cost of redaction will be borne by requesters, rather than by agency.

[14] "Under well-established principles of statutory construction, ... interrelated provisions must be construed together and harmonized if

that the Legislature intended the term "extraction" to have a special meaning with respect to the technical process required for the creation of an electronic record from a database. It cannot reasonably be interpreted as applying to the act of redacting information from a record before it is disclosed.[15]

Finally, courts have drawn a distinction between the terms "extract" and "redact" in a wide variety of analogous circumstances. For example, when deciding cases under the federal Freedom of Information Act ("FOIA") or ruling on requests to unseal judicial records, courts have used "redact" and "extract" to denote different actions by the government in gathering and producing electronically-stored records to the public. E.g., Matter of Leopold to Unseal Certain Elec. Surveillance Applications &

---

possible," and "when the same word or phrase is used, it should be given the same meaning in the related part of the law." Gruschka v. Unemployment Ins. Appeals Bd., 169 Cal. App. 3d 789, 792 (1985) (citations omitted).

[15] The State Board of Equalization's contemporary analysis of AB 2799 is consistent with this understanding. In a report after the bill was amended to add the cost provision, the Board noted that it might be difficult to "write programming language or a computer program, or to construct a computer report to extract data" in the statutory timeline. State Bd. of Equalization, Staff Legislative Bill Analysis of AB 2799 at 3 (July 10, 2000) (emphasis added). The same report noted that "[p]rovisions of the Public Records Act allow the Board to recover the direct costs of providing the records in an electronic format." Id. at 4. This shows that the Board understood "extraction" to refer to a technical process involving computer programming, while other aspects of production (such as redaction) would remain subject to existing provisions of the CPRA.

Orders, 300 F. Supp. 3d 61, 71, 77 (D.D.C. 2018), reconsideration denied sub nom. Matter of Leopold, 327 F. Supp. 3d 1 (D.D.C. 2018) (discussing "redact" as the removal of exempt material from court records and "extract" as the compilation of agreed-upon categories of information pulled from representative samples of those court records); Long v. U.S. Dep't of Justice, 703 F. Supp. 2d 84, 89-90 (N.D.N.Y. 2010), decision vacated in part on reconsideration, 778 F. Supp. 2d 222 (N.D.N.Y. 2011) ("extracted data" resulted where a government agency "wrote a query to select records from the database within the designated time period," and "redactions" had to be made "in the extracted data" with the aid of a computer code).

Similarly, in the context of e-discovery involving electronically stored information (or "ESI"), the terms "extract" and "redact" have distinct meanings that are well-known to courts and practitioners. The influential Sedona Conference Working Group defines "Data Extraction" as the "process of parsing data from any electronic documents into separate fields such as Date Created, Date Last Accessed, and Text." See The Sedona Conference Glossary: E-Discovery & Digital Information Management, Third Edition, at 12 (The Sedona Conference Working Group Series, 2010), available at https://canons.sog.unc.edu/wp-content/uploads/2011/02/glossary2010.pdf.[16]

[16] Courts routinely cite the Sedona Conference Working Group's publications in resolving e-discovery disputes. E.g., Larsen v. Coldwell

Other references to "extract" in the Sedona Conference Glossary similarly refer to a technical process of moving or grouping data. E.g., id. at 21 (defining "Export" as "[d]ata extracted or taken out of one environment or application usually in a prescribed format, and usually used for import into another environment or application"); id. at 39 (defining "Pattern Recognition" as "[t]echnology that searches ESI for like patterns and flags, and extracts the pertinent data, usually utilizing an algorithm"); id. at 44 (defining "Restoration of archival media" as "the transfer of data from an archival store to an active system for the purposes of processing (such as query, analysis, extraction, or disposition of that data)").

In contrast, the Sedona Conference Glossary defines "Redaction" as a discrete action that occurs when a "portion of an image or document is intentionally concealed to prevent disclosure of specific portions. Usually accomplished by applying an overlay. Often done to protect privileged or irrelevant portions of the document, including highly confidential, sensitive, or proprietary information." Id. at 44.

The Glossary treats redaction as a separate action that occurs after data has been extracted. E.g., id. at 41 (defining "Processing Data" as an

---

Banker Real Estate Corp., 2012 WL 359466, at *7 n.2 (C.D. Cal. Feb. 2, 2012) ("[c]ourts are increasingly referring to the Sedona Principles for guidance in matters regarding electronic discovery" as they "provided very useful guidance on the thorny issues relating to the discovery of electronically stored information") (quotation omitted).

"automated computer workflow where native data is ingested by any number of software programs designed to extract text and selected metadata and then normalize the data for packaging into a format for the eventual loading into a review platform," which would be used to make redactions). Accord Plantronics, Inc. v. ALIPH, Inc., 2012 U.S. Dist. LEXIS 152297, at *29 (N.D. Cal. Oct. 23, 2012) (noting in dispute over e-discovery costs that parties referred to separate steps of "processing of electronic documents such as Word and Excel files to extract the metadata (e.g., date created, author, etc.)" before those documents are then "reviewed and redacted in the database by the receiving or producing party"); Brown v. China Integrated Energy, Inc., 2014 U.S. Dist. LEXIS 194831, at *11-14 (C.D. Cal. June 19, 2014) (resolving e-discovery dispute by separately addressing the adequacy of how documents "were searched for and extracted" from a party's computer systems and also how redactions were then made to the extracted documents); Ebay Inc. v. Kelora Sys., LLC, 2013 U.S. Dist. LEXIS 49835, at *40-41 (N.D. Cal. Apr. 5, 2013) (taxing e-discovery costs based on invoices which listed extraction and redaction as separate tasks).

The common thread through all of these authorities is that "extraction" refers to an initial technical process of moving and collating data, often accomplished through automation, whereas "redaction" refers to something that individuals do to a document (the "extracted" data) to remove certain information from it, using human judgment applying

particular legal and factual circumstances. The Court of Appeal erred by conflating these terms in a manner that is contrary to well-established law and will frustrate the right of access to public records.

III. THE COURT OF APPEAL ERRED IN FAILING TO APPLY THE CONSTITUTIONAL MANDATE TO CONSTRUE THE CPRA BROADLY.

Notwithstanding the above, to the extent that the Court of Appeal found the term "extraction" in Section 6253.9 to be ambiguous, it should have employed the constitutionally-mandated interpretive rule to construe the language in a manner that furthers the public's right of access. See Cal. Const. Art. I, § 3(b). Instead, the court interpreted a term it deemed to be ambiguous in a manner that uproots decades of well-established law, allowing agencies to shift substantial costs onto CPRA requesters. This inevitably will discourage them from asserting their rights of access, contrary to the letter and spirit of the California Constitution.

CNPA and FAC were actively involved in the initiative that resulted in an amendment to California's Constitution to recognize the public's right of access to government records. In 2004, 83 percent of voters approved Proposition 59, known as the "Sunshine Amendment," which is now enshrined at Article I, § 3(b) of the California Constitution. That provision affirms that "[t]he people have the right of access to information concerning the conduct of the people's business," and guarantees that "the writings of public officials and agencies shall be open to public scrutiny." Id. §

3(b)(1). Of particular importance here, it provides that any statute, rule, and other legal authority "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Id. § 3(b)(2). As one court explained, "the PRA's principles are now enshrined in the state Constitution," and the "PRA embodies a strong policy in favor of access and must be construed broadly." Pasadena Police Officers Assn. v. Superior Court, 240 Cal. App. 4th 268, 282-83 (2015) ("PPOA").

This Court has made clear that Article I, Section 3(b) is not a mere policy statement, but instead is "a rule of interpretation" that must be followed whenever legislative language or intent is unclear. Sierra Club v. Superior Court, 57 Cal. 4th 157, 166 (2013). In Sierra Club, this Court employed the constitutional "interpretive rule" to broadly interpret a CPRA provision to allow for the disclosure of GIS-formatted databases. Id. at 175-76. In interpreting the phrase "computer mapping systems" in Government Code § 6254.9(b), this Court noted that the term "by itself is ambiguous." Id. at 170. But as this Court explained, "[t]o the extent that the term 'computer mapping system' is ambiguous, the constitutional canon requires us to interpret it in a way that maximizes the public's access to information unless the Legislature has expressly provided to the contrary." Id. at 175 (original emphasis; quotation omitted). Because there was no

such explicit expression of Legislative intent to narrow the public's right of access, the Court read the phrase broadly in favor of disclosure. Id.[17]

More recently, in City of San Jose v. Superior Court, 2 Cal. 5th 608 (2017), this Court reiterated that Article I, Section 3(b) is a "constitutional directive" that must be applied to ambiguous statutory language. Id. at 620. Consequently, this Court rejected a literal but "narrow reading" of the CPRA's definition of "local agency," finding it to be "inconsistent with the constitutional directive of broad interpretation." Id. "Broadly" construing the term, as required by the constitution, meant it included "not just the discrete governmental entities listed in section 6252, subdivision (a) but also the individual officials and staff members who conduct the agencies' affairs." Id. See also Los Angeles Board of Supervisors v. Superior Court, 2 Cal. 5th 282, 292 (2016) (noting when interpreting the language of a CPRA provision that, "[t]o the extent this standard is ambiguous, the PRA must be construed in whichever way will further the people's right of access") (quotation omitted).

---

[17] Notably, the legislative history of the provision at issue in Sierra Club had many similar features to that of AB 2799, including interested parties changing positions and dropping their opposition after an amendment. See 57 Cal. 4th at 172. But because the history did not point to a clear definition of the relevant term, this Court concluded that its "review of the history does not reveal anything decisive on the issue before us." Id. at 171.

The courts of appeal have followed this Court's guidance and treated Article I, Section 3(b) as a binding interpretive mandate when encountering ambiguous terms. For example, in POET, LLC v. State Air Resources Bd., 218 Cal. App. 4th 681 (2013), the Fifth Appellate District held that a "conflict between the public policies" involved in interpreting Government Code § 11347.3 "is resolved by applying the constitutional directive favoring public access to information." Id. at 752. As the court explained, "when a court is confronted with resolving a statutory ambiguity related to the public's access to information, the California Constitution requires the court to construe the ambiguity to promote the disclosure of information to the public." Id. at 750. See also PPOA, 240 Cal. App. 4th at 298 (construing the word "appraisal" in the Pitchess statutes in accordance with Article I, § 3(b) to further public access); Bertoli v. City of Sebastopol, 233 Cal. App. 4th 353, 369 (2015) (relying on Article I, § 3(b) in interpreting CPRA's fee-shifting provision to permit agencies to recover fees from unsuccessful requesters only in the "most egregious" circumstances).

The instant case is precisely the type of case in which Article I, Section 3(b) should be decisive. The Court of Appeal acknowledged a statutory "ambiguity" affecting the public's right of access, concluding that it was "unclear from the statutory language whether 'extraction'" as used in Section 6253.9 includes redacting records to segregate exempt information. NLG, 27 Cal. App. 5th at 948. Having found "no clear answer" in the

statute, id., the court should have resolved the question by interpreting it in a manner that "broadly" promotes public access, applying the "interpretive rule in article I, section 3, subdivision (b)(2), of the California Constitution." Sierra Club, 57 Cal. 4th at 175.

Instead, the Court of Appeal referenced Article I, § 3(b) only at the beginning of its opinion, treating it as a non-binding policy statement. Id. at 944-45. This was contrary to controlling precedent from this Court. See City of San Jose, 2 Cal. 5th at 617 (Article I, § 3(b)(2) is a "constitutional imperative"); Los Angeles Board of Supervisors, 2 Cal. 5th at 292 ("ambiguous" statutory language "must be construed in whichever way will further the people's right of access"). As the Ninth Circuit has explained, "where Congress expressly instructs that provisions of a statute shall be construed liberally, we should not read into the statute an unwritten additional hurdle, even if well intentioned." Khatib v. County of Orange, 639 F.3d 898, 904 (9th Cir. 2011) (en banc). Here, the Legislature and the voters expressly have provided that statutes like Section 6253.9 must be construed liberally to maximize public access to government information, as this Court's prior decisions have recognized.

The contrary interpretation chosen by the Court of Appeal is a dramatic scaling back of CPRA rights that will impose prohibitive costs on members of the public, discouraging them from making records requests. Article I, § 3(b) makes clear that courts should not restrict the public's

rights under the CPRA unless the Legislature has made its intent to do so crystal clear. There is no such evidence here. Instead, the Legislature passed AB 2799 with the goal of broadening access to public records by reducing requesters' burdens and costs. Section 6253.9 should be interpreted accordingly.

IV. CONCLUSION

For all of the reasons discussed above, CNPA and FAC respectfully request that this Court reverse the decision of the Court of Appeal, and hold that public agencies cannot require members of the public to pay for redaction costs to obtain copies of public records, regardless of the form in which a record is maintained or produced.

Dated: May 31, 2019

DAVIS WRIGHT TREMAINE LLP
KELLI L. SAGER
DAN LAIDMAN
SELINA MACLAREN

By Kelli L. Sager (SM)
Kelli L. Sager

Attorneys for Amici Curiae
CALIFORNIA NEWS PUBLISHERS ASSOCIATION and FIRST AMENDMENT COALITION

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c) and 8.520(c), the text of this brief, including footnotes and excluding the caption page, table of contents, table of authorities, the signature blocks and this Certificate, consists of 9,746 words in 13-point Times New Roman type as counted by the Microsoft Word word-processing program used to generate the text.

Dated: May 31, 2019

DAVIS WRIGHT TREMAINE LLP
KELLI L. SAGER
DAN LAIDMAN
SELINA MACLAREN

By _____
Selina MacLaren

Attorneys for Amicus Curiae
CALIFORNIA NEWS PUBLISHERS
ASSOCIATION and FIRST
AMENDMENT COALITION

California Newspaper Publishers Association
CNPA Services, Inc.

930 G Street, Sacramento, CA 95814-1811
Tel: (916) 288-6000 • Fax: (916) 288-6002

September 8, 2000

Honorable Gray Davis
California State Governor
State Capitol
Sacramento, California 95814

RE: SPONSOR AB 2799 (Shelley)

Dear Governor Davis:

The California Newspaper Publishers Association urges your signature approval of **Assembly Bill 2799** by Assemblyman Kevin Shelley, which would update and modernize the California Public Records Act (CPRA) to, among other things, allow citizens to obtain copies of electronically held public records in an electronic format. CNPA is the sponsor of **AB 2799**.

AB 2799 would also reinsert the word "delay" in the law, as in, agencies shall not obstruct or *delay* access, which was inadvertantly removed from the law several years ago. Finally, the bill would require agencies which have decided to reject a request for public records based upon an exemption, to communicate that decision to the requester in writing if the request was made in writing.

> *Computer data shall be provided in a form determined by the agency.* (Ca. Govt. Code Section 6253)

The provision of law referenced above, enacted in 1968, puts California in a distinct minority. Only four states -- California, Kentucky, Maryland and Oklahoma – leave the choice of format for providing copies of public records up to the custodian of the record. While several other states offer little guidance on the issue, today, 36 states have, in varying degrees, recognized the public's right to access public records in an electronic format.

Although the CPRA has always recognized that computer data is a public record, until recently, electronic public access was not a large issue because most public records still existed in paper form locked in metal filing cabinets. Those days are gone forever.

Nowadays the vast majority of public records at every level of government are created, maintained, used and communicated in an electronic format. It is obvious that all segments of society – business, education, government and its citizens – are taking full advantage of technological advances. Yet citizen access to copies of public records is governed by a single provision of law enacted over 30 years ago, when the world looked quite different.

Assembly Majority Leader Shelley's **AB 2799** would replace the outmoded and irrelevant law of the last millennium with a flexible set of rules that would allow Californians to access their records in a modern way without placing undue burden on state or local government agencies. Specifically, the bill would require an agency to make nonexempt electronically held public records available when requested by any person in any electronic format in which the agency holds the information. The bill would require an agency to make copies of the information available in any format in which it makes copies for its own use and for provision to other agencies. The bill would not require copies to be provided in any form not used by the agency.

After lengthy negotiations with several local government agencies and representatives, including the League of California Cities, the California State Association of Counties, the County Clerks Association, law enforcement groups and others, **AB 2799** was amended on June 22, to ensure the bill would not place new burdens on state or local agencies. Specifically, the bill was amended to require *the requester to bear the cost* of producing a copy of an electronically held record,

> "including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:
>
> (1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.
>
> (2) The request would require data compilation, extraction, or programming to produce the record." (Please see AB 2799, p. 5, lines 12-24)

This provision guarantees the costs associated with any extra effort that might be required to make an electronic public record available shall be borne by the requester, not the state or local agency.

It is important to note the several other protections expressly built into **AB 2779**. Nothing in the bill would "require the public agency to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format." Nothing in the bill "shall be construed to permit an agency to make information available only in an electronic format." Nothing in the bill would "require the public

agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained." Finally, nothing in the bill "shall be construed to permit public access to records held by any agency to which access is otherwise restricted by statute."

It is our understanding that, with one exception, the amendments have removed all known opposition to the bill. Orange County, the single remaining opponent to **AB 2799,** has stated it will remain opposed to any version of legislation that would allow citizens to access their records in an electronic format.

AB 2799 was approved by the Senate on a vote of 34-0 and the Assembly on a vote of 72-2. It seems slightly surreal that the state that has accomplished more than any other to deliver high technology and the information age to the world, has not enacted simple rules to allow its citizens *modern* public access to their public records. Nearly 30 years ago, the New Mexico Supreme Court said: The "right to inspect public records should . . . carry with it the benefits arising from improved methods and techniques of recording and utilizing information contained in these records, so long as proper safeguards are exercised as to their use, inspection and safety." Ortiz v. Jaramillo, 483 P.2d 500 (N.M. 1971). This forward-thinking passage, CNPA respectfully submits, would be an apt description of California law in January, 2001, if you determine **AB 2799** is worthy of your signature approval. The nearly 500 newspaper members of the CNPA respectfully believe it is.

Sincerely,

Thomas W. Newton
CNPA General Counsel

cc: Honorable Kevin Shelley
Honorable Debra Bowen
Craig Harrington, CNPA President, Publisher, Intermountain News, Burney
Harold W. Fuson, Jr., CNPA Governmental Affairs Chairman, V.P. and Chief Legal Officer, Copley Press, Inc.
Jack Bates, CNPA Executive Director
James Ewert, CNPA Legal Counsel

PROOF OF SERVICE
Case No. S252445

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of Los Angeles, California, and not a party to the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 865 South Figueroa Street, Suite 2400, Los Angeles, CA 90017.

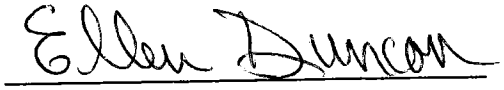
On May 31, 2019, I served the following document: **APPLICATION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CALIFORNIA NEWS PUBLISHERS ASSOCIATION AND FIRST AMENDMENT COALITION IN SUPPORT OF RESPONDENT NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER** as follows:

SEE ATTACHED SERVICE LIST

[X] U.S. Mail: I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence is deposited with the United States Postal Service in a sealed envelope or package that same day with first-class postage thereon fully prepaid. I served said document on the parties below by placing said document in a sealed envelope or package with first-class postage thereon fully prepaid, and placed the envelope or package for collection and mailing today with the United States Postal Service at Los Angeles, California addressed as set forth below:

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on May 31, 2019, at Los Angeles, California.



Ellen Duncan

SERVICE LIST

Amitai Schwartz, Esq. Law Offices of Amitai Schwartz 2000 Powell Street, Suite 1286 Emeryville, CA 94608 **Attorneys for Plaintiff/Respondent National Lawyers Guild, San Francisco Bay Area Chapter**	Alan L. Schlosser, Esq. American Civil Liberties Union Foundation of No. California, Inc. 39 Drumm Street San Francisco, CA 94111 **Attorneys for Plaintiff/Respondent National Lawyers Guild, San Francisco Bay Area Chapter**
Michael S. Lawson, Esq. Office of City Attorney 777 "B" Street, 4th Floor Hayward, CA 94541 **Attorneys for Defendants/Appellants City of Hayward, Adam Perez, Diane Urban**	Justin Christopher Nishioka, Esq. Attorney at Law 777 B Street, 4th Floor Hayward, CA 94541 **Attorneys for Defendants/Appellants City of Hayward, Adam Perez, Diane Urban**
Katie Boyd Townsend, Esq. The Reporters Committee for Freedom of the Press 1156 15th Street, NW, Suite 1020 Washington, DC 20005 **Attorneys for Amici Curiae** The Reporters Committee for Freedom of the Press, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, Bay Area News Group, Berkeleyside Inc., Californians Aware, CALMatters, The E.W. Scripps Company, Embarcadero Media, Gannett Co., Inc. International Documentary Association, Investigative Reporting Workshop at American university, KPBS, KQED, Inc., Los Angeles Times Communication LLC, The McClatchy Company, The Media Institue, MPA-The Association of Magazine Media, National Press Photographers Association, Nexstar Media Group, Inc., Online News Association, POLITICO LLC, Radio Television Digital News Association, The San Diego Union-Tribune LLC, Society of Environmental Journalists, Society of Professional Journalists, Sonoma Media Investments, LLC, Southern California Public Radio, TEGNA Inc., Tully Center for Free Speech, Voice of OC, Voice of San Diego	