No. D078415

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

VOICE OF SAN DIEGO, et al.,
Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent,

COUNTY OF SAN DIEGO,
Real Party in Interest.

APPEAL FROM
THE SUPERIOR COURT OF THE COUNTY OF SAN DIEGO
Hon. Joel R. Wohlfeil, (619) 450-7073
Superior Court No. 37-2020-00026651-CU-WM-CTL

AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 18 MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONERS

*Katie Townsend (SBN 254321)
**Counsel of Record*
Bruce D. Brown**
Shannon A. Jankowski**
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th St. NW, Ste. 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
ktownsend@rcfp.org
** *Of counsel*

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(e)(1) and (2), amici by and through their undersigned counsel, certify that the following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation or stock.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

The California Broadcasters Association is an incorporated nonprofit trade association with no stock.

California Newspaper Partnership is a general partnership operated by Media News Group, Inc.

California News Publishers Association ("CNPA") is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California. No entity or person has an ownership interest of ten percent or more in CNPA.

The Center for Investigative Reporting (d/b/a Reveal) is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Cityside is a 501(c)(3) nonprofit organization.

The E.W. Scripps Company, parent corporation to KGTV-TV, KERO-TV, and KSBY-TV, is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

Embarcadero Media is an independent and locally-owned media company. No entity or person has an ownership interest of 10 percent or more of Embarcadero Media other than founder William Johnson.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

Fox Television Stations, LLC (FTS) is an indirect subsidiary of Fox Corporation, a publicly held company. No other publicly held company owns 10% or more of the stock of Fox Corporation.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc. and the Vanguard Group, Inc. each own ten percent or more of the stock of Gannett Co., Inc.

The Greater Los Angeles Pro Chapter of the Society of Professional Journalists is a non-stock corporation with no parent company.

KQED Inc. is a nonprofit public benefit corporation. No entity or person has an ownership interest of 10 percent or more of KQED Inc.

The Los Angeles Press Club is a 1,000 member strong 501c3 nonprofit organization with no parent corporation and no stock.

The McClatchy Company, LLC d/b/a The Sacramento Bee, The Fresno Bee, and The Modesto Bee is privately owned by certain funds affiliated with Chatham Asset Management, LLC and does not have publicly traded stocks.

Media Guild of the West, NewsGuild-CWA Local 39213, is a labor union for journalists and media workers and is an unincorporated nonprofit association with no parent corporation and no stock.

The Foundation for National Progress, dba Mother Jones, is a nonprofit, public benefit corporation. It has no publicly-held shares.

Northern California Society of Professional Journalists has no parent corporation and issues no stock.

Dated: May 10, 2021

/s/ Katie Townsend
Katie Townsend
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Rules

Regulations

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Access to public records is essential in a democracy; it prevents the government from operating in secret and allows the public to monitor the actions of government agencies and officials. For this reason, the California Public Records Act, Cal. Gov't Code §§ 6250 *et seq.* (the "CPRA"), and the California Constitution establish the public's "right of access to information concerning the conduct of the people's business." Cal. Const. art. I, § 3(b)(1).

Here, Petitioners Voice of San Diego ("VOICE"), KPBS Public Broadcasting ("KPBS"), and The San Diego Union Tribune, LLC ("SDUT") (collectively, "Petitioners") submitted three requests to the County of San Diego ("County" or "Respondent") pursuant to the CPRA seeking location-based outbreak data related to the spread of COVID-19 in the San Diego area (collectively, the "Records").[2] The County denied the

---

[2] On April 10, 2020, VOICE filed a CPRA request to the County for "[a]ny and all copies of epidemiological reports sent to the state of California showing the results of San Diego County's investigative contact tracing efforts since Jan. 1, 2020, to present." 1 AA 88. On April 10, 2020, the County replied that it did not have "the capacity to search for records" due to the COVID-19 crisis, and that "[u]nder California Government Code section 6255 the public interest in receiving records at this time is outweighed by public interest in having County personnel free to handle this ongoing emergency." *Id.* at 88–89. The county added that "[w]e do not anticipate responding to your request until the emergency order has been lifted." *Id.*

On July 15, 2020, KPBS filed a CPRA request to the County for various data including "[t]he location of all businesses or other entities where COVID-19 community outbreaks have occurred in San Diego County from March 1, 2020 through July

request, claiming that information contained in the Records is confidential pursuant to Cal. Code Regs. tit. 17, § 2502(f)[3] and thus "exempted or prohibited [from disclosure] pursuant to federal or state law." Cal. Gov't Code § 6254(k). It further claimed that providing location data may create a chilling effect on reporting of COVID-19 data and, accordingly, that the interest in nondisclosure "clearly outweigh[ed]" the public interest in disclosure. Cal. Gov't Code § 6255(a).

Petitioners filed a petition for writ of mandate in the Superior Court of California for San Diego County (the "Superior Court") pursuant to Cal. Gov't Code § 6258, seeking an order for release of the Records. 1 AA 1.[4] The Superior Court denied the

---

15, 2020." *Id.* at 91. KPBS also requested the dates or "date range" for each outbreak, as well as the number of cases identified in each outbreak. *Id.* Two days later, the County produced some of the records, but withheld the locations and dates of the outbreaks. *Id.* On September 3, 2020, the County produced a document containing further information about the outbreaks, but it was redacted with respect to the location of the outbreaks. *Id.*

On September 3, 2020, SDUT filed a CPRA request to the County for various data including "a copy of the county's electronic list of community outbreaks." *Id.* at 92. The County produced some responsive records on September 11, 2020, but did not include any of the following categories of information, which had been specifically requested by SDUT: the date the outbreak investigation was initiated, the date the outbreak was confirmed, the location of the outbreak, and the address of those locations. *Id.*

[3] Title 17, section 2502 of the California Code of Regulations is hereinafter abbreviated to 17 CCR § 2502.

[4] Petitioners filed an amended petition for writ of mandate and a complaint seeking injunctive and declaratory relief on September 28, 2020. 1 AA 47.

petition, finding that the Records were exempt from disclosure for the reasons articulated by the County. *See* 3 AA 804; 3 AA 652.[5]

The Superior Court erred in denying the petition. The Records are public records under the CPRA to which no valid exemption applies. *See* Cal. Gov't Code § 6253. The Records do not identify specific individuals or implicate the privacy concerns that the County purports to invoke. Moreover, as courts in California and around the country have recognized, when a federal or state open records act—such as the CPRA—requires disclosure of public records, the confidentiality provisions of a medical health law such as 17 CCR § 2502(f) do not permit a government agency to deny disclosure of those Records. *See, e.g.*, Order Granting Writ of Mandate, *Cal. Newspaper P'ship v. Cty. of Alameda,* Case No. RG20062745 (Cal. Super. Ct. Jan. 7, 2021) (hereinafter "*California Newspaper*").

In addition, the Superior Court failed to properly balance the significant public interest in disclosure against the County's nebulous and speculative claims of a potential chilling effect. As evidenced by examples from across the country, *see* Section I.B, *infra*, public access to the Records will enable the news media to report meaningful information about the spread of the novel

---

[5] Petitioners subsequently filed a petition for extraordinary writ with this Court, which was denied on January 14, 2021. On January 25, 2021, Petitioners filed a petition for review with the Supreme Court of California. On March 24, 2021, the Supreme Court of California issued an order transferring the matter to this Court. On March 25, 2021, this Court issued an order vacating its January 14, 2021 order denying Petitioners' writ petition and requiring Respondent to show cause why the relief sought in the petition should not be granted.

coronavirus which will, in turn, allow Californians to make more informed decisions during this ongoing public health crisis—which, for individuals who are immunosuppressed or have another pre-existing condition, can be the difference between life and death.

While the County has since released a redacted community outbreak report to KPBS and SDUT, it continues to redact location names and addresses, thereby inhibiting vital reporting on a serious public health emergency. *See* Return of Real Party in Interest to Pet. for Extraordinary Writ ("Return") at 22. Because the paramount goal of the CPRA is to ensure that members of the public have access to the information they need to understand issues affecting their communities, amici urge the Court to grant the relief sought by Petitioners.

ARGUMENT

I. The Records implicate no exemptions to the CPRA nor any other bar to disclosure.

California courts have long recognized that "[o]penness in government is essential to the functioning of a democracy," and that "access permits checks against the arbitrary exercise of official power and secrecy in the political process." *Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 328–29 (2007) (citation omitted).

In accordance with these principles, the CPRA sets forth a basic rule requiring a state or local agency to disclose public records upon request. *See* Cal. Gov't Code § 6253. In general, the CPRA 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." *Sander v. State Bar of Cal.*, 58 Cal. 4th 300, 323 (2013). Every such record "must be disclosed unless a statutory exception is shown." *Id.* Thus, the CPRA *requires* disclosure of public records by a public agency, with a few limited, enumerated exceptions. And while the CPRA exempts certain specified records from disclosure, most of its exemptions are permissive, not mandatory. *See Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250, 1262 (2012). Indeed, the CPRA expressly contemplates that public agencies may choose to disclose records that they are not required to disclose under the Act. *See* Cal. Gov't Code § 6254.

An "agency opposing disclosure" under the CPRA "bears the burden of proving that an exemption applies." *ACLU of N. Cal. v. Superior Court*, 202 Cal. App. 4th 55, 67 (2011) (citation omitted). And because the "[s]tatutory exemptions from compelled disclosure are *narrowly construed*," an agency must demonstrate a "*clear overbalance* on the side of confidentiality" to justify nondisclosure. *Cal. State Univ. v. Superior Court*, 90 Cal. App. 4th 810, 831 (2001) (emphasis added) (citation and internal quotation marks omitted). Indeed, as this Court has recognized, "[i]n the particular context of the CPRA, if there is any ambiguity about the scope of an exemption from disclosure," it must be construed "narrowly" to maximize disclosure and governmental transparency. *Sonoma Cty. Emps.' Ret. Ass'n v. Superior Court*, 198 Cal. App. 4th 986, 993 (2011).

Here, the Records at issue fall squarely under the CPRA as "record[s] created or maintained by a public agency." *Sander*, 58 Cal. 4th at 323. As detailed further below, the County has failed to meet its burden to show that any exemption to disclosure applies, let alone to demonstrate a "clear overbalance on the side of confidentiality." *Cal. State Univ.*, 90 Cal. App. 4th at 831 (citation and internal quotation marks omitted). Thus, the CPRA mandates that the Records be disclosed to Petitioners.

A. No statutory exception prohibits disclosure of the Records.

The County contends—and the Superior Court erroneously held—that the Records are prohibited from disclosure under 17 CCR § 2502, thus bringing the Records within CPRA's exemption for "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law." Cal. Gov't Code § 6254(k). But this argument rests on an incomplete reading of the plain text of the regulation. Moreover, it ignores decisions of numerous state courts and guidance from the federal Department of Health and Human Services regarding the interplay between the confidentiality provisions of medical health laws and the disclosure requirements of state open records laws.

1. The confidentiality provisions of 17 CCR § 2502 do not prohibit release of the Records where, as here, the CPRA requires disclosure.

According to the County, the location outbreak data requested by Petitioners is provided to it pursuant to 17 CCR § 2502, which states that "[i]nformation reported pursuant to this section is acquired in confidence and shall not be disclosed by the

local health officer except as authorized by these regulations, as required by state or federal law, or with the written consent of the individual to whom the information pertains . . . ." 17 CCR § 2502(f); 1 AA 193.

The County's focus on the opening language of Section 2502(f)—"[i]nformation reported pursuant to this section is acquired in confidence and shall not be disclosed by the local health officer"—overlooks a critical portion of the regulation, however. Section 2502(f) also expressly provides that "[i]nformation reported pursuant to this section . . . shall not be disclosed . . . **except** as authorized by these regulations, **as required by state or federal law**, or with the written consent of the individual to whom the information pertains . . . ." *Id.* (emphasis added). Thus, based on the plain language of the regulation, disclosure of information reported pursuant to 17 CCR § 2502—including the information in the Records at issue here—is not prohibited when such disclosure is required by a state or federal law, including the CPRA.

As the County has acknowledged, the "leading medical privacy law, HIPAA [the federal Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-91, 110 Stat. 1936, § 264] is instructive" in interpreting the provisions of 17 CCR § 2502. Return at 36. Indeed, the County claims that information reported pursuant to 17 CCR § 2502 "is protected health information" under HIPAA, and points, in part, to the Code of Federal Regulations governing the exchange of protected

health information under HIPAA[6] to justify the County's nondisclosure of the data. *See* 1 AA 194. However, as Petitioners correctly point out, 45 C.F.R. § 164.512—like 17 CCR § 2502(f)—specifically provides that protected health information under HIPAA may be disclosed when that disclosure **is required by law** (emphasis added). *See* 2 AA 307–08; 45 C.F.R. § 164.512(a)(1) ("A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.").[7]

This specific interaction between the privacy provisions of HIPAA and the disclosure requirements of federal and state open records laws has been considered by numerous courts around the country, including other courts in California. *See, e.g.*, *California Newspaper*; *State ex rel. Adams Cty. Historical Soc'y v. Kinyoun*, 765 N.W.2d 212 (Neb. 2009); *Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. Ct. App.

---

6 *See generally*, 45 C.F.R. parts 160, 164.

7 The federal Department of Health and Human Services, which promulgated the regulations, explained that the "required by law" exception in 45 C.F.R. § 164.512 was intended to "preserve access to information considered important enough by state or federal authority to require its disclosure by law," including, by way of example, the "[u]ses and disclosures required by [the federal Freedom of Information Act]." *See Standards for Privacy of Individually Identifiable Health Information*, 65 Fed. Reg. 82,462, 82,667, 82,482 (Dec. 28, 2000); *see also Michaelis, Montanari & Johnson v. Superior Court*, 38 Cal. 4th 1065, 1076 (2006) ("Federal statutes and cases implementing or interpreting the federal Freedom of Information Act (FOIA) are instructive because the California [Public Records] Act is modeled on the FOIA.").

2006); *State ex rel. Cincinnati Enquirer v. Daniels*, 844 N.E.2d 1181 (Ohio 2006). In each published decision addressing this question, the court has held that where a state open records law requires the release of information, HIPAA's "as required by law" exception applies, and that the privacy provisions of HIPAA do not prevent the release of such information.

Daniels, the first case to decide this issue, is instructive. There, the Ohio Supreme Court reviewed a request by a newspaper under the Ohio Public Records Act ("OPRA") for access to lead contamination notices issued to property owners by the Cincinnati Department of Health. *Daniels*, 844 N.E.2d at 1183. Like Respondent here, the agency argued that the requested records constituted protected health information under HIPAA and thus fell within OPRA's exemption for records prohibited from disclosure by state or federal law. *Id.* at 1187. The court rejected the agency's argument, finding that, because OPRA—like the CPRA— required that public records be "made available" under the law [unless expressly exempt], and because—like the CPRA—the law was required to be "construed liberally in favor of broad access," OPRA fell within the "required by law" exception under 45 C.F.R. § 164.512, and the agency had a clear duty to disclose the requested records. *Id.* at 1187–88.

Since *Daniels*, courts have consistently interpreted HIPAA's "as required by law" exception to permit the release of protected health information where a state public records act requires that release. *See Abbott*, 212 S.W.3d at 659–60 (rejecting agency's arguments that HIPAA's privacy rule

precluded disclosure of names of state mental health facilities where allegations of abuse and sexual assault occurred and holding that "when determining whether to release protected health information in response to a [public records act] request, an agency must look to the limits and exemptions in the Act, not to [HIPAA's] Privacy Rule"); s*ee also Kinyoun*, 765 N.W.2d at 218 (finding that HIPAA's privacy rule did not prohibit release of records sought under the state's public records act); *Flores v. Freedom of Info. Comm'n*, No. CV136020905S, 2014 WL 1876915, at *3 (Conn. Super. Ct. Apr. 7, 2014) (concluding that records concerning arrests and allegations of misconduct by attorneys in a public defender's office were required to be disclosed under the general provisions of a state public records law and were thus not exempt under HIPAA).

Recently, in a case closely analogous to the one at issue here, a Superior Court rejected an argument by the Alameda County Health Department that newspapers' CPRA requests for the names of long-term care and other congregant care facilities with confirmed cases of COVID-19 (along with the number of infected staff and patients at each facility) fell within CPRA's section 6254(k) exemption because the records constituted protected health information which could not be disclosed under HIPAA. *California Newspaper* at 11–19. In granting the petitioners' request for a writ of mandamus and ordering the agency to disclose the records, the court found persuasive the Ohio and Texas court decisions in *Daniels* and *Abbott*, *id.* at 15, 19, and "agree[d] with *Abbott*'s ultimate conclusion," that:

> [I]f the request is made under the authority of a statute that requires disclosure, then the exception found in section 164.512(a) [disclosures required by law] applies, and the agency must disclose the information as long as the disclosure complies with all relevant requirements of the statute compelling disclosure.

Id. at 17 (quoting *Abbott*, 212 S.W.3d at 662).

The same conclusion follows here. As "record[s] created or maintained by a public agency," *Sander*, 58 Cal. 4th at 323, the Records fall within the scope of the CPRA, which requires that the County disclose the Records upon request. *See* Cal. Gov't Code § 6253. Therefore, the "as required by state or federal law" exception to 17 CCR § 2502(f) applies and the County cannot rely on the confidentiality provisions of that section to withhold the Records from Petitioners. *See* 17 CCR § 2502(f) ("Information reported pursuant to this section . . . shall not be disclosed . . . except as authorized by these regulations [or] as required by state or federal law . . . . "). As neither 17 CCR § 2502 nor Cal. Gov't Code § 6254(k) prohibits disclosure of the Records, the County has a duty to release them to Petitioners and the Superior Court erred in finding otherwise.

II. The public interest in disclosure outweighs any interest in nondisclosure.

The Superior Court further erred in concluding that "the public interest served by not disclosing" the Records "clearly outweighs the public interest served by disclosure." *See* Cal. Gov't Code § 6255(a). In so concluding, the Superior Court relied on the County's contention that "identifying businesses associated with outbreaks would have a chilling effect on the

future willingness of those businesses to report outbreaks" and that "disclosing outbreak locations would have the de-facto effect of revealing the identity of individuals associated with those locations, e.g. a small business with only a few employees." 3 AA 656–57.

However, as Petitioners explain, the County's position is purely "speculative," 2 AA 309, and based on the unsupported opinion testimony of Dr. Wilma Wooten, Public Health Officer for the County. Dr. Wooten's declaration offers no evidentiary support for her assertion that identifying businesses associated with outbreaks would have a chilling effect on the reporting of future outbreaks. 1 AA 287.

Moreover, the location-based data requested by Petitioners relates to locations where a "community outbreak" has occurred, which is defined as a site where "three or more COVID-19 cases in a setting and in people of different households over the past 14 days." *See* 2 AA 306. The County offers no evidence or data to support its assertion that disclosure of the Records would have the de-facto effect of revealing the identity of individuals associated with those locations, such as employees of small businesses. *See, e.g.*, 1 AA 199. To the contrary, it is equally, if not more, plausible to assume that such individuals may include not only business owners and employees, but also customers, delivery and maintenance workers, or even postal workers. As this Court has recognized, "speculative" and "self-serving" claims like those made by the County are "inadequate to demonstrate any significant public interest in nondisclosure." *Cal. State Univ.*,

90 Cal. App. 4th at 835 (denying University's request to withhold the names of donors pursuant to Cal. Gov't Code § 6255(a) where "the University has set forth no competent evidence" to support statements made by University personnel that disclosure of the donors' identities would create a chilling effect on donations).

Indeed, contrary to the County's assertion that "[a]ny public benefit of disclosure is modest at best," Return at 34, public policy overwhelmingly favors disclosure of the Records. As an initial matter, broad disclosure of public records and the narrow construction of any exemptions to disclosure are cornerstones of freedom of information laws. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (noting that the ability of freedom of information laws to facilitate the public's right to know is a "structural necessity in a real democracy"). And, more specifically, access to public records that communicate the scope of the COVID-19 crisis's toll on local communities—including on local businesses—helps to educate and inform Californians as they make decisions about daily life throughout the pandemic. In addition, it helps Californians evaluate government officials' response to the novel coronavirus.

A. Access to location outbreak data provides the public with essential health and safety information of vital importance during a global pandemic.

The news media plays a central role in communicating information about COVID-19 to the public, often relying on information gleaned from public records. As Derek Kravitz, a journalist and lecturer with Columbia University's Brown

Institute for Media Innovation, has explained, "[p]ublic disclosure of outbreaks are a matter of public interest, and a public health concern . . . . Greater transparency leads to greater awareness and knowledge of what's happening in local communities, and better strategies for people in either avoiding or preventing further community spread." NC Watchdog Reporting Network, *How NC chose cooperation over transparency on meatpacking plants with virus outbreaks*, News & Observer (Aug. 11, 2020), https://bit.ly/2TqLLGz.

Government agencies have recognized the unique power of the press to provide the public with information about the current public health crisis. The Iowa Attorney General's Office, for example, has recognized that the disclosure of the names of businesses that have experienced outbreaks of COVID-19 can help reduce the spread of the virus. *See* Iowa Dep't of Justice, Office of the Att'y Gen., *Frequently Asked Health-Related Legal Questions Regarding the COVID-19 Pandemic* (Apr. 20, 2020), https://perma.cc/X2MV-NQSE (advising that the "state epidemiologist has determined that it is necessary for protection of the health of the public to" identify such locations).

In other states, access to government records concerning COVID-19 outbreaks, including location data, has made possible meaningful reporting about the pandemic. For example, in Florida, state health administrators initially refused to disclose the names of the assisted living facilities in which residents had tested positive for COVID-19, despite numerous requests from journalists for that information. Daniel Chang, *Herald drafted a suit seeking ALF records. DeSantis aide pressured law firm not to*

file it, Miami Herald (Apr. 11, 2020), https://perma.cc/Z3L9-Z2XG. By mid-April 2020, a coalition of news media entities prepared to sue the governor for violating the state's public records law. Mary Ellen Klas & Lawrence Mower, *Under pressure, DeSantis releases names of elder care homes with COVID-19 cases*, Miami Herald (Apr. 18, 2020), https://perma.cc/KYH5-9KPQ. The night before the lawsuit was to be filed, Governor DeSantis's administration released the information. In doing so, he ordered the state's surgeon general to "determine that it is necessary for public health to release the names of the facilities where a resident or staff member is tested positive for COVID-19." *Id*. Release of the information helped Floridians make informed decisions about family members in assisted living facilities. As a spokesperson for AARP Florida explained, "[f]amilies now have at least some idea if the disease is in the facility where their loved one is and, even better, families know where it's not. They have a greater level of peace of mind if they know their facility isn't on the list." *Id*.

Similarly, in Ohio the state's Department of Health initially refused to disclose the names of assisted living facilities where there had been outbreaks of COVID-19. Rachel Polansky & Phil Trexler, *State of Ohio releases some details on COVID-19 cases in nursing homes after 3News investigation*, WKYC (Apr. 17, 2020), https://bit.ly/3kBPAFC. After a local news outlet filed a public records request for that data, the Department of Health began to publish the number of cases at each nursing home on its website. *See id.* One individual whose parent was in an Ohio

nursing home stated that having that information helped assuage his feeling of "helpless[ness]." *See id.*

The benefits of public disclosure of COVID-19 location outbreak data are not limited to nursing homes or assisted living facilities. In Oregon, for example, state health officials track outbreaks of five or more employees at workplaces where there are at least thirty workers, and such data is published weekly. *See, e.g.*, Oregon Health Authority, *COVID-19 Weekly Report* (Apr. 28, 2021), https://perma.cc/5SCM-RCHK. Reporting based on these weekly updates has examined outbreaks at prisons, corporate distribution facilities, childcare centers, and other locations, allowing Oregon communities to better understand the scope of the pandemic's toll in their state. *See, e.g.*, KGW Staff, *Here are the 102 active COVID-19 workplace outbreaks in Oregon*, KGW8 (Feb. 4, 2021), https://perma.cc/CQC6-9VDP (discussing how, as of February 4, 2021, seven of the eight largest active coronavirus outbreaks in Oregon were at state prisons); KGW Staff, *Here are the 124 active COVID-19 workplace outbreaks in Oregon*, KGW8 (Dec. 9, 2020), https://bit.ly/3sFel6P (noting a record number of workplace outbreaks in the state, stemming in part from cases at Amazon and Walmart distribution centers); Jade McDowell, *Oregon Health Authority lists weekly workplace outbreaks*, East Oregonian (Dec. 17, 2020), https://perma.cc/7A9L-5293 (reporting outbreaks at childcare facilities).

And, in Wisconsin, numerous counties have identified businesses where COVID-19 outbreaks have occurred, including

La Crosse County, which maintained a webpage detailing local COVID-19 outbreaks, and identifying businesses and other establishments as low, medium, or high risk. *See, e.g.*, Christa Westerberg, *Your Right to Know: Let the public see COVID-19 data*, Capital Times (Aug. 10, 2020), https://perma.cc/3S6W-J7ET. Such proactive disclosures were motivated by the principle that transparent access to data can "help protect workers and incentivize businesses to do better." *Id*. And, for consumers, "La Crosse County's information lets people who may have visited an establishment during a high-risk period know they should get tested or quarantine for 14 days. Or it lets them know their risk for exposure was low, providing peace of mind." *Id*.

B. Public access to location-based COVID-19 data can help to reduce the spread of the disease in California.

California residents, too, are entitled to accurate information from government agencies about the spread of COVID-19 in their communities. Californians need accurate, comprehensive information—including location outbreak data—to navigate the pandemic effectively. With knowledge of current outbreak locations, San Diego residents can take steps to reduce their chances of contracting COVID-19. Individuals who are immunosuppressed or have another pre-existing condition, or have not been vaccinated, can avoid such locations. And those who continue to frequent the location of a current outbreak may take additional precautions. Knowledge of past outbreak locations is equally important: individuals who were recently at

the site of a past outbreak may be motivated to obtain a COVID-19 test, thereby reducing the chance of further community spread.

The County, in seeking to prevent the release of records related to COVID-19 outbreaks, has hindered timely public access to this information of pressing public concern. "These delays . . . are not only imprudent, they are harmful." Adam A. Marshall & Gunita Singh, *Access to Public Records and the Role of the News Media in Providing Information About Covid-19*, 11 J. Nat'l Sec. L. & Pol'y 199, 207 (2020); *id.* at 212 ("Timely and dependable access to public records and meetings is always necessary for democratic governance, but it is especially critical in times of crisis and uncertainty.").

Indeed, as recently as 2017, San Diego residents bore the adverse effects of a similar lack of transparency on the part of Respondent in connection with a Hepatitis A outbreak in San Diego County which killed 20 people and sickened 600 others. *See Hepatitis A outbreak spurs new legislation*, KUSI News (Jan. 25, 2019), https://perma.cc/RY3J-CRCU. Then, the County similarly failed to provide the public and local city officials with location-based data about those who had contracted Hepatitis A citing, in part, state and federal health privacy laws. *See* Lisa Halverstadt, *County Won't Share Many Details on Where Hepatitis A Cases and Deaths Are Happening*, Voice of San Diego (Oct. 5, 2017), https://perma.cc/D9CT-6P24. Despite calls from the public and city officials for more detailed outbreak information, a County spokesperson contended that "more location information wouldn't

necessarily help combat the spread of the virus because most San Diegans aren't at risk of contracting the virus unless they have close contact with someone with hepatitis A." *Id.* Rather, the County posited that city officials could identify the greatest areas of outbreak as they "know where the concentrations of homeless people are, and they know . . . where there's feces on the street . . . [t]hat's something that's observable." *Id.* In response to a December 2018 state audit detailing the County's failure to timely respond to the Hepatitis A epidemic, legislation was passed in the California State Assembly which would require California counties to make Hepatitis A location outbreak information available to city officials. *See Bill Authored In Response To Hepatitis A Audit Passes Assembly Unanimously*, KPBS (May 2, 2019), https://perma.cc/G786-XRKT.

Public records laws, such as the CPRA, are intended to ensure that the public has timely access to information about matters of significant importance in their communities, including the government's response to emergencies. As these examples illustrate, such information is particularly vital during a pandemic, or other health crisis, such as COVID-19. Public access to the Records will help provide the people of California with the tools they need to safely navigate the ongoing pandemic and to help reduce the spread of the disease in San Diego County and throughout the State.

CONCLUSION

For the foregoing reasons, amici urge this Court to grant the relief sought by Petitioners.

Dated: May 10, 2021

Respectfully submitted,

/s/ Katie Townsend

Katie Townsend (SBN 254321)
Counsel for Amici Curiae
Bruce D. Brown**
Shannon A. Jankowski**
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
***Of counsel*

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the attached amici curiae brief was produced using 13-point Century Schoolbook type, including footnotes, and contains 5,005 words. I have relied on the word-count function of the Microsoft Word word-processing program used to prepare this brief.

Dated: May 10, 2021

/s/ Katie Townsend
Katie Townsend
Counsel for Amici Curiae

APPENDIX A: DESCRIPTION OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media 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.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The California Broadcasters Association ("CBA") is the trade organization representing the interests of the over 1000 radio and television stations in our state. The CBA advocates on state and federal legislative issues, provides seminars for

member education and offers scholarship opportunities to students in the communication majors.

The California News Publishers Association ("CNPA") is a nonprofit trade association representing the interests of over 400 daily, weekly and student newspapers and news websites throughout California.

California Newspaper Partnership ("CNP") is a general partnership organized under the laws of the State of Delaware. CNP does business in Southern California as the Southern California News Group and publishes numerous daily papers including The Orange County Register, The Sun, The Press-Enterprise, Los Angeles Daily News and Long Beach Press-Telegram. CNP does business in Northern California as the Bay Area News Group, publishing, among other daily papers, The Mercury News, East Bay Times, Marin Independent Journal, Santa Cruz Sentinel and Monterey Herald. Each of these publications are daily newspapers of general circulation engaged in the business of gathering and disseminating information to the public. CNP newspapers have been actively covering the COVID-19 pandemic and the federal, state and local government's response to it. And it has successfully litigated to obtain

outbreak data at long-term health care facilities in Alameda during the height of the pandemic.

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

Cityside is a nonpartisan, nonprofit media organization committed to building community through local journalism. Cityside publishes Berkeleyside and The Oaklandside, two of the leading independent, online news sites in the country.

The E.W. Scripps Company is the nation's fourth-largest local TV broadcaster, operating a portfolio of 61 stations in 41 markets, including KGTV-TV in San Diego, KERO-TV in Bakersfield, and KSBY-TV in San Luis Obispo. Scripps also owns Scripps Networks, which reaches nearly every American through the national news outlets Court TV and Newsy and popular entertainment brands ION, Bounce, Grit, Laff and Court TV Mystery. The company also runs an award-winning

investigative reporting newsroom in Washington, D.C., and is the longtime steward of the Scripps National Spelling Bee.

Embarcadero Media is a Palo Alto-based 40-year-old independent and locally-owned media company that publishes the Palo Alto Weekly, Pleasanton Weekly, Mountain View Voice and Menlo Park Almanac, as well as associated websites. Its reporters regularly rely on the California Public Records Act to obtain documents from local agencies.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States. The 28 stations have a collective market reach of 37 percent of U.S. households. Each of the 28

stations also operates Internet websites offering news and information for its local market.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The Greater Los Angeles Pro Chapter of the Society of Professional Journalists ("SPJ/LA") is a chapter of the Society of Professional Journalists. SPJ/LA is dedicated to improving and protecting journalism in the greater Los Angeles area. Founded in 1934, SPJ/LA provides educational programming for journalists and the public and promotes First Amendment issues of concern.

KQED Inc. is a nonprofit public benefit corporation organized under the laws of California and engaged in dissemination of news and information since its founding as a public broadcasting station in 1953. At all times relevant to this proceeding, KQED's core mission has been the pursuit and publication/broadcast of information in the public's interest. KQED has advanced this purpose not only through its consistent San Francisco Bay Area and statewide news reporting, which

relies heavily on the use of the California Public Records Act, but also as a champion of public access to some of the most serious information maintained by government: law enforcement use of deadly force, police misconduct and the broader operations of our state's criminal justice system.

The **Los Angeles Press Club** exists to support, promote, and defend quality journalism in Southern California. Our task is to encourage journalists by involving the public in recognizing such journalism together in belief that a free press is crucial to a free society. It is the only SoCal Journalist organization that serve journalists of all stripes (radio, podcast, TV, print, online, documentary filmmakers). The LAPC has existed since the early 1900's and was incorporated in 1948.

The McClatchy Company, LLC is a publisher of iconic brands such as *The Sacramento Bee*, *The Fresno Bee*, *The Modesto Bee*, the *Miami Herald*, *The Kansas City Star*, *The Charlotte Observer*, *The* (Raleigh) *News & Observer*, and the *Fort Worth Star-Telegram*. McClatchy operates media companies in 30 U.S. markets in 16 states, providing each of its communities with high-quality news and advertising services in a wide array

of digital and print formats. McClatchy is headquartered in Sacramento, California.

Media Guild of the West, NewsGuild-CWA Local 39213, was founded in 2019 by newly unionized journalists at the Los Angeles Times. The local now represents hundreds of unionized journalists and media workers in newsrooms throughout Southern California, Arizona and Texas. On July 8, 2020, Media Guild of the West members voted 94% to 6% to support advocacy for open-records access, improvements to the California Public Records Act and other transparency laws, and First Amendment issues that affect the work of journalists and serve the public interests of transparency and accountability.

Mother Jones is a nonprofit, reader-supported news organization known for ground-breaking investigative and in-depth journalism on issues of national and global significance.

The **Northern California Chapter of the Society of Professional Journalists** ("SPJ NorCal") is dedicated to improving and protecting journalism. It is a Chapter of the national Society of Professional Journalists, the nation's most broad-based journalism organization. Founded in 1909 as Sigma Delta Chi, the Society of Professional Journalists promotes the

free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects the First Amendment guarantees of freedom of speech and press. SPJ NorCal has a Freedom of Information Committee of journalists and First Amendment lawyers, which assists in its free speech and government transparency advocacy. Also, in collaboration with its Freedom of Information Committee, it hosts the annual James Madison Freedom of Information Awards and offers training to journalists on free press and access issues.

PROOF OF SERVICE

I, Katie Townsend, do hereby affirm that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above-captioned action. My business address is 1156 15th Street NW, Suite 1020, Washington, D.C. 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

On May 10, 2021, I caused the foregoing documents to be served: **Application for Leave to File Amici Curiae Brief and Proposed Amici Curiae Brief of the Reporters Committee for Freedom of the Press and 18 Media Organizations in Support of Petitioners**, as follows:

[x] By Truefiling:

Jeffrey P. Michalowski
w/ copy to: Jerri Zara
Senior Deputy County Counsel,
Appellate Litigation
County of San Diego, Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101
Phone: (619) 531-4886
Fax: (619) 531-6005
jeffrey.michalowski@sdcounty.ca.gov
jerri.zara@sdcounty.ca.gov

Counsel for Real Party in Interest County of San Diego

Felix Tinkov
Law Office of Felix Tinkov
3170 Fourth Avenue, Suite 250
San Diego, CA 92103
Phone: (619) 832-1761
Email: felix@tinkovlaw.com

Counsel for Petitioners Voice of San Diego, KPBS Public Broadcasting, and The San Diego Union Tribune, LLC

[x] By mail:

San Diego Superior Court
c/o Hon. Joel R. Wohlfeil, Dept. C-73
330 W. Broadway
San Diego, CA 92101

Counsel for Respondent
The Superior Court
of San Diego

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on the 10th of May, 2021, in Washington, D.C.

By: */s/ Katie Townsend*

Katie Townsend
Counsel for Amici Curiae