Case No. S252445

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER,

Plaintiff and Respondent,

v.

CITY OF HAYWARD ET AL.,

Defendants and Appellants.

Application to file Amici Curiae Brief and Brief of Amici Curiae of San Diegans for Open Government, California Taxpayers Action Network, and The Inland Oversight Committee in Support of Plaintiff National Lawyers Guild, San Francisco Bay Area Chapter

After a Decision by the Court of Appeal,
First Appellate District, Division Three

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Application to File *Amici Curiae* Brief in Support of National Lawyers Guild, San Francisco Bay Area Chapter

Pursuant to California Rule of Court 8.520(f), San Diegans for Open Government ("SDOG"), California Taxpayers Action Network ("CTAN"), and The Inland Oversight Committee ("IOC") (collectively "Amici") respectfully submit this application for leave to file an *amici curiae* brief in support of Plaintiff and Appellant National Lawyers Guild, San Francisco Bay Area Chapter ("NLG"). Amici's counsel has reviewed the parties' briefing in this matter and believes the Court will benefit from the attached *amici curiae* brief because it addresses some of the larger public-policy concerns and practical implications of the Court's forthcoming decision under the California Public Records Act ("CPRA").

The *amici curiae* brief was authored entirely by Amici's counsel and was not authored by counsel for either party to this matter. No person or entity, other than Amici and their counsel, has contributed – monetarily or otherwise – to the preparation or submission of the attached *amici curiae* brief.

Statement of Interest of *Amici Curiae*

Amici's interest in this case stems from their roles as "watchdog" organizations. All of them are run by unpaid volunteers who believe that an essential component of good government – even before any particular policy or decision can be judged as good or bad – is maximum transparency by public officials and steady,

informed participation by members of the public. Anything worth doing to benefit the public, as Amici's board members will tell you, should be done in full daylight, for everyone to see. Access to public records is an important tool in fulfilling their respective missions of ensuring government accountability.

Amici take their watchdog roles so seriously that they have litigated their concerns at all levels of the Judiciary and have obtained several published decisions that benefit the public on issues of transparency and good governance. *See, e.g., California Taxpayers Action Network v. Taber*, 12 Cal. App. 5th 115 (2017) (holding that CTAN had standing to enforce conflict-of-interest laws); *League of California Cities v. Superior Ct.,* 241 Cal. App. 4th 976 (2015) (upholding trial court's conclusion that attorney-client privilege did not render e-mail communications between city attorney and third party exempt from disclosure to SDOG under the CPRA); *Gilbane Bldg. Co. v. Superior Ct.*, 223 Cal. App. 4th 1527 (2014) (holding that SDOG had standing to enforce conflict-of-interest laws and that contract made in violation thereof is "void, not merely voidable"). This Court has even granted review in one of SDOG's cases in which one appellate division correctly refused to follow an adverse ruling against IOC from a different appellate division. *See San Diegans for Open Gov't v. Public Facilities Financing Auth. etc.*, 16 Cal. App. 5th 1273 (2017) (in lawsuit deciding standing to enforce conflict-of-interest laws,

following *Taber* and refusing to following *San Bernardino County v. Superior Court*, 239 Cal. App. 4th 679 (2015)). All of these cases were litigated using the evidence gained through requests for public records under the CPRA).

This case is relevant to Amici because the Court of Appeal's Opinion will have a devastating effect on the public's access to its government's records. First, the Opinion infringes upon the public's right to access and the commitment to transparency that is enshrined in our state's constitution. *See* CAL. CONST., art. I, § 3(b)(2). Second, it places a manipulable barrier between the public and its government. Under the Opinion, state and local agencies[1] will have the ability to charge prohibitive costs to any member of the public seeking to obtain copies of ***any*** public records kept in electronic form[2] – records that are vital to ensuring public agencies and officials are faithfully and lawfully discharging their duties for the benefit of the public – without the requisite balancing of the interest. *See* GOV'T CODE § 6255(a). Promoting maximum transparency and informed participation should not be reserved only for wealthy individuals and institutions.

For these reasons, Amici respectfully request permission to file the attached *amici curiae* brief.

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[1] Those terms are found in Government Code Sections 6252(a), 6252(d), and 6252(f).

[2] The Court of Appeal did not limit its Opinion to the video records at issue in the instant case, instead applying it to ***any*** electronic records. *See* Slip Op. at p. 14.

Dated: May 23, 2019. Respectfully submitted,

BRIGGS LAW CORPORATION

By: Cory J. Briggs

Cory J. Briggs
Attorney for *Amici Curiae*: San Diegans for Open Government, California Taxpayers Action Network, The Inland Oversight Committee

I. INTRODUCTION

The California Public Records Act ("CPRA") declares that "access to information concerning the conduct of the people's business is a fundamental and necessary ***right*** of every person in this state." GOV'T CODE § 6250[3]; *see also* CAL. CONST., art. I, § 3(b)(1). "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files." *CBS, Inc. v. Block*, 42 Cal. 3d 646, 651 (1986).

The CPRA is a vital tool in providing the necessary check on public agencies and officials to ensure they are faithfully and lawfully discharging their duties for the benefit of the public. Whether the records sought are videos of police activities or communications of government employees, the decision of an agency to maintain public records in electronic format should not render those records unreachable by the general public. And certainly the government ought not to be able to put those records out of reach through application of an outrageous price tag.

II. ARGUMENT AND ANALYSIS

The Court of Appeal's Opinion should be reversed, or at least depublished, because it stands in direct contravention to the mandate of the California Constitution

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[3] All statutory references in this brief are to the Government Code unless otherwise noted.

to promote transparency and access over secrecy and non-disclosure. In addition to the very serious constitutional implications, the Opinion creates a host of practical issues that would not exist but for the Opinion's broad and overarching reach. The Opinion effectively guts the heart of the CPRA with respect to records in electronic format – which today is virtually every record – and will leave average citizens impotent to keep their government in check.

A. The Constitutional Misstep in the Opinion Has Far-Reaching Implications

There is no doubt that the evolution of public records from paper files to electronic storage has posed challenges for the public agencies charged with retaining and producing such records in response to a CPRA request. However, this Court has recognized that the evolution to electronically stored records should not change the CPRA's purpose or principles of giving the public access to government's records. *See e.g., City of San Jose v. Superior Ct.*, 2 Cal. 5th 608 (2017) (access to records in government employees' private devices); *American Civil Liberties Union Foundation v. Superior Ct.*, 3 Cal. 5th 1032 (2017) (access to license plate reader data); *Sierra Club v. Superior Ct.*, 57 Cal. 4th 157 (2013) (access to GIS database).

In 2000, the Legislature recognized this evolution when it passed A.B. 2799 adding Government Code section 6253.9 to address electronic records in the scope

of the CPRA. 2000 Cal. Legis. Serv. Ch. 982 (A.B. 2799) (West). In 2004, Proposition 59 elevated the public's right of access to the California Constitution and declared: "A statute, court rule, or other authority, ***including those in effect on the effective date of this subdivision***, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." CAL. CONST., art. I, § 3(b)(2) (emphasis added); 2004 Cal. Legis. Serv. Prop. 59 (West). The preference towards access and transparency in government was no longer just a recommendation or a lofty ideal but a constitutional mandate. The Legislature in 2004 clearly intended for this mandate to apply to the existing provisions in the CPRA, including the then recently passed section 6253.9.

With the ever-expanding capabilities of technology and their benefits to government agencies, the Court's jurisprudence in the area of public records will necessarily continue to evolve. Questions about what constitutes a public record, what counts as burdensome or "unusual circumstances," and who bears the costs of complying with the CPRA will only continue to grow in number and complexity. The Court should engage this evolution with section 3 of Article I of the California Constitution in mind. To retreat from the constitutional mandate of transparency and access now will forever change who gets to monitor the wheels of government and who gets to hold government actors and agencies accountable.

B. The Practical Implications of the Opinion's Over-Reach

The Opinion is particular troubling because its ruling is not limited to the police body-camera video records at issue there but extends to ***all*** electronically stored records. *See* Slip Op. at 14. Laws and statutory interpretations do not exist in a vacuum; they have practical applications and practical consequences that need to be considered. *See Commission on Peace Officer Standards & Training v. Superior Ct.*, 42 Cal. 4th 278, 290 (2007). This Opinion is incredibly over-broad and creates more problems than it purports to solve.

1. The Opinion Creates Anti-Transparency Incentives

Amici believe an agency should absorb the basic and necessary costs of complying with the CPRA, whether the record is a piece of paper or a video clip, as it was the agency's decision to generate the public record in such a format in the first place. That public records in any form may have to be produced in response to a CPRA request is no secret to any government agency. This reality has incentivized agencies to adopt local rules, processes and procedures, and best practices in order to earnestly and efficiently respond to such requests.

The Opinion creates exactly the wrong kind of incentives. It will incentivize agencies to: (1) contract their public records storage to third-party providers that charge for anything other than making an exact duplicate of a record; (2) assign tasks

related to responding to a request to the least experienced staff member, resulting in more reimbursable time; (3) assign tasks to the staff member for which they can charge the highest fee, resulting in a higher reimbursable rate; or (4) to invoke exemptions even when the law does not require them to do so. The practical result of any of these incentives is uncontrollable costs and reduced access to public records.

a. Incentive to Use Third-Party Providers or Proprietary Software

Proprietary software and/or third-party applications for email, like Gmail or Yahoo, and document storage already pose access issues when it comes to public records requests. Increasingly, public officials are using personal or third-party means of communicating. The courts have ruled that emails and other electronic communications are public records within the meaning of the CPRA and that such records are subject to disclosure even if kept on a personal device (*e.g.*, cell phone, laptop) or in a third-party account (*e.g.*, Gmail, Yahoo) of a public official. *See City of San Jose, supra*, 2 Cal. 5th at 629. Whereas an agency computer server can be centrally located, maintained, secured, archived, and more easily searched for responsive records, third-party providers are scattered and are often difficult to access and search by anyone other than the user. Admittedly, the physical act of producing such records from personal devices or third-party providers can in some instances be

onerous and costly. However, the fact that an agency chose a particular method of communicating or storing their records should not render the records unreachable, either physically or due to costs, by the general public. Agencies must take the costs of CPRA compliance into account before choosing an electronic-storage regime in the same way that police departments must take into account individuals' right to be free of unreasonable searches and seizures and their right against self-incrimination when the department design training protocols for their officers.

In the case of body-camera or similar video footage, the storage provider could give the agencies free access to the footage in the provider's proprietary format (*e.g.*, the full footage viewable on the provider's software) but charge excessive fees for "editing services," "format conversion," or other technological services for which the marginal cost to the provider is zero (or nearly so) but which are necessary to render the footage easily viewable on standard equipment and software available to the public. This is equally possible for other, non-video electronic records.

Issues related to similar perverse incentives were previously raised by the First District Court of Appeal – the court that authored the underlying opinion in this case – in an earlier case involving the City of Hayward. *See Hayward Area Planning Ass'n v. City of Hayward*, 128 Cal. App. 4th 176 (2005) ("*HAPA*"). There the court concluded that "[u]nlike a public agency, a developer real party in interest has a

strong financial interest in the outcome and is free to act purely in its private interest. Because the City did not directly incur any liability for the costs, it had no incentive to control those costs." *Id.* at 185.[4]

b. Incentive to Maximize Revenue under the CPRA

The Legislature has repeatedly limited the instances when fees for public records could be charged to a requester to the direct cost of duplication, under section 6253(b) and 6253.9(a)(2), or extraordinary computer work, under section 6253.9(b)(2). The trend has been to narrow the ability to charge a requester for access to public records. *See* Opening Brief at p. 23 n.6. To change the rules now, as the Court of Appeal has done, is not only impermissible under the rules of statutory construction, but will undoubtedly shift agencies' focus from efficient access to public records to the generation of new revenues derived from newly erected barriers to transparency.[5]

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[4] In *HAPA*, the court held the a real party developer could not recover costs related to preparation of the administration record in a California Environmental Quality Act ("CEQA") case after the City had delegated the task to the developer without the plaintiff's consent. *HAPA, supra*, 128 Cal. App. 4th 176. The court's reasoning noted that the delegation created skewed incentives that undermined CEQA's statutory scheme: "Under the Legislature's scheme, either the plaintiff or the defendant public agency or both would have had reason to control those costs as the record was being prepared, promoting efficiency and limiting the need for time consuming litigation and judicial intervention." *Id.* at 185. While the court there was examining provisions under CEQA and not the CPRA, the principle of not creating perverse incentives is analogous.

[5] Notably, section 4 of A.B. 2799 made reference to Government Code section 17500 *et seq.* which provides for reimbursement to local agencies and school districts for the costs of state-mandated local programs. 2000 Cal. Legis. Serv. Ch. 982 (A.B. 2799). This would indicate that the Legislature knew there would be increased costs to agencies as a result of the addition of section

The Opinion here carries the same real, perverse incentive risk to either bloat costs or maximize revenue observed in *HAPA*. Furthermore, third parties do not have the same motivations or fiduciary duties that public officials have. *See People v. Hubbard*, 63 Cal. 4th 378, 397 (2016) (finding public officials owe a fiduciary duty to safeguard public funds). The practical result of these perverse incentives is that the cost to access electronically stored public records[6] – all electronic records, not just video records – will increase uncontrollably and only the wealthy will be able to see the records that agencies do not want the public to see.

c. Incentive to Invoke Exemptions Not Required by Law

The Opinion also gives public agencies an incentive to invoke exemptions even when the law does not require them to do so. If agencies are unable to charge for electronic redactions and extractions, they will have to decide either to invoke

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6253.9 and that the place to which agencies should look for reimbursement for extraordinary expenses was the State Mandates Claims Fund. There is no indication from the language of the bill or the legislative history that the addition of section 6253.9 was to defer ordinary costs of CPRA compliance or to generate revenue for the agency. Moreover, the voters eliminated agencies' unfunded-mandate arguments when they approved Proposition 42 in 2014 and amended the constitution to order agencies to comply with the CPRA. *See* CAL. CONST., art. I, § 3(b)(7) (requiring CPRA compliance); art. XIIIB, § 6(a)(4) (excluding compliance with Section 2(b)(7 from unfunded-mandates prohibition).

[6] At the same time A.B. 2799 was passed, the Legislature also passed S.B. 2067 to amend a variety of statutes to allow for the digitizing of public records and the destruction of paper duplicates of those records under specified conditions. *See* 2000 Cal. Legis. Serv. Ch. 569 (S.B. 2067) (West). Amici believe section 6253.9(b) was intended to capture those exceptional situations when extraordinary computer programing would be required in order to respond to a public records request, and not for the unfettered recoupment of routine CPRA compliance costs from requesters to access electronic records.

exemptions and bear their own costs to provide a limited version of the electronic information, or to turn over all the electronic information without having to incur any costs. But if the public must pay every time it wants electronic information and the agencies can set a high price for segregating the non-exempt information from the rest of the electronic record, the agencies will be able to avoid transparency in a way that neither the CPRA nor the California Constitution (*i.e.*, Section 3 of Article I) ever envisioned.

The ability to charge requesters for ancillary tasks merely because the records requested exist in electronic format will effectively give agencies a new, *de facto* exemption that the Legislature – and most importantly, the voters who approved Proposition 59 – neither included nor intended under the law.

2. The Opinion Will Hamper Public-Interest Litigation and the Assertion of Other Legitimate Government Claims

First, it is well-known that the CPRA may be used by litigants in order to obtain records even though the records could also be requested through discovery. *County of Los Angeles v. Superior Ct.*, 82 Cal. App. 4th 819, 826 (2000). There are practical reasons why a litigant would chose a public records request over propounding discovery in order to obtain public records; cost, time, and limitations on discovery are a few examples. A public records request can be made by any person

or entity; there is no requirement that an attorney be involved. The response time for a public records request is shorter: agencies must generally respond within 10 days, which is extendable by up to 14 days for "unusual circumstances." GOV'T CODE § 6253(c). Discovery is required to be answered within 30 days, extendable by agreement. *See* CIV. PROC. CODE § 2031.260(a). Discovery is limited to that which is relevant to the lawsuit or reasonably calculated to lead to discovery of admissible evidence. *See* CIV. PROC. CODE § 2017.010. The CPRA has no such limitation. *See* GOV'T CODE § 6257.5.

Second, while CPRA cases are technically not subject to a statute of limitations, many other types of cases that rely on the CPRA for the discovery of wrongful, actionable conduct by an agency are subject to strict deadlines. CEQA cases are required to be filed within 30 days of the Notice of Determination. PUB. RES. CODE § 21167(b). Similarly, Ralph M. Brown Act[7] cases – those arising under the open-government law for local agencies – similarly have a tight 30- or 90-day window for legal action. GOV'T CODE § 54960.1(c)(1). A tort claim is due within six months. *Id.*, § 911.2(a).

In this case, NLG did not initially request the body-camera videos but discovered their existence through Hayward's response. NLG was able to pay the

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[7] *See* GOV'T CODE § 54950 *et seq.*

$3,249.47 invoice. The average citizen would not be able to front that kind of money, and the time it would take to raise it might surpass the statute of limitations for his case.

3. The Opinion Treats Electronic Records Different from Paper Records

The Opinion treats electronic records that already exist in a format readily used or accessed by the agency differently from paper records. As more and more information is stored electronically, agencies more and more claim that they must pay a computer programmer to put the information in a format usable by the public. That situation is problem enough, but the Opinion now invites agencies to charge the public for the electronic equivalent of paper redactions.[8] Agencies may not lawfully charge for the personnel time spent redacting exemption information from paper records. The Opinion improperly puts electronic records on a different footing. *See Sander v. Superior Ct.*, 26 Cal. App. 5th 651, 669 (2018) ("There is no doubt that a

[8] The parties in this case discuss *ad nauseam* whether the term "extraction" in section 6253.9 means the same as or is a synonym of "redaction." It should be noted that in Respondent's answering brief, all of the legislative history for A.B. 2799 uses the terms "redact," "redacting," or "redaction" and none use the term "extraction" to describe the removing or obscuring of exempt material from a public record. Answer Brief, at p. 41-44. Recently, the Legislature, in contemplating police videos as public records, used the term "redaction" and not "extraction." GOV'T CODE § 6254(f)(4)(B); *see also* Opening Brief, at p. 40-41. The term "extraction" appears zero times in section 6254 and the term "redaction" appears five times. "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).

government agency is required to produce non-exempt responsive computer records in the same manner as paper records. . . .").

There will always be a cost burden to complying with the CPRA. When the records are in paper form, those costs include real estate costs to store the records; costs for file cabinets, shelves, file folders, boxes, copy machines, felt markers; and labor costs for staff to manage the records and respond to requests. The CPRA does not allow the costs of responding to reasonable requests – searching, identifying, redacting exempt material – when the records are stored in paper form; only the direct cost of duplication is recoverable from a requester. *See* Gov't Code § 6253(b); *see also North County Parents Org. v. Department of Ed.*, 23 Cal. App. 4th 144, 148 (1994) ("'Direct cost' does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted."). The evolution of records and communications from paper to electronic is undeniable and unstoppable. Requesters of electronic records should not be treated any differently from a requestor of paper records solely because that is the way the agency has decided to hold and store those records.

This is not to say that the cost burden of producing video or electronic records should never be passed on to the requester. Just as an overly burdensome request seeking records in paper form can result in a cost to the requestor beyond the direct

cost of duplication, an overly burdensome request for electronic or video records should be subject to the same balancing test before the burden is passed onto the requester. *See California First Amendment Coalition v. Superior Ct.*, 67 Cal. App. 4th 159, 166 (1998) (A "request which requires an agency to search an enormous volume of data for a "needle in the haystack" or, conversely, a request which compels the production of a huge volume of material may be objectionable as unduly burdensome"); *State Bd. of Equalization v. Superior Ct.*, 10 Cal. App. 4th 1177, 1188 (1992) (weighing the "public interest" under the CPRA includes "public concern with the cost and efficiency of government").[9]

Amici concede that storing video records, searching for responsive content within those records, and redacting exempt material from video records poses unique challenges for an agency. But the unique challenges related to video records are not universal to all electronic records.

Though undoubtedly well-meaning, the Opinion reveals a serious misunderstanding of Section 6253.9(b) and its history, the constitutional and

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[9] Even Justice Huffman, who dissented from the majority's opinion in *North County Parents* on the point of costs, finding that "direct costs" were not limited to the cost of the "running the copy machine and conceivably the person running the machine," still held in a later case that the question of costs was subject to the balancing test: "Always, it depends on the respective interests that are proven and balanced. (*See State Bd. of Equalization v. Superior Court* (1992) 10 Cal. App.4th 1177, 1188 [burden of showing a request is too onerous lies with the agency under § 6255].)" *Fredericks v. Superior Ct.*, 233 Cal. App. 4th 209, 237 (2015).

precedential rules of statutory interpretation, and the real-world implications of the reasoning on government transparency.

III. CONCLUSION

For these reasons, Amici respectfully request that the Court find in favor of NLG and reverse the Court of Appeal's opinion, or at least order that it be depublished.

Certificate of Word Court

I, Cory J. Briggs, certify that this document is set in 14-point Times New Roman font and contains less than 4,400 words, as counted by the WordPerfect program used to generate the document.

Date: May 23, 2019. Cory J. Briggs

Cory J. Briggs

PROOF OF SERVICE

1. My name is Monica Manriquez. I am over the age of eighteen. I am employed in the State of California, County of San Diego.

2. My ✓ business ___ residence address is Briggs Law Corporation, 4891 Pacific Highway, Suite 104, San Diego, CA 92110.

3. On May 30, 2019, I served ___ an original copy ✓ a true and correct copy of the following documents: Application to File Amici Curiae Brief and Brief of Amici Curiae of San Diegans for Open Government, California Taxpayers Action Network, and The Inland Oversight Committee in Support of Plaintiff National Lawyers Guild, San Francisco Bay Area Chapter

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

___ ***by personal service.*** I personally delivered the documents to the person(s) at the address(es) indicated on the list.

✓ ***by U.S. mail.*** I sealed the documents in an envelope or package addressed to the person(s) at the address(es) indicated on the list, with first-class postage fully prepaid, and then I

___ deposited the envelope/package with the U.S. Postal Service

✓ placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

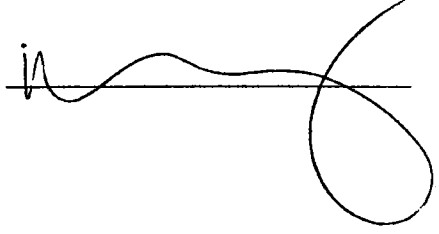
I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of San Diego, California.

___ ***by overnight delivery.*** I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and overnight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

___ ***by facsimile transmission.*** Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

✓ ***by e-mail delivery.*** Based on the parties' agreement or a court order or rule, I sent the documents to the person(s) at the e-mail address(es) shown on the list. I did not receive, within a reasonable period of time afterward, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws ___ of the United States ✓ of the State of California that the foregoing is true and correct.

Date: May 30, 2019 Signature: 

SERVICE LIST

National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al.

California Supreme Court Case No. S252445

California Courts of Appeal, First District, Division Three Docket No. A149328

Alameda County Superior Court Case No. RG15785743

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California Courts of Appeal First Appellate District, Division Three 330 McAllister Street San Francisco, CA 94102	*Court of Appeal* (by mail)