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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

NEWARK UNIFIED SCHOOL DISTRICT, Plaintiff, v. ELIZABETH BRAZIL, an individual, Defendant.	Case No.: RG14738281 **APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT ELIZABETH BRAZIL; AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT ELIZABETH BRAZIL** Date: February 20, 2018 Time: 9:00 a.m. Dept.: 511 Judge: Hon. Kimberly Colwell

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

Amici Curiae ACLU Foundation of Northern California, First Amendment Coalition, Californians Aware, California News Publishers Association, Center for Investigative Reporting, Electronic Frontier Foundation, Los Angeles Times Communications LLC, and McClatchy Company, respectfully submit this application for leave to file the attached Amici Curiae Brief in support of Defendant Elizabeth Brazil in her Motion for Attorneys Fees and costs and in opposition to Plaintiff Newark Unified School District's Motion for Attorneys Fees set to be heard on February 20, 2018, at 9:00 a.m.in Department 511 of the above-entitled court located at 24405 Amador Street, Hayward, California 94544.

The motion for attorney fees by the Newark Unified School District presents a wholly unprecedented, legally meritless, and deeply troubling effort by a public agency to obtain a half million dollar award against a member of the public who exercised her rights under the California Public Records Act ("CPRA") to seek records from her local school district. *Amici* seek leave of the Court to submit the attached brief explaining why an award of fees to the District in this case would violate the language and purpose of the CPRA and would cast an intolerable chill over the media, transparency organizations, and ordinary members of the public seeking to learn more about their government.

THE PROPOSED *AMICI* BRIEF WOULD ASSIST THE COURT IN DECIDING THIS MATTER

Amici respectfully contend that this brief would assist the Court in deciding this matter. (*Cf.* Calif. Rule of Court 8.200(c)(2) (rule for amicus briefs in the Court of Appeal).) *Amici* are non-profit organizations committed to free speech and open government as well as media organizations that routinely seek government records under the CPRA and litigate CPRA actions. As such, they have significant expertise with the legal and practical issues surrounding the CPRA. The proposed *amici* brief would provide the Court with important information about the CPRA's statutory framework and underlying public policies, including its fee-shifting provision. In addition, the

proposed *amici* brief would shed light on the practical implications of a ruling in favor of the District.

No party or counsel for a party in the pending matter authored this brief in whole or in part or made a monetary contribution intended to fund the preparation of submission of this brief. (*Cf.* Calif. Rule of Court 8.200(c)(2) (rule for amicus briefs in the Court of Appeal.)

Amici respectfully contend that submission of this brief would not prejudice any of the parties. This brief is being filed concurrent with Defendant's opposition. Defendant Elizabeth Brazil consents to the filing of this *amici* brief and has indicated she would not oppose an *ex parte* application by the District for leave to file a longer reply brief with three additional pages. As a result, the District would have ample opportunity to respond to the arguments in this *amicus* brief.

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Northern California ("ACLU") is a nonprofit, nonpartisan civil liberties organization with more than 135,000 members dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and our nation's civil rights law. Since its founding, the ACLU has had an abiding interest in the promotion of the guarantees of liberty and individual rights embodied in the federal and state constitutions, including the freedom of speech and freedom of the press guaranteed by the First Amendment to the United States Constitution and the Liberty of Speech Clause of the California Constitution. It and other ACLU affiliates in California regularly submit requests to state and local government entities under the California Public Records Act and routinely litigate CPRA cases. (*See, e.g., American Civil Liberties Union Foundation of Southern California v. Superior Court* (2017) 3 Cal.5th 1032; *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282; *American Civil Liberties Union Foundation of Northern California v. Deukmejian* (1982) 32 Cal. 3d 440; *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55.) Courts have frequently granted the ACLU leave to file amicus briefs in CPRA matters. (*See, e.g., City of San Jose v. Superior Court* (2017); *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59; 2 Cal.5th 608; *International Fed. of*

Prof. & Tech. Engrs., Local 21 v. Superior Court (2007) 42 Cal.4th 319.)

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

Californians Aware is a nonprofit public benefit corporation established under the laws of California and recognized by the Internal Revenue Service as a 501(c)(3) tax-exempt charity, founded to "help citizens, officials and journalists keep Californians aware of public issues, by supporting and defending open government, an enquiring press, and a citizenry free to exchange facts and opinions."

The California News Publishers Association (CNPA) is a non-profit trade association representing more than 1,500 daily, weekly and student newspapers in California. For well over a century, CNPA has defended the First Amendment rights of publishers to gather and disseminate - and the public to receive - news and information. Its members regularly use the CPRA in reporting on public agencies throughout the state, and on the performance of public employees and the expenditure of public funds. CNPA has filed amicus curiae briefs in numerous cases in which the Supreme Court and the Courts of Appeal have vindicated the public's and the press' right of access under the CPRA. (See, e.g., *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157; *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319; *POST* (2007) 42 Cal.4th 278; *Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440; *County of Santa Clara v. Superior Court* (2008) 170 Cal.App.4th 1301.)

The Center for Investigative Reporting (CIR), founded in 1977, is the nation's first nonprofit investigative journalism organization. CIR produces investigative journalism for its https://www.revealnews.org/ website, the Reveal national public radio show and podcast, and various documentary projects—often in collaboration with other newsrooms across the country.

The Electronic Frontier Foundation (EFF) is a San Francisco-based non-profit civil liberties organization that has worked for more than 25 years to protect and promote fundamental liberties in the digital world. EFF and its more than 44,000 active members have a strong interest in encouraging and challenging industry, government, and courts to support free expression, privacy, and transparency in the information society. As part of its mission, EFF has challenged the over-withholding of government records by California state agencies, most recently in its case, brought with the ACLU Foundation of Southern California, challenging the Los Angeles Police and Sheriff's Departments' withholding of license plate records under the California Public Records Act (CPRA). (*ACLU Found. of S. Cal. v. Super. Ct.* (2017) 3 Cal.5th 1032.) EFF has also served as *amicus* in other cases that seek to uphold the public's right to access government records under the CPRA and the federal Freedom of Information Act (FOIA), including *City of San Jose v. Super. Ct.*, 2 Cal.5th 608 (2017) and *Sierra Club v. Super. Ct.*, 57 Cal.4th 157 (2013).

Los Angeles Times Communications LLC ("The Times"), is a wholly owned subsidiary of Tribune Publishing Company, LLC, which in turn is a wholly owned subsidiary of tronc, Inc. It is the publisher of the Los Angeles Times, the largest metropolitan daily newspaper circulated in California. The Times also publishes through Times Community News, which includes the Daily Pilot, Coastline Pilot, Glendale News-Press, The Burbank Leader, Huntington Beach Independent, and the La Canada Valley Sun. The Times maintains the website www.latimes.com, a leading source of national and international news. The Times regularly relies on the CPRA for its reporting on state and local government agencies, and it has successfully litigated numerous CPRA cases. See, e.g., *Long Beach Police Officers Assoc. v. City of Long Beach* (2014), 59 Cal. 4th 59; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th

278; Los Angeles *Times Communications v. Alameda Corridor Transportation Authority* (2001) 88 Cal. App.4th 1381.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the *Miami Herald*, *The Kansas City Star*, *The Sacramento Bee*, *The Charlotte Observer, The* (Raleigh) *News and Observer,* and the (Fort Worth) *Star-Telegram*. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

DATED: February 2, 2017

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA

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AMICI CURIAE BRIEF

I. INTRODUCTION

The Legislature enacted the California Public Records Act ("CPRA") to facilitate "access to information concerning the conduct of the people's business." (Gov't Code, § 6250.) Yet the Newark Unified School District ("District") seeks almost half a million dollars in attorney fees against Elizabeth Brazil, a resident of the District who exercised her rights under the CPRA and attempted to learn more about her local government. The District's fee motion is legally unprecedented and would eviscerate the CPRA's "protections and incentives for members of the public" seeking to vindicate the public's right of access. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 427.)

The Legislature enacted an asymmetrical fee-shifting provision under which fees are mandatory to a prevailing records requester but available to a public agency only upon a showing that the requester's claim was "clearly frivolous." The District has not cited a single case—and *amici* are not aware of any—in which a court in California has ever awarded attorney fees against a requester of records, absent a finding that the requester's claim was "clearly frivolous." And for good reason. Such a ruling would violate the text and purpose of the CPRA and the strong public policy in favor of access articulated in Article I, section 3(b) of the California Constitution.

In addition, an award of fees, particularly one of this magnitude, would have devastating chilling effects on media and transparency organizations that routinely rely on the CPRA and ordinary California residents seeking greater transparency and accountability from their state and local governments. A ruling in the District's favor would embolden public agencies to seek fees against requesters in situations beyond those contemplated by the CPRA's fee-shifting statute, further chilling the public from exercising their statutory and constitutional rights to information about the government.

Amici respectfully urge this Court to deny the District's motion.

II. FACTUAL BACKGROUND

The underlying matter involves a close legal question that was only resolved by the California Supreme Court in 2016, two years after the facts of this case arose. Section 6254.5 of

the CPRA provides: "Notwithstanding any other law, if a state or local agency discloses a public record that is otherwise exempt from this chapter, to a member of the public, this disclosure shall constitute a waiver of the exemptions specified in Section 6254 or 6254.7, or other similar provisions of law." Before 2016, courts had divided on the question whether the inadvertent disclosure of documents produced in response to a CPRA request waived the attorney-client and work product privileges. In *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, our Supreme Court concluded it does not.

At issue here is a request for public records to the District by Ms. Elizabeth Brazil and another requester in 2014, before *Ardon* was decided. Ms. Brazil is not an attorney. The District produced records in response to her request, but subsequently realized it had inadvertently produced documents it contended were protected by the attorney-client or attorney work-product privileges. The District requested return of the documents; the requesters declined. *(Newark Unified School District v. Superior Court* (2015) 245 Cal. App.4th 887, 894.)

The District then filed a complaint for injunctive relief seeking return of the documents. Although the complaint alleges that the information is protected under the Evidence Code, Code of Civil Procedure, and Government Code section 6254 (Complaint ¶ 14), and contains a prayer for relief, nowhere does it identify a cause of action. That is, it does not identify a statute or other law that forms the legal basis for the District's lawsuit.

The District nevertheless sought a temporary restraining order and an order to show cause regarding a preliminary injunction. Rejecting the District's legal arguments, the trial court declined to issue the order to show cause, concluding that the District had indeed waived any applicable privileges pursuant to Government Code section 6254.5. (*Newark*, at 895.) The trial court issued an amended order, denying the District's request for a TRO, and affirming its earlier legal conclusion. (*Id.* at 896.) The District then sought a writ in the Court of Appeal, which ultimately vacated the trial court order. (*Id.* at 910-911.) The Supreme Court granted review and held the matter pending *Ardon.* (Case No. S229112, 10/14/15.) After *Ardon* was decided, it ultimately dismissed and remanded.

The District now seeks attorney fees in the amount of $449,317.60.

III. ARGUMENT

As a threshold issue, after the Court of Appeal remanded this case for further proceedings, the trial court determined that it would "read[ ] NUSD's complaint as asserting a claim under the CPRA." (District RJN, Ex. R at 188.) In doing so, the trial court noted that "the Legislature did not include this claim in the text of the CPRA," and instead relied on *Ardon* and *Newark* to find an "implied claim" for which the remedy is return of inadvertently disclosed documents. (*Id.*) But neither *Ardon* nor *Newark* explicitly decided that question. Thus, *Amici* question the accuracy of this determination, and contend that while a right to an injunction was allowed under the particular circumstances present, that right does not stem from the CPRA. (*See further section* III-A-4, *infra*.)

Regardless, even if the claim arises under the CPRA, there is no basis for application of its fee-shifting provision, given the strong, express incentives and protections it provides only to requesters (*see further section* III-A-1, *infra*.) Simply put, while the trial court may find an "implied" cause of action under the CPRA, there is no basis to also find an "implied" right to fee recovery to a public agency absent a finding that any claim made by Ms. Brazil was "clearly frivolous."

Moreover, since both parties appear to have alleged that this case arises under the CPRA (District RJN, Ex. R at 188), and indeed the District now fees under the CPRA, this Court should award fees to Ms. Brazil if it determines that this litigation was the catalyst for the disclosure of public records. (*See further section* III-C-4, *infra*.)

A. The CPRA Does Not Permit Any Award of Fees to A Public Agency Unless There is A Lawsuit Filed by a Requester Which is Found to Be "Clearly Frivolous"

The plain text of the CPRA prohibits any fee award to a public agency unless the requester's claim is "clearly frivolous." (Gov't Code, § 6259, subd. (d).) Application of any other standard would thwart the plain language of the statute, the legislative intent and policies behind the CPRA's fee shifting provision, and would radically undermine the "overall remedial purpose of the Public Records Act to broaden access to public records." (*Galbiso v. Orosi Pub. Util. Dist.* (2008) 167 Cal.App.4th 1063, 1088.)

1. The CPRA's Fee-Shifting Provision Creates "Protections and Incentives" For Members of the Public Seeking to Vindicate Public Access to Government Records

The CPRA and the California Constitution establish the state public policy of promoting government transparency by ensuring public access to government records. (Cal. Const., Art. I, § 3(b); Gov't Code, § 6250 ["access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state"].) The CPRA creates a statutory mechanism for members of the public to request records from government agencies, and to sue to enforce the right of access. (Gov't Code, §§ 6253-6258.) Records requesters who prevail in litigation are entitled to an award of attorney fees. (Gov't Code, § 6259, subd. (d).) Several aspects of the fee-shifting provision are salient here.

First, the fee-shifting provision applies only to suits brought pursuant to the CPRA to challenge the improper withholding of records from a member of the public. In the absence of a specific fee-shifting statute or contract to the contrary, of course, attorney fees are not ordinarily available to a prevailing party. (*See* Code of Civil Procedure, § 1021.) The Legislature thus provided for mandatory fee shifting in the CPRA to encourage the public to enforce their rights under the Act, and to enforce the Act's "salutary objectives." (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 349.) Section 6259 provides: "The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section." (Gov't Code, § 6259, subd. (d).) The Legislature provided for mandatory fee shifting in the CPRA because "[w]ithout some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies [concerning access to public records] will as a practical matter frequently be unfeasible." (*Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 902-03.)

Second, the fee-shifting provision contains not only "incentives" but also "protections…for members of the public" seeking public records. (*Filarsky*, 28 Cal.4th at 427.) In particular, the fee-shifting provision is asymmetrical: Fees are mandatory for a successful requester, but they can be awarded to a prevailing public entity only if the requester's claim was "clearly frivolous": "If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency." (Gov't Code, § 6259, subd. (d).) Thus, "if the defendant public agency prevails, the court lacks legal authority to award costs to the agency—even though

the agency would be entitled to costs in an ordinary action—unless the action is frivolous." (*Filarsky*, 28 Cal.4th at 427.) The "clearly frivolous" standard creates a high bar. "The conclusion that an action lacks merit does not determine whether it was frivolous." (*Crews v. Willows Unified School Dist.* (2013) 217 Cal.App.4th 1368, 1382.) Instead, a public agency must demonstrate that the "PRA petition was utterly devoid of merit or taken for an improper motive." (*Id.*)

Third, the fee-shifting statute uses the term "plaintiff" to refer to a requester of public records, not the government entity whose records are requested. The statute, for example, provides "costs and fees *shall be paid by the public agency* of which the public official is a member or employee and shall not become a personal liability of the public official." (Gov't Code, § 6259, subd. (d).) The Supreme Court has interpreted this sentence to "reflect[] a legislative intent that the plaintiff … cannot be the public agency from which disclosure is sought, because the provision contemplates that the public agency always will pay any costs and attorney fees 'should the plaintiff prevail.'" (*Filarsky*, 28 Cal.4th at 431.) And as noted above, the statute goes on authorize an award of fees or costs to "the public agency" only if "the court finds that the plaintiff's case is clearly frivolous." (Gov't Code, § 6259, subd. (d).) Thus, the terms "public agency" and "plaintiff" as used by the statute are mutually exclusive.

This functional interpretation, under which the term "plaintiff" in section 6259(d) refers to the person requesting records, was adopted by the court in *Fontana Police Department v. Villegas-Banuelos* (1999) 74 Cal.App.4th 1249. In that case, the Court of Appeal held that the Legislature intended to make fees available to a requester, even if the requester due to procedural "happenstance" was not the "plaintiff" in the action. (*Fontana*, at 1253 [fees available to requester who prevailed in litigation, even though public agency got "to the courthouse first" and was thus nominally the plaintiff].)

Fourth, courts have repeatedly cautioned that the CPRA's fee-shifting provision must be interpreted in light of "the overall remedial purpose of the Public Records Act to broaden access to public records." (*Galbiso*, 167 Cal.App.4th at 1088; *see also Community Youth Athletic Ctr. v. City of Nat'l City* (2013) 220 Cal.App.4th 1384, 1447.)

2. Fees Are Not Available to the District Because the Requester's Claim Was Not Clearly Frivolous

In a CPRA case, a public agency can only recover attorneys fees where the requestor's lawsuit is "clearly frivolous." Here, no such showing has, nor could, be made – and, indeed, the District has not even argued that Ms. Brazil made any claim that was "clearly frivolous."

Section 6259(d) expressly prohibits an award of fees to a "public agency" unless "the plaintiff's claim is clearly frivolous." Thus, the only instance where a government agency can recover fees from a requester is where that requester brings an action pursuant to the CPRA that is deemed "clearly frivolous"—a standard that is not met as a matter of law where a requester has a colorable claim or pursues a novel and important legal issue. (*See, e.g., Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1302; *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 484.) Indeed, as the California Supreme Court has explained, courts should only find actions to be frivolous in rare, extreme circumstances in which no reasonable attorney would consider the issues arguable. (*See, e.g., In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648-51.)

But Ms. Brazil's claim was far from frivolous, let alone "clearly frivolous." Indeed, her overall request for records can hardly be deemed clearly frivolous when the District produced documents in response, and subsequently claimed only that some of those documents were privileged. Nor was Ms. Brazil's position—that the District's production of the documents waived the attorney-client and work product privileges s under Section 6254.5 of the CPRA—clearly frivolous. That position was *twice* adopted by the trial court in this case. (*Newark*, 245 Cal.App.4th at 895-96.) And it was consistent with the trial *and* appellate courts in *Ardon*. (*Ardon*, 62 Cal.4th at 1181.) Ms. Brazil is not an attorney and had no ethical obligation to return inadvertently documents that the District asserted to be privileged.

That the Court of Appeal in this case and the Supreme Court in *Ardon* ultimately sided with the District does not render Ms. Brazil's position "clearly frivolous." "The conclusion that an action lacks merit does not determine whether it was frivolous." (*Crews*, 217 Cal.App.4th at 1382.) Fee awards against requesters are heavily disfavored and have been repeatedly reversed by the Courts of Appeal. (*Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 377 ["only one published appellate opinion has ever affirmed an award of attorney fees and costs to a public

agency on a finding of clear frivolousness under subdivision (d) of section 6259"].) This case simply does not meet the high bar necessary for a public agency to obtain fees against a requester.

3. The Mandatory Fee-Shifting Provision Does Not Apply to Public Agencies

The District completely ignores the "clearly frivolous" requirement and instead invokes the mandatory fee-shifting available for a prevailing CPRA plaintiff. But the mandatory fee-shifting provision is not intended to benefit "the public agency from which disclosure is sought." (*Filarsky*, 28 Cal.4th at 431.)

The District's motion relies on the first sentence of Section 6259(d), but ignores the second two sentences. The statute provides:

> The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. *The costs and fees shall be paid by the public agency* of which the public official is a member or employee and shall not become a personal liability of the public official. *If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.*

(Gov't Code, § 6259, subd. (d), emphasis added.)

The District dismisses the significance of the statutory text requiring fees to be "paid by the public agency" as applying only to situations when the public agency is "a defendant, not…a plaintiff." (District's Mem. of P&A's at 12:16-17.) Even assuming a public agency seeking to prevent disclosure could be a plaintiff *in a CPRA action* (*but see infra* Section III-A-4), which it cannot, the asymmetry in fee-shifting (mandatory fees for prevailing plaintiff, but fees available to "public agency" only if "plaintiff's case is clearly frivolous") demonstrates that the Legislature intended mandatory fees to be available only to a requester of documents. As the Supreme Court has made clear, the CPRA "reflects a legislative intent that the plaintiff in a proceeding pursuant to sections 6258 and 6259 cannot be the public agency from which disclosure is sought, *because the provision contemplates that the public agency always will pay any costs and attorney fees 'should the plaintiff prevail*." (*Filarsky*, 28 Cal.4th at 431, emphasis added.)

The District does not cite a single case—and *amici* are aware of none—that awards fees under the mandatory fee-shifting provision to a public agency whose records are sought. Indeed, allowing a public agency to obtain fees against a requester, without any demonstration that the

requester's claim is "clearly frivolous," would eviscerate the Legislature's intent in enacting Section 6259(d), which was to create both "protections and incentives for members of the public" to vindicate rights under the CPRA. (*Filarsky*, 28 Cal.4th at 427.)

4. The CPRA's Fee-Shifting Provision is Not Available Because the District Did Not Bring Suit Under the CPRA

Attorney fees are not available to the District because its suit was neither brought pursuant to Section 6259 of the CPRA, nor did it seek to challenge the improper withholding of public records from a member of the public.

The District seeks fees under Section 6259(d). The District does not cite any other basis for its fee motion, and absent this fee-shifting statute, the District would not be eligible for fees. (*See* Code of Civil. Proc., § 1021 [attorney's fees available only if "specifically provided for by statute" or contract].) But "[t]he provision authorizing an award of attorney fees to a prevailing plaintiff is limited expressly to litigation filed pursuant to section 6259." (*Filarsky*, 28 Cal.4th at 431.) Section 6259(d) specifically provides for fees to a prevailing plaintiff only "in litigation filed *pursuant to this section*," which authorizes relief upon the filing of a "verified petition…that certain public records are being improperly withheld from a member of the public." (Gov't Code, §6259, subd. (a) and (d), emphasis added.) Mandatory fee-shifting thus applies only to suits challenging the improper withholding of public documents from a member of the public. (*Galbiso*, 167 Cal.App.4th at 1087 [interpreting Section 6259(d)'s requirement that fees available to prevailing plaintiff "in litigation filed pursuant to this section" to mean that fees available whenever "public records are being improperly withheld from a member of the public," *i.e.*, in suits challenging denial of access to particular documents as well as blanket denial of access to documents through denial of access to premises to inspect documents].)

The District's Complaint nowhere cites Section 6259 as the basis for its claims. That is not surprising, because a public agency whose records are at issue is not authorized to file suit under Section 6259. "Government Code sections 6258 and 6259 [set forth] the exclusive procedure for litigating the issue of a public agency's obligation to disclose records to a member of the public … and these provisions do not authorize a public agency in possession of the records to seek a judicial determination regarding its duty of disclosure." (*See Filarsky*, 28 Cal.4th at 423.) In *Filarsky*, the

Supreme Court addressed whether Code of Civil Procedure 1060 might provide an alternative vehicle for a public agency seeking to avoid disclosure to file suit, but ultimately concluded that it did not. (*Id.* at 434-35.) Although the Court of Appeal in this case concluded that *Filarsky* did not bar the District's action (because the District was attempting to retrieve documents it had previously disclosed, rather than preemptively preventing disclosure of documents in its possession), the Court did not identify an alternative vehicle (such as Code of Civil Procedure 1060) that established the statutory basis for the District's suit. (*Newark*, 245 Cal.App.4th at 908-09.)

Nor is the District's suit the functional equivalent of a suit under Section 6259, which authorizes the filing of a writ petition to challenge the improper withholding of "public records…from a member of the public." (Gov't Code, § 6259, subd. a.) The District's action sought not to vindicate the public's right of access, but to return public records to a public agency.

Allowing the District to invoke the CPRA's mandatory fee-shifting provision against a requester of public records would violate the statute's plain language: The District's litigation was neither filed pursuant to Section 6259, nor did it seek to challenge the withholding of records from a member of the public. And it would also turn the statutory purpose on its head: The District's litigation sought to prevent—not promote—public access to government documents. (*See Filarsky*, 28 Cal.4th at 427 [underlying purpose of the mandatory fee-shifting provision is to promote public access to government documents.].)

B. Awarding Fees Here Would Chill Efforts by the Public to Exercise Their Protected Rights to Obtain Information About their Government

Awarding attorney fees to a public agency against a requester would have devastating real world consequences. In particular, it would cast an intolerable chill over the media, transparency organizations, and ordinary members of the public seeking to learn more about their government.

1. An Award of Fees Here Would Upset the Careful Balance of Incentives and Protections Established by the Legislature

The CPRA is premised on the ideal that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov't Code § 6250. See also Cal. Const. Art. 1, sec. 3 [recognizing a "right of access to information

concerning the conduct of the people's business"].) But ordinary citizens – who serve as the front-line enforcers of the CPRA – are at an inherent disadvantage when it comes to asserting their rights because of the high costs of litigation and the formidable resources of public agencies. The Legislature recognized that the promise of governmental transparency would be an empty one if members of the public were not given special incentives and protections to encourage them to seek judicial enforcement of the "fundamental" right of access.

For this reason, the CPRA's unique fee-shifting provision does more than any other part of the statute to ensure that the purpose of the law is fully realized. Section 6259(d) *incentivizes* members of the public to go to court by providing them with a mandatory award of attorneys' fees when they succeed at obtaining records, and it *protects* them from being held liable for government agencies' fees unless their lawsuits are "clearly frivolous." (*Id.* at § 6259(d); *Filarsky*, 28 Cal.4th at 427.) If the court were to hold here that fees are recoverable absent any such showing or claim, it would open a Pandora's box, permitting government agencies to pursue fees for reasons not allowed under the CPRA and exposing records requesters to enormous potential financial liability in clear defiance of the Legislature's careful balancing of incentives and protections for such requesters. This would discourage citizens from exercising their right of access because merely submitting a CPRA request would risk incurring massive fee awards based on acts – the mistaken release of records – over which records requesters have no control.

The CPRA is not self-enforcing. It requires individuals and institutions, usually nonprofit transparency advocacy groups, to ensure that its mandates are adhered to. In years past, newspapers were both able and willing to bring actions under the CPRA to ensure the government met its obligations under the statute. Those days have long since passed; most newspapers are in such a financial state that, even with the protections available under the CPRA's fee-shifting statute, they are increasingly unable and/or unwilling to bring such claims. (*See, e.g.*, Derek Thompson, "The Print Apocalypse and How to Survive It," *The Atlantic*, Nov. 3, 2016 [noting that between "2000 and 2015, print newspaper advertising revenue fell from about $60 billion to about

$20 billion, wiping out the gains of the previous 50 years"];[1] Mark J. Perry, "Creative Destruction: Newspaper ad revenue continued its precipitous free fall in 2014, and it's likely to continue," American Enterprise Institute Ideas, Apr. 30, 2015.[2]) Accordingly, it falls to non-profit organizations such as *amici* First Amendment Coalition or ACLU to bring actions seeking to enforce the public's right of access. If these organizations, not to mention financially vulnerable individuals, faced potentially crushing legal liability based on theories of fee recovery found nowhere in the CPRA, it would fundamentally alter the calculations not just in bringing CPRA litigation, but in the very basic act of submitting a CPRA request, to the detriment of access for all. The CPRA would in a very real sense be unenforceable.

CPRA litigation already poses a substantial burden for individuals and nonprofit groups, who must litigate for many months – and, often, many years – without any assurance their hundreds of hours of attorney time will be compensated. (See, e.g., *Sander v. State Bar of California* (2013) 58 Cal.4th 300 [in a case still pending 10 years after the initial request was filed, the California Supreme Court recognized a common law right of access to the State Bar of California's admissions database before remanding for further trial court proceedings].) If government agencies were able to seek and, potentially, obtain fee awards against such requesters in cases other than "clearly frivolous" lawsuits, the potential burden in enforcing California's access rights would be far too great for many if not most individuals and nonprofit groups to undertake.

The goal of protecting citizens who exercise their rights of access is underscored by 2009 legislation inspired by a case analogous to this one. In 2006, the nonprofit organization Californians Aware and its president, open government advocate Richard McKee, filed suit against the Orange Unified School District, claiming that the agency violated the CPRA and the Brown Act (California's open meetings law) by, among other things, distributing videotapes of a public meeting that omitted critical comments made by a school board member. (*See Californians Aware*

[1] Available at https://www.theatlantic.com/business/archive/2016/11/the-print-apocalypse-and-how-to-survive-it/506429/.

[2] Available at https://www.aei.org/publication/creative-destruction-newspaper-ad-revenue-continued-its-precipitous-free-fall-in-2014-and-its-likely-to-continue/.

v. Orange Unified Sch. Dist. (2008) 2008 Cal. App. Unpub. LEXIS 7487). The District successfully moved to strike the petition under the California anti-SLAPP statute, which provides for mandatory attorneys' fees for prevailing defendants. (*See* Code Civ. Proc., § 425.16, subd. (c).) The agency was awarded more than $80,000 in attorneys' fees, and because Californians Aware lacked sufficient financial resources, Mr. McKee, a community college chemistry professor, was held personally liable for practically the full amount.

When Mr. McKee died in 2011, a *Los Angeles Times* obituary described the effect of the fee award: "A lien was placed on the chemistry professor's home and his wages were garnished. He delayed his retirement until last year and tapped his savings to cover the award." (*See* Elaine Woo, "Richard P. McKee dies at 62; open government advocate," L.A. Times, Apr. 27, 2011.[3]) Mr. McKee's plight inspired the Legislature to amend the anti-SLAPP statute to prohibit prevailing defendants from recovering fees for striking CPRA petitions. *See* 2009 Cal SB 786, 2009 Cal Stats. ch. 65. The law now makes clear that public agencies cannot use the anti-SLAPP statute as a loophole to avoid the public records law's requirement that fees can only be awarded to governmental bodies if a CPRA petition is clearly frivolous. (Code Civ. Proc. § 425.16(c)(2).)

The author of the legislation explained that the amendment was motivated by a concern that members of the public would be discouraged from exercising their right of access in light of what happened to Mr. McKee. All of the legislative analyses of the bill included a statement from the bill's author, describing the *Californians Aware* case and its harsh outcome for Mr. McKee, and warning that "[i]f this experience continues as even a remote risk, no prudent person will use the courts to enforce open government rights that recently were given fundamental constitutional status, along with speech, press and privacy, by the voters in the passage of Proposition 59 of 2004 (Cal. Const., Art. I, Sect. 3 (b))." (*See*, *e.g.*, Assembly Floor Analysis of SB 786, June 24, 2009.)[4]

Here, the amount of fees sought—nearly half a million dollars—far outstrips the award in

[3] Available at http://www.latimes.com/news/obituaries/la-me- richard-mckee-20110427,0,3673562.story.

[4] Available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0751-0800/sb_786_cfa_20090624_180317_asm_floor.html.

McKee's case and indeed would be financially crushing to any ordinary individual. Such an award would send a loud message to any individual or organization seeking to enforce their rights of access that they may be brought into court to answer for their temerity in seeking to enforce California law. Setting aside the extremely dubious purported legal basis for the fee award sought here, such an award as a policy matter would directly countermand the Legislature's clear establishment of incentives and protections for records requesters.

2. An Award of Fees to the District Would Have Perverse Effects

A fee award here would have other perverse effects.

First, it would embolden other public agencies to seek fees against requesters in circumstances outside those contemplated by the fee-shifting statute. A ruling from this Court that a public agency can benefit from the mandatory-shifting provision would open the door to such arguments in other cases, casting an ever greater chill over the public's rights of access. Such a ruling would arm public agencies with a potent weapon, the threat of filing a fee motion, against requesters. Even if courts do not ultimately grant such motions, the mere threat would cast a strong chill. Risk-averse requesters seeking to avoid incurring additional attorney fees defending a fee motion or the anxiety associated with a potential adverse ruling would surely decline to assert their CPRA rights. Such an outcome would not serve the "overall remedial purpose of the Public Records Act to broaden access to public records." (*Galbiso*, 167 Cal.App.4th at 1088.)

Second, it would permit the government to recover fees for its own mistake. But for the District's mistake in releasing records subject to the attorney-client privilege, the action that forms the basis of the government's fee motion would not have existed. Brazil did not force the government to release records it should not have released. It should not fall to Brazil to compensate the government for its efforts to recover those records. This is particularly true given the utter absence of any authority recognizing fee awards against requesters in such a circumstance.

C. An Award of Fees to a Requestor Who Secures Important Public Records as a Result of Litigation Is Necessary To Realize The Protections Of The CPRA

The CPRA's plain language presumes that the only way the question of whether a record is public can end up in court is for a requestor to initiate a traditional Public Records Act lawsuit.

However, this ignores the reality that courts are increasingly allowing new and different procedural avenues for this same question to be decided. See, e.g., *Newark* and *Ardon*; see also *Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250 [allowing a "reverse-CPRA" lawsuit, in which a third-party seeks to enjoin a public agency from disclosing public records to a requester.] Although *Newark, Ardon* and *Marken* arose via a different procedural posture than a traditional CPRA lawsuit, they nevertheless litigate the same question - the public's right to a particular record or class of records under the CPRA. If courts are going to permit these implied causes of action, the only way to ensure the protections of the CPRA are also realized is to apply the CPRA's fee shifting provision.

This view is consistent with both the policies of the CPRA and with case law.

The CPRA's fee shifting provision, Government Code, section 6259, "should be interpreted in light of 'the overall remedial purpose of the [CPRA] to broaden access to public records." (*Community Youth Athletic Center,* 220 Cal.App.4th at 1440.) The guarantee of fee award to a requestor that obtains public records serves to advance public access to records by discouraging agencies from engaging in tactics to avoid disclosure. (*City of Santa Rosa v. Press-Democrat* (1986) 187 Cal.App.3d 1315, 1322.) As the Second District Court of Appeal emphasized in *Los Angeles Times Comm. LLC v. Alameda Corridor Transp. Auth*. (2001) 88 Cal.App.4th 1381, 1392, withholding attorneys' fees from a requestor "would chill efforts to enforce the public right to information."

The California Supreme Court has already found that the CPRA presumes that "the public agency *always* will pay any costs and attorney fees" should the requestor prevail. (*Filarsky*, at 431 (emphasis added); see also *Fontana*, 74 Cal.App.4th at 1253 [recognizing that an award of fees under the CPRA does not depend on "[t]he happenstance of who gets to the courthouse first."]) To realize this mandate, courts have broadly interpreted the CPRA's fee shifting provision to award fees when litigation results in the disclosure of information that an agency previously refused to release. (*Belth v. Garamendi,* 232 Cal.App.3d at 900 [a party prevails where the action results in the agency releasing a copy of a previously withheld document] *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 227-28 [fee award where the requestor had possession of the requested

documents prior to the litigation]; *Pacific Merchant Shipping Assn. v. Bd. of Pilot Comm'rs* (2015) 242 Cal.App.4th 1043, 1056 [a requestor "may be deemed a prevailing party even if the impact of the litigation did not take the form of court-ordered relief."])

Thus, when the court is presented with a fee request after litigation regarding the disclosability of public records, the focus of the court's inquiry should be on substance, over form. The court should look to the arguments of the parties, and not to their titles or locations on a caption, to determine which party is advocating on the public's behalf for disclosure and which party is trying to prevent that disclosure.

Here, if the court finds as, Ms. Brazil has alleged, that the District turned over many of the disputed records as a result of this litigation, she is the prevailing party and, thus, should be awarded attorneys fees pursuant to the CPRA.

III. CONCLUSION

For the foregoing reasons, amici respectfully request that the Court deny the District's motion for attorney fees.

DATED: February 2, 2018

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA

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PROOF OF SERVICE

State of California, County of Los Angeles

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 **February 2, 2018**, I served the foregoing documents described as **APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT ELIZABETH BRAZIL; AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT ELIZABETH BRAZIL** on the parties in this action as listed in the attached service list by the following means:

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By Overnight Delivery

I enclosed the document in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the address above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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

Date: February 2, 2018

Kristen Naranjo