



August 27, 2021

Honorable Tani Gorre Cantil-Sakauye, Chief Justice
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Voice of San Diego et al. v. Superior Court for the County of San Diego* (2021) 66 Cal. App. 5th 669, S270557.

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court,

Pursuant to Rule 8.500(g) of the California Rules of Court, the First Amendment Coalition (“FAC”) submits this letter urging the Court to grant review of the Court of Appeal’s decision in *Voice of San Diego et al. v. Superior Court for the County of San Diego* (2021) 66 Cal. App. 5th 669.

FAC is a California non-profit corporation dedicated to freedom of speech and government transparency. FAC provides legal information and consultations to journalists, academics, bloggers, and ordinary citizens regarding access rights under the Freedom of Information Act and California’s various open government laws. FAC files amicus briefs in important appeals, both in state and federal courts, including the United States Supreme Court. In addition, FAC files litigation to defend and expand the rights of the public and press under access laws, including the California Public Records Act (“CPRA” or the “Act”). *See, for example, Becerra v. Superior Court (First Amendment Coalition)* (2020) 44 Cal. App. 5th 897.

At a time when access to information can very well be a matter of life or death, this case affords the Court the chance to compel government agencies to fulfill their obligation to comply with the CPRA, especially during a crisis. The County of San Diego (“San Diego”) is concealing a mountain of potentially life-saving data about the locations of COVID-19 outbreaks in the community. Yet, San Diego refuses to proactively provide this data to the public, even as other counties such as Los Angeles, San Bernardino, and Merced regularly volunteer the same information on their public websites. The states of Oregon, Colorado and Kansas do the same. In addition, despite being home to 10 million people, Los Angeles has never received a complaint about posting COVID-19 outbreak locations. *This bill was meant to protect California workers from COVID. These counties are using it to protect employers instead*, The Mercury News (2021), <https://perma.cc/N2YS-9RSA>. Knowing about your COVID-19 risk should not depend on your county of residence or employment.

The CPRA has a public disclosure exemption when, “on the facts of the particular case the public interest served by not disclosing the record *clearly outweighs* the public interest served by disclosure of the record.” (Gov. Code, § 6255(a)). This is a high burden, and the government must demonstrate a “clear overbalance on the side of confidentiality.” (*Michaelis, Montanari & Johnson v. Superior Court*

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(2006) 38 Cal. 4th 1065, 1071.) This burden is simply impossible to meet when it comes to COVID-19 workplace outbreak locations — almost half of the counties in California are currently releasing this information to the public.

The Court of Appeal opinion chronically downplays the value of public access to COVID-19 outbreak location data. For example, the opinion twice quotes the Public Health Officer assuring the public that if a specific location really posed a threat, the “County Health Officer would close it down.” (*Voice of San Diego et al. v. Superior Court for the County of San Diego* (2021) 66 Cal. App. 5th 669, 680, 692.) However, it is impossible for the public to determine if that is true because that same government official refuses to release the data that would show the locations of frequent outbreaks, perhaps caused by a failure to enforce social distancing and mask requirements. The CPRA exists so the public can both trust and verify that government officials are performing their duties.

Since this case last came before the Court, the publication of workplace COVID-19 outbreak information for other counties has highlighted the vital public interest in public access to this data. Indeed, it was a media organization, The Mercury News, not the California Department of Public Health, that built the first centralized database of workplace COVID-19 outbreak information in California. Unfortunately, only half of California counties contributed information to the database. *Map: Two more counties provide workplace outbreak data*, The Mercury News (2021), <https://perma.cc/HLA6-8AW6>. The fact that so many counties routinely provide this data indicates that the public interest in nondisclosure does not clearly outweigh the interest in disclosure.

Despite the database’s shortcomings, the California Occupational Safety and Health Administration (“Cal/OSHA”) has relied on the data to study COVID-19 spread in California workplaces. At a July 20, 2021 Cal/OSHA meeting, the board discussed The Mercury News’ workplace outbreak database because it was the most complete information available. Several board members expressed a desire for the California Department of Public Health to publish more complete workplace outbreak information as well. Cal/OSHA also used the Mercury News database when presenting to the subcommittee on COVID-19 outbreaks in June 2021. *Cal/OSHA board members call for transparency around California’s workplace outbreaks*, The Mercury News (2021), perma.cc/SQM9-SW36.

Cal/OSHA and employers across the state are failing to live up to their legal responsibilities to California workers. Cal/OSHA relies on employers to self-report COVID-19 infections and the regulator has been unable to keep an accurate count of workplace COVID-19 infections. “Workplace researchers, health experts, and lawmakers all agree the data is likely missing swaths of essential workers who were seriously sickened at work.” For example, a Foster Farms plant in Fresno reported only two serious cases of COVID-19 to Cal/OSHA, despite the fact that four of their workers died from COVID-19 complications. A pistachio plant in Fresno also failed to report two COVID-related hospitalizations to Cal/OSHA. *California isn’t fully tracking serious workplace COVID-19 cases in Fresno. Here’s why*, Cal Matters (2021), <https://perma.cc/7UQD-PZBX>.

Publishing workplace outbreak data is essential because many employers are not informing their employees of outbreaks, as required by law. When The Mercury News published their database, it was

the first time that many Californians discovered that their workplaces had been affected by an outbreak. The database revealed many outbreaks for the first time and also confirmed the numbers in several previously known workplace outbreaks. *Map: Two more counties provide workplace outbreak data*, The Mercury News (2021), <https://perma.cc/HLA6-8AW6>. For example, “[t]he previously undisclosed outbreaks include the 171 cases reported at the Richmond HelloFresh last July, 187 cases at a newly-opened Amazon facility in Riverside County’s city of Beaumont in January, and 50 cases at an air conditioning company in Vacaville.” *This bill was meant to protect California workers from COVID. These counties are using it to protect employers instead*, The Mercury News (2021), <https://perma.cc/N2YS-9RSA>. After The Mercury News published the database, Santa Clara County agreed to release their workplace outbreak data. A Santa Clara County official regretfully stated that the County had been “too trusting” when it assumed that employers were notifying employees of outbreaks; but this was not the case at all. *Santa Clara County COVID data reveals more than 250 workplace outbreaks*, The Mercury News (2021), <https://perma.cc/48DD-JXYC>.

Prominent UCSF epidemiologist Dr. Kirsten Bibbins-Domingo has even asserted that by not releasing the data, counties are preventing public health experts from understanding COVID risk and spread. *This bill was meant to protect California workers from COVID. These counties are using it to protect employers instead*, The Mercury News (2021), <https://perma.cc/N2YS-9RSA>. A recent University of California, San Francisco study confirmed the association between hard-hit industries and excess mortality rates during the pandemic. *Santa Clara County COVID data reveals more than 250 workplace outbreaks*, The Mercury News (2021), <https://perma.cc/48DD-JXYC>.

The database also revealed troubling trends in COVID-19 enforcement in workplaces. Public Health officials primarily directed their efforts at customer complaints and did not often initiate enforcement actions in workplace outbreaks impacting employees. *Bay Area businesses with COVID-19 outbreaks rarely faced fines*, The Mercury News (2021), <https://perma.cc/G9SH-K2UZ>. Dr. Bibbins-Domingo indicated that this approach did not protect workers and increased the spread of COVID-19. Information about outbreaks is critical to combatting the pandemic and holding unsafe employers accountable. By withholding this data from the public, Counties are shielding employers from investigation while terrified workers are being kept in the dark, deprived of vital outbreak information that could keep them and their families safe.

The Court of Appeal opinion cited Dr. Wooten’s belief that the information was confidential under California Code of Regulations, title 17, section 2502, subdivision (f). However, section 2502 prohibits disclosure “except as authorized by these regulations, as required by state or federal law, or with the written consent of the individual to whom the information pertains or to the legal representative of that individual.” (Cal. Code Regs., tit. 17, § 2502, subd. (f).) The California State Legislature, stressing the importance of making outbreak location data widely available as COVID-19 continues to ravage this state, has already mandated the release of much of this information to the public. As of this year, the State Department of Public Health must “make workplace industry information received from local public health departments . . . available on its internet website in a manner that allows the public to track the number and frequency of COVID-19 outbreaks and the number of COVID-19 cases and outbreaks by industry reported by any workplace. . .” (Lab. Code, §

6409.6(g).) That obligation includes the duty to disclose the number of cases within each outbreak location. (Lab. Code, § 6409.6(b), (g).)

As the Legislature has recognized, disclosure of COVID-19 outbreak data, without personally identifiable information, is clearly in the public interest. But so too is the integrity of the CPRA, a law that public agencies cannot single-handedly decide no longer applies whenever compliance is inconvenient. The Act was passed to “increas[e] freedom of information” by giving the public “access to information in possession of public agencies.” (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.) Summarily denying review of a matter of such grave public interest like this one is antithetical to the Act’s very purpose. The Court should grant review in this case to preserve the integrity of the CPRA. In reviewing this case, the Court has the opportunity to remind public agencies that the right of access to information is a matter of law, not whim or unsubstantiated hunch. Even and especially in times of crisis, public agencies must uphold California’s commitment to open governance and the public’s right to know.

Sincerely,



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Proof of Service

I am over the age of 18 and not a party to this action.

I am employed in the county where this service occurred; my business address is:

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On August 27, 2021, I served the foregoing documents described as **First Amendment Coalition Letter in Support of Petition for Review** on the following parties via email:

Jeffrey Michalowski at Jeffrey.michalowski@sdcounty.ca.gov

Felix Tinkov at felix@tinkovlaw.com

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

Dated: August 27, 2021

Signed,

/s/ Monica Price

Legal Fellow

First Amendment Coalition

SBN: 335464

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