Case No.: S282937 and S282950

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE LAW FOUNDATION OF SILICON VALLEY,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SANTA CLARA,
Respondents,

THE CITY OF GILROY,
Real Party in Interest,

After a Decision by the Court of Appeal, Sixth Appellate District, Case Nos. H049552 and H049554 (Consolidated); Superior Court of the County of Santa Clara; Case No. 20CV362347

APPLICATION OF FIRST AMENDMENT COALITION, LA TIMES COMMUNICATIONS LLC, THE MCCLATCHY COMPANY LLC, CALIFORNIA NEWSPAPERS PARTNERSHIP, CALIFORNIANS AWARE, ELECTRONIC FRONTIER FOUNDATION, FREEDOM OF THE PRESS FOUNDATION, SOCIETY OF PROFESSIONAL JOURNALISTS, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICUS CURIAE BRIEF

AARON R. FIELD (SBN 310648)
ZACHARY E. COLBETH (SBN 297419)
CANNATA, O'TOOLE & OLSON LLP
100 Pine St., Suite 350, San Francisco, CA 94111

Document received by the CA Supreme Court.

Telephone: (415) 409-8900
Email: afield@cofolaw.com; zcolbeth@cofolaw.com

DAVID LOY (SBN 229235)
ANNIE CAPPETTA (SBN 354079)
FIRST AMENDMENT COALITION
534 4th Street, Suite B, San Rafael, CA 94901
Telephone: (415) 460-5060
Email: dloy@firstamendmentcoalition.org;
acappetta@firstamendmentcoalition.org

Attorneys for Amici Curiae
FIRST AMENDMENT COALITION, LA TIMES COMMUNICATIONS LLC, THE MCCLATCHY COMPANY LLC, CALIFORNIA NEWSPAPERS PARTNERSHIP, CALIFORNIANS AWARE, ELECTRONIC FRONTIER FOUNDATION, FREEDOM OF THE PRESS FOUNDATION, SOCIETY OF PROFESSIONAL JOURNALISTS, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Document received by the CA Supreme Court.

TABLE OF CONTENTS

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER.....14

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER.....24

I. INTRODUCTION.....24

II. ARGUMENT.....26

A. THE RIGHTS OF ACCESS TO PUBLIC RECORDS ENSHRINED IN THE PUBLIC RECORDS ACT AND ARTICLE I, SECTION 3(B) OF THE CALIFORNIA CONSTITUTION ARE ESSENTIAL TO THE FUNCTIONING OF A DEMOCRACY, AND ARE MEANT TO EMPOWER THE PUBLIC TO VERIFY ACCOUNTABILITY AND CHECK THE ARBITRARY EXERCISE OF OFFICIAL POWER AND SECRECY IN THE POLITICAL PROCESS.....26

B. THE PUBLIC RECORDS ACT MUST, AND DOES, GRANT REQUESTERS A RIGHT TO SEEK AND OBTAIN DECLARATORY RELIEF WHERE AN AGENCY DESTROYS, RATHER THAN DISCLOSES, NON-EXEMPT RESPONSIVE RECORDS. 35

1. The Language and Purpose of the Public Records Act Make Clear That Declaratory Relief Is Available to LFSV Here.....35

2. The Concern That the Court of Appeal's Holding Would Allow Agencies to Evade Disclosure by Intentionally Destroying, Rather Than Disclosing, Records That Reveal Unfavorable Truths About Their Actions on Behalf of the People They Serve Is Concrete, Not Hypothetical. 42

3. LFSV's Claims for Declaratory Relief Are Not Moot, and, in Any Event, Federal and State Cases Interpreting the Mootness Doctrine Make Clear That

Document received by the CA Supreme Court.

the Doctrine Does Not Preclude Declaratory Relief Here. ……..49

4. Cases from Federal and State Jurisdictions Interpreting Other Access Laws Confirm That Declaratory Relief Should Be, and Is, Available to Determine Applicability of the CPRA to Past Conduct. ……..…55

C. THE PUBLIC RECORDS ACT REQUIRES AGENCIES TO PRESERVE RESPONSIVE RECORDS WITHHELD AS EXEMPT BEFORE, AND *A FORTIORI* AFTER, A PUBLIC RECORDS ACT LAWSUIT IS THREATENED AND FILED……58

1. Requiring Agencies to Preserve Rather Than Destroy Responsive Records Is Necessary to Effectuate the Purpose of the Public Records Act. ……..……58

2. The Court of Appeal's Ruling on Preservation Would, As with Declaratory Relief, Have Arbitrary and Unreasonable Results That the Legislature Did Not Intend. ……..…62

3. At a Minimum, Documents Must Be Preserved When Litigation Related to Those Documents Is Threatened and *a Fortiori* Once Litigation Related to Those Documents Has Commenced. ……67

4. Article I, Section 3(b) of the California Constitution Confirms That The Public Records Act Requires Agencies to Retain Records They Contend Are Responsive, and *a Fortiori* Requires That They Retain Records When Litigation Is Threatened or Has Commenced. ……...69

5. Cases Interpreting the Federal FOIA and Other States' Access Laws Confirm That Agencies Must Preserve Records They Withhold Until the Statute of

Document received by the CA Supreme Court.

Limitations for Bringing a Public Records Act Case Expires. ……72

6. The Parade of Horribles Gilroy Argues That Recognizing a Preservation Requirement Would Cause Is Greatly Exaggerated, and in Any Event Does Not Justify the Harm Caused by Giving Agencies a Free Hand to Destroy Public Records After Asserting an Exemption. ……78

III. CONCLUSION ……81

CERTIFICATE OF WORD COUNT……83

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES

CALIFORNIA CASES

ACLU Foundation of Southern California v. Superior Court
(2017) 3 Cal.5th 1032 19

ACLU of Northern California v. Superior Court
(2011) 202 Cal.App.4th 55 ..... 33, 59

Braun v. City of Taft
(1984) 154 Cal.App.3d 332 64

California First Amendment Coalition v. Superior Court
(1998) 67 Cal.App.4th 159 ..... 21, 47, 59

California State University, Fresno Association, Inc. v. Superior Court
(2001) 90 Cal.App.4th 810 59

California State University v. Superior Court
(2001) 90 Cal.App.4th 810 63

Cedars-Sinai Medical Center v. Superior Court
(1998) 18 Cal.4th 1 69

Citizens for a Better Environment v. Department of Food & Agriculture
(1985) 171 Cal.App.3d 704 73

Citizens Oversight, Inc. v. Vu
(2019) 35 Cal.App.5th 54, 55

City of Gilroy v. Superior Court
(2023) 96 Cal.App.5th 51

City of San Jose v. Superior Court
(2017) 2 Cal.5th 608 ..... *passim*

Document received by the CA Supreme Court.

City of Los Angeles v. Metropolitan Water District of Southern California
(2019) 42 Cal.5th 290 ..... 29, 30

Community Youth Athletic Center v. City of National City ("CYAC")
(2013) 220 Cal.App.4th 1385 ..... 31, 32, 34, 64

Commission on Peace Officer Standards and Training v. Superior Court ("CPOST")
(2007) 42 Cal.4th 278 ..... 16, 21

Comm. to Relocate Marilyn v. City of Palm Springs
(2023) 88 Cal.App.5th 607 ..... 38, 39

Cook v. Craig
(1976) 55 Cal.App.3d 773 ..... 53, 55

County of Santa Clara v. Superior Court
(2009) 171 Cal.App.4th 119 ..... 21, 47, 50

Filarsky v. Superior Court
(2002) 28 Cal.4th 419 ..... 21, 29, 33

Galbiso v. Orosi Public Utility District
(2008) 167 Cal.App.4th 1063 65

Golden Door Properties, LLC v. Superior Court
(2020) 53 Cal.App.5th 733 ..... 52, 53, 69

Great Lakes Properties, Inc. v. City of El Segundo
(1977) 19 Cal.3d 152 36

Horwich v. Superior Court
(1999) 21 Cal.4th 272 66

International Federation of Professional & Technical English, Local 21, AFL-CIO v. Superior Court ("IFPTE")
(2007) 42 Cal.4th 319 ..... *passim*

Kim v. Reins International California, Inc.

Document received by the CA Supreme Court.

(2020) 9 Cal.5th 73 65

Lampley v. Alvares
(1975) 50 Cal.App.3d 124 66

Long Beach Police Officers Association v. City of Long Beach (Los Angeles Times Communications LLC)
(2014) 59 Cal.4th 59 16

Los Angeles County Board of Supervisors v. Superior Court
(2016) 2 Cal.5th 282 ..... 21, 27

MHC Operating Limited Partnership v. City of San Jose
(2003) 106 Cal.App.4th 204 49

National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward
(2020) 9 Cal.5th 488 ..... 21, 27

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court
(1999) 20 Cal.4th 1178 15

People v. Purcell
(1937) 22 Cal.App.2d 126 64

Register Division of Freedom Newspapers v. County of Orange
(1984) 158 Cal.App.3d 893 62

Rosales v. Depuy Ace Medical Company
(2000) 22 Cal. 4th 279 53

San Gabriel Tribune v. Superior Court
(1983) 143 Cal.App.3d 762 ..... 14, 31, 63

Sierra Club v. Superior Court
(2013) 57 Cal.4th 157 ..... 19, 21, 29

Teachers' Retirement Board. v. Genest
(2007) 154 Cal.App.4th 1012 38

Victor Valley Union High School District v. Superior Court of San

Document received by the CA Supreme Court.

Bernardino County
(2023) 91 Cal.App.5th 1121 69

FEDERAL CASES

Chambers v. U.S. Department of Interior
(D.C. Cir. 2009) 568 F. 3d 998 73

Courthouse News Service v. Planet
(9th Cir. 2020) 947 F.3d 581 33

Citizens for Responsibility & Ethics in Washington v. Federal Election Commission ("*CREW*")
(D.C. Cir. 2013) 711 F.3d 180 31

Hajro v. U.S. Citizenship and Immigration Services
(9th Cir. 2016) 811 F.3d 1086 ..... 50, 51, 52

Judicial Watch, Inc. v. U.S. Department of Commerce
(D.D.C. 1998) 34 F.Supp.2d 28 73

Payne Enterprises., Inc. v. United States
(D.C. Cir. 1988) 837 F.2d 486 51

Press-Enterprise Co. v. Superior Court
(1986) 478 U.S. 1 27

SafeCard Services, Inc. v. S.E.C.
(D.C. Cir. 1991) 926 F.2d 1197 73

OTHER STATE CASES

Daugherty v. Jacksonville Police Department
(Ark. 2012) 411 S.W.3d 196 77

Gray Media Group, Inc. v. City of Charlotte
(N.C. Ct. App. 2023) 892 S.E.2d 629 ..... 56, 57

Price v. Town of Fairlee

Document received by the CA Supreme Court.

(Vt. 2011) 26 A.3d 26 75

Roberts v. News-Press Publishing Company
(Fla. Dist. Ct. App. 1982) 409 So.2d 1089 58

Spokane Research & Defense Fund v. City of Spokane
(Wash. 2005) 117 P.3d 1117 56

Walloon Lake Water System, Inc. v. Melrose Township
(Mich. Ct. App. 1987) 415 N.W.2d 292 74

CALIFORNIA STATUTES

Evid. Code § 915 62

Gov. Code § 6200 60

Gov. Code § 54950 70

Gov. Code § 7920.000, *et seq.* 14, 26

Gov. Code § 7920.505 ..... 34, 35

Gov. Code § 7920.530(a) 63

Gov. Code § 7921.000 70

Gov. Code § 7922.000 ..... 34, 59

Gov. Code § 7922.500 ..... 30, 66

Gov. Code § 7922.525 76

Gov. Code § 7922.530(a) 30, 76

Gov. Code § 7922.535 30

Gov. Code § 7922.535(a) 30, 31

Gov. Code § 7922.600. ..... 32, 41

Document received by the CA Supreme Court.

Gov. Code § 7922.600(a). 39

Gov. Code § 7923.000 ..... *passim*

Gov. Code § 7923.100 34

Gov. Code § 7923.105(a) 62

Gov. Code § 7923.110(a) 35, 62

Gov. Code § 7923.115(a) 35

Gov. Code § 7923.625 28

Gov. Code § 34090(d) 60

Pen. Code § 832.7(a) 39

Pen. Code § 832.7(b) 28

CALIFORNIA CONSTITUTION

Cal. Const. art. I, § 3(b) ..... *passim*

Cal. Const. art. I, § 3(b)(1) ..... *passim*

Cal. Const. art. I, § 3(b)(2) ..... *passim*

Cal. Const. art. I, § 3(b)(7) ..... *passim*

CALIFORNIA RULES OF COURT

Cal. R. Ct. 8.520(f)(4) 22

FEDERAL STATUTES

Document received by the CA Supreme Court.

5 U.S.C. § 552, *et seq.* (Freedom of Information Act ["FOIA"]) ... 27

OTHER AUTHORITIES

Benjamin Mueller, *Health Officials Tried to Evade Public Records Laws, Lawmakers Say* (May 28, 2024) N.Y. Times <https://www.nytimes.com/2024/05/28/health/nih-officials-foia-hidden-emails-covid.html> 46

Claire Trageser, *Advocates alarmed by use of private messaging app by San Diego public officials* (May 25, 2022) KPBS <https://www.kpbs.org/news/local/2022/05/25/advocates-alarmed-by-use-of-private-messaging-app-by-san-diego-public-officials> 43

Cory Weinberg, *How Telegram Offers Way Around Public Records Laws* (Mar. 16, 2016) The Information <https://www.theinformation.com/articles/how-telegram-offers-way-around-public-records-laws> 42

Geoffrey King, *Court rules Vallejo illegally destroyed evidence in police killings* (June 27, 2023) Open Vallejo <https://openvallejo.org/2023/06/27/court-rules-vallejo-illegally-destroyed-evidence-in-police-killings/> 46

Jason Henry, *El Monte officials used 'disappearing message' app Signal to coach cannabis applicant* (Aug. 31, 2023) San Gabriel Valley Tribune <https://www.sgvtribune.com/2023/08/28/el-monte-officials-used-disappearing-message-app-to-coach-cannabis-applicant/> 44

Joe Rivano Barros, *Mayor Breed is deleting texts. Legal experts say that's a problem.* (Sept. 16, 2024) Mission Local https://missionlocal.org/2024/09/mayor-breed-is-deleting-texts-legal-experts-say-thats-a-problem/ 43

Joseph Geha, *Former San Jose mayor must explain how he complied with records law* (July 16, 2023) San Jose Spotlight https://sanjosespotlight.com/former-san-jose-mayor-sam-liccardo-

Document received by the CA Supreme Court.

must-explain-how-he-complied-with-california-public-records-law/ 48

Joseph Geha & Jana Kadah, *Ex San Jose mayor and city violated the law, judge rules* (Aug. 29, 2023) San Jose Spotlight https://sanjosespotlight.com/ex-san-jose-mayor-sam-liccardo-and-city-violated-the-law-judge-rules-california-public-records-act/ 48

Karl Olson, Why does London Breed keep illegally deleting her text messages? (Sept. 20, 2024) The San Francisco Standard <https://sfstandard.com/opinion/2024/09/20/why-breed-illegally-deletes-texts/> 43

Laurence Du Sault & Geoffrey King, *Senior officials ordered destruction of Vallejo police shooting evidence* (Feb. 5, 2023) Open Vallejo <https://openvallejo.org/2023/02/05/vallejo-destroyed-evidence-of-police-killings/> 45

Op. Ark. Atty. Gen. 2001-340 (2001), *available at* <https://ag-opinions.s3.amazonaws.com/uploads/2001-340.pdf> 76

Public Access Opinion 19-013, 2019 Ill. Op. Atty. Gen. No. 13 (2019), *available at* < https://illinoisattorneygeneral.gov/Open-And-Honest-Government/PAC/Opinions/> 75

Simon Boazman & Jeremy Young, *Exclusive: US police 'using Tiger Text app to conceal evidence'* (Sept. 18, 2018) Al Jazeera <https://www.aljazeera.com/news/2018/9/18/exclusive-us-police-using-tiger-text-app-to-conceal-evidence> 44

Tran Nguyen, *San Jose Spotlight is suing San Jose, Mayor Liccardo over private email use* (Feb. 3, 2022) San Jose Spotlight https://sanjosespotlight.com/san-jose-spotlight-is-suing-san-jose-mayor-liccardo-over-private-email-use/ 49

Document received by the CA Supreme Court.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to California Rule of Court 8.520(f), proposed *amici curiae* First Amendment Coalition, LA Times Communications LLC, The McClatchy Company LLC, California Newspapers Partnership, Californians Aware, Electronic Frontier Foundation, Freedom of the Press Foundation, Society of Professional Journalists, and Reporters Committee for Freedom of the Press respectfully request leave to file the attached brief as *amici curiae* in support of Petitioner Law Foundation of Silicon Valley ("Petitioner" or "LFSV").

INTERESTS OF *AMICI*

Proposed *amici* are all news media organizations and media and government transparency advocates who regularly use the California Public Records Act, Gov. Code §§ 7920.000 *et seq.* ("Public Records Act" or "CPRA"), to investigate and inform their readers and the public about matters of public concern. In doing so, they act as "guardian[s] for the public," *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774, and effectuate the Public Records Act by "verify[ing]" government "accountability"; "check[ing] . . . the arbitrary exercise of official

Document received by the CA Supreme Court.

power and secrecy in the political process"; and " 'expos[ing] corruption, incompetence, inefficiency, prejudice, and favoritism,' " *Int'l. Fedn. of Prof'l & Tech. Engs., Local 21, AFL-CIO v. Superior Court* ("*IFPTE*") (2007) 42 Cal.4th 319, 328-329, 333 (quoting *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1211, fn. 28).

The **First Amendment Coalition** ("FAC") is a nonprofit organization dedicated to defending freedom of speech, freedom of the press, and the people's right to know. FAC provides legal information and consultations regarding access rights under state and federal law. FAC regularly files amicus briefs in state and federal courts and engages in litigation to protect and expand the rights of the press and public to transparency in government.

Los Angeles Times Communications LLC ("Los Angeles Times") publishes the *Los Angeles Times*, the largest metropolitan daily newspaper circulated in California. Los Angeles Times maintains the website www.latimes.com, a leading source of national and international news. Los Angeles Times appears as one of the key news sources in Apple News+ and other large digital distribution channels, reaching millions of readers around California and the country. Los Angeles Times

Document received by the CA Supreme Court.

frequently advocates for public access to records and meetings under laws such as the CPRA. Many published decisions in California arose from Los Angeles Times' advocacy on key public records issues, including this Court's ruling in *Long Beach Police Officers Assoc. v. City of Long Beach (Los Angeles Times Communications LLC)* (2014) 59 Cal.4th 59, 64, that public agencies generally must disclose the names of law enforcement officers involved in shootings, and this Court's decision in *Commission on Peace Officers Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 297-298, 301, recognizing the "public's legitimate interest in the identity and activities of peace officers," and finding that the names of most such officers are public and not protected by the peace officer confidentiality laws known as the *Pitchess* statutes. Los Angeles Times is concerned that the CPRA will cease to function properly if the Court were to affirm the decision claiming public records requesters have no recourse when a public agency destroys public records rather than producing them. The remedies provision of the CPRA (Government Code Section 7923.000) states explicitly that declaratory relief is available to enforce a member of the public's rights to inspect or receive public records, and that

Document received by the CA Supreme Court.

language is broad enough to encompass declaratory relief that an agency must produce rather than destroy public records.

The McClatchy Company, LLC ("McClatchy") publishes thirty daily newspapers and provides award-winning news coverage to communities throughout the United States. Headquartered in Sacramento, McClatchy publishes four California dailies: *The Sacramento Bee* (est. 1857 as "The Daily Bee"), *The Fresno Bee*, *The Modesto Bee*, and *The San Luis Obispo Tribune*. The work of journalists from McClatchy's publications has been honored with many awards, including more than fifty Pulitzer Prizes. McClatchy regularly relies on the Public Records Act to investigate and inform its readers about matters of public interest.

California Newspapers Partnership, dba Bay Area News Group and Southern California News Group, publishes daily newspapers throughout California, including *The Orange County Register*, *The Press-Enterprise*, *San Bernardino Sun*, *Long Beach Press-Telegram*, *East Bay Times*, *Marin Independent Journal*, *Santa Cruz Sentinel*, *Monterey Herald, Times Standard*, *Lake County Record-Bee*, *Ukiah Daily Journal*, *Times-Herald*; San Jose Mercury News LLC, dba *The Mercury News*; and the

Document received by the CA Supreme Court.

San Diego Union Tribune. Each of the aforementioned newspapers regularly relies on the CPRA as a tool for gathering information for the dissemination to the public. Therefore, faithful compliance with the provisions of the CPRA and corresponding constitutional provisions governing access to public records is imperative to their missions.

Californians Aware ("CalAware") is a nonpartisan, non-profit advocacy group with a board composed of journalists, current and former government officers and employees, and public interest advocates. Its mission is to foster the improvement of, compliance with, and public understanding of open government laws throughout the State of California.

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 30,000 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. This includes

Document received by the CA Supreme Court.

a 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 CPRA. (*ACLU Found. of S. Cal. v. Superior Court* (2017) 3 Cal.5th 1032.) EFF has also served as *amicus curiae* 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. Superior Court* (2017) 2 Cal.5th 608 and *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157.

The **Reporters Committee for Freedom of the Press** was founded by journalists and media lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Freedom of the Press Foundation ("FPF") is a nonprofit organization that protects, defends, and empowers public-interest journalism. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press

Document received by the CA Supreme Court.

through a variety of avenues. Among other things, FPF develops encryption tools, documents attacks on the press, trains newsrooms on digital security practices, and advocates for the public's right to know, including its right of access to government records under laws like the CPRA.

The **Society of Professional Journalists** ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

Lead *amicus* FAC has a wealth of experience advocating for government transparency and for construing the Public Records Act in favor of access, as Article I, section 3(b)(2) of the California Constitution requires. It has appeared as *amicus curiae* in access cases in this Court, in other California courts, and in state and federal courts throughout the nation, including all of the Public Records Act cases decided by this Court in the last twenty-five

Document received by the CA Supreme Court.

years. (*Nat'l Laws. Guild, S.F. Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488; *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608; *L.A. Cnty. Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282; *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157; *Comm'n on Peace Officer Standards & Training v. Superior Court* ("*CPOST*") (2007) 42 Cal.4th 278; *IFPTE*, *supra*, 42 Cal.4th 319; *Filarsky v. Superior Court* (2002) 28 Cal.4th 419.) FAC has also litigated many Public Records Act cases on its own behalf, including *San Jose Spotlight and First Amendment Coalition v. City of San Jose* (Santa Clara Cnty. Super. Ct.) Case No. 22CV394443, which turned, in important part, on the first question presented here.. Many of the other *amici* have appeared as *amici curiae* in previous access cases, as well, including cases before this Court.

From the perspective of proposed *amici*, the Court of Appeal's decision is inconsistent with the language and purpose of the Public Records Act and Article I, section 3(b) of the California Constitution. The Court of Appeal's decision, if not reversed, will invite agencies to overlook or destroy rather than disclose the kind of records that the public needs most – records about controversial decisions and records that reveal mis- or

Document received by the CA Supreme Court.

malfeasance in government – undermining the ability of *amici* to effectuate the public's right of access under the Public Records Act, which this Court has repeatedly held is "essential to the functioning of a democracy." (*IFPTE*, *supra*, 42 Cal.4th at p. 328; *City of San Jose*, *supra*, 2 Cal.5th at p. 615.)

For these reasons, proposed *amici*'s views will contribute meaningfully to the briefing and assist the Court in resolving the issues presented. *Amici* respectfully request that leave to file the attached brief be granted.[1]

Respectfully submitted,

Dated: September 25, 2024 **CANNATA, O'TOOLE & OLSON LLP**

By: */s/ Aaron R. Field*
Aaron R. Field

Aaron Field
Zachary Colbeth

Dated: September 25, 2024 **FIRST AMENDMENT COALITION**

By: */s/ David Loy*
David Loy

David Loy
Annie Cappetta

[1] No person or entity other than *amici curiae* and their counsel authored the attached brief or made a monetary contribution intended to fund the preparation or submission of the brief. (Cal. R. Ct. 8.520(f)(4).)

Document received by the CA Supreme Court.

Attorneys for Amici Curiae

Document received by the CA Supreme Court.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

I.
INTRODUCTION

Some 17 years ago, this Court famously declared, "Openness in government is essential to the functioning of a democracy." (*IFPTE*, *supra*, 42 Cal.4th at p. 328.) Seven years ago, in a unanimous opinion authored by Justice Corrigan, the Court brought those words into the digital age by holding that when a government official uses a "personal" electronic device to conduct public business – as many public officials increasingly do – the same rules apply and the resultant records may be public records depending on their content. (*City of San Jose*, *supra*, 2 Cal.5th at p. 614.)

In the ensuing years, government officials have continued to conduct public business on personal electronic accounts and devices. And, many public agencies and officials have continued to resist the rules of openness set forth in this Court's landmark Public Records Act opinions and in Article I, section 3(b)(2) of the California Constitution. Recent corruption scandals in such cities as Los Angeles, San Francisco, and Oakland have placed into

Document received by the CA Supreme Court.

stark relief what this Court observed in the *International Federation* case: access to public records empowers the public to "verify accountability," prevents "arbitrary" government secrecy, and "makes it possible for members of the public to expose corruption, incompetence, inefficiency, prejudice and favoritism." (*IFPTE*, *supra*, 42 Cal.4th at pp. 328-329, 333 [internal citation and quotation marks omitted].)

Respondent City of Gilroy's contentions that declaratory relief is not available to Petitioner Law Foundation of Silicon Valley ("LFSV") here, and that the Public Records Act does not require agencies to retain records after a requester has asked for them is not only contrary to the Public Records Act's plain language, but also irreconcilable with the essential policy interests that it and Article I, section 3(b) serve. Its position would invite precisely the sort of arbitrary secrecy and arbitrary exercise of government power that the Public Records Act and Article I, section 3(b) were enacted to prevent.

Gilroy argues that complying with the Public Records Act, as petitioner and *amici curiae* read it, would be too difficult and that it can't afford to do so. (See Gilroy Answer Br.) There's a simple answer to that: It is not too hard to comply with the Public

Document received by the CA Supreme Court.

Records Act and, as corruption scandals illustrate, Californians can't afford to allow public agencies *not* to comply.

The Court of Appeal's decision should be reversed. This Court should hold that declaratory relief is available in Public Records Act cases where an agency has destroyed non-exempt public records after they were requested but before they could be produced or has otherwise processed a Public Records Act request unlawfully. The Court should also hold that agencies must preserve records responsive to a Public Records Act request for three years.

II.
ARGUMENT

A. THE RIGHTS OF ACCESS TO PUBLIC RECORDS ENSHRINED IN THE PUBLIC RECORDS ACT AND ARTICLE I, SECTION 3(B) OF THE CALIFORNIA CONSTITUTION ARE ESSENTIAL TO THE FUNCTIONING OF A DEMOCRACY, AND ARE MEANT TO EMPOWER THE PUBLIC TO VERIFY ACCOUNTABILITY AND CHECK THE ARBITRARY EXERCISE OF OFFICIAL POWER AND SECRECY IN THE POLITICAL PROCESS.

This Court has repeatedly stated that the right of access enshrined in the Public Records Act, Gov. Code § 7920.000 *et seq.*, and Article I, section 3(b) of the California Constitution is

Document received by the CA Supreme Court.

"essential to the functioning of a democracy."[2] (*IFPTE*, *supra*, 42 Cal.4th at p. 328; *City of San Jose*, *supra*, 2 Cal.5th at p. 615.)

> Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.

(*IFPTE*, *supra*, 42 Cal.4th at pp. 328-329 [internal citation and quotation marks omitted]; accord. *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 13 ["People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." (internal citation and quotation marks omitted)].)

[2] "The California Public Records Act (PRA) establishes a right of public access to government records." (*Nat'l Laws. Guild, S.F. Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 492.) "Modeled after the federal Freedom of Information Act (5 U.S.C. § 552, *et seq.*), the CPRA was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies." (*Ibid.* [citing *L.A. Cnty. Bd. of Supers. v. Superior Court* (2016) 2 Cal.5th 282, 290].) "In enacting the statute in 1968, the Legislature declared this right of access to be 'a fundamental and necessary right of every person in this state' (Gov. Code § 6250) — a declaration ratified by voters who amended the California Constitution in 2004 to secure a 'right of access to information concerning the conduct of the people's business' (Cal. Const., art. I, § 3, subd. (b)(1), added by Prop. 59, Gen. Elec. (Nov. 2, 2004))." (*Ibid.* [citation omitted].)

Document received by the CA Supreme Court.

"Verify[ing] accountability" is particularly important here given the records that petitioner LFSV requested here that gave rise to the present dispute: records related to respondent City of Gilroy's ("respondent" or "Gilroy") homeless camp-clearing efforts, including video recordings captured by the body-worn cameras of Gilroy police officers. As this Court has explained:

> The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant. Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an "on the street" level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm.

(*CPOST*, *supra*, 42 Cal.4th at pp. 297-298 [internal citations and quotation marks omitted].) The enactment of SB 1421 and SB 16, which amended Penal Code section 832.7(b), and AB 748, which amended the Public Records Act's records of investigation exemption as set forth in Government Code section 7923.625, reaffirmed the importance of access to law enforcement records.

Document received by the CA Supreme Court.

To achieve the policy purposes animating the Public Records Act, the Act:

> . . . establishes a basic rule requiring disclosure of public records upon request. [Citation.] In general, it creates "a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency."

(*City of San Jose*, *supra*, 2 Cal.5th at p. 616 [citations omitted].) "Every such record 'must be disclosed unless a statutory exception is shown.' " (*Ibid.*; accord. *Sierra Club*, *supra*, 57 Cal.4th at p. 166 [all public records are subject to disclosure unless the Legislature has expressly provided to the contrary]; *IFPTE*, *supra*, 42 Cal.4th at pp. 328-329 [agency bears burden of justifying nondisclosure].)

The Public Records Act also contains a slate of carefully-crafted procedures that agencies must follow when processing Public Records Act requests, which prevent agencies from frustrating the right of access with arbitrary delays. (See *Filarsky*, *supra*, 28 Cal.4th at p. 427 [clear intent of Public Records Act was that "the determination of the obligation to disclose records requested from a public agency be made expeditiously"].) The Act provides "a streamlined and expedited process for public access to government records[.]" (*City of L.A. v.*

Document received by the CA Supreme Court.

Metro. Water Dist. of S. Cal. (2019) 42 Cal.App.5th 290, 297.) It requires agencies to make a determination on a request within ten (10) days, unless a special circumstance set forth in the Act is present and properly invoked, in which case agencies may take an additional fourteen (14) days to respond. (Gov. Code § 7922.535.) "No further delays are authorized by the statute." (*City of L.A.*, *supra*, 42 Cal.App.5th at p. 297.) It further requires that public records be disclosed "promptly." (Gov. Code § 7922.530(a).) And, it provides – consistent with the Act's general purpose of preventing arbitrary secrecy and arbitrary delay – that "[n]othing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records." (Gov. Code § 7922.500.)

The Public Records Act also states what information a determination letter must include: a response must "notify the person making the request" of the agency's "determin[ation] whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency . . . and the reasons therefor." (Gov. Code § 7922.535(a).) This means that an agency must complete a search for responsive records and determine and state whether and the extent to which they are

Document received by the CA Supreme Court.

exempt, and the statutory basis for any exemption claims, by the ten-day or 24-day response deadline. (See *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n* ("*CREW*") (D.C. Cir. 2013) 711 F.3d 180, 188-189 [Kavanaugh, J.] [holding that under similar provisions of the federal Freedom of Information Act, by the determination deadline, agencies must "gather and review the documents" and "determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents"]; *San Gabriel Tribune*, *supra*, 143 Cal.App.3d at p. 772 [holding that courts "can draw on" FOIA "for judicial construction" of the Public Records Act].) If an agency does not disclose responsive records concurrently with its determination letter, it must also "state the estimated date and time when the records will be made available." (Gov. Code § 7922.535(a).)

The Public Records Act also provides that agencies must "assist" requesters in identifying records responsive to their requests or the purpose of their requests, "[d]escribe the information technology and physical location" of responsive records," and "provide suggestions for overcoming practical barriers to access." (*Community Youth Athletic Center v. City of*

Document received by the CA Supreme Court.

National City ("*CYAC*") (2013) 220 Cal.App.4th 1385, 1424-1425 [citing former Gov. Code § 6253.1, which is now codified at Gov. Code § 7922.600].)

In *CYAC*, a well-reasoned decision that should guide this Court's analysis, the Court of Appeal held, after discussing many of these provisions, that searching for records half-heartedly based on a "feigned" or overly-literal misinterpretation of the request violates the Public Records Act. (*CYAC*, *supra*, 220 Cal.App.4th at pp. 1424-1425, 1430.) Instead, the *CYAC* court held that the Public Records Act requires agencies to search for records in a reasonably "proactive" and "diligent" way, construing the request "reasonably in light of its clear purposes" and accounting for "the reality that a requester, having no access to agency files, may be unable to precisely identify the documents sought." (*Ibid.*) Applying this rule, the Court of Appeal affirmed the trial court's declaratory judgment that the agency respondent had violated the Public Records Act by conducting a search that was not "proactive" or "diligent" – and that, like Gilroy here, allowed non-exempt responsive records to be destroyed before they could be produced to the requester. (*Id.* at p. 1430.)

Document received by the CA Supreme Court.

The *CYAC* court's decision was based in part on an insight that is also important here: an agency's "inability or unwillingness to locate" public records "ha[s] the same effect as withholding" them. (*Id.* at p. 1425.) This led the *CYAC* court to hold that agencies bear the burden of proving adequacy of search with the same kind of " ' "detailed justification" ordinarily required to withhold information.' " (*Ibid*. [quoting *ACLU of N. Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 85].)

The Public Records Act's procedures and deadlines account for a truth that is well-known to *amici*: if journalists and community members are not able to access records quickly, less information will reach interested members of the public when they are most willing and able to consider it and take action in response. As the United States Court of Appeals for the Ninth Circuit recently put it, "The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." (*Courthouse News Serv. v. Planet* (9th Cir. 2020) 947 F.3d 581, 594 [internal citations and quotation marks omitted]; accord. *Filarsky*, *supra*, 28 Cal.4th at p. 427 [clear intent of Public Records Act was that "the determination of the

Document received by the CA Supreme Court.

obligation to disclose records requested from a public agency be made expeditiously"].) Further, because delay can have "the same effect as withholding," *CYAC*, *supra*, 220 Cal.App.4th at pp. 1424, the Public Records Act's procedures and deadlines advance the same core purposes that the right of access itself does: allowing Californians to "verify accountability" and "check[ing] . . . the arbitrary exercise of official power and secrecy in the political process." (*IFPTE*, *supra*, 42 Cal.4th at pp. 328-329.)

Thankfully for requesters, who often face agency noncompliance with these rules, the Public Records Act has teeth. It provides:

> Any person may institute a proceeding for injunctive or declarative relief, or for a writ of mandate, in any court of competent jurisdiction, to enforce that person's right under this division to inspect or receive a copy of any public record or class of public records.

(Gov. Code § 7923.000.) "Whenever it is made to appear. . . that certain public records are being improperly withheld," "the court shall order the officer or other person charged with withholding the records to disclose those records or show cause why that person should not do so." (Gov. Code § 7923.100.) "If the court finds that the public official's decision to refuse disclosure is not justified under Section 7922.000 or any provision listed in Section

Document received by the CA Supreme Court.

7920.505, the court shall order the public official to make the record public." (Gov. Code § 7923.110(a).) And, if a requester "prevails in litigation" under the Public Records Act, the requester is entitled to mandatory attorney's fees and costs. (Gov. Code § 7923.115(a).)

The Public Records Act, including its deadlines, its search and determination procedures, and its declaratory relief provision, must " 'be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access' " under Article I, section 3(b)(2) of the California Constitution. (*City of San Jose*, *supra*, 2 Cal.5th at p. 617 [quoting Cal. Const., art. 1, § 3(b)(2)].)

B. THE PUBLIC RECORDS ACT MUST, AND DOES, GRANT REQUESTERS A RIGHT TO SEEK AND OBTAIN DECLARATORY RELIEF WHERE AN AGENCY DESTROYS, RATHER THAN DISCLOSES, NON-EXEMPT RESPONSIVE RECORDS.

1. The Language and Purpose of the Public Records Act Make Clear That Declaratory Relief Is Available to LFSV Here.

Established rules of statutory interpretation readily answer the first question before this Court – whether LFSV can seek and obtain a judicial declaration that Gilroy violated the Public Records Act where, after receiving LFSV's Public Records

Document received by the CA Supreme Court.

Act requests, Gilroy destroyed rather than disclosed non-exempt responsive records – in the affirmative. As this Court has explained:

> 'When we interpret a statute, "[o]ur fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. [. . .] If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." [Citation.] 'Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.' " [Citation.]

(*City of San Jose*, *supra*, 2 Cal.5th at pp. 616-617.) All of these considerations indicate that declaratory relief is available to LFSV here.

The plain meaning of the Public Records Act's enforcement provision, Gov. Code § 7923.000, resolves the issue in petitioner's favor. (See *Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155 ["It is axiomatic that in the interpretation of a statute where the language is clear, its plain meaning should be followed."].) That provision explicitly provides

Document received by the CA Supreme Court.

that a Public Records Act litigant can seek not only "injunctive" and "writ" relief, but also "declarative" relief, "to enforce that person's right under this division to inspect or receive a copy of any public record or class of public records." (Gov. Code § 7923.000.) LFSV seeks precisely the sort of relief that this language contemplates: a judicial declaration – that is, "declarative relief" – that Gilroy violated the Public Records Act by frustrating its ability to access non-exempt public records by simply destroying them rather than producing them. The notion that obtaining declaratory relief to address this sort of destruction does not constitute "enforce[ment]" of the right of access under the Public Records Act is wrong; just as fining someone for a prior unlawful act is plainly "enforcement" of the violated law, the declaratory relief that LFSV seeks is plainly "enforcement" in this case. Indeed, because Gilroy destroyed rather than disclosed the recordings at issue, declaratory relief is now *the only means of "enforcing" the Public Records Act available* to address and remediate Gilroy's decision.

Confirming that the plain language of the Public Records Act's enforcement provision forecloses Gilroy's reading of the statute, Gilroy's interpretation would make the word

Document received by the CA Supreme Court.

"declarative" in Government Code section 7923.000 surplusage. (See *Teachers' Ret. Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1028 [courts should give "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose" and "avoid an interpretation that renders any portion of the statute superfluous, unnecessary, or a nullity," because they "presume that the Legislature does not engage in idle acts" (internal citations omitted)].) Read as Gilroy proposes, the Public Records Act's "declarative" relief language would be entirely redundant with its injunctive and writ relief language – that is, declaratory relief would be available only when injunctive and writ relief are available as well – and would have no meaningful effect at all.

The purpose of the Public Records Act – empowering members of the public to "verify accountability" and preventing the "arbitrary exercise of official power and secrecy in the political process," see Part II.A, *supra* – confirms that LFSV must be, and is, entitled to seek and obtain declaratory relief here. (*IFPTE*, *supra*, 42 Cal.4th at p. 328.) Gilroy's proposed alternative reading would allow agencies to ignore the Public Records Act's processing procedures and deadlines freely, to

Document received by the CA Supreme Court.

conduct searches that are as self-servingly narrow or unreasonable as they choose, and to destroy rather than disclose responsive records with impunity.

The rule against interpreting a statute in a way that would have arbitrary and unreasonable results the Legislature did not intend is also not consistent with Gilroy's position. (E.g., *CPOST*, *supra*, 42 Cal.4th at p. 290 ["Thus, our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results."].) In *CPOST*, this Court applied this rule to hold that whether a record is exempt from disclosure under the Public Records Act because it constitutes a peace officer "personnel record" under Penal Code section 832.7(a) must turn on content, rather than location, because the location of a record is in the sole, arbitrary control of the agency. This Court explained:

> Applying these principles, we conclude that the Court of Appeal's construction of section 832.8, although consistent with the statute's language, is unreasonable because it would lead to arbitrary and anomalous results. Under the Court of Appeal's interpretation, the circumstance that a document was placed into a file that also contained the type of

Document received by the CA Supreme Court.

> personal or private information listed in the statute would render the document confidential, regardless of whether the document at issue was of a personal or private nature, and regardless of whether it was related to personnel matters. For example, as counsel for the Commission conceded at oral argument, a newspaper article praising or criticizing the particular act of an officer could be deemed confidential if placed into such a file. Also, the same type of information could be rendered confidential in one law enforcement agency if maintained in a file that also contained personal information, but would not be confidential in another agency if maintained in a different type of file. Furthermore, if records are stored in a computer in electronic form, it would be difficult, if not impossible, to determine which records are contained in the same virtual "file."

(*CPOST*, *supra*, 42 Cal.4th at pp. 290-291.) In *City of San Jose*, again partly to avoid granting agencies and officials arbitrary control over whether to disclose public records, this Court declined to interpret the Public Records Act's definition of presumptively accessible "public records" to categorically exclude records on public officials' personal electronic accounts and devices. (See *City of San Jose*, *supra*, 2 Cal.5th at pp. 624-625.)

Gilroy's position should be rejected because it would have the same type of arbitrary and unreasonable result that this Court avoided in *City of San Jose* and *CPOST*. As this Court has held and the Public Records Act itself makes clear, the Public

Document received by the CA Supreme Court.

Records Act was meant to *foreclose*, not invite, arbitrary agency secrecy. Gilroy's contention that backward-looking declaratory relief is not available collides irreconcilably with this purpose, inviting rather than discouraging arbitrary or self-interested delays, searches, omissions, and withholdings. If adopted, Gilroy's position would, among other things, encourage agencies to enact retention policies that destroy records at short intervals and incentivize unreasonable searches rather than assisting requesters in locating and obtaining the records they are seeking as the Public Records Act requires. (Gov. Code § 7922.600.)

Article I, section 3(b)(2) of the California Constitution conclusively confirms LFSV's reading of the Public Records Act and forecloses Gilroy's. (See, e.g., *Nat'l Lawyers Guild*, *supra*, 9 Cal.5th at p. 507 [holding that Article I, section 3(b) required that the Public Records Act's processing fee provisions must be construed in favor of access and confirmed that agencies may not charge requesters for redacting electronic records].) Article I, section 3(b)(2) requires that the Public Records Act, including the entitlement to "declarative" relief in its enforcement provision, be construed broadly in favor of access. It thus confirms that the Public Records Act allows the declaratory relief LFSV seeks.

Document received by the CA Supreme Court.

2. The Concern That the Court of Appeal's Holding Would Allow Agencies to Evade Disclosure by Intentionally Destroying, Rather Than Disclosing, Records That Reveal Unfavorable Truths About Their Actions on Behalf of the People They Serve Is Concrete, Not Hypothetical.

Amici's concerns about officials destroying rather than disclosing public records are based on a legion of well-documented instances in which public officials have destroyed public records to evade public scrutiny. This has occurred at all levels of government, from local to state to federal.

In 2016, The Information reported that several elected members of San Francisco's Board of Supervisors and their advisors and aides were using the ephemeral messaging app Telegram, which allows them to destroy records of conversations about public business, to avoid disclosure under the CPRA. (Cory Weinberg, *How Telegram Offers Way Around Public Records Laws* (Mar. 16, 2016) The Information <https://www.theinformation.com/articles/how-telegram-offers-way-around-public-records-laws>.) "In an interview, a San Francisco government staff member said they were encouraged to use the app by colleagues in City Hall who described it as a way

Document received by the CA Supreme Court.

to skirt the city's public records laws." (*Ibid.*) The Information reported that the staff member said that this purpose "is exactly what it's being used for," and the practice has "caught on." (*Ibid.*) Also, according to recent reporting, San Francisco Mayor London Breed has a practice of simply deleting records from her personal accounts and devices on a regular basis, categorically frustrating public access to them. (See Karl Olson, Why does London Breed keep illegally deleting her text messages? (Sept. 20, 2024) The San Francisco Standard <https://sfstandard.com/opinion/2024/09/20/why-breed-illegally-deletes-texts/>; Joe Rivano Barros, *Mayor Breed is deleting texts. Legal experts say that's a problem.* (Sept. 16, 2024) Mission Local <https://missionlocal.org/2024/09/mayor-breed-is-deleting-texts-legal-experts-say-thats-a-problem/>.)

This practice has caught on around the state too, not just in San Francisco, as reports have found officials in San Diego, Long Beach, and El Monte, using self-deleting messaging apps to intentionally avoid disclosure of public records. (Claire Trageser, *Advocates alarmed by use of private messaging app by San Diego public officials* (May 25, 2022) KPBS <https://www.kpbs.org/news/local/2022/05/25/advocates-alarmed-

Document received by the CA Supreme Court.

by-use-of-private-messaging-app-by-san-diego-public-officials>

["Miller-Sclar, who at the time was [San Diego Councilmember] Campillo's spokesperson, gave his junior colleague [a staffer in Councilmember Joe Lacava's office] some advice: download the messaging app Signal. He even sent her a download link. 'Def download signal, its (sic) preferable for me for communicating about campaign/work stuff, or of course just the tea,' Miller-Sclar wrote."]; Simon Boazman & Jeremy Young, *Exclusive: US police 'using Tiger Text app to conceal evidence'* (Sept. 18, 2018) Al Jazeera <https://www.aljazeera.com/news/2018/9/18/exclusive-us-police-using-tiger-text-app-to-conceal-evidence> ["Current and former officers from the Long Beach Police Department in Southern California have told Al Jazeera that their police-issued phones had Tiger Text installed on them. . . . Two of the officers claimed that they were also instructed by their superiors to use the app to 'have conversations with other officers that wouldn't be discoverable'."]; Jason Henry, *El Monte officials used 'disappearing message' app Signal to coach cannabis applicant* (Aug. 31, 2023) San Gabriel Valley Tribune <https://www.sgvtribune.com/2023/08/28/el-monte-officials-used-disappearing-message-app-to-coach-cannabis-applicant/> ["City

Document received by the CA Supreme Court.

Manager Alma Martinez set . . . Signal[] to delete messages after only an hour, ... Teresa Tsai of GSC Holdings, a company that failed to obtain a retail cannabis license, alleged she was directed by then-Mayor Andre Quintero and Martinez in 2019 to use Signal — and only Signal — to communicate with them 'prior to and during the application process.' "].)

Public employees in California have intentionally evaded the disclosure of not only routine communications, but also records that expose the most extreme exercises of government power, such as police killings. As Open Vallejo reported, in "January 2021, officials for the city of Vallejo intentionally — and with approval from a senior attorney for the city — destroyed key evidence in multiple police killings and one non-fatal shooting." (Laurence Du Sault & Geoffrey King, *Senior officials ordered destruction of Vallejo police shooting evidence* (Feb. 5, 2023) Open Vallejo <https://openvallejo.org/2023/02/05/vallejo-destroyed-evidence-of-police-killings/>.) "The department destroyed nearly all audiovisual and physical evidence in the six cases." (*Ibid.*) "The city destroyed the records although many were set to be disclosed under California transparency laws," and Open Vallejo had "pending public records requests" for them. (*Ibid.*) Open

Document received by the CA Supreme Court.

Vallejo also sought judicial intervention, and the court found that Vallejo had violated the CPRA by destroying the records and ordered the city not to destroy records that are the subject of current public records requests moving forward. (Geoffrey King, *Court rules Vallejo illegally destroyed evidence in police killings* (June 27, 2023) Open Vallejo <https://openvallejo.org/2023/06/27/court-rules-vallejo-illegally-destroyed-evidence-in-police-killings/>.)

The intentional destruction of public records transcends local politics. The House of Representative's Select Subcommittee on the Coronavirus Pandemic recently released a series of private emails obtained via subpoena for records of National Institutes of Health ("NIH") officials, which laid bare these officials strategizing to evade the Freedom of Information Act ("FOIA"). (Benjamin Mueller, *Health Officials Tried to Evade Public Records Laws, Lawmakers Say* (May 28, 2024) N.Y. Times <https://www.nytimes.com/2024/05/28/health/nih-officials-foia-hidden-emails-covid.html>.) The emails revealed "at least some N.I.H. officials deleted messages and tried to skirt public records laws in the face of scrutiny over the pandemic." (*Ibid.*)

Document received by the CA Supreme Court.

> "I learned from our foia lady here how to make emails disappear after i am foia'd but before the search starts, so i think we are all safe," Dr. David Morens, a former senior adviser to Dr. Fauci, wrote in February 2021. That email chain included Dr. Gerald Keusch, a scientist and former N.I.H. official, and Peter Daszak, the president of EcoHealth Alliance, a virus-hunting nonprofit group whose work with Chinese scientists has drawn scrutiny from lawmakers.
>
> "Plus i deleted most of those earlier emails after sending them to gmail," Dr. Morens added, referring to his personal Gmail account.

(*Ibid.*) With the assistance of one of the very staff charged with responding to FOIA requests, Dr. Morens says he learned how to exploit retention loopholes to destroy public records after receiving a request. (*Ibid.*) Here, Gilroy invites this Court to read the Public Records Act so narrowly that it would create similar loopholes that could be exploited to evade transparency and accountability to the public.

A case recently litigated by *amicus curiae* First Amendment Coalition, *San Jose Spotlight and First Amendment Coalition v. City of San Jose* (Santa Clara Cnty. Super. Ct.) Case No. 22CV394443, illustrates how the Court of Appeal's decision will undermine the Public Records Act if not reversed. With *San José Spotlight*, the First Amendment Coalition sued the City of San José for failing to comply with record requests that sought

Document received by the CA Supreme Court.

information showing the extent to which the City of San Jose's former mayor was doing public business on his personal accounts or devices, an issue addressed by this Court in *City of San Jose*, *supra*, 2 Cal.5th 608. The respondents not only improperly withheld many records, but also failed to locate and disclose plainly public business-related text messages referred to in other documents. They later repeatedly failed to meaningfully explain to the Court how they conducted their search of personal accounts and devices for responsive records. In the end, in addition to ordering respondents to disclose additional records, the Superior Court held that the City of San Jose had not conducted an adequate search and entered a declaratory judgment in favor of the petitioners and against respondents. (See Joseph Geha & Jana Kadah, *Ex San Jose mayor and city violated the law, judge rules* (Aug. 29, 2023) San Jose Spotlight <https://sanjosespotlight.com/ex-san-jose-mayor-sam-liccardo-and-city-violated-the-law-judge-rules-california-public-records-act/>; Joseph Geha, *Former San Jose mayor must explain how he complied with records law* (July 16, 2023) San Jose Spotlight <https://sanjosespotlight.com/former-san-jose-mayor-sam-liccardo-must-explain-how-he-complied-with-california-public-

Document received by the CA Supreme Court.

records-law/>; Tran Nguyen, *San Jose Spotlight is suing San Jose, Mayor Liccardo over private email use* (Feb. 3, 2022) San Jose Spotlight <https://sanjosespotlight.com/san-jose-spotlight-is-suing-san-jose-mayor-liccardo-over-private-email-use/>.) The declaratory judgment held respondents accountable for violating the Public Records Act's processing requirements and sent a strong message to the City of San Jose, the former Mayor, and the public that improperly processing a request has legal consequences.

3. LFSV's Claims for Declaratory Relief Are Not Moot, and, in Any Event, Federal and State Cases Interpreting the Mootness Doctrine Make Clear That the Doctrine Does Not Preclude Declaratory Relief Here.

Under California law, a case is moot only "when the decision of the reviewing court 'can have no practical impact or provide the parties effectual relief.' " (*MHC Operating Ltd. P'ship v. City of San Jose* (2003) 106 Cal.App.4th 204, 214 [citation omitted].) Here, LFSV's claim for declaratory relief is live because such a judgment would still have the practical impact of defining the public and LFSV's right to access Gilroy's bodycam records that are scheduled for destruction after Gilroy receives a public records request for them.

Document received by the CA Supreme Court.

Dicta in *County of Santa Clara* state that "[t]he CPRA provides *no* judicial remedy for any other person or entity or a remedy that may be utilized for any purpose other than to determine whether a particular record or class of records must be disclosed," but the opinion states this in the context of allowing a taxpayer claim to proceed under a separate statute, even where it alleged illegal policies and practices related to fulfilling public records requests. (*County of Santa Clara v. Superior Ct.* (2009) 171 Cal.App.4th 119, 127.) In other words, the court decided the issue, based on this dicta, to *maximize* public access to records and ensure judicial determination of allegedly illegal public-records practices. (See *ibid.*) The Court cannot constitutionally apply that dicta in this context, where it would obstruct the public's right of access to Gilroy's records – and it is, of course, not binding on this Court in any event. (See Cal. Const. art. I, § 3(b)(2) ["A statute, court rule, or other authority . . . shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."].)

While the Court of Appeal's reference to *Hajro* is accurate insofar as the case states "after the agency produces all non-exempt documents and the court confirms the agency's proper

Document received by the CA Supreme Court.

invocation of an exemption, the specific FOIA claim is moot because the injury has been remedied," it ignored the complete framework articulated in *Hajro*, under which this case is not moot. (See *City of Gilroy v. Superior Court* (2023) 96 Cal.App.5th 818, 832 [quoting *Hajro v. U.S. Citizenship & Immigration Servs.* (9th Cir. 2016) 811 F.3d 1086, 1103].)

The Ninth Circuit made clear in *Hajro* that while a "specific FOIA claim is moot," a "pattern or practice" FOIA claim is not:

> [W]here a plaintiff alleges a pattern or practice of FOIA violations and seeks declaratory or injunctive relief, *regardless of whether his specific FOIA requests have been mooted*, the plaintiff has shown injury in fact if he demonstrates the three following prongs: (1) the agency's FOIA violation was not merely an isolated incident, (2) the plaintiff was personally harmed by the alleged policy, and (3) the plaintiff himself has a sufficient likelihood of future harm by the policy or practice. . . . In other words, a pattern or practice claim is not necessarily mooted by an agency's production of documents. [*Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (1988)] (holding that a pattern or practice claim is viable "[s]o long as an agency's refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials").

(*Hajro*, *supra*, 811 F.3d at p. 1103.) Here, Gilroy's violation of the CPRA was not an isolated incident. Gilroy failed to search for,

Document received by the CA Supreme Court.

review, and preserve responsive records until it received a threat of litigation for at least four different requests that LFSV submitted — those dated October 9, 2018, October 15, 2018, November 8, 2018, and May 20, 2019. (*See Hajro*, 811 F.3d at p. 1104 ["Plaintiffs have a number of ways to prove that the agency's FOIA violation was not an isolated event. For example, a plaintiff can provide evidence that he has been subjected to a FOIA violation more than once."].) Gilroy has given no indication that it will discontinue its practice of failing to search for, review, or preserve responsive records until after a threat of litigation. Therefore, under the reasoning in *Hajro*, LFSV properly alleges a pattern-or-practice claim that remains live.

Furthermore, even if the Court determines this case is moot, it remains appropriate for the Court to decide this case as an issue of broad public interest that is likely to recur. "The appellate court has the inherent power to retain a moot case under three discretionary exceptions: (1) the case presents an issue of broad public interest that is likely to recur; (2) the parties' controversy may recur; and (3) 'a material question remains for the court's determination.'" (*Golden Door Props., LLC v. Superior Court* (2020) 53 Cal.App.5th 733, 760 [citation

Document received by the CA Supreme Court.

omitted]; see also *Rosales v. Depuy Ace Med. Co.* (2000) 22 Cal. 4th 279, 282 [reviewing moot case in light of the "well-established line of judicial authority recognizing an exception to the mootness doctrine, and permitting the court to decline to dismiss a case rendered moot by stipulation of the parties where the appeal raises issues of continuing public importance"].)

California courts have found that disputes over the applicability of the Public Records Act to past actions are likely to recur and present issues of broad public interest wherever the agency has refused to concede its position. In *Cook v. Craig* (1976) 55 Cal.App.3d 773, 779–780, California Highway Patrol ("CHP") voluntarily disclosed the information sought while a CPRA case was pending. However, given CHP's position "that it has no legal obligation to disclose these procedures, and its voluntary disclosure only after litigation was commenced," the court could not "say that the dispute will not recur." (*Id.* at p. 780.) "In such circumstances, especially where, as here, the issue is one affecting the public generally, the courts need not accept mootness." (*Ibid.*) Accordingly, the court declined to dismiss *Cook* at moot. (*Ibid.*; see also *Golden Door Props., LLC*, *supra*, 53 Cal.App.5th at pp. 760–761 [relying on *Cook* and exercising

Document received by the CA Supreme Court.

discretion to decide issue of whether email destruction violated the California Environmental Quality Act, even if moot, because it was likely to recur as the County maintained it could lawfully destroy the emails]; see also, e.g., *F.B.I. v. Fikre* (2024) 601 U.S. 234, 242 [reaffirming the longstanding federal rule that "a defendant's voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur' " – a "formidable burden" because, "[w]ere the rule more forgiving, a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off; it might even repeat "this cycle" as necessary until it achieves all of its allegedly "unlawful ends"] [citations and quotation marks omitted].)Similarly in *Citizens Oversight, Inc. v. Vu* (2019) 35 Cal.App.5th 612, 615, which Gilroy relies upon to contend this case is moot, the court held that "[p]ublic disclosure of ballots is an important issue of public interest and the question of access will likely recur" with future requests for the same category of records, given that the agency had not changed its position that it may destroy those ballots 22 months after an election. It therefore invoked the public-interest mootness exception to resolve the case, even

Document received by the CA Supreme Court.

though the requested records no longer existed. (*Ibid.*) Like the agencies in *Cook* and *Citizens Oversight*, Gilroy has refused to concede that its practice of categorically exempting, failing to search, and deleting bodycam footage, even after a public records request is submitted, violates the CPRA. (*See* Gilroy Answer Br.) In its reply brief, LFSV makes clear that it may seek bodycam footage from Gilroy in the future. But without the Court ruling on its declaratory judgment claim, Gilroy "will continue to destroy responsive records before LFSV or any other member of the public could obtain review from the Superior Court." (LFSV Reply Br. at p. 30 n.4.) Thus, the controversy is likely to recur between the parties, or between Gilroy and other members of the public, yet evade review. Access to police bodycam footage is also a matter of great public importance, as it allows the public to assess the conduct of its business, including for abuses of police power. (See Part II.A, *supra*.) As such, the Court should hold that the case is not moot.

4. Cases from Federal and State Jurisdictions Interpreting Other Access Laws Confirm That Declaratory Relief Should Be, and Is, Available to Determine Applicability of the CPRA to Past Conduct.

Document received by the CA Supreme Court.

Several states have confirmed that declaratory relief must remain available to determine the applicability of open-records laws to past conduct, even after all requested records are produced, in order to effectuate the people's right of access. For example, the Washington Supreme Court held that "intervening disclosure of the documents did not moot judicial review," because "[s]ubsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time." (*Spokane Research & Defense Fund v. City of Spokane* (Wash. 2005) 117 P.3d 1117, 1124–1125.

Similarly, in North Carolina, "[w]here there is still outstanding requested relief that could alter the legal relationship between the parties and have a practical effect on the dispute between the parties, the case is not moot." (*Gray Media Grp., Inc. v. City of Charlotte* (N.C. Ct. App. 2023) 892 S.E.2d 629, 636.) Because of this, even after an agency produced all requested records, the North Carolina Court of Appeals held that a "declaratory judgment on the merits [still] has the practical implication of defining the public's right to access records created by a public official but possessed solely by a third

Document received by the CA Supreme Court.

party . . . and would remove any uncertainty on that issue." (*Ibid.*) Thus, "this issue is not moot." (*Ibid.*) The North Carolina court went even further, holding "although the controversy is not moot, we are, alternatively, justified in exercising our discretion to consider the question because the issue is capable of repetition yet evading review." (*Id.* at p. 637.) Here, LFSV's claim for declaratory relief is live because such a judgment would still have the "practical implication of defining the public's right to access records" that the agency never reviewed and scheduled destruction of, despite a pending, disputed records request. (See *id.* at p. 636.) As in *Gray Media*, the Court is also justified to rule on LFSV's claim for declaratory judgment, in the alternative, as an issue that is capable of repetition yet evading review, see Part.II.B, *supra*.

Likewise, the Florida Court of Appeal held that, even where all requested records were produced and a claim for production of records is moot, an "appellee has an available remedy by injunction or by way of declaratory judgment" to determine whether local policy violated the state open-records law because the "availability of public records for inspection is and will continue to be a unique issue that deserves an

Document received by the CA Supreme Court.

expeditious determination if the public records law is to have meaning." (*Roberts v. News-Press Pub. Co.* (Fla. Dist. Ct. App. 1982) 409 So.2d 1089, 1092.) In that case, the plaintiff-appellee even failed to plead a claim for such declaratory relief, but the court still ruled on it because of the importance of records-access issues and because the spirit of the state constitution suggested "that no cause be dismissed because an improper remedy has been sought." (*Ibid.*)

C. THE PUBLIC RECORDS ACT REQUIRES AGENCIES TO PRESERVE RESPONSIVE RECORDS WITHHELD AS EXEMPT BEFORE, AND *A FORTIORI* AFTER, A PUBLIC RECORDS ACT LAWSUIT IS THREATENED AND FILED.

1. Requiring Agencies to Preserve Rather Than Destroy Responsive Records Is Necessary to Effectuate the Purpose of the Public Records Act.

Requiring agencies to preserve, rather than destroy, responsive public records that they withhold as exempt – at least until the statute of limitations for challenging the withholding expires – is essential to effectuating the purpose of the Public Records Act. It is also necessary to effectuate the PRA's explicit rights to judicial enforcement and *in camera* review, where appropriate in litigation.

Document received by the CA Supreme Court.

A threshold issue in any CPRA case is whether the agency has identified or disclosed all requested records that "can be located with reasonable effort." (*Cal. First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.) Apart from accounting for all responsive records, the agency must also prove that each withheld record qualifies for an exemption. (Gov. Code § 7922.000; *IFPTE*, *supra*, 42 Cal.4th at p. 329 ["The party seeking to withhold public records bears the burden of demonstrating that an exception applies."].) "Conclusory or boilerplate assertions that merely recite statutory standards are not sufficient." (*ACLU of N. Cal.*, *supra*, 202 Cal.App.4th at pp. 82-83.) An agency also cannot carry its burden with "speculative, self-serving opinions designed to preclude the dissemination of information to which the public is entitled." (*Cal. State Univ., Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 835.)

Given the foregoing and in order to provide a true right of access to public records, the right must endure and exist for a sufficient period of time in order to allow the requester to make the request and, if need be, to obtain judicial review. This is especially so when public records have already been isolated and

Document received by the CA Supreme Court.

identified by a public agency as responsive to a particular CPRA request. Allowance of the destruction of public records without allowing for that necessary and critical period of time is contrary to the PRA's entire statutory scheme, as well as the California Constitution. It is also antithetical to the PRA's purpose, which is to ensure "openness in government" and to provide "checks against the arbitrary exercise of official power and secrecy in the political process." (*IFPTE*, 42 Cal.4th at pp. 328-329.) A government without check and balances, and without the accountability and transparency that the CPRA requires, is a government guaranteed to not work for the people of California.

The destruction of records that the Court of Appeal's decision would allow for would turn the CPRA on its head and send a message that rather than "openness in government is essential to the functioning of a democracy," *IFPTE*, *supra*, 42 Cal.4th at p. 328, "destruction of records is essential to the functioning of a bureaucracy." That is not, and should not, be the law. It would give officials a "get out of jail free" card when they destroy public records in violation of, for example, Government Code sections 6200 and 34090(d). It would also leave public agencies ultimately unaccountable, free to destroy and rid

Document received by the CA Supreme Court.

themselves of public records that they may not want the public to ever see.

The argument for an agency not having to preserve public records would render the CPRA toothless. "[P]ublic access makes it possible for members of the public 'to expose corruption, incompetence, inefficiency, prejudice and favoritism.'" (*IFPTE*, *supra*, 42 Cal.4th at p. 333.) If a public official can delete or destroy records and leave office and thereby prevent members of the public from learning about what he or she did, then public officials could theoretically destroy evidence of corrupt or illegal communications (whether it be concerning bribes, kickbacks, or the like), and prevent the public from finding out about the corrupt exchange simply by deleting the record. That isn't, and shouldn't be, the law. As our unanimous Supreme Court explained in *City of San Jose*, 2 Cal.5th at p. 625, if public officials could evade the CPRA simply by hiding, deleting, or destroying public records, "government officials could hide their most sensitive, and potentially damning, discussions[.]"

Furthermore, requiring agencies to preserve responsive records also effectuates, not only the PRA's purpose, but the right of judicial enforcement because if the agency has not carried its

Document received by the CA Supreme Court.

burden of proof under the PRA, "the court *shall* order" the agency "to make the record[s] public." Gov. Code § 7923.110(a) (emphasis added). Requiring preservation of records also effectuates the right under the CPRA of having the court conduct an *in camera* review of withheld documents, where appropriate, in litigation. (See Gov. Code § 7923.105(a); Evid. Code § 915; *Register Div. of Freedom Newspapers v. County of Orange* (1984) 158 Cal.App.3d 893, 901.) Without preservation of public records, all of these purposes and rights under the CPRA could be destroyed and the CPRA rendered largely meaningless. Thus, to give effect and meaning to the CPRA (and the California Constitution), it is necessary that public agencies preserve public records for a sufficient amount of time, and particularly in cases in which it is withholding responsive documents under the CPRA that pertain to an active and ongoing CPRA request, so as to afford an opportunity for meaningful judicial inquiry and review.

2. The Court of Appeal's Ruling on Preservation Would, As with Declaratory Relief, Have Arbitrary and Unreasonable Results That the Legislature Did Not Intend.

The Court of Appeal's ruling on preservation would, as with declaratory relief, have arbitrary and unreasonable results that

Document received by the CA Supreme Court.

the Legislature did not intend. Without a ruling on preservation of public records, agencies could simply destroy responsive records that they claim are exempt immediately, and thereby prevent their disclosure entirely and without consequence. Such an interpretation would flout California law (including the CPRA) and the California Constitution, allowing public agencies to essentially deny access to public records in an arbitrary, unreasonable, and frankly lawless manner – all without consequence or public recourse.

A public record is broadly defined as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Gov. Code § 7920.530(a). The requirement that a record relate to the conduct of the public's business is broadly construed and rarely contested. (See, e.g., *Cal. State Univ. v. Superior Court* (2001) 90 Cal.App.4th 810, 824-25; *San Gabriel Tribune*, *supra*, 143 Cal.App.3d at p. 774 ["This definition is intended to cover every conceivable kind of record that is involved in the governmental process." (citations omitted)].) Indeed, "Generally, any 'record . . . kept by an officer because it is necessary or convenient to the

Document received by the CA Supreme Court.

discharge of his official duty . . . is a public record.' " (*City of San Jose*, *supra*, 2 Cal.5th at p. 618 [citing *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 340 and *People v. Purcell* (1937) 22 Cal.App.2d 126, 130].)

California courts, repeatedly and consistently under the PRA, have indicated the importance of preserving public records, and have been willing to grant relief based upon that concept. For example, in *Community Youth Athletic Center*, the Court of Appeal stated that: "Even though the City was not found to be intentionally obstructionist, neither was it sufficiently proactive or diligent in making a reasonable effort to identify and locate the raw crime data. The trial court was justified in concluding the City failed to meet its disclosure duties under the PRA." (*CYAC*, *supra*, 220 Cal.App.4th at p. 1430.) The Court of Appeal added that the City had an obligation to "facilitate a reasonable effort to locate and release the information." (*Ibid.*) A requirement that City officials preserve and not delete public records, particularly when records are claimed as exempt under a CPRA request, is entirely consistent with *Community Youth Athletic Center* and with the statutory requirement that agencies assist requesters in obtaining access to records. (See Gov. Code § 7922.600(a)

Document received by the CA Supreme Court.

[requiring that public agencies "[a]ssist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated" and "[p]rovide suggestions for overcoming any practical basis for denying access to the records or information sought"].)

Similarly, in *Galbiso v. Orosi Public Utility Dist.*, the Court of Appeal found a violation of the CPRA when an agency required a requester to leave the premises: "OPUD's practice of making Galbiso leave the premises when she sought public records effectively barred *any* inspection of records." (*Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1088 [emphasis in original].) Here, similarly, the position that a public agency may delete public records without accountability potentially, and effectively, bars any inspection of documents and violates the PRA.

The preservation requirement is implicit within the PRA, and as noted *supra*, fundamentally important to effectuating its purpose and to preventing arbitrary and unreasonable results. (See *supra* Part II.C.1; see also *Kim v. Reins Int'l California, Inc.* (2020) 9 Cal.5th 73, 87 [explaining that courts "do not construe statutes in isolation, but rather read every statute with reference

Document received by the CA Supreme Court.

to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness"] [internal quotation marks omitted; citing *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276]); *Comm. to Relocate Marilyn v. City of Palm Springs* (2023) 88 Cal.App.5th 607, 627 [explaining that one must "avoid a construction that would lead to unreasonable, impractical, or arbitrary results"] [citation and internal quotation marks omitted]; *Lampley v. Alvares* (1975) 50 Cal.App.3d 124, 128 ["Where a statute is susceptible of two constructions, one leading to mischief or absurdity, and the other consistent with justice and common sense, the latter must be adopted."] [citation omitted].) Indeed, the CPRA even states: "Nothing in this division shall be construed to permit an agency to delay or obstruct the inspection or copying of public records." (Gov. Code § 7922.500.) The height of obstruction of public records is their destruction. (See *ibid.*)

Allowing the determination of which documents and types of documents are destroyed and which preserved to be left up to an arbitrary process within each public agency, without regard to the CPRA or to CPRA requests made by members of the public, is inconsistent with the CPRA and with the goal of providing the

Document received by the CA Supreme Court.

public with effective, regular access to public records. (See *IFPTE*, *supra*, 42 Cal.4th at p. 336 ["Whether or not a particular type of record is exempt should not depend upon the peculiar practice of the government entity at issue."].) Thus, a preservation requirement – of at least some kind – is implicit in the CPRA. (See *ibid.*; see also *Kim*, *supra*, 9 Cal.5th at p. 87; *Comm. to Relocate Marilyn*, *supra*, 88 Cal.App.5th at p. 627.)

That courts and CPRA requesters be allowed to review the basis for the withholding of responsive records is a necessary part of the PRA, and this is particularly the case given the mandate within California law that the CPRA be broadly construed in favor of access to public records. (See, e.g., Cal. Const., art. I, § 3(b)(1)-(2), (7).) It is also consistent with this Court's rejection of allowing public agencies to "evade public scrutiny" regarding public records by finding ways of circumventing the public's "presumptive right of access." (See *City of San Jose*, *supra*, 2 Cal.5th at pp. 616, 624-625.)

3. At a Minimum, Documents Must Be Preserved When Litigation Related to Those Documents Is Threatened and *a Fortiori* Once Litigation Related to Those Documents Has Commenced.

Document received by the CA Supreme Court.

Even if the preservation of public records is not mandated without limit under the PRA, a preservation requirement must exist in at least some capacity under rules pertaining to the preservation of records in litigation. At a minimum, public records must be preserved when litigation related to those records is threatened and *a fortiori* once litigation related to those records has commenced. To effectuate the purpose of the PRA, the earlier the requirement is imposed, the better – and, conversely, the later the requirement is imposed, the worse. (See *supra* Part II.C.1.)

Indeed, once a public agency reviews public records and makes a determination as to which will be withheld, allowing that agency to then destroy such records (and especially when litigation is threatened or has commenced), would be to allow the executive agency to supplant the role of the judge and, indeed, judiciary as a whole. Aside from raising serious separation-of-powers concerns between the executive and judicial branches of our state government, this would also effectively allow the agency itself to become judicial officer in its own case, making determinations (including potentially self-serving and/or corrupt determinations) as to whether records at issue are destroyed

Document received by the CA Supreme Court.

(and, as a result, never produced) or whether they will be preserved.

The approach favoring preservation of public records under the CPRA is also consistent with the Civil Discovery Act, which applies to petitions for writ of mandate, like CPRA actions. (See *Golden Door Properties, LLC*, *supra*, 53 Cal.App.5th at p. 777.) It is also consistent with the Civil Discovery Act's prohibition of the destruction of evidence after litigation has commenced. (See *Cedars-Sinai Med. Ctr. v. Superior Ct.* (1998) 18 Cal.4th 1, 12 [stating that "[d]estroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery"]; *Victor Valley Union High Sch. Dist. v. Superior Ct. of San Bernardino Cnty.* (2023) 91 Cal.App.5th 1121, 1139 [same].)

4. Article I, Section 3(b) of the California Constitution Confirms That The Public Records Act Requires Agencies to Retain Records They Contend Are Responsive, and *a Fortiori* Requires That They Retain Records When Litigation Is Threatened or Has Commenced.

Article I, section 3(b) of the California Constitution confirms that the Public Records Act requires agencies to retain records that they contend are responsive, and *a fortiori* requires

Document received by the CA Supreme Court.

that they retain records when litigation is threatened or has commenced. The people have a constitutional "right of access to information concerning the conduct of the people's business," Cal. Const. art. I, § 3(b)(1), and "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code § 7921.000.) The government may not "decide what is good for the people to know and what is not good for them to know." (Gov. Code § 54950.) Further, as stated above, Article I, section 3(b)(1) of the California Constitution states that: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const. art. I, § 3(b)(1).) This express right of access affirms the principle that agencies have an obligation to retain responsive public records and to make such records open to the public. (See *ibid.*) This is especially the case when litigation has commenced or is likely to commence because at that point the withheld records are unquestionably at issue, and a judicial determination must be made as to whether and to what extent such records shall be made public. (See *ibid.*)

Document received by the CA Supreme Court.

To deny the existence of a records preservation and retention requirement would be to eviscerate the public's fundamental right to access public records, as stated in Article 1, section 3(b)(1) of the California Constitution. (See Cal. Const. art. I, § 3(b)(1).) This is because a "right of access" is no right at all without the actual public records and "writings of public officials and agencies" that have been preserved and retained by those officials and agencies. (See *ibid.*) Indeed, without retention, the right of access is merely an empty shell – devoid of all practical meaning and consequence. (See *ibid.*)

Article I, section 3(b)(2) of the California Constitution is also instructive, stating: "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (Cal. Const. art. I, § 3(b)(2).) Section 3(b)(2) clearly indicates that *broad* interpretation of statutes is warranted to "further[] the

Document received by the CA Supreme Court.

people's right of access" and *narrow* construction is warranted when "limit[ing] the right of access." The Court of Appeal's position, however, flips this concept on its head – employing a broad interpretation of a public agency's ability to destroy public records under California statutes and a narrow interpretation of the mandate within the Public Records Act and California Constitution that public access to public records be made paramount and of the utmost importance in preserving democracy and public agency accountability. (See Cal. Const. art. I, § 3(b)(2); see also *City of San Jose*, *supra*, 2 Cal.5th at p. 625 ["The whole purpose of CPRA is to ensure transparency in government activities."]; *IFPTE*, *supra*, 42 Cal.4th at pp. 328-329, 333 [explaining that *inter alia* "[i]n order to verify accountability, individuals must have access to government files" and that disclosure of public records is necessary "to expose corruption, incompetence, inefficiency, prejudice, and favoritism"].

5. Cases Interpreting the Federal FOIA and Other States' Access Laws Confirm That Agencies Must Preserve Records They Withhold Until the Statute of Limitations for Bringing a Public Records Act Case Expires.

Cases interpreting the federal FOIA have recognized that an agency's destruction of public records after receiving a request

Document received by the CA Supreme Court.

can violate FOIA, upon which the CPRA is based. (*Judicial Watch, Inc. v. U.S. Dep't of Commerce* (D.D.C. 1998) 34 F.Supp.2d 28, 44–46 [holding "if the document is removed *after* the filing of the request, failure to produce it *is* an improper withholding" and ordering supervised discovery aimed at "identifying instances of unlawful destruction and removal of documents by" agency after receiving a FOIA request]; *SafeCard Services, Inc. v. S.E.C.* (D.C. Cir. 1991) 926 F.2d 1197, 1201 ["If the agency is no longer in possession of the document, *for a reason that is not itself suspect*, then the agency is not improperly withholding that document." (emphasis added)]; *Chambers v. U.S. Dep't of Interior* (D.C. Cir. 2009) 568 F.3d 998, 1004 [stating "an agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA"]; see also *Citizens for a Better Env't v. Dep't of Food & Agric.* (1985) 171 Cal.App.3d 704, 712 ["As related, the California enactment is modeled upon the FOIA. Thus, 'the judicial construction and legislative history of the federal act serve to illuminate the interpretation of its California counterpart.'"].)

Other states acknowledge a requirement to retain records until judicial review of a request is complete is implicit from the

Document received by the CA Supreme Court.

intent and structure of their open-records laws, even without a statutory section expressly requiring retention. For example, the Michigan Court of Appeals has held that the Michigan FOIA imposes a "duty to provide access" to requested public records and that this obligation "inherently includes the duty to preserve and maintain such records until access has been provided or a court executes an order finding the record to be exempt from disclosure." (*Walloon Lake Water System, Inc. v. Melrose Township* (Mich. Ct. App. 1987) 415 N.W.2d 292, 295.) In that case, the plaintiff submitted a request to a township for a copy of a letter but, instead of furnishing the letter or providing a written explanation for denying that request, the township supervisor "merely relinquished possession of the document, thereby defeating the purposes of the FOIA." (*Id.* at pp. 295–296.) "The Legislature could not have intended for a public body which seeks to prevent disclosure to take justice into its own hands in such a manner." (*Id.* at p. 296.)

Similarly, the Vermont Supreme Court has held that the state statute's "orderly process" for consideration, appeal, and judicial review of records requests "would be circumvented, and the citizen's right to access defeated, if [the retention schedule] of

Document received by the CA Supreme Court.

the election statutes were applied to allow the custodian to unilaterally destroy the requested ballots and tally sheets even when an access request remains pending." (*Price v. Town of Fairlee* (Vt. 2011) 26 A.3d 26, 33.) Thus, any "discretionary authority" to destroy records under other laws "must be stayed when a public-records request for the material is filed . . . and the stay must remain in effect until the request is resolved." (*Id.* at p. 34.)

A binding opinion of the Illinois Attorney General states that although the state "FOIA does not contain express requirements detailing a public body's duty to preserve records either before or after receiving a FOIA request, construing FOIA to permit destruction of records to avoid complying with a request would lead to an unjust and absurd result — defeating FOIA's purpose of opening governmental records to the light of public scrutiny." (*Public Access Opinion 19-013*, 2019 Ill. Op. Atty. Gen. No. 13 (2019), *available at* < https://illinoisattorneygeneral.gov/Open-And-Honest-Government/PAC/Opinions/>.) This retention requirement was implicit in the sections of the open-records law that state "[e]ach public body shall make available to any person for inspection or

Document received by the CA Supreme Court.

copying all public records," and "each public body shall promptly provide, to any person who submits a request, a copy of any public record required to be disclosed." (*Ibid.*) These sections of the Illinois open-records law are materially identical to provisions in the CPRA. (See Gov. Code § 7922.525 ["Public records are open to inspection at all times during the office hours of a state or local agency and every person has a right to inspect any public record"]; Gov. Code § 7922.530(a) ["each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available"].) Thus, a retention requirement while a request remains pending is also implicit in the CPRA.

The Attorney General of Arkansas has also opined that, even though the state open-records law "does not contain any records retention requirements," destruction of public records would nonetheless "violate the FOIA [] if the documents were destroyed *after* a request for access to the documents had been presented" to the local agency. (Op. Ark. Atty. Gen. 2001-340 (2001), *available at* <https://ag-opinions.s3.amazonaws.com/uploads/2001-340.pdf>.) Furthermore, "a citizen who has been aggrieved by such

Document received by the CA Supreme Court.

destruction may be entitled to civil relief." (*Ibid.*; see also *Daugherty v. Jacksonville Police Dep't* (Ark. 2012) 411 S.W.3d 196, 204-205 [citing the attorney general opinion approvingly].)

The foregoing decisions and opinions reflect a common understanding among the federal and state courts that have considered the issue that open-records laws must require retention — from after a request is submitted through opportunity for judicial review and final disposition of the request — to meaningfully effectuate their purposes. The CPRA is not an exception to this principle, but an example of it. To allow the public to meaningfully assess the conduct of its business, officials must be required to retain records responsive to a request until they have either disclosed the records, the statute of limitations on a CPRA claim has run, or a court has entered final judgment that the records are exempt. Without such an inherent limitation, officials may shroud their records in secrecy without consequence by scheduling them for routine deletion before the agency must respond to records requests.

Document received by the CA Supreme Court.

6. The Parade of Horribles Gilroy Argues That Recognizing a Preservation Requirement Would Cause Is Greatly Exaggerated, and in Any Event Does Not Justify the Harm Caused by Giving Agencies a Free Hand to Destroy Public Records After Asserting an Exemption.

The parade of horribles that the City argues that recognizing a preservation requirement would cause is greatly exaggerated and, in any event, does not justify the harm caused by giving agencies a free hand to destroy public records after asserting an exemption. The City's position, if adopted by this Court, would invite public agencies to destroy records immediately after claiming that they are exempt. That would complicate or frustrate meaningful judicial review of the exemption decision and, most importantly, would make it impossible for requesters to obtain the real transparency promised by the PRA, rather than just declaratory relief and a fee award, in litigation.

The City argues that recognizing a CPRA retention requirement would be "far-reaching" and too "burdensome" an obligation to possibly bear, but this is belied by the City's own acknowledgement that here it "did place a litigation hold on bodycam footage once the LFSV threatened suit" and that "there

Document received by the CA Supreme Court.

is no reason to believe other public agencies would not do likewise." (See Gilroy Answer Br. at p. 65.) Thus, treating CPRA requests as a "litigation hold" on responsive documents is in line with what many public agencies already practice, or at the very least is a mere short step away from such a practice. When documents at issue have already been identified as exempt and isolated by the public agency, it is not unreasonable that they be required to refrain from destroying such public records. This Court can, and should, recognize that principle.

The "burdensome" contention also fails for other reasons. For example, given that vast quantities of public records are capable of being stored electronically – and indeed are stored in that manner – the "burden" of preservation and retention is greatly diminished. These days, public agencies no longer require massive storage rooms to house their public records; they can all be quickly and efficiently stored on a computer server. The burden on the agencies therefore is relatively minimal, particularly given that such records are already being stored in such a manner. Moreover, to the extent that an agency has already isolated and identified records as part of its initial CPRA determination regarding responsive records, the added so-called

Document received by the CA Supreme Court.

"burden" of retaining such records is even more minimal. When compared to the public's fundamental right to access to public records and to the importance of governmental transparency, the supposed added burden on the public agency pales in comparison. (See, e.g., *supra* Part II.C.1.; see also Cal. Const., Art. I, § 3(b)(1)-(2), (7); *City of San Jose*, *supra*, 2 Cal.5th at pp. 624-625; *IFPTE*, *supra*, 42 Cal.4th at pp. 328-329, 333.)

The City also argues that "to announce an implied duty of preservation would effectively negate statutes authorizing record retention policies." (Gilroy Answer Br. at p. 64.) Not so. A duty of preservation would not "negate" such statutes, but rather – as is the case for many statutory schemes – simply complement and supplement those retention statutes. (See also Cal. Const., Art. I, § 3(b)(1)-(2), (7); *City of San Jose*, *supra*, 2 Cal.5th at pp. 624-625; *IFPTE*, *supra*, 42 Cal.4th at pp. 328-329, 333.) In other words, the CPRA and California's retention statutes can be harmonized and easily read in conjunction with each other – and indeed should be, always keeping in mind the goal both within the CPRA and California Constitution of broad public access to public records. (See *ibid.*) This is particularly so given that retention statutes do not obligate an agency to *destroy* records, but merely

Document received by the CA Supreme Court.

provide a minimum amount of time that an agency must *retain* records.[3] Having public agencies take into account public records under the CPRA and CPRA requests would merely constitute a preservation requirement that naturally meshes and harmonizes with the various other retention statutes and principles under California law.

III.
CONCLUSION

Consistent with the language of the Public Records Act, Article I, section 3(b) of the California Constitution, and the "essential" purpose that the Public Records Act serves, the Court of Appeal's decision should be reversed.

Respectfully submitted,

Dated: September 25, 2024 **CANNATA, O'TOOLE & OLSON LLP**

By: */s/ Aaron R. Field*
Aaron R. Field

Aaron Field
Zachary Colbeth

Attorneys for Amici Curiae

[3] It is critically important to recognize that with regard to retention statutes, these constitute *minimum* periods that an agency must preserve records. It does not prevent the agency from preserving and retaining records for *a longer* period of time than the statutory minimum. In other words, destruction of public records by the agency is entirely voluntary, and they certainly do not override or negate the PRA's *independent* statutory obligations regarding public access and preservation, both express and implied.

Document received by the CA Supreme Court.

Dated: September 25, 2024 **FIRST AMENDMENT COALITION**

By: */s/ David Loy*
David Loy

David Loy
Annie Cappetta

Attorneys for Amici Curiae

Document received by the CA Supreme Court.

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204 and 8.520, I certify that the above brief uses proportionally spaced, Century Schoolbook typeface of 13 points or more, and in reliance upon the word count feature of the word processing computer program Microsoft Word, contains 13,409 words, not including tables, this certificate, and attachments.

Dated: September 25, 2024 **CANNATA, O'TOOLE & OLSON LLP**

By: */s/ Aaron R. Field*
Aaron R. Field

Aaron Field
Zachary Colbeth

Attorneys for Amici Curiae

Dated: September 25, 2024 **FIRST AMENDMENT COALITION**

By: */s/ David Loy*
David Loy

David Loy
Annie Cappetta

Attorneys for Amici Curiae

Document received by the CA Supreme Court.

PROOF OF SERVICE

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

On September 25, 2024, I served the following documents in the manner(s) selected:

1. **APPLICATION OF FIRST AMENDMENT COALITION, LA TIMES COMMUNICATIONS LLC, THE MCCLATCHY COMPANY LLC, CALIFORNIA NEWSPAPERS PARTNERSHIP, CALIFORNIANS AWARE, ELECTRONIC FRONTIER FOUNDATION, FREEDOM OF THE PRESS FOUNDATION, SOCIETY OF PROFESSIONAL JOURNALISTS, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICUS CURIAE BRIEF**

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

[X] (EMAIL) transmitted to the email address(es) listed below:

[X] (US MAIL) placing true and correct copies thereof enclosed in a sealed envelope(s), mailed in the United States mail with first class postage fully prepaid, at San Francisco, California, addressed as set forth below:

Document received by the CA Supreme Court.

By E-Service:

Neel L. Chatterjee
Monte Cooper
Goodwin Procter LLP
601 Marshall Street
Redwood City, CA 94063
nchatterjee@goodwinlaw.com
mcooper@goodwinlaw.com

Thomas Philip Zito
Disability Rights Advocates
2001 Center Street, 4th Floor
Berkeley, CA 94704
tzito@dralegal.org

Tristia Bauman
Law Foundation of Silicon Valley
4 North 2nd Street, Suite 1300
San Jose, CA 95113
Tristia.bauman@lawfoundation.org

Megan Deanne Bettles
Wendell Lin
Goodwin Procter LLP
3 Embarcadero Center
San Francisco, CA 94111
mbettles@goodwinlaw.com
wlin@goodwinlaw.com

Faraz Behnamjou
Goodwin Procter LLP
601 South Figueroa Street, Suite 4100
Los Angeles, CA 90017
fbehnamjou@goodwinlaw.com

Attorneys for Petitioner The Law Foundation of Silicon Valley

Document received by the CA Supreme Court.

William D. Ross
David Paul Schwarz
Law Offices Of William D. Ross
400 Lambert Street
Palo Alto, CA 94306
wross@lawross.com
dschwarz@lawross.com

Andrew L. Faber
Thomas Patrick Murphy
Berliner Cohen
10 Almaden Boulevard, 11th floor
San Jose, CA 95113
andrew.faber@berliner.com
tom.murphy@berliner.com

Donald Alan Larkin
Office of the City Attorney, City of Morgan Hill
17575 Peak Avenue
Morgan Hill, CA 95037
donald.larkin@morganhill.ca.gov

Attorneys for City of Gilroy

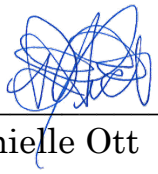
By U.S. Mail:
*For delivery on September 26, 2024

Clerk of the Court
Court of Appeal – Sixth
Appellate District
333 West Santa Clara Street
San Jose, CA 95113

Clerk of the Court
Santa Clara Superior Court
191 North First Street
San Jose, CA 95113

Document received by the CA Supreme Court.

I declare that the foregoing is true and correct and that this declaration was executed in San Francisco, California, on September 25, 2024.



Danielle Ott

Document received by the CA Supreme Court.