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California Court of Appeal
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

RE: ***San Benito County v. Superior Court (Western Resources Legal Center)***
Court of Appeal Case No.: H050285
San Benito Superior Court Case No.: CU2100204

Amicus Curiae Letter of the California State Association of Counties and League of California Cities in Support of Petition for Writ of Mandate

Honorable Justices:

The California State Association of Counties (CSAC) and the League of California Cities (Cal Cities) urge this Court to grant the Petition for Writ of Mandate pending in this matter.

A. Interest of Amici Curiae.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. Specifically, the significant issues regarding the applicability, and proper extent of discovery in Public Records Act proceedings attempting to be brought under the Civil Discovery Act.

Cal Cities is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

In 2017, the court held in *City of Los Angeles v. Superior Court* (2017) 9 Cal. App. 5th 272, that discovery is permitted in California Public Records Act ("CPRA") proceedings under the Civil Discovery Act, a case of first impression in the Court of Appeal. That

opinion provided general guidance that discovery could be limited in these CPRA proceedings. (*Id*. at pp. 288, 290 ["Thus, 'for discovery purposes, information should be regarded as "relevant to the subject matter". . . .Federal courts have consistently held that while discovery is permissible in FOIA cases, its use is more 'limited' than in other types of civil actions."].)

Amici have a strong interest in how the *City of Los Angeles* opinion is applied to CRPA actions in the trial court, as allowing broad civil discovery in CPRA cases creates negative practical administrative and fiscal impacts on amici's members. The concerns with discovery in CPRA cases that the Second District attempted to address in *City of Los Angeles* have come to fruition here, with this trial court disregarding any generalized limitations on discovery in CPRA cases, ultimately allowing discovery to be used to expand and undercut the Legislative intent of the CPRA. The expansion, methods, and types of discovery proposed under this case could significantly impact local agencies attempting to meaningfully comply with a CPRA request, creating a pathway for individual claimants to work around the CPRA and use the Civil Discovery Act to purposefully distort the matters at issue in CPRA proceedings. The trial court's order goes beyond access and transparency of public records, moving into cross-examination on public agency actions and reasoning. Perhaps worse, it creates a disincentive for records requesters to work with public agencies to clarify and in some situations even narrow the scope of requests, which is a process that helps ensure that the public records are made available to the public without excessive burdens on local agencies.

The trial court order creates an untenable situation that logically could not have been contemplated or intended by the California Legislature in their construction of the CPRA. It will result in increased costs for local agencies and the courts and is therefore an issue of significance to CSAC and Cal Cities.

B. Granting Discovery Without Any Apparent Limitation in CPRA Cases is Inconsistent with the Statutory Scheme for Obtaining Public Records in this State.

CSAC and Cal Cities believe in transparency in public actions and the public's constitutionally-protected right to access public information. At the same time, there is some information that is protected from public disclosure, and the act of searching for records and determining which documents should not be disclosed cannot be allowed to grind the wheels of government administration to a halt. The CPRA statutory scheme was thus carefully devised with the intent of making public documents available for inspection while balancing the administrative burdens around expediency and individual privacy rights. (Cal. Const., art. I, § 3, subd. (b), pars. (2), (3);

Gov. Code, §§ 6250, 6253.) Denying San Benito County's writ and allowing the trial court to require the county to produce records without any apparent limitations and on an accelerated timeframe goes far beyond the intended scope of the CPRA.

The facts of this case illustrate the balance between transparency and administrative realities. San Benito did provide documents to the requester in response to its first request, was working on a supplemental round of documents, sought input from the requester to coordinate production of those additional documents, and sought further conversations on the second document request (Writ Petition, pp. 11-12.) This is precisely how the CPRA is intended to work—local agencies help requesters formulate focused requests and where voluminous records are sought, produce the records on a rolling basis to allow government to continue to function while the documents are found, reviewed for exemptions, and produced. Indeed, this course of conduct is noted as a "best practice" in Cal Cities' CPRA guidebook:

> When faced with a voluminous public records request, a local agency has numerous options — for example, asking the requester to narrow the request, asking the requester to consent to a later deadline for responding to the request, and providing responsive records (whether redacted or not) on a "rolling" basis, rather than in one complete package. It is sometimes possible for the agency and requester to work cooperatively to streamline a public records request, with the result that the requester obtains the records or information the requester truly wants and the burdens on the agency in complying with the request are reduced.

(League of California Cities, *The People's Business: A Guide to the California Public Records Act* (Sept. 2022) p. 24 [available online at: https://www.calcities.org/docs/default-source/city-attorneys/the-people's-business-2022.pdf?sfvrsn=6671a8ea_7].)

The trial court order has allowed Real Party in Interest to completely circumvent this process. Rather than working with the County to obtain the records sought and accept the documents from a voluminous request on a rolling basis, Real Party in Interest instead filed a lawsuit, and the trial court applied the Civil Discovery Act to order all of the non-exempt documents to be produced in 28 days and require the County to respond to interrogatories, which gives the requester information that is not even a "record" under the CPRA. (*Sander v. Superior Court* (2018) 26 Cal.App.5th 651, 665 ["It is well established under California law and guiding federal precedent under the Freedom of Information Act (5 U.S.C. § 552) (FOIA) that, while the CPRA requires

public agencies to provide access to their existing records, it does not require them to create new records to satisfy a request."].)

This untenable outcome contradicts the CPRA's statutory scheme. California Government Code sections 6258 and 6259 provide the procedure for enforcing the right to inspect or receive a copy of any public record, it now becomes intermingled with civil act discovery requirements and timelines. (Gov. Code, § 6258; see also *Filarsky v. Super. Ct.* (2002) 28 Cal.4th, 419, 423 ["in enacting sections 6258 and 6259, the Legislature specified the exclusive procedure in these circumstances for litigation disputes regarding a person's right to obtain disclosure of public records under the Act."].) Even if application of the Civil Discovery Act is proper in CPRA cases, it must be done in a limited manner and reserved to instances where the trial court must resolve whether the agency has a duty to disclose, whether the discovery request is justified due to a need for expeditious resolution, or to instances where there is evidence of bad faith on the part of the agency or tangible evidence that documents have been improperly withheld. (*City of Los Angeles, supra,* 9 Cal.App.5th at pp. 289-290.) None of that analysis was done by the trial court here.

Instead, the requestor used the Civil Discovery Act to obtain public records more quickly than the County determined it can reasonably produce them, and to obtain additional and expanded responses beyond what it would be entitled to receive under the CPRA—all without any finding that the County has violated, or even may have violated, the CPRA in its actions in responding to the request. In so doing, the requestor has effectively exploited the ambiguity created in *City of Los Angeles*, to force production of records without consideration of administrative viability and to move beyond a CPRA request and go into cross-examination with county employees before the CPRA action has been addressed. If allowed to stand, this order would create irreparable injury to the County and have ripple effects on all local agencies in the same situation. Once a county or other local agency has to put its governing responsibilities on hold to respond to the discovery order or has provided discovery responses that go far beyond the scope of identifying and providing non-exempt documents, there is simply no way to "roll the clock back." The requester will now have used civil discovery under the guise of a CPRA action to go far beyond what would and should have been originally provided under a CPRA action originally envisioned by the Legislature. The Petition should therefore be granted to avoid irreparable harm to San Benito and future local agencies where legitimate questions exist about the appropriateness of responses and the extent and applicability of civil discovery in addressing those issues.

C. Granting the Petition for Writ of Mandate Will Allow this Court to Provide Important Guidance that Discovery be Limited in California Public Records Act Action to Avoid Irreparable Injury to Local Jurisdictions Statewide.

Amici can in good faith represent that each year public entities in California receive thousands and thousands of public records requests annually. (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1190.) In general, the number of requests seems to be ever-increasing, perhaps due in part to the ease with which requests can be made electronically (including, with a requestor's push of the "send" button to multiple addresses). (*Ibid*.)

Even since the *Ardon* opinion was issued in 2016, requests appear to be increasing both in scope and complexity, which – as this case reflects – is compounded by the decision in *City of Los Angeles v. Superior Court* (2017) 9 Cal. App. 5th 272. By allowing civil discovery in CPRA cases with only limited guidance to trial courts, the Second District in *City of Los Angeles* created confusion in CPRA actions.

Amici absolutely agree that public agencies must disclose non-exempt records. But it is unreasonable and beyond the CPRA statute or case law to allow individuals or entities to begin a CRPA request, be "unsatisfied" with the request-response on time or scope, and then inappropriately leverage the *City of Los Angeles* decision to pull in the Civil Discovery Act to circumvent an agency's legitimate decision to provide documents on a rolling basis or to seek responses that clearly go beyond the scope a "public record" and effectively cross-examine the agency about the records is antithetical to the CPRA. The requested discovery responses do not merely seek to identify documents. Rather, the requestor used is using discovery to gain information and access to individual opinions of county staff. These include not only if certain actions were or were not taken, but "why" they were not taken. Facially, these questions are not an evaluation of whether the County has complied with the request, but rather, is using civil discovery and the trial court to push a CPRA action into unlimited civil discovery in what amounts to a fishing expedition for future litigation. This could not have possibly been the intent of the California Legislature or even the court in *City of Los Angeles*. This court now has before it an opportunity to create clear guidance that the Civil Discovery Act cannot be used to circumvent the statutory process for responding to a CPRA request.

Cities and counties across the state are struggling under the volume and breadth of CPRA requests. Being pulled into costly, time-consuming litigation under the pretext that they are not complying with the CPRA, only to have plaintiffs advance discovery requests that are clearly targeted to go beyond public transparency and accelerate release of records and/or move into subjective cross-examination of agency employee

opinions and attitudes of specific situations will only make the situation infinitely worse. With thousands of requests sent to local agencies each year, this misuse of the Civil Discovery Act and going beyond what is traditionally afforded in a public request will reverberate throughout the state for agencies trying to comply with the already extensive requests – creating little limitation on dragging local agencies before the court under the guise of dissatisfaction to throw out all limitations envisioned under the CPRA.

For all of these reasons, Amici urge this Court to grant the Petition for Writ of Mandate, provide the relief requests in the Petition, and revisit the *City of Los Angeles* decision to either provide clear guidance to trial courts, public agencies and requestors on the appropriate limits of the Civil Discovery Act to CPRA cases or to determine that the Second District erred in concluding the Civil Discovery Act applies to CPRA cases at all.

Sincerely,

By: /s/

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Litigation Counsel

Counsel for Amici Curiae
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STATE OF CALIFORNIA California Court of Appeal, Sixth Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, Sixth Appellate District

Case Name: **San Benito County v. Superior Court**
Case Number: **H050285**
Lower Court Case Number: **CU2100204**

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9/20/2022

Date

/s/Jennifer Henning

Signature

Henning, Jennifer (193915)

Last Name, First Name (PNum)

California State Association of Counties

Law Firm