No. C080685

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

RICHARD STEVENSON AND KATY GRIMES,

Petitioners and Appellants,

vs.

CITY OF SACRAMENTO

Defendant and Respondent.
_____/

Sacramento County
Case No. 34-2015-80002125

On Appeal from the Superior Court of California, Sacramento County
The Honorable Shelley Anne W. L. Chang

REQUEST FOR PERMISSION TO FILE AMICUS CURIAE BRIEF OF THE SACRAMENTO BEE, FIRST AMENDMENT COALITION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND OTHERS IN SUPPORT OF PETITIONERS AND APPELLANTS RICHARD STEVENSON AND KATY GRIMES; BRIEF OF AMICI CURIAE

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Caption:

Richard Stevenson and Katy Grimes

v.

City of Sacramento

Court of Appeal Case Number:

No. C080685

Pursuant to California Rules of Court, Rule 8.208(e), interested entities or parties are listed below:

Name of Interested Entity or Person	**Nature of Interest**
The Sacramento Bee	*Amicus Curiae*
First Amendment Coalition	
The Reporters Committee for Freedom of the Press	
The Sacramento Valley Mirror	
The North Coast Journal	
The Ferndale Enterprise	
The Lake County News	
The Davis Vanguard	
The Woodland Record	
Californians Aware	

June 12, 2017

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San Francisco, CA 94111

Party Represented: Richard Stevenson and Katy Grimes

TO: THE HONORABLE PRESIDING JUSTICE VANCE W. RAYE AND ASSOCIATE JUSTICES OF THE THIRD APPELLATE DISTRICT:

Amici curiae Sacramento Bee, First Amendment Coalition, Reporters Committee for Freedom of the Press and other non-profit entities, and various small newspaper publishers (hereafter, collectively, "*amici*") hereby request permission to file the accompanying brief in support of petitioners and appellants Richard Stevenson and Katy Grimes.

The issues presented by this case—whether a Public Records Act ("PRA") petitioner can be required to obtain a bond to prevent the destruction of public records, and whether it is necessary to seek an injunction to prevent a government agency from destroying records responsive to a PRA request—are of serious concern to *amici*. Members of the news media routinely use the Public Records Act to help monitor the operations of government and gather and report news on matters of public concern. If citizens of modest means can be required to post a bond to prevent government agencies from destroying records requested under the PRA, the public's ability to enforce the Public Records Act will be gravely compromised.[1]

[1] Pursuant to California Rule of Court 8.200(c)(3), *amici* attest that no party or counsel for any party authored the accompanying brief or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than the *amici*, their members, or their

Amici are familiar with the presentation of these issues by the parties in this case and believe the accompanying brief will assist this Court in deciding this matter. *Amici* and their counsel have participated in many of the Public Records Act cases decided by the California Supreme Court and by this Court, and believe their familiarity with the Act and how it is enforced can provide this Court with valuable perspective in this case. (*See, e.g.*, *City of San Jose* v. *Superior Court* (2017) 2 Cal. 5th 608; *International Federation of Professional and Technical Engineers Local 21* v. *Superior Court* (2007) 42 Cal. 4th 319; *Sacramento County Employees' Retirement System* v. *Superior Court* (2011) 195 Cal. App. 440.)

For the foregoing reasons, and those set forth in the accompanying brief, *amici* respectfully request this Court's permission to file the accompanying *amici curiae* brief.

Dated: June 12, 2017

CANNATA, O'TOOLE, FICKES & ALMAZAN LLP

By: _____

KARL OLSON
Attorneys for Amici

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counsel in this appeal, made a monetary contribution intended to fund the preparation or submission of the accompanying brief.

No. C080685

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I. INTRODUCTION

The issue presented by this case—whether a requester of public records under the California Public Records Act, Cal. Gov. Code §§ 6250 *et seq.* ("PRA"), should have to secure an injunction to prevent their destruction and post a bond if the injunction issues—could have far-reaching implications. As petitioners and appellants point out (Appellants' Opening Brief at 1), the public cannot access records that no longer exist.

Notwithstanding the basic principle that a litigation hold should be placed on documents when litigation is foreseeable, the City of Sacramento (the "City") would have destroyed 15 million emails requested under the PRA if an injunction had not issued here. Its insistence upon destroying the emails required petitioners and appellants to post a bond, initially of $80,000, an amount which was later reduced to $2,349 when the City could not show any damage (other than the purported need to incur attorney's fees) from the issuance of the injunction. CT 367.

The bond requirement imposed by the trial court presents a collision between two statutory schemes, Code of Civil Procedure section 529 and Government Code section 6259. The trial court interpreted the former to require a bond as a condition to issuing a preliminary injunction. However, imposing such a requirement is inconsistent with Government Code section 6259(d), which provides that petitioners under the Public Records Act cannot be required to pay the government's costs and attorney's fees unless

an action is "clearly frivolous." (*See Crews v. Willows Unified School District* (2013) 217 Cal. App. 4th 1368.)

This Court should reverse the trial court for several reasons. First, an injunction should not be required to prevent an agency from destroying records which are requested under the PRA. Second, the specific statute—Government Code section 6259, which prevents imposition of costs and fees upon a petitioner unless an action is frivolous—governs over the general, Code of Civil Procedure section 529. Third, requiring bonds as a condition of granting an injunction in PRA cases would lead to illogical and absurd results: under Code of Civil Procedure sections 529 and 995.220, public agencies are exempt from the bonding requirements, but under the trial court's interpretation of section 529, petitioners of modest means such as Mr. Stevenson and Ms. Grimes would have to post a bond to prevent an agency like the City with a budget of nearly a billion dollars from destroying public records.

For all these reasons, and those set forth below, the order of the trial court requiring petitioners to post a bond should be reversed.

II. INTEREST OF AMICI

Amicus Curiae **The Sacramento Bee** is the flagship newspaper of The McClatchy Company and has been publishing for 160 years. Since its founding in 1857, it has won six Pulitzer Prizes and numerous other awards. This year, the *Bee*'s reporting on immigrants, nursing homes, and

former UC Davis Chancellor Linda Katehi has been recognized with regional and corporate newspaper awards. The use of the Public Records Act is a regular staple of its reporting.

Amicus Curiae **First Amendment Coalition** ("FAC") is an award-winning, nonprofit public interest organization based in San Rafael, California, dedicated to advancing free speech, open and accountable government, and public participation in civic affairs. FAC acts locally, statewide, and throughout the nation. Founded in 1988 as the "California First Amendment Coalition," FAC shortened its name in 2009. The new name acknowledges the declining relevance, in the Internet era, of state borders to many First Amendment issues.

Amicus Curiae **The Reporters Committee for Freedom of the Press** is an unincorporated nonprofit association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Amicus Curiae **The Sacramento Valley Mirror** is a small bi-weekly newspaper headquartered in Glenn County. The Mirror is the recipient of the Bill Farr Award of the California Society of Newspaper Editors in 2000; Hofstra University's Francis Frost Wood Courage in Journalism Award in 2000; **t**he California Press Association's Newspaper

Executive of the Year Award in 2009; and the 2011 Norwin Yoffie Lifetime Achievement Award of the Northern California Chapter of the Society of Professional Journalists. The Mirror is also a three time recipient of the California Newspaper Association's Freedom of Information Award.

Amicus Curiae **The North Coast Journal** is a small daily newspaper headquartered in Humboldt County. NCJ is the recipient of the 2017 Northern California Society of Professional Journalists James Madison award and the 2017 California Newspaper Publishers Association Freedom of Information award.

Amicus Curiae **The Ferndale Enterprise** is a small daily newspaper headquartered in Humboldt County. The Enterprise is the recipient of of the 2016 First Amendment Coalition's Open Government and Free Speech award, the 2016 Nor Cal Society of Professional Journalists James Madison award and the 2016 California Newspaper Publishers Association Freedom of Information award.

Amicus Curiae **The Lake County News** is a small online news media outlet headquartered in Lake County. LCN is the recipient of the 2014 Nor Cal Society of Professional Journalists James Madison award.

Amicus Curiae **The Davis Vanguard** is a small online news media outlet headquartered in Yolo County.

Amicus Curiae **The Woodland Record** is a small online news media outlet headquartered in Yolo county.

Amicus Curiae **Californians Aware** is a nonprofit, non-partisan public benefit corporation organized under the laws of California and recognized as a 501(c)(3) charity by the Internal Revenue Service. Its mission is to foster the improvement of, compliance with and public understanding and use of, public forum law, which deals with people's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

III. INJUNCTIVE RELIEF SHOULD NOT BE REQUIRED TO PREVENT A PUBLIC AGENCY FROM DESTROYING RECORDS RESPONSIVE TO A PRA REQUEST.

A. A Litigation Hold Is Necessary When Litigation Is Foreseeable.

At the outset, requesters of public records should not need to obtain an injunction to prevent the destruction of records they have requested. Government Code section 6253(a) explicitly provides that public records "are open to inspection at all times," section 6253(b) provides that agencies shall upon request "make the records promptly available to any person," and section 6253(d) commands, "Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records." It goes without saying that if an agency destroys records which have been requested, it has "obstruct[ed]" access to them. The legislature's clear command in section 6253 is that agencies should preserve records which have been requested, and citizens should not need to obtain an

injunction to fulfill that command.

Similarly, Government Code section 6253.1(a) requires government agencies to (1) assist members of the public to identify records and information responsive to requests, (2) describe the information technology and physical location in which records exist, and (3) provide suggestions for overcoming any practical basis for denying access to the records or information sought. Once again, the legislative command that agencies assist the requesters of public records would be defeated by a public agency's destruction of those records. Citizens should not need to go to court to prevent agencies from destroying records which they are supposed to help members of the public obtain.

In federal courts, it is well-established that private and government entities have an obligation to preserve evidence related to both pending and anticipated litigation. (*See, e.g., Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 220 F.R.D. 212 ("*Zubulake IV*"); *Silvestri v. Gen. Motors Corp.* (4th Cir. 2001) 271 F.3d 583, 591 ["The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."]; *Kronisch v. United States* (2d Cir. 1998) 150 F.3d 112, 126 [applying rule to federal government].) Moreover, that obligation supersedes any otherwise applicable document retention policy: "[o]nce a party reasonably anticipates litigation, it must

suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." (*Zubulake IV*, *supra*, 220 F.R.D. at p. 218.)[1]

The California Supreme Court recently made clear in *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, that public records on "personal" electronic accounts such as email accounts may be required to be disclosed in response to requests under the PRA. In setting forth guidance to public agencies for conducting searches for emails on such "personal" accounts, the Court stated: "[o]nce an agency receives a CPRA request, it must 'communicate the scope of the information requested to the custodians of its records,' although it need not use the precise language of the request. [Citation omitted.] As to requests seeking public records held in employees' nongovernmental accounts, an agency's first step should be to communicate the request to the employees in question. The agency may

[1] Lawyers also have an ethical duty to ensure that documents and electronically stored information ("ESI") are preserved for actual or anticipated litigation. *See generally* Eric Deitz, *Ethics in the ether: Competently representing your client with regard to ESI*, State Bar of California (February, 2016), archived at https://perma.cc/87P4-H3TA; Nathan M. Crystal, *Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds*, 43 Akron L. Rev. 715 (2010); Eleanor H. Chin, Ryan D. Derry, *Alt-Delete Judges Have Made It Clear That Ignorance Is No Longer an Excuse for Spoliation of Electronic Evidence*, L.A. Law., July-August 2010, https://www.lacba.org/docs/default-source/lal-back-issues/2010-issues/julyaugust-2010.pdf.

then reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material." (*Id.* at pp. 627–28.)

Although the Court did not explicitly say that employees must then save potentially responsive emails, it went on to say that "agencies can adopt policies that will reduce the likelihood of public records being held in employees' private accounts," and that agencies "'are in the best position to implement policies that fulfill their obligations' under public records laws 'yet also preserve the privacy rights of their employees,'" such as a requirement that employees use or copy their government email address for all communications touching on public business. (*Id*. at p. 628.) The Court added, "[f]ederal agency employees must follow such procedures to ensure compliance with analogous FOIA requests." (*Ibid*.) Implicit in the Court's holding in *San Jose* is the requirement that agencies and their employees must save records which have been requested: it would make no sense to require that records touching upon public business be copied on a government server, or searched for by a public official or employee, if the agency or its officials and employees are free to destroy the record before a court decides whether it must be disclosed.

A party requesting public records under the PRA should not be required to run to court seeking an injunction to prevent an agency from destroying public records. The agency should, as a matter of course, place a litigation hold on requested records to ensure they are preserved,

processed, and released in accordance with the PRA.[2] While the City euphemistically characterizes its planned record destruction as a "record retention policy[,]" (Respondent's Brief at 7) it never explains why there was such a hurry to destroy records which had been sitting on a server for many years. It contends that "[t]he volume of potentially responsive records made *responding* to Appellants' request unfeasible from both a technological and staff resource standpoint" (Respondent's Brief at 8 (emphasis added)), but that is a different issue entirely. It might have been hard to *retrieve* the records requested, but that does not mean the City had to *destroy* all of them, or that from a "technological and staff resource standpoint" the City could not have kept the records on a server while it worked with petitioners to narrow the request.

The City's position is deeply troubling. Unless agencies routinely place a litigation hold on requested records, officials with something to hide may delete potentially embarrassing or incriminating records and force requesters to either lose their right to access records or rush to court seeking an injunction (and perhaps have to post a bond if they get one). This would frustrate the ability of the public to expose "corruption, incompetence, inefficiency, prejudice and favoritism," which the California Supreme Court has described as a core purpose of the Public Records Act.

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[2] It should also be noted that Government Code section 34090(d) requires agencies to retain records for a minimum of two years.

(*International Federation of Professional and Technical Engineers Local 21 v. Superior Court* (2007) 42 Cal. 4th 319, 333 ("*IFPTE*").) Moreover, if a public official or employee commonly (or exclusively) uses a "personal" electronic device to conduct public business, absent a routine litigation hold placed on records residing on those personal electronic devices, records responsive to PRA requests—including, potentially, those revealing misconduct—may disappear into the ether. (*See City of San Jose*, *supra*, at pp. 628–29.) A PRA requester should not have to run to court, seek an injunction, and post a bond simply to preserve the public records they have requested.

B. There Are No Technological Barriers or Financial Costs To Storing Email that Necessitate or Warrant Their Destruction after a PRA Request Is Made.

The burden associated with placing a litigation hold on the destruction of email after a PRA request has been made, if any, is small, thanks to the ever-decreasing cost of electronic storage in the Information Age. Indeed, maintaining, accessing, and transmitting electronic data is faster, cheaper, and more efficient now than at any other point in human history. (*See, e.g.*, Gil Press, *A Very Short History of Big Data*, Forbes (May 9, 2013), http://bit.ly/2rc4isM.) Given the current state of technology government entities should not attempt to hide behind the "cost" of storing and producing electronic records that belong to the public.

Compared to other types of data, emails are particularly minute; their size is usually measured in kilobytes ("kB").[3] A small text-based email is approximately 2 kB. *Kilobytes Megabytes Gigabytes Terabytes*, Stanford University, https://web.stanford.edu/class/cs101/bits-gigabytes.html (last accessed May 30, 2017). Microsoft considers an average email to be 50 kB. (*See* markga, *How much bandwidth do I need for my users connecting to Exchange Online*? Microsoft Office 365 Education Blog (Feb. 13, 2012), *archived at* https://perma.cc/UMN2-C9HD.) By comparison, a typical video DVD has a capacity of 4.7 gigabytes (or 4,700,000 kB)—many orders of magnitude larger. (*See Kilobytes Megabytes Gigabytes Terabytes*, *supra*.)

In contrast to the small size of emails, the capacity of electronic storage has skyrocketed in recent years, while the cost of storage has simultaneously plummeted. Between 1993 and 2013, the price for one gigabyte of memory on a computer hard drive fell from $1,851.98 to $0.04. Michael V. Copeland, *Storage*, Wired Magazine, http://archive.wired.com/magazine/wired-20th-anniversary/ (last accessed

[3] Computer memory is generally measured in "bytes." A byte is roughly the equivalent of one roman alphabetic letter, and a page of such text is generally equivalent to two kilobytes (or approximately two thousand bytes). *Kilobytes Megabytes Gigabytes Terabytes*, Stanford University, https://web.stanford.edu/class/cs101/bits-gigabytes.html (last accessed May 30, 2017). There are some minor differences in how entities calculate a kilobyte that are not relevant for the purposes of this brief. *See Prefixes for binary multiples*, National Institute of Standards and Technology, http://physics.nist.gov/cuu/Units/binary.html (last accessed May 30, 2017).

May 31, 2017). That trend has continued in recent years: a three terabyte ("TB") hard drive (3,000,000,000 kB) can now be purchased for less than $69 online,[4] the equivalent of approximately $0.02 per gigabyte. Assuming an average message size of 50 kB, such a drive could hold approximately 60,000,000 emails.

The City of Sacramento's approved budget for FY2015/2016 totaled $951,600,000. *City of Sacramento Approved Budget Fiscal Year 2015/2016,* City of Sacramento, *archived at* https://perma.cc/QGX4-GHN7. Assuming, *arguendo*, that Respondents received 14 million emails per year, *cf.* Resp. Br. at 8, and an average email size of 50 kB, a three TB drive would hold more than *four years* of email for less than $69. The frequency and size of attachments could change that calculation, but there are other readily available and inexpensive storage options that would mitigate such variations. Companies providing online "cloud"-based storage will back up an *unlimited* amount of data at exceedingly affordable rates. One company, Backblaze, offers unlimited online storage backup for a computer for $50 per year[5] (0.00000525% of Sacramento's budget). In other words, regardless of the size or frequency of emails, they can be stored for the cost of a few cups of coffee. That burden is not zero, but it is a miniscule one to

[4] *Hitachi 3TB 7200RPM 3.5" Desktop SATA Hard Drive*, Amazon, *archived at* https://perma.cc/9LHY-QZFR.
[5] *Backblaze for Business*, Backblaze, *archived at* https://perma.cc/WVR7-TX4Y.

ensure the public's Constitutional and statutory rights of access are preserved. *See* Cal. Const. art. I, § 3(b)(1); Cal. Gov. Code §§ 6250, *et seq.* Moreover, and more fundamentally, as Appellants note, "to some extent *any* request for disclosure of public records will place a burden on government. Both the voters and their elected officials have established the general policy that this burden is *well worth bearing* in order to keep democracy vital." *Los Angeles Unified Sch. Dist. v. Superior Court*, 228 Cal. App. 4th 222, 250, 175 Cal. Rptr. 3d 90, 111 (2014) (emphasis added). Any purported "cost" of storing electronic government records does not and should not deprive the public of their democratic rights.

IV. GOVERNMENT CODE SECTION 6259's SPECIFIC LIMITATIONS ON ACCESS COSTS CONTROL OVER CODE OF CIVIL PROCEDURE SECTION 529's GENERAL LANGUAGE

Government Code section 6259(d) provides that petitioners seeking public records "shall" recover their attorney's fees and costs when they prevail. Section 6259(d), however, limits the government's ability to recover attorney's fees and costs to the rare situation where a PRA action is "clearly frivolous." No reported case has affirmed a "clearly frivolous" finding in a PRA case, and this Court in *Crews*, *supra*, 217 Cal. App. 4th at pp. 1380–82, reversed a finding that a publisher of a small newspaper in the

Central Valley town of Willows (Glenn County) was responsible for fees and costs in a PRA case.[6]

Government Code section 6259(d) is a specific provision of the PRA which effectuates the over-arching purpose of the Act and of article I, section 3(b) of the California Constitution, which guarantee citizens the power to monitor the operations of their government. It limits the potential liability of PRA requesters for fees and costs to "clearly frivolous" actions. Section 6259(d) conflicts with Code of Civil Procedure section 529 if the latter is interpreted to require a bond whenever a PRA requester seeks injunctive relief. This Court should follow the rule that specific statutes govern over general statutes. (*State Department of Public Health v. Superior Court* (2015) 60 Cal. 4th 940, 960; *Woods v. Young* (1991) 53 Cal. 3d 315, 325.) The application of that rule here leads to the conclusion that no bond is required to secure injunctive relief preventing destruction of records sought pursuant to the PRA, particularly when the only "harm" the agency can assert is the expense of its own counsel.

The California Supreme Court in *Filarsky* v. *Superior Court* (2002) 28 Cal. 4th 419, 427–29 described the non-reciprocal fee provision in section 6259(d) as one of the primary "protections and incentives" available to requesters of public records and those seeking to enforce the Public Records Act. But the protections of that section could easily be eroded if a

[6] The newspaper in that case is one of the *amici* in this case.

bond is required of requesters to prevent records from being destroyed. If a small newspaper publisher or citizen watchdog sought and obtained injunctive relief to stop the destruction of records, the requirement of a bond could accomplish through the back door what Government Code section 6259(d) forbids from happening through the front door: saddling the citizen with high costs to enforce their right to records. A bond of $2,349 (the eventual amount here, representing the city's supposed attorney's fees) may not seem like a lot of money to a near-billion dollar agency like the City of Sacramento, but it can be enough to deter a citizen from enforcing her rights. (CT 334:19-335:18 [appellant Katy Grimes nearly withdrew from lawsuit as a result of the imposition of the bond/undertaking order].) And the record of this case shows that agencies may inflate the costs of retaining records, and trial judges may accept inflated estimates of costs. (CT 220:14-223:1-5 [appellants questioned city's claim of possible damages in their request for bond] and RT 78:16-27 [trial court initially ordered $80,000 bond and petitioners again protested lack of evidence supporting that claim].)

V. CONSTRUCTION OF CODE OF CIVIL PROCEDURE SECTION 529 AGAINST A BOND REQUIREMENT IN PRA ACTIONS IS NECESSARY TO AVOID ABSURD RESULTS AND INCONSISTENCY WITH THE CALIFORNIA CONSTITUTION.

The California Supreme Court has held in a Public Records Act case that statutes should be construed to avoid absurd results. (*Commission on*

Peace Officers Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 290 [statutes should be construed in a way that "leads to the more reasonable result," and that avoids "unreasonable, impractical, or arbitrary results"].) It is also well settled that under Proposition 59, enacted in 2004 and embodied in article I, section 3(b)(2) of the California Constitution, statutes must be broadly construed to the extent they further access to public records and information, and narrowly construed to the extent they limit disclosure. (*See generally Sierra Club v. Superior Court* (2013) 57 Cal. 4th 157, 166.)

The gist of the City of Sacramento's brief is that courts have no discretion and that bonds must be required whenever an injunction issues in all cases. Such an ironclad rule, as discussed above, would be inconsistent with the Public Records Act and its specific provision allowing requesters to recover fees and costs whenever they prevail but exempting them from paying fees and costs unless they file clearly frivolous actions.

It also bears note that even outside the context of the Public Records Act, courts have at the very least expressed doubt as to whether Code of Civil Procedure section 529 sets forth an ironclad bond requirement in all cases. In *Mangini* v. *J. G. Durand International* (1994) 31 Cal. App. 4th 214, 219–220, the Court of Appeal observed that it is an open question whether courts can either waive a bond requirement or order a nominal bond in environmental litigation: "To date this recurring issue remains

unresolved: Do courts of this state, under the provisions of section 529 or otherwise, have the power to order a nominal bond or to waive any bonding requirement as a condition to issuing a preliminary injunction in 'environmental' litigation?"[7]

Requiring a bond under Code of Civil Procedure section 529 in Public Records Act cases would impose precisely the sort of monetary burden that Government Code section 6259(d) expressly prohibits. CCP section 529(b)(3) provides that the bonding requirement does not apply to a "public entity or officer described in Section 995.220." CCP section 995.220 lists the state, counties, cities, and the United States. Thus, if the City's position is correct here, agencies *never* have to post a bond, but those seeking public records from agencies *always* have to post a bond to keep

[7] The Court in *Mangini* found that requiring a bond on the facts of that case would not be unjust, observing: "Any potential bond is likely to be modest. Furthermore, nothing in the record suggests Mangini was unable to post a bond. Mangini is not the nonprofit plaintiff we commonly see in environmental litigation. She is a gainfully employed practicing attorney." (31 Cal. App. 4th at p. 218.) The Court noted that a line of federal decisions has "held or assumed that only a nominal injunction bond should be imposed in cases which seek to protect the environment" (*Id*. at p. 217), but concluded, "[i]n the absence of some evidence showing a bond would be an impediment to maintaining the action, we see no reason to even reach the federal rule. In sum, even if the federal rule is applicable in California, it would not assist Mangini here." (*Id*. at pp. 218–19.) Here, on the other hand, petitioner Stevenson declared below that he could not afford a bond because he is indigent (CT 322-23) and protested the bond the city asked for as "an $80,000 filing fee to initiate a lawsuit and gain access to the legal justice system." (CT 323:4-6.) Appellant Katy Grimes very nearly withdrew from the lawsuit because of the bond/undertaking order. (CT 334:19-335:1-18.)

agencies from destroying records which might shed light on the operations of those agencies and whether public officials and employees are engaged in "corruption, incompetence, inefficiency, prejudice and favoritism." (*IFPTE*, *supra*, 42 Cal. 4th at p. 333.) This would create an unreasonable result which would be wholly inconsistent with the California Constitution's pro-access provision, article I, section 3(b)(1). This Court should construe CCP section 529 to avoid such an unreasonable result. (*Commission on Peace Officers Standards and Training*, *supra*, 42 Cal. 4th at p. 290.)

VI. CONCLUSION

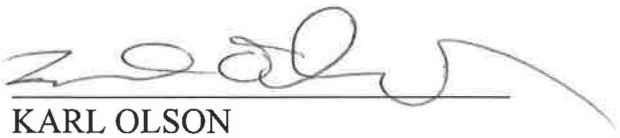
Requiring PRA requesters to obtain an injunction to prevent the destruction of records at issue in PRA litigation runs directly counter to the purpose of the California Public Records Act and the clear mandate of the California Constitution, both of which require that records relating to the people's business be made available to the public. That which does not exist plainly is not "available," and nothing in the CPRA or any other law requires the public to obtain a specific order requiring agencies to preserve records to which they are entitled under California law—and that which California law requires all litigants to preserve in any event.

Similarly, requiring PRA requesters to post a bond to keep public agencies from destroying public records would defeat openness in government, which our Supreme Court has declared is "essential to the

functioning of a democracy." (*IFPTE*, *supra*, 42 Cal. 4th at p. 328.) It would be inconsistent with article I, section 3(b) of the California Constitution. It would invite public agencies to close the courthouse door on records requesters through the stratagem of making inflated assertions of harm for doing what litigants take for granted, holding on to records which are or might be used in litigation. This Court should construe the specific provisions of the PRA, Government Code section 6259, as controlling over the general bonding provisions of Code of Civil Procedure section 529. The order requiring appellants to post a bond to obtain a preliminary injunction should be reversed, and this Court should make clear that government agencies subject to PRA litigation must preserve all records at issue in such litigation, without the need for any injunction or any other order requiring such preservation.

Dated: June 12, 2017

CANNATA, O'TOOLE, FICKES & ALMAZAN LLP

By: 

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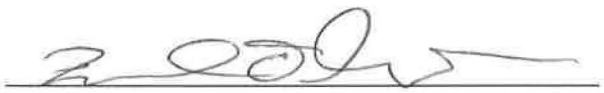
CERTIFICATE OF WORD COUNT
PURSUANT TO CAL.R.CT. 14 (c)(1)

Pursuant to California Rule of Court 8.204(c), I certify that the above opening brief uses proportionally spaced, Roman typeface of 13 points or more, and in reliance upon the word count feature of the word processing computer program Microsoft Word, contains 4,871 words, not including tables, this certificate, and attachments.

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

Executed this 12th day of June, 2017 at San Francisco, California.



Karl Olson

PROOF OF SERVICE

I declare that I am employed in the County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within entitled cause, and my business address is CANNATA, O'TOOLE, FICKES & ALMAZAN LLP, 100 Pine Street, Suite 350, San Francisco, CA 94111.

On June 12, 2017 I served the following documents in the manner(s) selected:

1. **REQUEST FOR PERMISSION TO FILE AMICUS CURIAE BRIEF OF THE SACRAMENTO BEE, FIRST AMENDMENT COALITION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND OTHERS IN SUPPORT OF PETITIONERS AND APPELLANTS RICHARD STEVENSON AND KATY GRIMES; BRIEF OF AMICI CURIAE**

[X] (FEDEX DELIVERY): By placing true and correct copies thereof enclosed in a sealed FedEx Envelope and delivered to the address(es) as set forth below:

[X] (ELECTRONIC SERVICE): On the date executed below, I electronically served the document(s) via TrueFiling to the recipients below:

By Electronic Service via TrueFiling

Court of Appeal for the State of California
3rd Appellate District

Paul Nicholas Boylan
Paul Nicholas Boylan Esq.

Andrea Velasquez
City Attorney's Office
City of Sacramento

By FedEx Delivery
Sacramento County Superior Court
720 9th Street
Sacramento, CA 95814

I declare that the foregoing is true and correct and that this declaration was executed in San Francisco, California, on June 12, 2017.

Eric de Lara