CASE NO.: B310585

COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

LOS ANGELES TIMES COMMUNICATIONS LLC,
THE ASSOCIATED PRESS, and SCRIPPS NP OPERATING, LLC,
publisher of the VENTURA COUNTY STAR,
Appellants,

v.

ARIK HOUSLEY, et al.,
Respondents,

COUNTY OF VENTURA
Real Parties in Interest.

Appeal of Preliminary Injunction
Preventing Disclosure of Public Records
Superior Court No. 56-2019-00523492-CU-WM-VTA
The Superior Court for the County of Ventura
Hon. Henry Walsh, Judge

APPELLANTS' REPLY BRIEF

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX:

Los Angeles Times Communications LLC, The Associated Press, and Scripps NP Operating, LLC, Publisher Of The Ventura County Star (collectively, the "Appellants") respectfully submit this Reply Brief in support of their request that this Court immediately vacate the preliminary injunction issued by the Ventura County Superior Court ("trial court"), which prohibits the County of Ventura ("County") from producing disclosable public records, on the mere hope that the California Legislature *might* change the law to limit disclosure of autopsy reports.

I. INTRODUCTION

The trial court issued a preliminary injunction based on representations by counsel for Respondents that the California Legislature might approve legislation introduced by Assemblywoman Jacqui Irwin – Assembly Bill 268 – canceling the public's right of access to the autopsy reports requested here. (AA 764.) Respondents failed to inform this Court that the Legislature did not enact such legislation. More than six weeks prior to Respondents' filing of their brief, the Senate Public Safety Committee called off a hearing slated for June 29, 2021 on the proposed legislation at Assemblywoman Irwin's request in the face of opposition.[1] AB 268 did not move forward even to a vote in the Senate Public Safety Committee, let alone make it through the

[1] *See* https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202120220AB268.

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Senate Judiciary Committee or the floor of the California Senate or past Governor Newsom's desk. (*See id.*) The legislative session again ended on September 10, 2021, without the Legislature amending the law to restrict access to autopsy reports. (*See id.*)

Because the purported basis for a preliminary injunction did not come to pass, this Court should immediately vacate the injunction that has obstructed disclosure of the autopsy reports from the mass shootings at the Borderline Bar & Grill for almost a year. This Court should also make clear that it is improper for a court to enjoin disclosure of public records based on a hope that a legislative body will change the law. The trial court did not cite any authority supporting entry of an injunction premised on wished-for law as opposed to existing law, and we know of no such precedent.[2] *See* Section II.B, *infra*.

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[2] A court must apply the law as it is written and may not issue decisions based on what the court wished it were. (*See e.g.*, *Helmondollar v. DMV* (1992) 7 Cal.App.4th 52, 56-57 [where statute provided for suspension of license for anyone *convicted* of driving under the influence, court rejected attempt to use public policy reasons to expand the law to those who plead no contest, stating that, "[w]hile we recognize the severity of the numerous, dangerous, and deadly risks associated with drinking and driving, we may do no more than apply the law as written. If, on reflection, the Legislature intended a different result, it may amend the law and say so. As it is now written, however, we are compelled to decide as we do."] *See also Mosser Cos. v. San Francisco Rent Stabilization & Arbitration Bd.* (2015) 233 Cal.App.4th 505, 517 ["Whether the application of rent control protection to occupants who begin their residency as minors is wise economic policy is a question for legislative, not judicial, determination …. We must therefore apply the law as written, and the current law does not permit vacancy decontrol until all lawful *occupants* residing in a dwelling at the start of the tenancy vacate the premises."] *See further* AOB, Sect. III.B.)

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Under the current law, the autopsy records requested by the Appellant news organizations are public records subject to disclosure. (*See People v. Dungo* (2012) 55 Cal.4th 608, 621 ("*Dungo*"); *People v. Wardlow* (1981) 118 Cal.App.3d 375, 388 ("*Wardlow*"), citing *People v. Williams* (1959) 174 Cal.App.2d 364, 390 ("*Williams*"); *see further* Appellants' Opening Brief ("AOB"), Sect. III.A.)

Respondents try to distinguish *Dungo* by claiming that it involved a criminal case "where different interests are at stake." (Respondents' Brief ("RB") 29-30.) But the language of that California Supreme Court decision does not support a limitation only to criminal cases. "The usefulness of autopsy reports, including the one at issue here, is not limited to criminal investigation and prosecution; such reports serve many other equally important purposes," the *Dungo* Court stated. (55 Cal.4th at 621.) After explaining that a decedent's relatives may use an autopsy report to determine whether to file a wrongful death lawsuit and an insurance company may use it to decide whether a death is covered by a policy, the Court explained, "in certain cases an autopsy report may satisfy the public's interest in knowing the cause of death, particularly when (as here) the death was reported in the local media." (*Id. See also Dungo*, 55 Cal.4th at 627, 640 [concurring & dissenting opinions of Justices Werdegar and Corrigan, which also note that autopsy reports are public records].) Hence, *Dungo* expressly recognizes the value of public disclosure of autopsy reports that detail the

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circumstances, manner, and causes of unnatural, violent deaths such as those that occurred at the Borderline.[3] (§ 27491.)

Respondents cite cases that restrict disclosure of autopsy photos based on privacy claims, but Appellants are not seeking autopsy photos, and those cases do not extend privacy rights to the written autopsy records that the Appellant news organizations requested in this case. Likewise, Respondents cite non-binding cases from a minority of out-of-state jurisdictions, based on statutory schemes that the California Legislature has chosen not to follow. These non-binding cases do not override the California authorities recognizing that autopsy records are public – or the cases from the majority of jurisdictions around the country that allow access to autopsy reports. *See* Section II.C, *infra*.

As a last-ditch effort to prevent disclosure, Respondents argue that Appellants have not shown that disclosure is in the public interest. Not only does the burden to justify non-disclosure fall

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[3] Because autopsy reports are considered reliable official records with a reduced "prospect for fabrication" and are not just prepared for use in a criminal trial, the reports are admissible into evidence under the hearsay exception for non-testimonial public records. (*See Dungo*, 55 Cal.4th at 621; 627 (Werdegar, J. concurring). It would not make sense for autopsy reports to qualify as evidence in criminal or civil trials where such evidence is presumptively open to the public (*NBC Subsidiary* (*KNBC-TV*), *Inc., et al. v. Superior Court* (1999) 20 Cal.4th 1178, 1208 ("*NBC Subsidiary*"); *KNSD Channels 7/39 v. Superior Court* (1998) 63 Cal.App.4th 1200, 1204-1205 ("*KNSD Channels*")), but then be exempt from disclosure under the CPRA, as Respondents urge.

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directly on Respondents, not Appellants,[4] the balancing test Respondents attempt to engraft cannot be reached without meeting the elements necessary to demonstrate that a privacy right in autopsy reports actually exists.[5] *See* Section II.D., *infra*.

Even if the Court were to reach said balancing test, Respondents cannot refute the broad public interest in maintaining disclosure of autopsy reports by simply claiming that Appellants have not demonstrated what disclosure of these autopsy reports will prove. Appellants cannot say what these particular autopsy reports will show any more than Respondents (who admit they have not seen the reports). (RB 26.) Nor can Respondents conclusively establish that the reports will not shed any light on this tragedy. However, Appellants have demonstrated that autopsy reports in

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[4] *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071 ["proponent of non-disclosure" must demonstrate that the records at issue are not disclosable]; *O'Connell v. Sup. Ct.* (2006) 141 Cal.App.4th 1452, 1481 [burden of proof is on the moving party "to show all elements necessary to support issuance of a preliminary injunction"].)

[5] The California Supreme Court has stated that "the party claiming a violation of the constitutional right of privacy established in article I, section 1 of the California Constitution must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest." (*See International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 338-339 ("*Int'l Federation*"), citing *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40 ("*Hill*") [stating that "'[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest"].) Only then does the court engage in any balancing of interests. (*Sheehan v. San Francisco 49ers* (2009) 45 Cal.4th 992, 998.

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other situations have shed light on a variety of important public issues, and courts have recognized these values. From providing insight as to how public officials, like coroners, conduct their tasks to exposing information about police and mass shootings to new methods for treating victims of mass shootings, information gained from autopsy reports have provided critical tools in analyzing and reporting on matters of great public importance. *See* Section II.E., *infra*.

Finally, prior restraint case law rejects entry of restraining orders like preliminary injunctions on willing speakers such as Ventura County, which has represented to the parties and the trial court that it would disclose the autopsy records from the Borderline mass shootings. (AA 233 [stating that Ventura notified Respondents that they intend to release autopsy reports in response to Appellants' CPRA request].) Ventura County's decision to disclose should be free from judicial interference. (*Nickerson v. San Bernardino County* (1918) 179 Cal. 518, 522 ["[w]hen the Legislature has committed … to [a municipal body] judgment or discretion as to matters upon which it is authorized to act, courts of equity have no power to interfere with such a body in the exercise of its legislative or discretionary functions"].) If a court restrains a public agency that has a right and duty to disclose public records, then that restraint order preventing the agency from disseminating the information violates the requester's right to receive information from a willing speaker and is, therefore, an unconstitutional prior restraint. *(See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 756–757 [holding that the First Amendment provides protection for would-be recipients of speech,

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in addition to the speaker].) "Every moment's continuance of [such an order] amounts to a flagrant, indefensible, and continuing violation of the First Amendment." (*Freedom Communications v. Superior Court* (2008) 167 Cal.App.4th 150, 153.) *See* Section II.F., *infra*.

For all these reasons, Appellants urge this Court to immediately vacate the preliminary injunction issued in this case.

II. ARGUMENT

A. *De Novo* Is The Correct Standard of Review Because The Issues Presented In This Case Are Legal, Not Factual.

As Appellants discussed in their opening brief ("AOB"), the correct standard of review is *de novo*. Respondents, however, urge this Court to use the more deferential abuse of discretion standard, but fail to explain or even allege what "factual issues" would allegedly warrant such review. (RB 13.) This case presents only legal questions, namely whether (1) an injunction can be based entirely on introduced, but not enacted, legislation, and (2) Respondents have asserted any legally recognized privacy right on which their restraining order could be based. Each question warrants *de novo* review.

When issuing a preliminary injunction, trial courts are required to evaluate two factors: the likelihood the plaintiff will prevail on the merits at trial and the balance of harms. (*ITV Gurney Holding Inc. v. Gurney* (2017) 18 Cal.App.5th 22, 28–29.) If "the 'likelihood of prevailing on the merits' factor depends upon the construction of a statute or another question of law, rather than evidence to be introduced at trial, our review of that issue is

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independent or *de novo*." (*Marken v. Santa Monica-Malibu School Dist.* (2012) 202 Cal.App.4th 1250, 1261 ("*Marken*").)

Here, the trial court's error was not in its balancing of the two factors (as it never actually did the required balancing), but instead in its finding that proposed legislation was sufficient grounds for a preliminary injunction. This legal question warrants *de novo* review. (*See Ventura County Deputy Sheriff's Assoc. v. County of Ventura* (2021) 61 Cal.App.5th 585, 590 [applying *de novo* review in reverse-CPRA case]; *Pasadena Police Officers Assoc. v. Superior Court* (2015) 240 Cal.App.4th 268, 284 [applying *de novo* review in reverse-CPRA case to interpretation of the CPRA and its application to undisputed facts].)

Respondents' entire lawsuit, including the requested injunction, is premised on its argument that disclosure of the autopsy reports at issue is an invasion of their privacy. Respondents bear the burden of establishing a legally recognized privacy interest. "Whether a legally recognized privacy interest exists is a question of law subject to *de novo* review. (*See 420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316, 1347; *see also Hill*, 7 Cal.4th at 40 ["whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court" and if there is "no reasonable expectation of privacy… the question of invasion may be adjudicated as a matter of law"].) If the trial court had balanced the public interests in disclosure and confidentiality, that balancing would also be subject to independent review by this court. (*See CBS v. Block* (1986) 42 Cal.3d 646, 650-651, citing *ACLU v. Deukmejian* (1982) 32 Cal.3d 440, 443-444.)

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Even if this case were reviewed under a more deferential standard, the trial court abused its discretion by failing to rely on the California cases related to disclosure of autopsy reports and by basing its injunction on proposed legislation that had not been enacted.

B. Respondents Fail to Refute the Authority Demonstrating That The Trial Court Erred By Issuing The Preliminary Injunction On the Basis of Proposed Legislation.

Courts are required to follow the law, not what they believe the law should be or might be in the future. (*See* AOB, Sect. II.B.) Respondents fail to address the numerous authorities set out in the AOB that confirm this point. The failure of the trial court to apply current law not only constitutes reversable error, it is also unwise.

The California legislative process is arduous.[6] Over the two-year 2019/2020 session, a total of 4,848 bills were introduced between the Senate and the Assembly. Of those, 3,374 bills were introduced in the Assembly. Only a fraction of those passed. Even of the 987 that actually passed and made it to the governor's desk, 158 were ultimately vetoed. Statistically, it is more likely that introduced legislation will not actually become law.

Such is the case with the legislation that the trial court relied on here. Assemblywoman Irwin, who represents Ventura County, first introduced a bill in 2019/2020 seeking to make autopsy records

[6] *See* https://capitolweekly.net/by-the-numbers-the-2019-2020-legislative-session/; *see also* https://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml?session_year=20192020&house=Both&author=All&lawCode=All.

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exempt from disclosure under the CPRA. (AA 365, 509-512.) The Legislature refused to enact it. (AA 514.) Assemblywoman Irwin reintroduced similar legislation again in 2021. Even after amendments to narrow the scope, the Legislature still refused to change the law to make autopsy reports secret. [7]

Respondents have been less than candid with this Court about the legislation at issue here. In their brief, they state that "appellants claim that the Legislature declined to enact the pending legislation. (Opening Br. 24.) To the contrary, the bill (AB 268) passed out of the Assembly on May 27, 2021 with 75 ayes, 1 no, and 2 abstentions." (RB 43.) Not only does passage in the Assembly have absolutely no legal meaning, on June 29, 2021, prior to the filing of Respondents' Brief, the bill stalled in the Senate Public Committee, with the author eventually requesting cancelation of the hearing. Respondents failed to mention this rather salient fact. The legislative session concluded on September 10, 2021 with no enacted legislation restricting access to autopsy reports for a second session in a row. (*See* FN 7, *infra*.)

Respondents also argue that not granting the injunction could have "hinder[ed] the Legislature from taking further action on the pending legislation…." (RB 17.) But injunctive relief is not supposed to be used as a political tool to gain advantage in the political process. Nor should trial courts be issuing injunctions hoping to interfere with the legislative process.

Respondents claim that the court's order simply maintains the status quo until the legislature has an opportunity to pass on this issue, "providing a more secure form of relief…than would a judicial

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[7] *See* https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202120220AB268.

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interpretation." (AA 764.) But no case holds that a court may issue an injunction on how the law may change in the future. If that were true, the courts would be deciding temporary restraining orders and preliminary injunctions based on pure speculation, instead of on the actual merits.

Respondents cite *Jones v. Coleman* (M.D. Tenn., Apr. 19, 2017, No. 3:16-CV-00677) 2017 WL 1397212, a trial court decision from Tennessee, to support the trial court's rationale for the preliminary injunction. A trial court decision from Tennessee has no precedential value in California, and the procedural posture of that case undermines any application here. In *Jones*, the action challenged a currently enacted statute as unconstitutional. Pending legislation may have changed the statute to address the plaintiffs' concerns, and the public agency charged with enforcement of the allegedly unconstitutional statute stated that it would not "enforce the statute against Plaintiffs…." (*Id.* at 4.) The Court confirmed that it was issuing the injunction on that basis alone. (*Id.* ["the Court will grant an injunction based upon Defendants' representation that they do not intend to enforce the statute against Plaintiffs"].)

Here, the trial court did not face any question about the potential unconstitutionality of any law. The court was supposed to decide whether third parties can enjoin disclosure of autopsy records that are traditionally disclosed to the public. Rather than decide the issue on the merits, the trial court punted, claiming that it could enjoin disclosure for what is now nearly a year based on speculation that the Legislature might enact legislation restricting access to autopsy reports, despite the failure of the Legislature to enact that legislation the previous year. The ruling was not grounded in any

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precedent and should be vacated immediately given that the Legislature has not acted to restrict the reports that are the subject of this litigation.

C. Respondents Have Failed To Establish That Disclosure of Autopsy Reports is Prohibited Under California Law.

In reverse-CPRA actions,[8] the "party seeking to enjoin an agency's disclosure … must establish that such a disclosure 'is otherwise prohibited by law.'" (*Marken*, 202 Cal.App.4th at 1270.) This is because the CPRA expressly provides that "[n]othing…prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise ***prohibited by law***." (*Id.* at 1262 (emphasis added); *see also* Gov. Code § 6253(e) ["**[e]*xcept as otherwise prohibited by law***, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter" (emphasis added)].)

Thus, while courts may issue an order requiring "a public official to perform an official act required by law," they cannot properly force an official to exercise discretion in a particular manner. (*Marken* at 1262 [citing Code of Civ. Proc. § 1085, authorizing a trial court to issue a writ of mandate "to compel the performance of an act which the law specifically enjoins"].) Courts exercise limited review "out of deference to the separation of powers

[8] A reverse-CPRA case is one in which a third-party files litigation to stop the disclosure of public records. Respondents admit this is a reverse-CPRA case. (*See* RB 8.)

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between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority." (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 211–212.) The court does not "substitute its judgment for that of the agency, for to do so would frustrate legislative mandate." (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 230.)

In a reverse-CPRA case, the party seeking to restrain disclosure of the records must show that there is a "clear, present, ministerial duty upon the part of the respondent and a correlative clear, present, and beneficial right in the petitioner to the performance of that duty." (*Marken*, 202 Cal.App.4th at 1262]; *see also County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973 [an "injunction…is appropriate to restrain action which, if carried out, would be unlawful"].)

Respondents cannot make such a showing because (1) California case law confirms that autopsy reports are disclosable public records; (2) many cases on which they rely apply to autopsy photos, not reports; and (3) the other cases they rely on are from other states where, unlike California, statutes explicitly prohibit disclosure of autopsy reports.

1. *Respondents Misrepresent The California Cases Regarding Disclosure Of Autopsy Reports.*

As Appellants discussed in the AOB, California courts repeatedly have stated that autopsy reports are public records. (*See Dungo*, 55 Cal.4th at 627; *Wardlow*, 118 Cal.App.3d at 388, citing *Williams*, 174 Cal.App.2d at 390; *accord Walker v. Superior Court*

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(1957) 155 Cal.App.2d 134, 138-139 ("*Walker*") ["[a]n autopsy report is a record that the coroner is required to keep and is therefore a public record which any citizen may inspect"]; *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1278 ("*Dixon*") [noting that autopsy reports are public records subject to disclosure, but allowing withholding of reports that pertained to open homicide investigation]; *see* AOB, Section III.A.)

Under California law, the Legislature is presumed when it enacted the CPRA in 1968 to have been aware of the decisions in *Wardlow, Williams*, and *Walker* finding autopsy records to be public records available for public inspection. (*See People v. Casarez* (2012) 203 Cal.App.4th 1173, citing *Buckley v. Chadwick* (1955) 45 Cal.2d 183, 200 ["It is a generally accepted principle that in adopting legislation the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them"].) The Legislature could have exempted coroners' records from public disclosure at that time or afterward, but has not done so as to adult autopsy records like those at issue in this case.

Respondents largely ignore these California cases, merely writing them off as "involving criminal cases, where different interests are at stake." (RB 29-30.) This stance ignores the facts of each case.

In *Walker*, 155 Cal.App.2d at 138-139, the court's holding did not rely on the decedent's rights as a criminal defendant, but rather on an autopsy report's status as a disclosable public record.

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The issue in *Wardlow,* 118 Cal.App.3d at 387-388, and *Dungo*, 55 Cal.4th at 627, was admissibility. Both courts held that the record was admissible in evidence – and presumptively available to the press and the public under the First Amendment and the common law[9] precisely because an autopsy report is a public record.

Additionally, Respondents mispresent the holding in *Dixon,* 170 Cal.App.4th 1271, summarily stating that "this case supports plaintiffs" because it "confirms that release of autopsy reports is determined on a case-by-case basis and that disclosure should be withheld when an exemption applies." But that is a fictional reading of the holding in that case and evidences a fundamental misunderstanding of the CPRA.

The CPRA is based on the principle that "all public records are subject to disclosure unless the Legislature has expressly provided to the contrary." (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1418; *see also Sander,* 58 Cal.4th at 323 [every record "must be disclosed unless a statutory exception is shown"]; *Pasadena Police Officers Ass'n*, 240 Cal. App. 4th at 283 (*citing County of Santa Clara v. Superior Court* (2009) 170 Cal. App. 4th 1301, 1320 ["[p]ublic policy favors disclosure and, generally speaking, a public record is subject to disclosure unless the PRA provides otherwise"].) In *Dixon*, the public agency successfully overcame that presumption by demonstrating that the autopsy report in that particular instance was exempt from disclosure under Government Code section 6254(f) (the investigatory records exemption) because it was compiled "for law enforcement" purposes

[9] *See NBC Subsidiary,* 20 Cal.4th at 1208; *KNSD Channels*, 63 Cal. App. 4th at 1204-1205)

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where "a concrete and definite prospect" of "criminal law enforcement" proceedings existed at the time. (*Id.* at 1276-1277.) The *Dixon* case had nothing to do with any assertions about privacy.

When the public agency does not meet its burden to show that section 6254(f) applies, autopsy reports inherently remain disclosable public records. As explained in the AOB, the elements of that exception are not here. [*See* further AOB, pp. 22-23.] The County expressly acknowledges that this exemption does not apply. (AA 272 [explaining that because there was no definite and concrete prospect of criminal law enforcement proceedings, the exemption does not apply].) Nor did the trial court make any such finding, despite Respondents pleas to do so.

But even if the County could have asserted this exemption under *Dixon*, the CPRA expressly provides that it does not have to. (*See* Gov. Code §§ 6254 ["[n]othing…prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise ***prohibited by law***" (emphasis added)]; 6253(e) ["**[e]*xcept as otherwise prohibited by law***, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter" (emphasis added)].) "The Act endows the agency with discretionary authority to override the statutory exceptions when a dominating public interest favors disclosure." (*CBS, Inc. v. Block*, 42 Cal.3d at 652, quoting *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656.) As the court explained in *Marken*, 202 Cal.App.4th at 1270, "the exemptions from disclosure provided by section 6254 are permissive, not mandatory: They allow

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nondisclosure but do not prohibit disclosure. … [T]he interested party seeking to enjoin an agency's disclosure by a reverse-CPRA action must establish that such a disclosure 'is otherwise prohibited by law.'"

Respondents cannot force an agency to assert an exemption, lest they run afoul of the CPRA's prohibition on allowing third parties to control the disclosure of public records. (Gov. Code § 6253.3 [another party may not control the disclosure of information that is otherwise subject to disclosure].) Nor can a court or Respondents force the agency to do so without running afoul of the limits of its jurisdiction. (*Marken*, 202 Cal.App.4th at 1262 [courts cannot properly force an official to exercise discretion in a particular manner].) Here, Ventura County represented that it would disclose the autopsy reports and would not assert CPRA exemptions for investigative records. Respondents do not have standing to force the County to assert the discretionary investigative records exemption, and it would not have made sense for the County to invoke it when the shooter is dead and the authorities have no prospect of criminal enforcement proceedings.

Along the same lines, Respondents repeatedly say they are invoking Section 6254(c), but that provision, regarding unwarranted invasions of privacy, is also discretionary. [RB 16, 19, 24-40.] Respondents have no grounds to force Ventura County to invoke Section 6254(c). Since Ventura County declined to invoke Section 6254(c), all of Respondents' arguments concerning that exemption to the CPRA are irrelevant to the issues presented here.

The only relevant inquiry is whether the records are exempt from disclosure under another law separate from the CPRA, which

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would be incorporated into the CPRA under Section 6254(k). No such law exists. Respondents tried to convince the Legislature to enact such a law, but their efforts have not been successful to date. As explained below and in the AOB (pp. 29-32), the constitutional right of privacy does not apply to records that are regularly disclosed by public agencies around the state.

2. *Many of the Cases Cited by Respondents Relate to Autopsy Photos And Do Not Govern Release of Autopsy Reports In California.*

Respondents repeatedly claim that the cases they cite extend beyond autopsy photos. But this is not an accurate reading on these cases.

For example, Respondents rely on *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856 ("*Catsouras*"). But the Court stated that it was an extraordinary case involving decapitated corpse photographs in which CHP officers emailed them to their family and friends on Halloween for shock value. (*Id.* at 863-864.) The court noted that "freedom of the press" was not at issue in a case where the decedent's family brought invasion of privacy claims against the officers for emailing the disturbing photos to their friends, and affirmed that its holding only extended to the extremely graphic images. (*Id.)* "California law clearly provides that surviving family members have no right of privacy in the context of written media discussing, or pictorial media portraying, the life of a decedent," the court stated. (*Id.* at 863.) "Any cause of action for invasion of privacy in that context belongs to the decedent and expires along with him or her." (*Id.,* citing *Flynn v. Higham* (1983) 149 Cal.App.3d 677.)

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Similarly, Respondents claim that *National Archives & Records Administration v. Favish* (2004) 541 U.S. 157 ("*Favish*"), 165 holds that "[t]he right to personal privacy is not confined . . . to the 'right to control information about oneself.'" (RB 20.) While the quote is accurate, the discussion and issue presented was expressly limited to photographs. (*See id.* at 170 ["we hold that FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images"].)

Respondents cherry-pick a quote from *Accuracy in Media, Inc. v. National Park Serv. (*D.C. Cir. 1999) 194 F.3d 120, 123, arguing that the court noted "the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence." (RB 22.) This case was also about the "photos of the body of the late Deputy White House counsel Vincent W. Foster, Jr., taken at the scene of his death and at the autopsy" and had nothing to do with autopsy reports. (*Id.* at 121.)

Respondents have ignored this fundamental distinction and asked this court to conflate disclosure of reports with disclosure of photographs. However, to do so would dramatically expand the very limited exception discussed in these cases. Other courts have recognized it would be improper to do so.

Catsouras distinguishes between written media discussing the decedent and highly graphic images of the decedent's body. Under *Flynn v. Higham*, *Hendrickson v. California Newspapers* (1975) 48 Cal.App.3d 59 ("*Hendrickson*"),[10] and other cases, family members

[10] In *Hendrickson*, the court rejected an invasion of privacy claim by relatives arising from mention of a decedent's criminal past in an

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cannot make invasion of privacy claims in California arising from disclosure of information about their relative who has passed away. (*Catsouras*, 181 Cal.App.4th at 870.) The *Catsouras* court distinguished those cases on the basis that photos were different from written material, stating that "[n]ot one of those cases pertains to the dissemination of death images of a decedent. Instead, these cases have to do with written media discussing, or pictorial media portraying, the life of a decedent." (*Id.*)

Even as to autopsy photographs, the *Catsouras* court indicated that a relative may not have a cognizable invasion of privacy claim when autopsy photographs are disseminated for "any official law enforcement purpose or genuine public interest," as opposed to the dissemination "out of sheer morbidity or gossip" that occurred among the CHP officers. (*Id.* at 874.) Certainly, the court did not suggest that the limited exception it recognized would trump the public's right of access to any public records, including autopsy reports.

Similarly, in *Charles v. Office of the Armed Forces Medical Examiner* (D.D.C. 2013) 935 F.Supp.2d 86, 98–100, when a reporter requested autopsy reports of service members killed in action, the military claimed that the autopsy reports should be exempt, attempting to extrapolate the holding in *Favish* to autopsy reports. (*Id.* at 99.) The court declined to do so. The "Supreme Court's holding in [*Favish*] was limited to 'surviving family members' right to personal privacy with respect to their close relative's *death-scene*

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obituary. (48 Cal.App.3d at 62-64 ["courts have uniformly denied a cause of action of relatives for the invasion of privacy of another family member"].)

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images," the court stated. Because the defendants did not carry their burden to show more than a *de minimis* privacy interest to justify withholding autopsy reports under federal FOIA law, the court ordered disclosure of the autopsy reports.

In *Prison Legal News v. Executive Office for U.S. Attorneys* (10th Cir. 2011) 628 F.3d 1243, 1252, the Tenth Circuit also found that "[t]he nature of the family's strong privacy interest in the photographs, video, and accompanying audio is distinct from information about what those images and recordings contain."

In *New York Times Co. v. National Aeronautics and Space Admin* (D.C. Cir. 1990) 920 F.2d 1002, the Court distinguished between a privacy right in an audiotape of Space Shuttle Challenger astronauts' voices just prior to their death and the transcript, which had been publicly released. In fact, the court reprinted portions of the transcript in its decision, undermining any claim that reading a transcript or report of events could be as jarring. *(Id.* at 1005–1006.) As the Court explained, "information recorded through the capture of a person's voice is distinct and in addition to the information contained in the words themselves." (*Id.* at 1006; *see also Pike v. United States Department of Justice* (D.D.C. 2016) 306 F.Supp.3d 400, 412, *aff'd* (D.C. Cir., June 23, 2017, No. 16-5303), 2017 WL 2859559 ["*written* transcripts of recordings do not contain information that is identical to the *audio* recorded version"].)

These cases reflect the reality that reading information in a report does not have the same effect as other media, such as a photograph or an audio recording. Respondents claimed to the trial court that they wanted to be sheltered from unwanted emails containing images of their family members. Reading a report

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involves some decision to engage with the material in a way that being shown photographs or watching graphic video does not. While one could theoretically be caught off guard by an image, the same cannot be said for the active task of reading through a multi-page report.

The only other cases cited by Respondents are not persuasive for a variety of reasons. For example, Respondents repeatedly cite *Badhwar v. United States Dep't of Air Force* (D.C. Cir. 1987) 829 F.2d 182, 185–186 ("*Badhwar*"), claiming that it "recogniz[ed] privacy interests of families of deceased aircraft pilots in autopsy reports which would be "of a kind that would shock the sensibilities of surviving kin." (RB 21; *see also* RB 22,28, 31.) Instead, the court recognized that the trial court had failed to analyze ***whether*** disclosure of the autopsy report would constitute an invasion of privacy. (*Badhwar* (D.C. Cir. 1987) 829 F.2d at 185.) "Some autopsy reports, presumably, would not be of a kind that would shock the sensibilities of surviving kin. Others clearly would. .... On remand, the court will determine whether disclosure of the information in Block 13 would constitute a "clearly unwarranted invasion of personal privacy." *(Id. at* 185–186.)

Respondents cite *Marzen v. Dep't of Health & Hum. Servs. (*7th Cir. 1987) 825 F.2d 1148, 1150, but that case was about actual medical records regarding an infant, not autopsy reports of adults.

The citation to *Bowen v. FDA* (9th Cir. 1991) 925 F.2d 1225, 1228, notes that the Court upheld withholding of autopsy reports where individuals were killed by cyanide-contaminated products. (RB 22.) While this is correct, the Court upholds the Government's claim of exemption with nearly no discussion. (*Bowen v. FDA* (9th

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Cir. 1991) 925 F.2d 1225, 1228.) The same is true in *Wolk Law Firm v. US NTSB* (E.D. Pa. 2019) 392 F.Supp.3d 514, 527. Neither decision actually considered whether surviving family members have a right to control dissemination of autopsy reports, and a case is certainly not authority for propositions not considered.

3. *Cases Cited By Respondents That Do Not Apply California Law Are Not Instructive.*

Respondents point to a number of cases from other states or that interpret the federal Freedom of Information Act to argue that this Court should prohibit disclosure of the requested autopsy reports. However, where California has not chosen to enact similar statutory requirements, FOIA or state public records case law is inapposite. (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 351 ["in view of the Legislature's painstaking efforts to articulate appropriate limitations on the mandatory disclosure of public records, the argument in favor of incorporating the FOIA criteria into the CPRA is extremely weak"]; *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 431-432 [rejecting an analogy to "reverse-FOIA" actions under federal law]; *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 825 n.4 [explaining that while the CPRA and FOIA "have similar policy objectives and should receive a parallel construction[,] … [t]he CPRA may not, however, be construed to read into it FOIA language which the CPRA itself does not contain"].)

In a reverse-CPRA lawsuit in California, the standard Respondents must meet is much higher – disclosure must be prohibited by law. (*Marken*, 202 Cal.App.4th at 1270 ["party seeking to enjoin an agency's disclosure by a reverse-CPRA action must

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establish that such a disclosure 'is otherwise prohibited by law'"].) None of the cases cited by Respondents are sufficient to meet this standard.

For example, in *Reid v. Pierce County* (1998) 136 Wash.2d 195, 197–198, Respondents claim the opinion states that "immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent." (RB at 30.) As with other cases, the only question the court was asked to decide in that case was regarding the unlawful misappropriation and dissemination of autopsy ***photographs***, not reports. (*Id.* at 197-198 ["we are asked to decide whether Plaintiffs may maintain a cause of action against Pierce County (County) and its employees for appropriating and displaying to others photographs of corpses of Plaintiffs' deceased relatives"].) While the court did find that the sharing of *photographs* [not autopsy reports] would support a claim for invasion of privacy, this was based, at least in part, on a Washington statute that makes autopsy reports confidential. California has no such law.

Respondents claim that *Lawson v. Meconi* (Del. 2006) 897 A.2d 740, 747, "recogniz[ed] personal privacy protections for decedent's family and prohibit[ed] release of autopsy report." In that case, the decedent's wife sought an order to preclude disclosure of the autopsy report, claiming a common law right of privacy and citing a Delaware statute which restricts the disclosure of autopsy reports. Notably, the Court referenced a signing statement issued by the Governor when she signed the statute, stating that the bill "gives Delaware residents the most privacy protection of any state in the country…" (*Id.* at 745). The court agreed that the wife was entitled

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to injunctive relief based solely on the statute, finding it unnecessary to "address the common law right of privacy basis for her claim." (*Id.* at 741–742.)

Similarly, Respondents claim that in *Galvin v. Freedom of Info. Comm'n* (1986) 201 Conn. 448, 461, the court prevented "disclosure of autopsy reports because they 'might cause embarrassment and unwanted public attention to the relatives of the deceased.'" In that case, a reporter requested the autopsy report of a "16 year old [] boy [who] was shot and killed in the course of a struggle with a Norwich police officer." (*Id.* at 450.) The court relied on a strict statutory construction analysis, finding that the Connecticut statute and the accompanying regulations allowed the medical examiner's office to limit public disclosure of autopsy reports. In California, conversely, the Legislature has mandated access to autopsy reports related to officer involved shootings, such as in this case. (*See* Penal Code § 832.7 [mandating access to autopsy reports].) Nor did the Court make any finding that a family member had a right to block disclosure of the information. In fact, the court noted that "family members of the deceased have no standing to receive notice of [the] hearing, let alone to object or otherwise be heard at the hearing. Their interests must be represented by the official body seeking to oppose disclosure, in this case the chief medical examiner, whose standing to invoke their claims of privacy is questionable." (*Galvin v. Freedom of Info. Comm'n,* 201 Conn. at 461.)

The same is true for *Perry v. Bullock* (2014) 409 S.C. 137, 141–142, where the court relied on the interpretation of South Carolina statutes to find that autopsy reports are not disclosable, and *Globe*

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Newspaper Co. v. Chief Medical Examiner (1989) 404 Mass. 132, 136, where the court found that the Massachusetts Legislature had enacted a statute limiting disclosure of autopsy reports and finding that the "court is not free to ignore the plain language of the statute."

Since these cases all expressly rely on another state's statutory scheme which restricts disclosure of autopsy reports and related records – and the California Legislature has repeatedly refused to enact the same – these cases are of limited value here.

To support their quest to change the law, Respondents point to a minority of merely ten states that have enacted statutes prohibiting the release of autopsy reports to the public.[11] Regardless, California and 39 other states – the vast majority – have not enacted such a statute, and it is not the trial court's province to second guess the California Legislature's judgment. (*Williams,* 5 Cal.4th at 361.) "Unless that judgment runs afoul of the Constitution it is not our province to declare that the statutorily required disclosures are inadequate or that the statutory exemption from disclosure is too broad. Nor is it our province to say that the approach the Legislature chose is inferior [ ], or to substitute one approach for the other." (*Id.*; *see also Community Youth Athletic Center v. City of National*

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[11] Some of those few states that have enacted statutes prohibiting disclosure, upon closer examination, merely provide for a balancing test. Oregon's statute provides that autopsy reports are "exempt from disclosure…unless the public interest requires disclosure in the particular instance." (Or. Rev. Stat. § 192.501(36).) West Virginia's statute also provides that "[i]nformation of a personal nature such as that kept in a personal, medical or similar file" is exempt from disclosure "if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance." (W. Va. Code § 29B-1-4(a)(2).)

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City, 220 Cal.App.4th at 1440.) Thus, if Respondents believe that California should adopt similar statutory schemes to those enacted in the minority ten states, they must address their complaints to the Legislature – not this Court. (*N. Cal. Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116, 124 ["[i]f the burden becomes too onerous, relief must be sought from the Legislature"].)

While Respondents cited to distinguishable cases from a minority of jurisdictions, Respondents fail to acknowledge the many other cases cited by Appellants where courts around the country have recognized that autopsy reports are public records subject to disclosure. (AOB at 24-26.) Those decisions are consistent with the California cases stating that autopsy records are public in California except if it would interfere with an ongoing investigation. (*See* Section II.C.1, *infra*; AOB at 24-26.) For example, in *Shuttleworth v. City of Camden* (NJ App. Div. 1992) 610 A.2d 903, 914, a court in New Jersey granted a newspaper reporter access to the autopsy report concerning a shooting of a man while in custody but denied access to autopsy photos – which is reflective of California's case law on the same issue. "In the absence of any ongoing homicide investigation, … we agree with the trial judge's conclusion that the public interest would be served by release of the autopsy report." (*Id. Accord Bozeman v. Mack* (La. Ct. App. 1998) 744 So.2d 34, 37 (citing *Everett v. Southern Transplant Service, Inc.* (La. 1998) 709 So.2d 764) ["We conclude that an autopsy report is a public record when it is prepared by a coroner in his public capacity as coroner. There is a great deal of authority in support of this conclusion."].) These cases are more analogous to the prevailing case law generally providing for disclosure of autopsy reports in California, especially in

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the absence of any California law exempting autopsy records from public disclosure.

D. Respondents Did Not Establish A Legally Protected Privacy Interest Or An Objectively Reasonable Expectation of Privacy In The Autopsy Reports.

Respondents argue that this Court should balance its privacy rights in the autopsy reports against the public interest in disclosure.[12] This position puts the cart before the horse.

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[12] Respondents claim that multiple exemptions support non-disclosure, but they cite provisions of the CPRA that are discretionary (*e.g.*, Gov. Code §§ 6254(c), (f)) and not part of the analysis in a reverse-CPRA case. (*See* Section II.C.2, *infra*.) Respondents have to show that the records are "otherwise prohibited by law." (Gov. Code § 6253(e).) They have not cited any such law. On the constitutional right of privacy, Respondents bear the burden of showing a legally protected privacy interest, a reasonable expectation of privacy under the circumstances, and a serious invasion of the privacy interest. Only when those elements are met would a court balance privacy interests and the public interests in disclosure. (*Int'l Federation*, 42 Cal. 4th at 338-339 (quoting *Hill*, 7 Cal.4th at 38)). If a proponent of secrecy establishes a legally protected privacy interest, a reasonable expectation of privacy, and a serious invasion of privacy, then the balancing that is done at the final step in constitutional privacy cases follows a congruent balancing done with Gov. Code §§ 6254(c) and 6255 of the CPRA. (*See Cal. State Univ., Fresno Ass'n v. Superior Court* (2001) 90 Cal.App.4th 810, 832-833 [because court addressed agency's CPRA claims, it need not address agency's constitutional privacy arguments since the standards are the same]; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 345 [constitutional privacy claim "weighing process" requires same balancing in final step of inquiry as occurs with CPRA balancing tests in § 6254(c) and § 6255].) Since California has not recognized cognizable privacy rights in autopsy reports, and Respondents have not shown a reasonable expectation of privacy, no balancing is required. The presumption of disclosure controls.

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Respondents cannot invoke the general balancing test because they must show that disclosure is prohibited by law, which requires Respondents to demonstrate a violation of constitutional privacy rights.

As repeatedly laid out by the California Supreme Court, "the party claiming a violation of the constitutional right of privacy established in article I, section 1 of the California Constitution must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest. (*Int'l Federation,* 42 Cal.4th 319, 338, citing *Hill*, 7 Cal.4th 1, 39-40.) Only then would the Court look to whether "the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Sheehan v. San Francisco 49ers* (2009) 45 Cal.4th 992, 998; *accord Int'l Federation*, 42 Cal. 4th at 339, quoting *Hill*, 7 Cal.4th at 38.)

In the AOB, Appellants lay out numerous reasons why Respondents cannot establish a constitutional privacy claim. (*See* AOB, Sect. III.C.) For example, the stated privacy interest must be "an objective entitlement founded on broadly based and widely accepted community norms." (*Int'l Federation*, 42 Cal.4th at 331.) In the AOB, Appellants demonstrated that autopsy reports are routinely disclosed in California and in many other jurisdictions around the country.

Respondents largely ignore this requirement.[13] While some states have moved to restrict access to autopsy reports, the

[13] The only instance Respondents discuss is *Las Vegas Rev.-J. v. Eighth Jud. Dist. Ct. in & for Cty. of Clark* (Nev. 2018) 412 P.3d 23,

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community norm in the majority of states is disclosure of autopsy reports concerning adults who passed away in unnatural deaths, including in California. (*See* AOB, pp. 31-32.) That is why Ventura, Los Angeles and other counties provide for routine public access to the autopsy reports. (*See* https://mec.lacounty.gov/case-search/ [official Los Angeles County Medical Examiner website, where public can obtain copies of autopsies; AA 640 [Ventura County Chief Medical Examiner confirming that his office routinely makes autopsy reports public].) Respondents argue that these widespread disclosures should be disregarded because Appellants have not shown that any of the families objected to disclosure. This position, again, demonstrates a misunderstanding of the burden in this case, which lies squarely on Respondents. (*Michaelis, Montanari & Johnson,* 38 Cal.4th at 1071 ["proponent of non-disclosure" must demonstrate that the records at issue are not disclosable]; *O'Connell*, 141 Cal.App.4th at 1481 [burden of proof is on the moving party "to show all elements necessary to support issuance of a preliminary injunction"].)

The right to privacy is based on an objective standard and does not rely on the subjective desires of Respondents to keep confidential these autopsy reports. (*Int'l Federation*, 42 Cal.4th at 331 [proponents of withholding must show "objective entitlement" to

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claiming that autopsy reports were released before family members had an opportunity to object. However, the court merely presumed for the purpose of its analysis that the parties had a protectable privacy interest. (*Id*. at 27 ["[f]or purposes of our analysis we assume, without deciding, that the Hartfield Parties had a protectable privacy interest in preventing disclosure of Mr. Hartfield's redacted autopsy report"].) Even the presumed privacy interests were held insufficient to support the trial court's injunction.

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privacy "founded on broadly based and widely accepted community norms"].) The record demonstrates that even in Ventura County autopsy reports are routinely disclosed, and the medical examiner has no documented complaints regarding disclosure. (AA 640.) These disclosures undermine any claim that, objectively, disclosure of autopsy reports is considered highly offensive by the general population. Nor do Respondents state why they would be entitled to a special, higher level of privacy than everyone else in the State of California or the many jurisdictions around the country where autopsy reports are generally disclosable. Respondents cannot objectively claim a broad-based and widely accepted community norm of secrecy regarding autopsy reports when San Bernardino County released the autopsy reports in 2016 of the 14 victims of the San Bernardino terror attack, Santa Barbara County released the autopsy reports on the deaths of 34 people in 2019 aboard the Concepcion boat off the coast of Santa Cruz Island, Los Angeles County released the autopsy reports of the five victims of the mass shootings in Santa Monica in 2013, and many other public agencies disclosed autopsy records concerning unnatural deaths, including mass shootings. (*See* AOB, Sect. III.C.1.; AA 420, 738)

Nor can Respondents establish an objectively reasonable expectation of privacy in autopsy reports in the Borderline shootings when such disclosures are routinely made by public agencies in California. (*See id.*; *Poway Unified School Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496, 1505 [affirming disclosure of tort claim records under CPRA where minor victim of sexual assault did not establish a reasonable expectation of privacy in tort claim filed with

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school district even though victim expressed preference for confidentiality if possible].)

E. The Balancing Test Is Not Warranted Here But In Any Event Would Favor Disclosure Of The Records.

Respondents claim the public interest is not furthered by disclosure. As explained above, it is not necessary to reach this question because Respondents have not established a legally protected privacy interest or a reasonable expectation of privacy in autopsy reports. Even if the Court were to do a balancing test, the privacy interests advanced by Respondents do not clearly outweigh the public interest in autopsy reports that are created by and used by public officials to determine the circumstances, causes and manner of unnatural deaths pursuant to state law. (Gov. Code § 27491.)

Neither Appellants nor Respondents know the precise contents of the autopsy reports for the Borderline shootings because they are being withheld. Nevertheless, in other cases where public agencies have disclosed autopsy reports, the reports have contributed to the public interest by providing key details that furthered public knowledge about drownings, deaths by fire, mass shootings, officer-involved shootings, and many other unnatural deaths. (*See* AOB, pp. 33-37.) From reporting on government impropriety to police accountability to medical journals analyzing the best ways to treat victims of mass shootings, autopsy reports have proved critical to informing society about important matters of significant public concern. (*See id.*)

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It was autopsy reports, after all, that raised questions about the manner of death of 34 victims of the Concepcion boat fire who were thought to be asleep below deck. The Santa Barbara County Sheriff-Coroner's report showed at least six wearing shoes or other footwear; one man clutched a cellphone; and a woman was holding a flashlight. The released reports cast doubt on early official explanations from Santa Barbara County that all had died from smoke inhalation below deck while sleeping. (AA 435, 738.)[14]

Autopsy reports serve as tools for police accountability[15], as in the police shooting of 18-year-old Andres Guardado where the victim's

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[14] *See also* https://www.latimes.com/california/story/2020-05-21/autopsies-of-34-boat-fire-victims-raises. This and the other articles cited herein are subject to judicial notice. (Evidence Code § 452(h) [allows judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable or immediate and accurate determination by resort to sources of reasonably indisputable accuracy"]; *Int'l Federation*, 42 Cal.4th at 334 [as part of establishing public interest in salary information, California Supreme Court stated that the "[n]ewspapers submitted to the trial court numerous examples of articles published throughout the state that used information concerning public employee salaries to illustrate claimed nepotism, favoritism, or financial mismanagement in state and local government"].) *See further* concurrently filed Request for Judicial Notice.

[15] Where the public agency claimed that it had provided sufficient information in press releases and other official government statements, the court stated those disclosures were insufficient, and the press and public could gain access to the actual autopsy records. Without such access, "the press releases are based on information circulated by law enforcement officials allegedly generated by their investigation, and the veracity of that information cannot be challenged. This is particularly significant when the press releases deal with a confidential investigation by law enforcement of its own

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autopsy report revealed that he was shot five times in the back and that all five gunshot wounds were fatal.[16] Similarly, in the police shooting of 17-year-old Laquan McDonald, the autopsy report showed that police shot the victim sixteen times, but in different areas of the body and from different angles than law enforcement had reported.[17] Police had originally told the public that McDonald died of a gunshot wound to the chest after he lunged at an officer with a knife. The information from the autopsy report sparked public debate about the case and was partly responsible for the resulting federal investigation of the Chicago police department. (*See also* AA 446 [detailing how the disclosure of the autopsy report of Freddie Gray cast doubt on whether police failed to follow safety procedures "through acts of omission"].)

The San Francisco Chronicle reported on the first COVID-19 death in the United States after discovering the death in an autopsy

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conduct and the plaintiffs seek disclosure to further a 'public good' as opposed to a private need." (*Shuttleworth*, 610 A.2d at 909.)

[16] *See* https://www.latimes.com/california/story/2020-07-10/andres-guardado-coroner-autopsy.

[17] *See* Jamie Kalven, *Sixteen Shots: Chicago Police Have Told Their Version of How 17-year-old Black Teen Laquan McDonald Died. The Autopsy Tells a Different Story*, Slate, Feb. 10, 2015, https://slate.com/news-and-politics/2015/02/laquan-mcdonald-shooting-a-recently-obtained-autopsy-report-on-the-dead-teen-complicates-the-chicago-police-departments-story.html; *see also* James Warren, *How the Media Blew Reporting the Chicago Cop's Shooting of a Teen*, Poynter, Nov. 25, 2015, https://www.poynter.org/reporting-editing/2015/how-the-media-blew-reporting-the-chicago-cops-shooting-of-a-teen/.

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report made publicly available.[18] That decedent's family may have had similar concerns about their loved one being associated with a COVID-19 death, but the public had great interest in knowing that the deadly pandemic had impacted Santa Clara County, and the record was required to be disclosed under the CPRA.

Respondents ignore these examples, instead claiming that Appellants have not demonstrated what these particular autopsy reports will show – an unreasonable standard since the parties do not know what is contained within the withheld records. California case law does not require such a showing by records requesters. In *Connell v. Superior Court* (1997) 56 Cal.App.4th 602, 627, the court held that while a public official "may assert the public has no interest in these records because she is performing her task properly, … this is akin to asking that we allow her 'to exercise absolute discretion, shielded from public accountability' in the operations of her office. [Citation omitted.] However, the public interest demands the ability to verify." Along the same lines, in *New York Times v. Superior Court* (1990) 218 Cal.App.3d 1579, 1585, the court explained that the "District should not be allowed to exercise absolute discretion, shielded from public accountability in [its decisions]. "'In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.'" (*Id.*, *citing CBS v. Block*, 42 Cal.3d at 651-652).

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[18] *See* https://www.sfchronicle.com/health/article/First-known-U-S-coronavirus-death-occurred-on-15217316.php; *see also* https://www.latimes.com/opinion/story/2021-04-01/autopsy-records-bill-press-access.

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As the California Supreme Court recently explained, "[i]t is no answer to say . . . that we must presume public officials conduct official business in the public's best interest. The Constitution neither creates nor requires such an optimistic presumption. Indeed, the rationale behind the Act is that it is for the public to make that determination, based on information to which it is entitled under the law." (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 625.)

Coroners/medical examiners are vested by the state to inquire into and establish the circumstances, manner, and causes of death for individuals in unnatural deaths. The details of what these public officials conclude about how individuals died unnatural deaths are public as a matter of policy. Autopsies shed light on how government officials, including the coroner, are performing their official duties to determine the cause, manner and circumstances of unnatural deaths.[19]

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[19] *See* "Autopsy Photos Are Often Used to Refute Official Conclusions," *The News Media & The Law*, The Reporters Committee For Freedom of the Press, Spring 2001, available at https://www.rcfp.org/journals/the-news-media-and-the-law-spring-2001/autopsy-photos-are-often-us/ [listing a dozen examples in which autopsy reports exposed inaccuracies in official accounts of deaths, from prisoners to an airline passenger]; Juliette Rihl, "Mixed-up Meds & Long Waits: How Understaffing Hurts Medical Treatment at Allegheny County Jail," *Public Source* (Jan. 7, 2021), https://www.publicsource.org/allegheny-county-jail-inmate-medical-wait-times-understaffing/ [reviewing autopsy reports to shed light on poor medical treatment in public jail]; Kathleen Wilson and Cheri Carlson, "Medical examiner's practices inappropriate but may not be illegal, officials say," *Ventura County Star*, December 18, 2015, available at https://archive.vcstar.com/news/local/coroners-practices-inappropriate-but-may-not-be-illegal-officials-say-

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In this case, Appellant news organizations have been pressing *for years* to obtain information in the possession of Ventura County – from 911 call records to any camera footage to autopsy records – that can provide a more complete picture for the public of what happened. The details showing specifically how the victims of the Borderline shootings died are one piece of the puzzle in accounting to the public what happened, whether it could have been prevented, and what can be done in the future to prevent the tragedy or better save lives.

For instance, details from victim autopsy reports in the 2016 San Bernardino terrorist attacks indicated that the victims may have been caught off guard when they were shot.[20] In the murders of 49 people at the Orlando Pulse nightclub in 2016, their release has informed gun control advocacy and shed light on the importance of building code enforcement and compliance. [21]

Access to these reports in connection with other publicly disclosed information, in the aggregate, can help experts and officials spot trends, which could improve responses to future tragedies. (*See Dungo*, 55 Cal.4th at 625 (Werdegar, J.,

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26f45185-bf87-081b-e053-010000-362977931.html/; Veronica Rocha, "Ventura County medical examiner, under investigation, is placed on paid leave," *Los Angeles Times*, June 26, 2015, available at https://www.latimes.com/local/lanow/la-me-ln-ventura-medical-examiner-investigation-20150626-story.html.)

[20] *See* https://www.pe.com/2016/05/27/san-bernardino-shooting-autopsy-reports-released-for-dec-2-victims-update-2/

[21] *See* https://projects.tampabay.com/projects/2021/narratives/pulse-five-years-later/; *see also* https://digitaledition.orlandosentinel.com/tribune/article_popover.aspx?guid=596aabc0-7622-47ae-8be8-dd0764373d88

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concurring) [noting that autopsies "protect[] the public interest and provide[] the information necessary to address legal, public health, and public safety issues in each case"].) These reports may inform the way government officials and the public respond to future incidents of mass shootings or other catastrophes. If autopsy reports show that victims died because they did not receive adequate or timely medical care, for example, officials might determine that immediate access is most important. If, however, autopsies generally show that the majority of causalities happen in the first few minutes before police arrive on the scene, securing the facility and making a slower, more deliberate entry may be a preferable response. Without the detailed information typically available in autopsy reports, analysis and reporting of these important issues will suffer.

F. The Trial Court's Order Gagging The County From Producing Records Is A Prior Restraint.

Respondents appear to have misinterpreted Appellants' constitutional arguments, and thus made arguments that are not relevant here.

For example, Respondents argue that the injunction "does not violate the First Amendment…because the press has 'no greater right of access to information than that possessed by the public at large,'" citing *Houchins v. KQED* (1978) 438 U.S. 1, 39 and *Dixon*, 170 Cal.App.4th at 1279. (RB 46.) Neither case is about prior restraints.

The right to access public records is firmly grounded in the CPRA and the California Constitution (Art. I, Sect. 3(b)). Appellants and all members of the public have an equal right of access to public records, such as the autopsy reports at issue here. But that is not the

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basis for Appellants' argument that the trial court's injunction is an unconstitutional prior restraint.

Regardless of whether Appellants have an independent right to obtain these records under the CPRA or the California Constitution, once the County decided it was going to disclose these records, it became a "willing speaker" for purposes of the First Amendment analysis. (*See* AA 233 [stating that Ventura notified Respondents that they intended on releasing autopsy reports in response to Appellants' CPRA request] and AA 271 [County acknowledging that the CPRA requires it to disclose the autopsy reports and other Medical Examiner records].) "[W]here a [willing] speaker exists… the protection afforded is to the communication, to its source and to its recipients both." *(Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 756–757; *see also Kleindienst v. Mandel* (1972) 408 U.S. 753, 762–763 ["[i]t is now well established that the Constitution protects the right to receive information and ideas"].)

Respondents do not address this precedent and the other cases set out in the AOB on this issue. (*See* AOB, Sect. III.F.) Instead, they argue that "the trial court's order is not a prior restraint because a prior restraint only "exists when the government attempts to impose a total ban on a form of expression prior to it being expressed," and "prior restraint jurisprudence only applies when the press already possesses the information in question, and the government seeks to prevent its publication." (RB 47.) But "[t]emporary restraining orders . . . are classic examples of prior restraints." (*Alexander v. United States* (1993) 509 U.S. 544, 550.) While prior restraints are generally challenged by those who are

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restricted from speaking, the First Amendment right exists to "receive information and ideas," as well as to speak them. (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 398.)

As such, the injunction issued by the trial court acts as a gag order on the County, preventing it from releasing information it has stated it has decided to release about a mass shooting which has been an issue of great public concern. The protections of the First Amendment extend to government representatives engaged in communications to the public. (*E.g., Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1115-116; *Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375.) "Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." (*Pines v. Tomson*, 160 Cal.App.3d at 397.)

Under these decisions, the trial court's order is a prior restraint because it is a "judicial order[] forbidding certain communications … issued in advance of the time that such communications are to occur.'" (*In re Marriage of Evilsizor & Sweeney* (2015) 237 Cal.App.4th 1416, 1427.) As such, it is presumptively unconstitutional. (*Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, 558-59.)

California has recently recognized that attempting to prevent a public agency from releasing records can form the basis for a strategic lawsuit against public participation (a SLAPP). In *Collondrez v. City of Rio Vista* (2021) 61 Cal.App.5th 1039, 1044, 1046 *review denied (June 30, 2021),* a police officer sued to prevent the city from disclosing information from his personnel file in response to

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requests under the California Public Records Act, claiming invasion of privacy. The city filed an anti-SLAPP motion. (*Id.*) In granting the anti-SLAPP motion, the court found that the complaint arose "from protected speech as each cause of action is fundamentally premised on the City's release of his personnel information to media outlets." (*Id.* at 1049.) If a city's release of public records is protected speech, then government interference with that speech before it occurs is a prior restraint. (*Pennsylvania Family Institute, Inc. v. Black* (3d Cir. 2007) 489 F.3d 156, 165 [where one enjoys a right to speak, others hold a "reciprocal right to receive" that speech]; *see also Pansy v. Borough of Stroudsburg* (3d Cir. 1994) 23 F.3d 772, 791 [finding that press had a right to challenge court-imposed confidentiality over public records based on right to receive information, noting that the "case thus illustrates how confidentiality orders can frustrate, if not render useless, federal and state freedom of information laws"].)

To justify such an order, the proponent must demonstrate that the restriction is necessary "to further a state interest of the highest order," (*Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97, 102), and that the publication "threaten[s] an interest more fundamental than the First Amendment itself." (*Procter & Gamble Co. v. Bankers Trust Co.* (6th Cir. 1996) 78 F.3d 219, 227.) This is an exceptionally onerous burden. The proponent must present evidence of a "clear and present danger" of harm to a paramount state interest; "speculati[on]" or "factors unknown and unknowable" never will justify a prior restraint. (*Nebraska Press*, 427 U.S. at 563; s*ee also KCST-TV Channel 39 v. Municipal Court* (1988) 201 Cal.App.3d 143, 146.)

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Respondents do not show how this presumption could be overcome here. Not only have Respondents not demonstrated any recognized privacy right, courts have consistently held that assertion of privacy rights or even other constitutional rights like the right to a fair trial does not justify a prior restraint. (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 419 ["[d]esignating the conduct as an invasion of privacy" does not warrant a prior restraint]; *see also United States v. Salameh* (2d Cir. 1993) 992 F.2d 445, 446 ["[a] prior restraint on constitutionally protected expression, even one that is intended to protect a defendant's Sixth Amendment right to trial before an impartial jury, normally carries a heavy presumption against its constitutional validity"]; *In re Providence Journal* (1st Cir. 1987) 820 F.2d 1342, 1345, *modified on reh'g en banc*, 820 F.2d 1354, *cert. dismissed on other grounds*, *United States v. Providence Journal Co.* (1988) 485 U.S. 693 [reversing "temporary restraining order barring publication of [FBI] logs and memoranda" to protect surveilled citizen's Fourth Amendment rights….].)

For all these reasons, this Court should immediately vacate the unconstitutional prior restraint prohibiting the willing speaker – Ventura County – from communicating the autopsy report information to Appellant news organizations.

III. CONCLUSION

Cases about disclosure of public records are given priority to promote "disclosure of public information at a time when the material still was newsworthy or of particular importance to the plaintiff." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 118 (George, J. concurring).) The scheduling of proceedings in these

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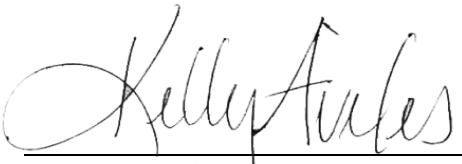
cases is supposed to have "the object of securing a decision as to these matters at the earliest possible time." (*See id.*; *NBC Subsidiary (KNBC-TV),* 20 Cal.4th at 1211 [delaying public access is inconsistent with "utilitarian values"].)

Appellant news organizations have now faced restraining orders from the trial court for almost a year, frustrating public access to the autopsy reports concerning the Borderline shootings. The trial court entered these restraining orders without citing any precedent and used the guise of proposed legislation to delay disclosure. Given this background, and the longstanding California case law stating that autopsy reports are public records subject to disclosure, this Court should immediately overturn the trial court's order and vacate the preliminary injunction.

DATED: September 21, 2021 LAW OFFICES OF KELLY A. AVILES



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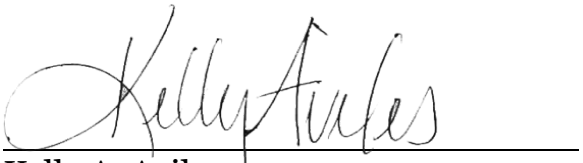
CERTIFICATE OF WORD COUNT

I, Kelly A. Aviles, am counsel in this matter and I hereby certify, that this Writ Petition contains 11,454 words, including footnotes, excluding tables, the cover information, the Certificate of Interested Entities or Persons, this Certificate of Word Count, and the attached orders, according to the computer program count used to produce this brief. Therefore, the number of words in the Petition complies with California Rules of Court, Rules 8.204(c)(1) and 8.486(a)(6).

DATED: September 21, 2021 LAW OFFICES OF KELLY A. AVILES



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PROOF OF SERVICE

I reside or work within in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1502 Foothill Blvd., Suite 103-140, La Verne, CA 91750.

On **September 21, 2021**, I served the foregoing documents described as **APPELLANTS' REPLY BRIEF** on the parties in this action as listed in the attached service list by the following means:

Service List

SEE ATTACHED

Electronic Service

In accordance with Code of Civil Procedure sections 1010.6 and 1013, California Rules of Court, Rule 2.251, an order of the court, and/or an agreement of the parties, I caused the documents to be sent to the person at the email address listed below via email or via an electronic filing provider. After transmission, I did not receive, within a reasonable period of time, any electronic message or other indication that the transmission was unsuccessful.

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

Date: September 21, 2021 /s/ Albert D. Aviles
Albert D. Aviles

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