November 27, 2018

The Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 941102-4749

Re: Amicus Letter in Support of Petition for Review in *National Lawyers Guild v. City of Hayward*, No. S252445, Court of Appeal opinion reported at 27 Cal.App.5th 927 (2018), as modified (Oct. 26, 2018), petition for review filed (Nov. 7, 2018)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Northern California Chapter of the Society of Professional Journalists ("SPJ NorCal") and the Pacific Media Workers Guild (The NewsGuild-Communications Workers of America Local 39521, AFL-CIO; "the Guild") urge the Court to grant review in this case. The Court of Appeal incorrectly interpreted Government Code section 6253.9(b)(2) to allow a local agency to charge exorbitant fees for reviewing and redacting electronic public records before disclosing them. (See *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2018) 27 Cal.App.5th 937 [238 Cal.Rptr.3d 505, 515-16], as modified on denial of rehg. (Oct. 26, 2018) (*National Lawyers Guild*).)

The Court of Appeal's decision threatens to cut off access to electronic public records for journalists who lack institutional funding – such as journalists at nonprofit news organizations, freelancers, student journalists, and bloggers – whenever a public agency unilaterally asserts that the records contain exempt material that must be redacted. The cost issue goes to the heart of the efficacy of the statute. Construing section 6253.9 broadly to allow fees for time spent on redaction creates a new type of "digital divide"[1] in which only the wealthy and powerful can wield the Public Records Act and the constitutional right of access to hold the government accountable.

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[1] The term "digital divide" refers to "the economic, educational, and social inequalities between those who have computers and online access and those who do not." (See Definition of digital divide, Merriam-Webster.com <https://www.merriam-webster.com/dictionary/digital%20divide> [last visited 11/26/18]; see also Lyz Lenz, *Iowa: Rural broadband, and the unknown costs of the digital divide*, Columbia Journalism Rev. (Oct. 15, 2018) <https://www.cjr.org/special_report/midterms-2018-iowa-rural-broadband.php/> ["If an informed electorate is a vital part of our democracy, then we cheapen it by making access to information a privilege rather than a right"] [last visited 11/26/18].)

The Court of Appeal's decision also failed to honor the interpretive mandate of article I, section 3(b)(2) of the California Constitution. That section requires any statute, including Government Code section 6253.9(b)(2), to be "broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (See Cal. Const., art. I, § 3, subd. (b)(2).) The Court of Appeal's opinion in this case acknowledged the constitutional rule, but failed to apply it. (See *National Lawyers Guild*, *supra*, 27 Cal.App.5th 937 [238 Cal.Rptr.3d at pp. 510, 512-16].)

I. Grounds for Review.

The Court should grant review in this case. Review is proper "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The questions presented here satisfy both prerequisites, because they have constitutional dimensions and will impact the continued vitality of the California Public Records Act ("CPRA"), which this Court has held furthers the sort of "[o]penness in government" that is "essential to the functioning of a democracy" and "permits checks against the arbitrary exercise of official power and secrecy in the political process." (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 615 (*San Jose*) [quoting *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-29] [internal quotations omitted].) Amici respectfully ask the Court to accept review to settle the important questions raised by the National Lawyers Guild:

> (1) Whether a year 2000 amendment to the California Public Records Act (Gov. Code section 6253.9, subd. (b)) allows a public agency to shift the cost of redacting electronic records to a requester, when the cost of redaction cannot be imposed for paper records?
>
> (2) If the statutory language of the amendment is ambiguous, as found by the Court of Appeal, does Article I, section 3(b) of the California Constitution compel a construction in this case that does not limit access to redacted electronic records by the ability to pay?

(Petition for Review, filed on Nov. 7, 2018.)

In the alternative, amici respectfully request that the Court order that the Court of Appeal's opinion not be published. (See Cal. Rules of Court, rules 8.1105(e)(2), 8.1125(a).)

II. Interests of Amici.

A. SPJ NorCal.

SPJ NorCal works to support journalists throughout Northern California by engaging in, among other things, public advocacy and educational outreach to working journalists and journalism students and hosting two annual awards ceremonies to celebrate local journalists' achievements. It is a chapter of the national Society of Professional Journalists ("SPJ"), the nation's most broad-based journalism organization. SPJ NorCal has joined amicus curiae briefs in appeals under the CPRA and the Ralph M. Brown Act before, including *San Jose*, *supra*, 2 Cal.5th 608.

SPJ NorCal seeks to underscore the importance of the Court of Appeal's decision to freelancers, journalists at small or nonprofit media organizations, and student journalists. SPJ NorCal's members include many full-time journalists at mainstream publications. However, they also include freelancers, journalists at small or nonprofit media organizations, and student journalists. These "non-institutional" journalists typically lack the financial resources of larger media organizations. (See, e.g., Jones, *Litigation, Legislation, and Democracy in A Post-Newspaper America* (2011) 68 Wash. & Lee L.Rev. 557, 617, 619–21 ["The individuals who are sometimes derisively referred to as 'pajama bloggers' or 'jammie surfers' do not ordinarily have financial resources of any significance, and referring to them as independent journalists (a term that is more accurate in at least some subset of the cases) does not change this financial equation"]; Stevenson, *A Presumption Against Regulation: Why Political Blogs Should Be (Mostly) Left Alone* (2007) 13 B.U. J. Sci. & Tech. L. 74, 88 ["Unlike traditional media entities, bloggers have few financial resources."].)

B. The Guild.

The Guild is a union representing communications professionals, including staff, freelance and student journalists, primarily in Northern California, Hawaii and Nevada. The Guild provides programs and services that help members secure sufficient remuneration and working conditions conducive to doing their jobs. Especially for journalists, those working conditions include the ability to obtain public records in timely fashion and at non-prohibitive cost; the cost consideration is significant particularly for freelancers with their limited operating budgets.

The Guild's programs and services include advocacy for government transparency (a.k.a. "sunshine"), an essential component of democracy. Most recently, the Guild joined with SPJ NorCal and other sunshine-advocacy and public-interest organizations in opposing a San Francisco City Charter amendment that includes a provision allowing the Board of Supervisors to tamper with the San Francisco

Sunshine Ordinance (San Francisco Admin. Code, ch. 67) that the voters passed in November, 1999.

The Guild again takes up the cause of sunshine by joining this Amicus Letter.

III. The Court of Appeal Misinterpreted Government Code Section 6253.9(b), with Grave Consequences for Freelance Writers, Bloggers, Student Journalists, and the Public.

The CPRA generally provides that public agencies shall make copies of public records "promptly available to any person upon payment of fees covering *direct costs of duplication*, or a statutory fee if applicable." (See Gov. Code, § 6253, subd. (b), emphasis added.)

Government Code section 6253.9 contains additional fee provisions for records in electronic format. Section 6253.9, subdivision (a)(2) begins by affirming the general principle, that "[t]he cost of duplication shall be *limited to the direct cost of producing a copy* of a record in an electronic format." (Gov. Code, § 6253.9(a)(2), emphasis added.) Subdivision (b)(2) goes on to provide for additional cost recovery in specified circumstances, as follows in relevant part:

> Notwithstanding paragraph (2) of subdivision (a), the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when ... [t]he request would require data compilation, *extraction*, or programming to produce the record.

(Gov. Code, § 6253.9, subd. (b)(2), emphasis added.)

In *National Lawyers Guild*, the parties' dispute focused on whether "extraction" "'means [reducing] a record by taking out information that is exempt from public disclosure.'" (See *National Lawyers Guild*, *supra*, 27 Cal.App.5th 937 [238 Cal.Rptr.3d at pp. 511-12] [quoting the Guild's argument].) The Court of Appeal held the term "extraction" did allow the City to recover its expenses (see *id.* [238 Cal.Rptr.3d at 515-16]), the vast majority of which were for staff time spent redacting material the City claimed was exempt from disclosure. (See *id.* [238 Cal.Rptr.3d at 507-08].)

The Court of Appeal's interpretation is unsupported by the plain language of the CPRA and its legislative history. Section 6253.9(b)(2) does not expressly refer to "redaction" and nothing in that section or the surrounding sections suggests the term

"extraction" refers to the routine task of removing exempt information from an existing record. (See Gov. Code, § 6253.9, subd. (b)(2); see generally Gov. Code, § 6250, et seq.; see also *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 174-75 [examining legislative history of section 6253.9 and observing no changes appeared to have been made in response to criticism that it would require significant staff time to redact nondisclosable information].)

Moreover, the term "extraction" must be interpreted in the context in which it appears. (See *Sierra Club*, *supra*, 57 Cal.4th at p. 168 [because Government Code section 6254.9 "refers to 'computer mapping systems' as a species of 'computer software,' the term 'computer mapping systems' should be construed in light of the meaning of 'computer software.'"].) Here, data "extraction" is sandwiched between data "compilation" and data "programming," phrases commonly understood to refer to some step in the process of transforming machine-readable data into a human-readable "record." In context, the term "extraction" cannot reasonably be expanded to include redaction of material claimed to be exempt.

The practical effect of the Court of Appeal's ruling will be to cut off access for independent writers who lack the financial backing of a traditional news agency, such as freelancers, bloggers, and student journalists, upon whom the public has come to depend for news and information.

A. The Public and Traditional Media Rely on Freelancers, Bloggers, Small and Nonprofit Media Organizations, and Student Journalists to Effectuate the Right of Access to Writings of Public Officials.

"As technology evolves, individuals increasingly access their news through a variety of non-traditional sources." (Giordano, Comment, *Protecting the Free Flow of Information: Federal Shield Laws in the Digital Age* (2014) 23 CommLaw Conspectus 191, 191.) "Independent news outlets, bloggers, freelance reporters, and student journalists are now important sources of online information." (*Id.*)

Likewise, "as traditional outlets have adapted to changing circumstances and challenging economics, student journalists have played a vital role in meeting their communities' needs for news and information." (Peters, Belmas, and Bobkowski, *A Paper Shield? Whether State Privilege Protection Apply to Student Journalists* (2017) 27 Fordham Intell. Prop. Media & Ent. L.J. 763, 766-67.) Institutional news sources facing growing demand for 24-7 news coverage also increasingly "rely on freelancers that operate at their own expense." (See Grossman, Note, *All the News That's Worth the Risk: Improving Protection for Freelance Journalists in War Zones* (2017) 40 B.C. Int'l & Comp. L.Rev. 141, 147.)

Freelancers, bloggers, small and nonprofit media organizations, and student journalists regularly exercise the right of access to provide information to the public. The following are examples of important public records-based work by non-traditional media organizations:

- In a 2018 article, freelance journalist Michael Toren revealed how funds for the "Free City" program, a two-year pilot program that would allow students at City College of San Francisco to attend for free, had been stalled due to a series of bureaucratic missteps. (See Toren, *Prop. W Funds have yet to reach City College*, The Guardsman (Feb. 21 – Mar. 6, 2018), pp. 1-2 <https://issuu.com/theguardsmanonline/docs/issue03.2-working-bw> [last visited 11/26/18.) Through public records requests, Toren obtained communications between the City and County of San Francisco and City College of San Francisco showing San Francisco had serious concerns about how the College's invoices had been calculated. (See *id.*)

- Kym Kemp, who owns and operates a blog covering Humboldt and Mendocino counties, wrote a series of posts on drivers who said Rohnert Park police pulled them over and then seized their marijuana and cash. Further investigation, including a CPRA request for an incident report, revealed numerous irregularities with the stops. The officers were placed on administrative leave after Ms. Kemp's articles were posted. (Kemp, *Rohnert Park Police Officers Being Investigated Following Two Incidents Where Humboldt County Cannabis Was Seized Under Suspicious Circumstances*, Redheaded Blackbelt (Apr. 26, 2018) <http://kymkemp.com/2018/04/26/rohnert-park-police-officers-being-investigated-following-two-incidents-where-humboldt-county-cannabis-was-seized-under-suspicious-circumstances/> [last visited 11/26/18].)

- As a series of layoffs made her a contract writer, investigative journalist Karen Dillon collaborated with KSHB-TV reporter Melissa Yeager on a three-part series called *The Dark State*, which drew attention to problems caused by restrictions on access to criminal records in Kansas. (See Lee, *This Kansas City reporter was laid off twice in a year—but her work has just helped change a state law*, Columbia Journalism Rev. (July 2, 2014) <https://archives.cjr.org/united_states_project/karen_dillon_kansas_city_journalist_police_records.php> [last visited 11/26/18].) Dillon's work was credited for helping to change Kansas law to "open[] up probable-cause affidavits for search and arrest warrants to the media and the public on request." (See *id.*)

- Students from the UC Berkeley Graduate School of Journalism New Media Program gathered data on every traffic stop that the Fresno Police Department made in 2016, as well as jail booking and release data from January 2017 to February 2018, through requests made under the CPRA. In combination with other public data, they used the data from their public records requests to publish a searching analysis of racial disparities in traffic stops, school suspensions, and jails in the City of Fresno, including interactive maps, charts, historic images, and audio-visual content. (Thebault & Fuller, *'Justice For Who?'*, Unequal From Birth <https://unequalfrombirth.com/revised/justiceforwho/> [link to data and summary of methodology at <https://reisthebault.github.io/unequal_from_birth/justice/>] [last visited 11/26/18].)

- In 2016, student members of a SPJ chapter at Central Michigan University conducted a FOIA audit of the state's 15 public universities. (Clark, *How 'the public is priced out of public records' by Michigan universities*, Columbia Journalism Rev. (Apr. 5, 2016) <https://www.cjr.org/united_states_project/how_the_public_is_priced_out_of_public_records_by_michigan_universities.php> [last visited 11/26/18].) They sought "a year's worth of information on expenses from the university presidents and governing boards, and also police reports on campus sexual assaults," in an effort to compare how the universities responded to the requests. (*Id.*) The total price tag demanded to fulfill the students' requests exceeded $20,000. (*Id.*)

- In a 2015 article published in San Francisco State University's student newspaper, reporter Brian Grabianowski used public records to shine a light on the University's reliance on furniture made by California Prison Industry Authority, a company that profits from the labor of California prison inmates. (See Grabianowski, *Rehabilitation program leads campus debate over prison labor*, Golden Gate Xpress (Oct. 27, 2015) <http://goldengatexpress.org/2015/10/27/rehabilitation-program-leads-campus-debate-over-prison-labor/> [last visited 11/26/18].)

If the Court of Appeal's opinion stands, and the cost of public information goes up, stories like these will become increasingly unaffordable.

B. Freelance Writers, Bloggers, and Student Journalists Lack the Resources of Traditional Media Sources.

Historically, traditional news media associations played a major role in both the passage and enforcement of open records laws, thereby ensuring the right of access for all. (See Jones, *supra*, 68 Wash. & Lee L.Rev. at pp. 598–611; see also *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 572-73 ["Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public"].) As newspapers and traditional media companies have gone under or consolidated, independent writers and small press have taken on an important role in newsgathering, but they often lack the financial resources that made it possible for traditional news media to enforce public records laws effectively. (See Jones, *supra*, 68 Wash. & Lee L.Rev. at pp. 612-13, 617, 619–21; Stevenson, *supra*, 13 B.U. J. Sci. & Tech. L. at p. 88.)

For example, freelance war reporters in Syria made as little as seventy dollars per article. (See Grossman, *supra*, 40 B.C. Int'l & Comp. L.Rev. at pp. 147-48, fn. 57-58 [citing Francesca Borri, *Woman's work: The twisted reality of an Italian freelancer in Syria*, Columbia Journalism Rev. <http://www.cjr.org/feature/womans_work.php?page=all>].) In an online rates database maintained on the web site, The Freelancer, freelancers reported rates ranging from several thousand dollars per project to as little as $.01 per word. (See Rates Database, The Freelancer by Contently <https://contently.net/rates-database/rates/> [last visited 11/26/18].) Student journalists may or not be paid at all.

C. If the Court of Appeal's Ruling Stands, Public Agency Fees for Personnel Time Spent Redacting Exempt Material from Existing Public Records Often Will Exceed the Payment for the Job.

The Court of Appeal's decision denies a "fundamental and necessary right of *every person in the state*" (Gov. Code, § 6250, italics added) to those who cannot afford to scale the $3,000 wall erected between them and the information they are legally entitled to receive. It is not uncommon for government agencies to hide public documents behind exorbitant prices. The following reported examples are illustrative:

- The Commonwealth of Massachusetts Executive Office of Public Safety and Security Department of Corrections estimated the cost to produce "Use of Force Reports" from January 1, 2008 through September 27, 2013 to be $312,688.00. (The Commonwealth of Mass. Exec. Office of Pub. Safety &

Sec. Dept. of Corr., letter to George LeVines, Assignment Editor, MuckRock News, Sept. 27, 2013 <https://cdn.muckrock.com/foia_files/MuckRock.LeVines.UOF.9.27.13.pdf> [last visited 11/26/18].) Costs to redact accounted for over ninety percent, $283,168.00, of that total and averaged $4.266 per page. (*Id.*)

- In Florida, "some newspapers and private citizens have encountered jaw-dropping fees for records such as a $399,000 quote to search five [months'] worth of a South Florida police agency's emails for gay slurs, a $45,000 estimate for a database of complaint and disciplinary records involving North Florida police officers, and a $700 estimate for Ebola reports in a state where there were no documented cases of Ebola." (Sanders, *Audit: Agencies handle public record requests differently*, Miami Herald (March 14, 2015) <https://www.miamiherald.com/news/state/florida/article14470640.html> [last visited 11/26/18].)

- A South Carolina non-profit "shelled out more than $4,000 for reports that shed light on the spending habits of 5th Circuit Solicitor Dan Johnson, who had spent taxpayer dollars on his own brother to deejay at an office Christmas party." (Knapp, *South Carolina law was aimed at dropping price of public records. But is it paying off?*, The Post and Courier (March 15, 2018) <https://www.postandcourier.com/news/south-carolina-law-was-aimed-at-dropping-price-of-public/article_3929c8b4-2160-11e8-94da-bb05d92a6975.html> [last visited 11/26/18].)

- Portland, Oregon "Mayor Ted Wheeler's office asked for $3,189 for a set of emails between six staffers" that "would shed light on the city of Portland's response to street protests." (Shepherd, *Portland City Hall is Hiding Police Tactics Behind Huge Public Records Fees*, Willamette Week (Oct. 11, 2017) <https://www.wweek.com/city/2017/10/11/portland-city-hall-is-hiding-police-tactics-behind-huge-public-records-fees/> [last visited on 11/26/18].)

This shows how quickly and easily the cost of records can eclipse any expected payment from the typical job. The Court of Appeal's ruling potentially affects any electronic record that a public agency unilaterally determines must be redacted. Such records could become unaffordable for all but the most well-heeled requesters. A sharp increase in costs disproportionately affects small and nonprofit publications, such as the independent news website Mission Local, which focuses on local issues (law enforcement accountability, local history, housing, and jobs) in a specific neighborhood (the Mission in San Francisco). (See Mission Local <https://missionlocal.org/> [last visited 11/26/18].) If less wealthy newsgatherers are

denied access, they cannot serve as government watchdogs on the issues that are most relevant to their communities.

IV. The California Constitution Requires Potential Ambiguities in the CPRA to Be Resolved in Favor of the People's Right of Access.

"In 2004, California voters approved Proposition 59, which amended the state Constitution to provide a right of access to public records." (*Sierra Club*, *supra*, 57 Cal.4th at p. 166.) Proposition 59 also added a constitutional rule of interpretation specific to statutes affecting the right of access: "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."[2] (Cal. Const., art. I, § 3, subd. (b)(2).)

As this Court has acknowledged, under this rule, "to the extent that legislative intent is ambiguous, the California Constitution requires us to 'broadly construe[ ]' the PRA to the extent 'it furthers the people's right of access' and to 'narrowly construe[ ]' the PRA to the extent 'it limits the right of access.'" (*Sierra Club*, *supra*, 57 Cal.4th at p. 166; see also *San Jose*, *supra*, 2 Cal.5th at p. 617.)

A. The CPRA's Fee Provisions Are Subject to Proposition 59's Interpretive Mandate, because the Amount of the Fees Determines "Access to Information Concerning the Conduct of the People's Business."

There can be no doubt that Proposition 59 applies to section 6253.9's cost provisions, because those provisions limit the right of access. (Cf. *North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144, 148 ["A reduction in copy fee permits 'greater access' to records"]; cf. also *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 281-82, 285 ["the statutory scheme before us is all the more invidious because its practical effect is to deny to poor women the right of choice guaranteed to the rich"].) In a case considering whether the City of Milwaukee could charge for staff time spent redacting personal information from incident summaries contained in police reports, the Supreme Court of Wisconsin made clear that high fees interfere with accessibility:

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[2] The statute in question, Government Code section 6253.9, was enacted in 2000, and therefore was in effect on the effective date of Proposition 59. (See Stats. 2000, ch. 982, § 2, p. 7142 [added by Assem. Bill No. 2799 (1999-2000 Reg. Sess.)] <https://clerk.assembly.ca.gov/content/statutes-and-amendments-codes-2000?archive_type=statutes> ["Statute Chapters" link for "Volume 5," "Regular Session"] [last visited 11/26/18].)

> This case is not about a direct denial of public access to records, but the issue in the present case directly implicates the accessibility of government records. The greater the fee imposed on a requester of a public record, the less likely the requester will be willing and able to successfully make a record request. Thus, the imposition of fees *limits and may even serve to deny access* to government records.

(See *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 5 [815 N.W.2d 367, 370-71], emphasis added.)[3]

B. Despite Recognizing Potential Ambiguity in Government Code Section 6253.9(b), the Court of Appeal Limited the Right of Access to Otherwise Disclosable Records by Construing "Extraction" Broadly.

The Court of Appeal found "no clear answer in the statutory text to the parties' dispute" over the meaning of the word "extraction." (See *National Lawyers Guild*, *supra*, 27 Cal.App.5th 937 [238 Cal.Rptr.3d at pp. 512-13].) Despite initially acknowledging article 1, section 3(b) of the California Constitution (see *id.* [238 Cal.Rptr.3d at 510]), the Court of Appeal failed to reconcile the rule with its conclusion. (See *id.* [238 Cal.Rptr.3d at 512-16] [relying on legislative history without addressing Proposition 59's interpretive rule].)

Had the Court properly applied article I, section 3(b), it would have had to interpret the term "extraction" narrowly. A narrow construction does not allow agencies to charge additional fees any time they decide an electronic record must be redacted, which routinely occurs. The Court of Appeal also failed to reconcile its legislative history analysis with this Court's contrary discussion in *Sierra Club*. (Compare *id.* [238 Cal.Rptr.3d at p. 515, fn.9] with *Sierra Club*, *supra*, 57 Cal.4th at pp.174-75 [noting agency concerns that section 6253.9 would require "significant amounts of

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[3] (But cf. *California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1451-52 [analyzing statutory fees under Government Code section 27366, not the CPRA].) The statutory scheme at issue in *Stanislaus* differs from the CPRA, and the Court of Appeal's decision in *Stanislaus* is therefore materially distinguishable, in two critical ways: (1) county recorders "*shall*" charge the fees set forth in Government Code section 27360 et seq., whereas the CPRA does not specifically *require* public agencies to charge any fee; (2) the CPRA contains procedural protections for requesters, such as deadlines by which agencies must respond and attorney fee-shifting provisions, that Government Code section 27360 et seq. does not. (Compare Gov. Code, § 6250, et seq., with Gov. Code, § 27360, et seq.) In addition, the analysis in *Stanislaus* is simply wrong in the CPRA context. High fees uniformly reduce accessibility, by making public information less affordable (or unaffordable), giving agencies a tool to hide non-exempt information they deem sensitive or embarrassing, and deterring those of lesser means from pursuing requests. The opportunity to say this unequivocally is yet another reason why review should be granted.

staff time to redact nondisclosable information," yet observing, "[t]he Legislature does not appear to have adopted any amendments in response to this concern"].)

The Court of Appeal did not use the proper methodology, and therefore broadly construed section 6253.9's fee provisions to defeat the right of access. To the extent section 6253.9(b)(2) is ambiguous, as in *Sierra Club*, "[a]ny remaining doubt about the proper interpretation" should have been "dispelled by the interpretive rule in article I, section 3, subdivision (b)(2), of the California Constitution," *in favor of the right of access*. (See *Sierra Club*, *supra*, 57 Cal.4th at pp. 175-76.) Review is necessary so that this issue of statewide importance can be evaluated using the constitutionally required methodology.

V. Conclusion.

If the Court of Appeal's opinion stands, public agencies may effectively deny access to an increasing number of public records by simply pricing journalists with fewer financial resources out of the marketplace of ideas. Agencies can more easily block access to information they deem sensitive, by demanding exorbitant fees for information they in their sole discretion decide is exempt and must be redacted. Only requesters who can afford to pay the fees under protest *and* file a lawsuit will be able to challenge these decisions. This result subverts the will of the Legislature and the voters.

The Legislature intended agencies to bear the cost of compliance with laws protecting the right of access, except for the direct cost of reproduction, and certain costs associated with electronic records under the limited circumstances described in section 6253.9. (See Gov. Code, §§ 6253, subd. (b), 6253.9, subd. (b)(2).) Review, or in the alternative, depublication of the Court of Appeal's opinion is necessary to give effect to the Legislature's intent, and the will of the voters in making the right of access a matter of constitutional importance.

Respectfully submitted,

McMANIS FAULKNER

Christine E. Peek

CHRISTINE PEEK (234573)
Attorneys for Amici

PROOF OF SERVICE BY MAIL

Re: *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al.*, No. S252445, California Court of Appeal, First Appellate District, Case No. A149328

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action; my business address is 50 West San Fernando Street, 10th Floor, San Jose, CA 95113.

On November 27, 2018, I served the foregoing document described as:

Amicus Letter in Support of Petition for Review in *National Lawyers Guild v. City of Hayward*, No. S252445, Court of Appeal opinion reported at 27 Cal.App.5th 927 (2018), as modified (Oct. 26, 2018), petition for review filed (Nov. 7, 2018)

on the following person(s) in this action:

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☒ **(BY MAIL)** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above or on the attached service list. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this businesses' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am employed in the county where the mailing occurred. The envelope or package was placed in the mail at San Jose, California.

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

Executed on November 27, 2018, at San Jose, California.

Susan Van Norman