COURT OF APPEAL

OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

TIM CREWS, Plaintiff and Appellant, vs. WILLOWS UNIFIED SCHOOL DISTRICT ET AL., Defendants and Respondents,	Third District Civ. No.: **C066633** Glenn County Superior Court, Case No. 09CV00697 (Hon. Peter Twede)

BRIEF OF AMICI CURIAE FIRST AMENDMENT COALITION, CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, LOS ANGELES TIMES COMMUNICATIONS LLC, MCCLATCHY COMPANY, CALIFORNIA NEWSPAPERS PARTNERSHIP, THE ORANGE COUNTY REGISTER, HEARST CORPORATION AND THE PRESS-ENTERPRISE IN SUPPORT OF APPELLANT TIM CREWS

DUFFY CAROLAN (SBN 154988)
DAN LAIDMAN (SBN 274482)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
duffycarolan@dwt.com
danlaidman@dwt.com

Attorneys for AMICI CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE THIRD APPELLATE DISTRICT COURT OF APPEAL FOR THE STATE OF CALIFORNIA:

Amici Curiae the First Amendment Coalition, California Newspaper Publishers Association, Los Angeles Times Communications LLC, McClatchy Company, California Newspapers Partnership, The Orange County Register, Hearst Corporation and The Press-Enterprise respectfully submits this brief in support of Appellant Tim Crews.

I. SUMMARY OF ARGUMENT

The California Public Records Act ("CPRA") is premised on the lofty ideal that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov't Code § 6250. But ordinary citizens – who serve as the front-line enforcers of the CPRA – are at an inherent disadvantage when it comes to asserting their rights because of the high costs of litigation and the formidable resources of public agencies. The Legislature recognized that the promise of governmental transparency would be an empty one if members of the public were not given special incentives and protections to encourage them to seek judicial enforcement of the "fundamental" right of access.

For this reason the CPRA's unique fee-shifting provision does more than any other part of the statute to ensure that the purpose of the law is fully realized. Section 6259(d) *incentivizes* members of the public to go to court by providing them with a mandatory award of attorneys' fees when they succeed at obtaining records, and it *protects* them from being held liable for government agencies' fees unless their lawsuits are "clearly

frivolous." *Id.* at § 6259(d); *Filarsky v. Superior Court*, 28 Cal. 4th 419, 427 (2002). The trial court's ruling, however, undermines the carefully crafted statutory scheme by collapsing the vital distinction between an unsuccessful CPRA action and a frivolous one. If the decision is upheld – and if the sweeping rule proposed by the Willows Unified School District is adopted – members of the public with colorable claims would be strongly *discouraged* from going to court to enforce their rights. Agencies throughout California would be able to avoid public scrutiny and accountability and leave the public in the dark by invoking the example of what happened to Appellant Tim Crews.

Mr. Crews, an independent newspaper publisher, filed a CPRA request in 2009 to investigate a classic matter warranting public scrutiny – how a local school district was spending its money. When the District did not produce any records within the statutorily mandated timeline, Mr. Crews petitioned the trial court for relief. And when the District responded with only partial disclosure, he aggressively pursued his case and forced the production of previously withheld public records. Yet for exercising his right of access in the precise manner contemplated by the CPRA, the California Constitution, and decades of controlling case law, Mr. Crews now faces personal financial ruin.

The trial court deemed Mr. Crews' litigation frivolous and ordered him to pay the District more than $56,000 to cover its attorneys' fees and costs. The trial court did not find that Mr. Crews' claims were not colorable, or that no reasonable attorney would have pursued them. Rather, it faulted Mr. Crews primarily for serving his petition when the District had begun partial production. But the ruling overlooks the CPRA's emphasis on *prompt* disclosure, as well as the ample authority making clear that *public agencies*

have the burden of justifying their withholding of exempt records or their delayed production due to logistical hurdles. Finding Mr. Crews' case frivolous on these grounds was a radical departure from the familiar principle that colorable claims with arguable bases in the law should not be deemed frivolous even if they are ultimately unsuccessful. If the trial court's ruling is affirmed it would undermine the cause of governmental transparency statewide. It should be reversed for several independent reasons.

First, the trial court's ruling contradicts the text of the CPRA, Article I, Section 3(b) of the California Constitution, and decades of case law that establish that the public records law must be broadly construed in favor of public access and in a manner that *encourages* citizens to seek judicial enforcement of their rights. The Legislature strongly reaffirmed these core principles with recent legislation responding to an analogous case. After the Fourth District upheld a substantial fee award against an activist who filed an unsuccessful CPRA and open meetings lawsuit, the Legislature enacted a bill in 2009 to prevent public agencies from using the anti-SLAPP statute to recover fees against CPRA petitioners unless their actions are clearly frivolous. The legislative history emphasizes that the CPRA's fee-shifting provision is designed to "allow citizens to go to court if necessary with what they believe to be meritorious litigation to correct unlawful government secrecy without the chill of being saddled with crippling fee exposure as the cost of losing." Assembly Floor Analysis of SB 786, June 24, 2009.

Second, a decision affirming the trial court's ruling would conflict with authority making clear that unsuccessful CPRA lawsuits cannot give rise to liability for a public agency's fees, and that the "clearly frivolous" standard is not met where a requester has a

colorable claim or pursues a novel and important legal issue. *See, e.g., Tracy Press, Inc. v. Superior Court*, 164 Cal. App. 4th 1290, 1302 (2008); *Rogers v. Superior Court*, 19 Cal. App. 4th 469, 484 (1993); *see also Boyle v. City of Redondo Beach*, 70 Cal. App. 4th 1109, 1122 (1999) (same in context of open meetings law). As the California Supreme Court has explained, courts should only find actions to be frivolous in rare, extreme circumstances in which no reasonable attorney would consider the issues arguable. *See, e.g., In re Marriage of Flaherty*, 31 Cal. 3d 637, 648-51 (1982). Applying a looser standard would have a chilling effect on plaintiffs with legitimate claims and deter them from asserting their rights. *See Choate v. County of Orange*, 86 Cal. App. 4th 312, 323 (2000).

Third, the primary basis for the trial court's finding of frivolousness was the timing of Mr. Crews' litigation. But in sanctioning Mr. Crews for serving the District after it only partially disclosed the requested records after the expiration of the statutorily mandated deadline, the trial court overlooked authority establishing that the CPRA encourages requesters to seek prompt judicial enforcement while obligating public agencies to provide full disclosure within established timeframes, or to carry the burden of justifying any exceptions. *See, e.g., Powers v. City of Richmond*, 10 Cal. 4th 85, 111 (1995); *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1332-35 (1991); *Marken v. Santa Monica-Malibu Unified School Dist.*, 202 Cal. App. 4th 1250, 1268 n.14 (2012). Upholding the trial court's ruling would encourage public agencies to release public records in drawn-out stages, frontloading the production of non-controversial documents and saving the disclosure of any embarrassing or damaging records until after the issue is

no longer newsworthy. Agencies could use this tactic to delay the release of records until after elections are held, after votes are taken or contracts entered into, or, as happened here, until after the end of the school year. And if a requester complains or tries to go to court to speed up production, the agency could point to this case and scare off the requester with the chilling prospect of ruinous attorneys' fees. *Cf. Powers*, 10 Cal. 4th at 118 (George, J., concurring) ("the *timeliness* of disclosure often is of crucial importance in actions brought under the Public Records Act") (original emphasis).

Fourth, the trial court's finding of frivolousness was also based on its determination that the parties should have engaged a neutral to resolve issues regarding the format of the records, a requirement that does not exist in the CPRA. Affirming the trial court's ruling would further discourage citizens from exercising their right of access because by filing a CPRA petition they would risk incurring massive fee awards simply for failing to predict that a court might impose a novel, extra-statutory requirement. *See California Teachers Ass'n v. State of California*, 20 Cal. 4th 327, 344 (1999).

Finally, the District essentially asks this Court to adopt a sweeping new rule that would permit courts to deem CPRA actions frivolous – and to impose massive fee orders on requesters – based on a loose list of factors including the breadth of a request and how difficult it is for the agency to respond. But courts have rightly eschewed such standards and restricted their findings of frivolousness to narrow cases in which no reasonable attorney would have found a case arguable. *See In re Marriage of Flaherty*, 31 Cal. 3d at 648-50. Nor can the District's standard be squared with the CPRA cases placing the burden on public agencies to explain why a request seeks nonresponsive documents or

why compliance would be overly burdensome. *See, e.g., ACLU of N. Cal. v. Superior Court*, 202 Cal. App. 4th 55, 85 (2011); *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1327 (2009). Adopting the District's standard would enable public agencies to insulate themselves from scrutiny by threatening requesters with liability for attorneys' fees based on the agency's own professed technical limitations or the challenging nature of a request.

Because upholding the trial court's ruling and adopting the District's proposed standard would provide public agencies with a blueprint for discouraging citizens with colorable claims from going to court to force the disclosure of public records, Amici Curiae respectfully request that this Court reverse the judgment of the trial court.

II. LEGAL ANALYSIS

A. The CPRA's Fee-Shifting Provision Must Be Interpreted In A Manner Consistent With Its Purpose Of *Encouraging* Citizens To Judicially Enforce Their Right Of Access To Public Records.

The CPRA requires that courts award attorneys' fees to prevailing plaintiffs, but it provides for the recovery of fees by public agencies only "[i]f the court finds that the plaintiff's case is clearly frivolous." Gov't Code § 6259(d). In *Filarsky*, the California Supreme Court explained that the CPRA's unique fee-shifting provision reflects the intent of the Legislature to provide both "*protections* and *incentives* for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure." 28 Cal. 4th at 427 (emphasis added).

The Legislature *incentivized* citizens to assert their rights by providing mandatory fees for successful CPRA plaintiffs. *Id.* And it *protected* them with a fee-shifting

provision where, "if the defendant public agency prevails, the court lacks legal authority to award costs to the agency--even though the agency would be entitled to costs in an ordinary action--unless the action is frivolous." *Id.* "Thus, unless the plaintiff initiates litigation pursuant to section 6258 that is clearly frivolous, the plaintiff is insulated from liability for the public agency's costs incurred in defending the action." *Id.*

The goal of protecting citizens who initiate CPRA lawsuits was underscored by recent legislation inspired by a case analogous to this one. In 2006, the nonprofit organization Californians Aware and its president, open government advocate Richard McKee, filed suit against the Orange Unified School District, claiming that the agency violated the CPRA and the Brown Act (California's open meetings law) by, among other things, distributing videotapes of a public meeting that omitted critical comments made by a school board member. *See Californians Aware v. Orange Unified Sch. Dist.*, 2008 Cal. App. Unpub. LEXIS 7487 (Cal. App. 4th Dist. Sept. 4, 2008). The District successfully moved to strike the petition under the California anti-SLAPP statute, which provides for mandatory attorneys' fees for prevailing defendants. *See* Code Civ. Proc. § 425.16(c). The agency was awarded more than $80,000 in attorneys' fees, and because Californians Aware lacked sufficient financial resources, Mr. McKee, a community college chemistry professor, was held personally liable for practically the full amount.

When Mr. McKee died in 2011, a *Los Angeles Times* obituary described the effect of the fee award: "A lien was placed on the chemistry professor's home and his wages were garnished. He delayed his retirement until last year and tapped his savings to cover the award." *See* Elaine Woo, "Richard P. McKee dies at 62; open government advocate,"

L.A. Times, Apr. 27, 2011, *available at* http://www.latimes.com/news/obituaries/la-me-richard-mckee-20110427,0,3673562.story. Mr. McKee's plight inspired the Legislature to amend the anti-SLAPP statute to prohibit prevailing defendants from recovering fees for striking CPRA petitions. *See* 2009 Cal SB 786, 2009 Cal Stats. ch. 65. The law now makes clear that public agencies cannot use the anti-SLAPP statute as a loophole to avoid the public records law's requirement that fees can only be awarded to governmental bodies if a CPRA petition is clearly frivolous. Code Civ. Proc. § 425.16(c)(2).

The author of the legislation, Sen. Leland Yee, explained that the amendment was motivated by a concern that members of the public would be discouraged from exercising their right of access in light of what happened to Mr. McKee. All of the legislative analyses of the bill included a statement from Sen. Yee describing the *Californians Aware* case and its harsh outcome for Mr. McKee, and warning that "[i]f this experience continues as even a remote risk, no prudent person will use the courts to enforce open government rights that recently were given fundamental constitutional status, along with speech, press and privacy, by the voters in the passage of Proposition 59 of 2004 (Article 1, Section 3 (b))." *See, e.g.*, Assembly Floor Analysis of SB 786, June 24, 2009, *available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0751-0800/sb_786_cfa_20090624_180317_asm_floor.html. Sen. Yee added:

> Litigation to enforce the open government laws that is dismissed on the motion to strike creates a palpable chilling impact on a citizen's willingness to attempt to enforce the basic civil rights the laws are intended to protect. Open government laws like the Brown Act and the California Public Records Act provide that a plaintiff suing to enforce them can be required to pay a prevailing (government agency) defendant's attorney's fees only upon a court finding that the plaintiff's case was irresponsible: "clearly frivolous and totally lacking in merit (Brown Act

- Government Code Section 54960.5 or 6259(d)). *These good faith plaintiff protections allow citizens to go to court if necessary with what they believe to be meritorious litigation to correct unlawful government secrecy without the chill of being saddled with crippling fee exposure as the cost of losing.*

Id. (emphasis added).

The Senate voted unanimously for SB 786, and the Assembly approved the bill by a vote of 66-2. The Legislature thus strongly reiterated that the overriding purpose of the CPRA's fee-shifting provision is to protect members of the public who seek judicial enforcement of their right of access to public records.

B. A Frivolous CPRA Petition Is Different From An Unsuccessful One.

As these legislative enactments and the cases interpreting the CPRA make clear, fee awards for prevailing public agencies are meant to be reserved for truly unusual situations. In recognition of this clear legislative intent to protect records requesters, courts have interpreted Section 6259(d) as setting a very high bar for public agencies to recover attorneys' fees from CPRA requesters.[1]

In *Rogers v. Superior Court*, 19 Cal. App. 4th 469, 484 (1993), the Second District reversed the trial court's fee award to a municipality that prevailed in a CPRA action, explaining that "the Legislature has expressly limited an award of costs to the public agency to those actions in which the plaintiff's case is clearly frivolous." The *Rogers*

[1] The state's municipalities share this view. The League of California Cities explains in its guide to the CPRA that a "successful local agency defendant may seek an award of attorney fees and court costs against an unsuccessful plaintiff, but the agency will only obtain such an award in *very limited circumstances*." League of California Cities, The People's Business: A Guide to the California Public Records Act at 47 (2008), *available at* http://www.cacities.org/UploadedFiles/LeagueInternet/62/62f84af4-13c5-4667-8a29-261907aea6d6.pdf (emphasis added).

Court ruled against the petitioner on the substance, concluding that the deliberative process privilege permitted the public agency to redact the phone numbers from officials' telephone records. *Id.* at 481. However, although the court "found petitioner's case to be unmeritorious, it is certainly not frivolous," and therefore the trial court "erred in awarding costs to the City." *Id.* at 484.

Similarly, in *Tracy Press, Inc. v. Superior Court*, 164 Cal. App. 4th 1290, 1302 (2008), this Court rejected a prevailing public agency's request for attorneys' fees under the CPRA even though the petitioner's litigation "was doomed from the beginning" because of the absence of an indispensable party. The Court held that the case was "not clearly frivolous" because "the petition attempted to raise an important and novel issue" concerning the scope and applicability of the CPRA. *Id.* Taken together, these decisions stand for the proposition that a *losing* CPRA case is quite different from a *frivolous* one, and that a petitioner should not have to pay a public agency's fees if he or she files suit advancing an arguable, if ultimately incorrect, legal position.[2]

The Second District's decision in *Boyle v. City of Redondo Beach*, 70 Cal. App. 4th 1109 (1999) is also instructive. Applying the similar fee-shifting provision of the Brown Act, the state's open meetings law, the court granted in part and denied in part the

---

[2] Interpreting the federal Freedom of Information Act ("FOIA"), the D.C. Circuit held in *Baez v. DOJ*, 684 F.2d 999 (D.C. Cir. 1982) that the government could recover its *costs* against an unsuccessful FOIA plaintiff, but the court distinguished the recovery of *fees*. "Unlike attorneys' fees, whose magnitude and unpredictability have *discouraged parties with otherwise meritorious claims from litigation*, the small and predictable costs of court fees, printing costs, and court reporters' fees have customarily been viewed as necessary and reasonable incidents of litigation, properly reimbursable to the victors." *Id.* at 1003 (emphasis added).

defendants' requests for attorneys' fees on appeal. The court denied a public agency's request for fees, concluding that even though the petitioner lost on the merits, the court did remand on one procedural point, and thus the action against the city was not frivolous. *Id.* at 1121. The court only awarded fees with respect to claims against outside counsel defendants who were not even proper defendants under the statute, and thus "*no reasonable attorney* would have named [them] in the complaint." *Id.* at 1122 (emphasis added).

These decisions show that in order to trigger fee-shifting in favor of a public agency, a petition must be so obviously and inarguably meritless that "no reasonable attorney" would have brought it. *Id.* This standard is consistent with other analogous contexts in which courts have delineated the boundary between unsuccessful claims and frivolous ones. For example, in *In re Marriage of Flaherty*, 31 Cal. 3d 637 (1982), the California Supreme Court analyzed the circumstances in which an appeal could be deemed frivolous. The Court started with the proposition that such findings should be made "sparingly," and that the definition of "frivolous" was based on "extreme examples." *Id.* at 648-49.

The Court concluded that "an appeal should be held to be frivolous only when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit." *Id.* at 650. But the Supreme Court added that courts must be cautious even in applying such a strict standard:

> [A]ny definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals. Justice Kaus stated it well. In reviewing the dangers inherent in any attempt to define frivolous appeals, he said the courts cannot be 'blind to the obvious: the borderline between a frivolous appeal and one which simply has no merit is vague indeed . . . . The difficulty of drawing the line simply points up an essential corollary to the power to dismiss frivolous appeals: that in all but the clearest cases it should not be used.' .... The same may be said about the power to punish attorneys for prosecuting frivolous appeals: the punishment should be used most sparingly to deter only the most egregious conduct.

Id. at 650-51 (quoting *People v. Sumner*, 262 Cal. App. 2d 409, 415 (1968)) (original emphasis). The Supreme Court therefore held that while the appellant's appeal lacked merit it was not frivolous because "it was not unreasonable for [his counsel] to think the issues were arguable." *Id.* at 651.

The Fourth District reached a similar conclusion in *Choate v. County of Orange*, 86 Cal. App. 4th 312 (2000), which involved the federal civil rights law 42 U.S.C. § 1983. Courts have interpreted the law's attorneys' fee provision, 42 U.S.C. § 1988, as ordinarily requiring fees for prevailing plaintiffs, but only providing fees for successful defendants when a claim is frivolous. *Id.* at 322. The trial court had awarded the defendants $240,000 in attorneys' fees after a seven-week jury trial resulted in only "extremely limited success" for the plaintiffs, who won less than $5,000 in damages from a single sheriff's deputy. *Id.* at 318. The Court of Appeal reversed the fee award, reasoning that "[w]hatever criticism may be levied against the prosecution of this case, it manifestly was not clearly frivolous or brought solely for harassment without hope of

success." *Id.* at 323. The Court further explained that "[p]rivate citizens should not forgo the opportunity to vindicate core federal rights because they lack financial resources or because they fear they will have to pay the other side's attorney fees if they lose. The specter of attorney fees should chill only vexatious plaintiffs who bring meritless lawsuits to settle scores, not disputes." *Id.* at 322-23.

The same reasoning applies in the CPRA context. Just as Section 1988 exists to encourage private citizens to "vindicate core federal rights," the fee-shifting provision of the CPRA is designed to encourage members of the public to assert their right of access to public records, which is "a fundamental and necessary right of every person in this state." *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 329 (2007) (quoting Gov't Code § 6250). These authorities make clear that by limiting public agencies' recovery of attorneys' fees to "clearly frivolous" cases, the Legislature intended to carve out a small, exceptional category of petitions that no reasonable attorney would arguably believe to have merit.

But even if the CPRA's use of the phrase "clearly frivolous" was uncertain, any ambiguities would have to be resolved in favor of protecting members of the public who exercise their right to access public records. *See Galbiso v. Orosi Public Utility Dist.*, 167 Cal. App. 4th 1063, 1088 (2008) ("we interpret section 6259 in keeping with the overall remedial purpose of the Public Records Act to broaden access to public records."); *see also CBS, Inc. v. Block*, 42 Cal. 3d 646, 651-52 (1986) (CPRA "was passed for the explicit purpose of increasing freedom of information .... Maximum disclosure of the conduct of governmental operations was to be promoted by the Act")

(quotation omitted). Moreover, in 2004, California voters passed Proposition 59, which amended the state Constitution to formally enshrine the right of access to government records. The California Constitution now declares that the "people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const., art. I, § 3, subd. (b)(1). "A statute, court rule, or other authority … shall be *broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.*" *Id.* at (b)(2) (emphasis added). Therefore, the California Constitution and decades of controlling precedent require that if there is a close case in which it is not obvious that a petition is "clearly frivolous," the issue must be resolved in favor of the CPRA requester.

C. The Trial Court's Ruling Contradicts The CPRA And California Constitution And Will Chill The Exercise Of Citizens' Access Rights.

The trial court's decision and the rule that the District advocates for on appeal undermine the Legislature's carefully crafted scheme by collapsing the crucial distinction between unsuccessful and frivolous CPRA petitions. If the District's argument were to prevail, it would work a sea change in the law that would strongly discourage citizens from seeking judicial enforcement of their right of access to public records.

1. The Trial Court's Finding Of Frivolousness Ignores Controlling Precedent And Imposes Novel Extra-Statutory Requirements.

The trial court explained that it found Mr. Crews' action to be frivolous for two primary reasons: (1) he served the petition after the District had provided some but not all responsive records; and (2) he did not work with the District to engage a "neutral" to

resolve issues related to the format of the records. (AOB at 23-24; CT 1798:6-11, 12-15). The former explanation ignores controlling precedent emphasizing that time is of the essence in responding to CPRA requests, while the latter imposes a novel requirement with no basis in the statute or the case law.

a. The CPRA Is Designed To Encourage Prompt Judicial Enforcement By Records Requesters.

Consistent with the statutory aim of ensuring *prompt* access to public records, the CPRA sets specific timelines for governmental agencies to respond to requests. *See* Gov't Code § 6253(b) (agencies "shall make the records promptly available" upon request). Agencies have an initial 10-day window to make a determination as to whether records are disclosable, although extensions of an additional 14 days are available in "unusual circumstances." *Id.* at § 6253(c). The judicial enforcement provisions also emphasize speed. In CPRA actions, pleadings and hearings must be scheduled "with the object of securing a decision … at the earliest possible time," *id.* at § 6258, and trial court rulings are "immediately reviewable" through an extraordinary writ process with expedited deadlines, *id.* at § 6259(c).

In *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325 (1991), the Supreme Court examined the history of the 1984 amendment that created the CPRA's unique appellate review procedure, and determined that "the exclusive purpose of the amendment was to speed appellate review." *Id.* at 1334. The Court noted that the amendment had been sponsored by the California Newspaper Publishers' Association (CNPA), and "inspired by a case in which a newspaper had successfully sued in the

superior court to obtain government records, but was forced to wait several years while the case was on appeal, by which time the story was no longer newsworthy." *Id.* at 1334-35. The Court quoted legislative history materials which showed that "the amendment's goal was 'to prohibit public agencies from delaying the disclosure of public records by appealing a trial court decision and using continuances in order to frustrate the intent of the Public Records Act.'" *Id.* at 1335 (quoting Sen. Comm. on Judiciary, Analysis of Sen. Bill No. 2222 (1983-1984 Reg. Sess.)). *See also Los Angeles Times v. Alameda Corridor Transp. Auth.*, 88 Cal. App. 4th 1381, 1386 (2001) (the "exclusive purpose" of the provision for review by extraordinary writ "was to speed appellate review").

In *Powers v. City of Richmond*, 10 Cal. 4th 85, 112 (1995), the Court reiterated that "the legislative objective was to expedite the process and thereby to make the appellate remedy more effective" for CPRA requesters. In a separate concurring opinion, Justice George explained that the Legislature was "[p]ersuaded that the *timeliness* of disclosure often is of crucial importance in actions brought under the Public Records Act." *Id.* at 118 (George, J., concurring) (original emphasis). Justice George emphasized the history showing that the Legislature was responding to the CNPA's concern that public agencies were frustrating the central purpose of the law by finding ways to delay "disclosure of public information at a time when the material still was newsworthy or of particular importance to the plaintiff." *Id.*

In this case Mr. Crews made his CPRA request on March 5, 2009. It is undisputed that the District told him that it would begin its production 54 days later on April 28, 2009, and that Mr. Crews filed his CPRA petition that day when he did not receive any

records from the District. (AOB at 3; RB at 5-6). It is also undisputed that Mr. Crews subsequently served his petition on the District after he had received some, but *not all* of the requested public records. (AOB at 3-4; RB at 6-8). The Second District recently confronted a situation in which a school district notified a CPRA requester "within the statutorily mandated 24-day period [that] it intended to produce the requested records but also said it would delay providing any copies for an additional month." *Marken v. Santa Monica-Malibu Unified School Dist.*, 202 Cal. App. 4th 1250, 1268 n.14 (2012). The court chastised the district for this delay, explaining that it had "serious questions whether that delay was authorized under the CPRA." *Id.* Given the ample authority emphasizing that "the *timeliness* of disclosure often is of crucial importance in actions brought under the Public Records Act," it is inconceivable that a CPRA action could be deemed frivolous for being brought too soon when it was brought after the expiration of the statutorily mandated response deadline, and while responsive records still had not been disclosed. *Powers*, 10 Cal. 4th at 118 (George, J., concurring) (original emphasis).

The facts of this particular records request further underscore that the timing of Mr. Crews' CPRA action was not unreasonable, let alone frivolous. Mr. Crews sought the information to follow up on a tip that the District superintendent may have been improperly using school resources to campaign in favor of a ballot measure. (AOB at 2). Therefore, time was of the essence both because of an impending election, and because the information came to Mr. Crews' attention toward the end of the school year. It is undisputed that approximately two months elapsed from Mr. Crews' initial request until the District produced *any* records. By dragging out its production of these public records

from the early spring into the summer, the District was able to delay public scrutiny of its financial and managerial issues until the end of the school year, when public attention to school district issues drops off dramatically.

This is exactly the kind of situation that provided the impetus for the Legislature to amend the CPRA to speed appellate review so that public agencies could not delay "disclosure of public information at a time when the material still was newsworthy or of particular importance to the plaintiff." *Id.* By seeking judicial enforcement of his right of access to these public records at a time when the material was especially newsworthy, Mr. Crews was following the clear direction of the Legislature and the California Supreme Court. To deem his action frivolous and impose ruinous attorneys' fees on this basis would undermine the statutory scheme and encourage the exact sort of dilatory behavior by public agencies that the Legislature sought to avoid.

The trial court's ruling provides public agencies with an invitation to evade the requirements of the CPRA by starting to produce some non-controversial records around the time of the statutorily mandated response deadline, but then delaying production of potentially embarrassing or damaging public records until after the time of maximum public scrutiny has passed. Agencies and officials could employ this delaying tactic in a wide array of situations, such as:

- To avoid producing records before an election;
- To avoid producing records before a significant vote;
- To avoid producing records before an official retires or changes posts;
- To avoid producing records before a contract or other deal is entered into; or

- To avoid producing education-related records before the end of the school year.

Under any of these scenarios, if a CPRA requester complains about the pace of production or states an intention to exercise his or her right to judicial enforcement, the agency could warn that the requester will risk incurring massive attorneys' fees because, under the trial court's ruling, the petition could be deemed frivolous merely because the agency had begun to partially produce the records. Such a threat – backed up by the very real example of what happened to Mr. Crews – would likely scare off most citizens from enforcing their right of access, thus preventing them from holding government accountable and completely undermining the Legislature's carefully crafted scheme.

b. Records Requesters Should Not Be Punished For Failing To Predict Novel, Extra-Statutory Requirements.

The trial court also labeled Mr. Crews' petition frivolous because it determined that the parties "could have agreed to a neutral" to resolve issues regarding the format of the records before Mr. Crews initiated litigation. (AOB at 24; CT 1798:12-15). But the CPRA does not require pre-filing mediation; instead it explicitly permits members of the public to seek prompt judicial enforcement when a public agency has denied a request. *See* Gov't Code § 6258. It is questionable enough for a court to reject a claim on the merits based on a novel, extra-statutory requirement, but it is wholly inappropriate to make this the basis for a finding of frivolousness. Because there is nothing in the statute about using a neutral – and indeed because the statute and the case law only encourage

prompt *judicial* enforcement – Mr. Crews could hardly have been expected to predict that such a novel requirement would be imposed.[3]

California courts have made clear that litigants cannot be punished with attorneys' fee awards for such failures to predict the outcomes of their cases. In *California Teachers Ass'n v. State of California*, 20 Cal. 4th 327, 340 (1999), the Supreme Court struck down a statute that required teachers who request administrative hearings to pay a substantial amount of the state's costs when they lose. The Court explained that:

> [A] teacher attempting to discern whether an administrative hearing will be 'meritless' (as that term is used by the state) must predict, in advance, whether the Commission will exercise its discretion in a particular manner. The outcome of cases, however, cannot always be predicted. The law is never static .... The difficulty is to estimate what effect a slightly different shade of facts will have and to predict the speed of the current in a changing stream of the law. The predictions and prophecies that lawyers make are indeed appraisals of a host of imponderables.

Id. at 344 (quotations omitted). Therefore, the court concluded that the "statute impermissibly chills the right to a hearing in every case in which a teacher cannot know the ultimate outcome--in other words, in every case." *Id.* at 345. Citing the strict frivolousness standard from *In re Marriage of Flaherty*, the Supreme Court concluded that the statute erased the crucial distinction between an unsuccessful case and a frivolous one in a manner that would discourage the pursuit of legitimate claims. "A litigant's nonfrivolous assertion of a procedural right may not be chilled through fear of subsequent reprisals in the form of monetary penalties. The prospect of liability for hearing costs

[3] Indeed even the District now disclaims any reliance on this ground for imposing attorneys' fees and costs on Mr. Crews. (RB at 39).

could cause teachers to limit their defense and forgo vigorous advocacy, even if they are not deterred from demanding a hearing." *Id.* at 345-46 (citation omitted).

The same reasoning applies here. Not only could Mr. Crews not be expected to "predict, in advance" that the trial court would impose an extra-statutory requirement that the parties hire a referee, *id.* at 344, but he could not have possibly known the contents of the 3,200 pages of withheld documents inspected by the trial court at its *in camera* hearing. (AOB at 11). Because the District did not describe the contents of the records to Mr. Crews and did not provide a privilege log, he had no way of knowing in advance that these thousands of pages of documents would not contain any disclosable information. *See ACLU of N. Cal. v. Superior Court*, 202 Cal. App. 4th 55, 83 (2011) ("Because the agency has full knowledge of the contents of the withheld records and the requester has only the agency's affidavits and descriptions of the documents, its affidavits must be specific enough to give the requester 'a meaningful opportunity to contest' the withholding of the documents and the court to determine to determine whether the exemption applies.") (quoting *Cozen O'Connor v. United States Dep't of Treasury*, 570 F. Supp. 2d 749, 765 (E.D. Pa. 2008)).

If the trial court's ruling is upheld, CPRA requesters would be subject to the same chilling effect that the Supreme Court identified in *California Teachers Ass'n*, as they would risk incurring massive fee awards simply for failing to predict that a court might impose a novel, extra-statutory requirement, or that documents, the contents of which are known only to the public agency, might turn out to be exempt. Such an outcome would discourage members of the public from initiating legitimate CPRA actions for "fear of

subsequent reprisals in the form of monetary penalties," and even if they did file writ petitions the "prospect of liability for hearing costs could cause [CPRA requesters] to limit their defense and forgo vigorous advocacy, even if they are not deterred from demanding a hearing." 20 Cal. 4th at 345-46.

2. The District Seeks A Rule That Would Vastly Expand The Definition Of "Frivolous" In Contravention Of The CPRA.

The District offers a laundry list of objections to how Mr. Crews conducted the litigation, arguing that, taken as a whole, this amounts to "substantial evidence" to support a finding of frivolousness. (RB at 23-24). But the District's list of grievances completely ignores the text of the CPRA and the controlling case law. For example, the District complains that Mr. Crews' request was "extremely broad" and that he declined "to narrow his request." (RB at 23). But the CPRA does not limit the breadth of requests, nor does it require requesters to engage in negotiations to limit the scope of their requests. To the contrary, courts have recognized that "[b]ecause the requestor may not know what documents or information of interest an agency possesses, he or she may be unable to provide the specificity an agency may require." *ACLU of N. Cal.*, 202 Cal. App. 4th at 85. In keeping with the clear purpose of the CPRA of broadening access to public records, courts have resolved such issues by keeping the burden on the public agency – not the requester – to explain why a request is overly broad or burdensome. *See id.* ("The most effective way in which a trial court can insure the reasonableness of a claim that information sought to be withheld is not responsive to the request is to require

the agency to explain the claim in the same detail needed to justify other grounds for withholding public records.").

Similarly, the District emphasizes that it had informed Mr. Crews of when it would comply with his request, and that it "began producing documents as promised." (RB at 23). But as discussed in Section II.C.1.a, *supra*, the District's partial compliance beyond the statutorily mandated deadline shows only that the District did not meet its obligations under the CPRA, not that Mr. Crews' petition was frivolous. *See Marken*, 202 Cal. App. 4th 1250, 1268 n.14. And the District's focus on its own "technical limitations" and the burden caused by the allegedly "sensitive and confidential nature of the information in the emails" ignores the consistent case law that gives little weight to such concerns. (RB at 24). "'There is nothing in the Public Records Act to suggest that a records request must impose no burden on the government agency.'" *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1327 (2009) (quoting *State Bd. of Equalization v. Superior Court*, 10 Cal. App. 4th 1177, 1190 n.14 (1992)).

Indeed, courts have specifically addressed the very issue that the District complains about here: the burden of segregating exempt and nonexempt material prior to disclosing records. Courts have not, as the District suggests, held that CPRA requests can be deemed frivolous because they may require such work. To the contrary, courts have consistently resolved these issues in favor of requesters. *See Northern Cal. Police Practices Project v. Craig*, 90 Cal. App. 3d 116 (1979) ("Undoubtedly, the requirement of segregation casts a tangible burden on governmental agencies and the judiciary.

Nothing less will suffice, however, if the underlying legislative policy of the PRA favoring disclosure is to be implemented faithfully.").

Ultimately, then, the District argues for a new standard for defining "frivolous" that would permit public agencies to recover their fees whenever a request is difficult to comply with and a requester is aggressive in asserting his or her fundamental right of access. As described above, this wholly ignores decades of precedent that places the burden of handling difficult requests on public agencies and encourages citizens to vigilantly enforce their rights. But even if the District's proposed rule was not explicitly contrary to the CPRA and the public records case law, it would still run afoul of the well-established principle that only exceptional cases should be deemed frivolous. *See In re Marriage of Flaherty*, 31 Cal. 3d at 648-49. The District's rule would abandon the familiar frivolousness standard applicable only to extreme cases that no reasonable attorney would have brought in favor of a sweeping standard in which an action can be considered frivolous because it inconveniences the other side and/or the trial court, with no consideration of whether the petitioner's claims were colorable.

If the District's standard were adopted, it is easy to imagine public agencies throughout the state increasingly invoking their own purported "technical limitations," the breadth and sensitivity of requests, and other such burdens to claim that they cannot disclose public records in a timely or thorough manner. They could then discourage requesters from seeking judicial enforcement by threatening them with liability for the agency's fees. In this era of fiscal challenges for the public sector, it is understandable that some agencies would want to avoid responding to resource-intensive public records

requests. But the answer is not to throw up unprecedented roadblocks to discourage all such requests, as governmental transparency and accountability are more necessary than ever in difficult financial times. *See International Federation*, 42 Cal. 4th at 334 ("'It is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds.'") (quoting *San Diego Union v. City Council*, 146 Cal. App. 3d 947, 955 (1983)).

III. CONCLUSION

The CPRA's fee-shifting provision is meant to level the playing field so that journalists, activists, and ordinary citizens who lack the financial resources of governmental agencies can nonetheless hold those agencies accountable by taking them to court to force the disclosure of public records. *See Braun v. City of Taft*, 154 Cal. App. 3d 332, 349 (1984) ("Section 6259 was enacted to carry out the purposes of the California Public Records Act. Through the device of awarding attorney fees, citizens can enforce its salutary objectives."). The trial court's ruling vitiates this goal by turning the fee-shifting provision into a tool for intransigent agencies to *discourage* citizens from judicially enforcing their right of access.

By eliminating any meaningful distinction between an unsuccessful petition and a frivolous one, the decision produces a classic chilling effect because members of the public with legitimate claims will forgo enforcement of their rights for fear of being saddled with massive liability for agencies' fees simply because they might lose. The

Court should avoid this outcome and maintain the letter and spirit of the CPRA by reversing the judgment of the trial court.

Dated: 31st day of October, 2012.

DAVIS WRIGHT TREMAINE LLP
DUFFY CAROLAN
DAN LAIDMAN

By: _____
Duffy Carolan

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I, Duffy Carolan, counsel for Amici Curiae in the instant matter, *Tim Crews v. Willows Unified School District et al.,* Case No. C066633, hereby certify that the foregoing document was prepared pursuant to and in compliance with California Rule of Court Section 8.204(c)(1). This brief contains a total of 7,338 words and was formatted in Times New Roman, 13-point typeface.

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

Dated: October 3, 2012

Respectfully submitted,

Duffy Carolan
Attorney for Amici Curiae

Proof of Service

I, Janis Wooley, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533.

I caused to be served the following document:

Brief of Amici Curiae First Amendment Coalition, California Newspaper Publishers Association, Los Angeles Times Communications LLC, McClatchy Company, California Newspapers Partnership, The Orange County Register, Hearst Corporation and The Press-Enterprise in Support of Appellant Tim Crews

I caused the above document to be served on each person on the attached list by the following means:

☑ I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on October 3, 2012, following the ordinary business practice.
(Indicated on the attached address list by an [M] *next to the address.)*

☑ I enclosed a true and correct copy of said document in an envelope, and placed it for collection and mailing via Federal Express on October 3, 2012, for guaranteed delivery on October 4, 2012, following the ordinary business practice.
(Indicated on the attached address list by an [FD] *next to the address.)*

☐ I consigned a true and correct copy of said document for facsimile transmission on June 21 2012.
(Indicated on the attached address list by an [F] *next to the address.)*

☐ I enclosed a true and correct copy of said document in an envelope, and consigned it for hand delivery on June 26, 2012.
(Indicated on the attached address list by an [H] *next to the address.)*

☐ A true and correct copy of said document was emailed on May 31, 2011.
(Indicated on the attached address list by an [E] *next to the address.)*

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

Executed on October 3, 2012, at San Francisco, California.

Janis Wooley

Service List

Key:	[M]	**Delivery by Mail**	[FD]	**Delivery by Federal Express**	[H]	Delivery by Hand
	[F]	Delivery by Facsimile	[FM]	Delivery by Facsimile and Mail	[E]	Delivery by Email
	[E]	Delivery by Electronic Mail				

[FD]	Karl Olson, Esq. Ram, Olson, Cereghino & Kopczynski LLP 555 Montgomery Street, Suite 820 San Francisco, CA 94111 Telephone: 415-433-4949 Facsimile: 415- 433-7311 Email: kolson@rocklawcal.com	Plaintiff/Appellant Tim Crews
[FD]	Matthew P. Juhl-Darlington Matt Juhl Darlington & Associates 555 Main Street, Suite 210 Chico, CA 95928 Telephone: 530-343-3334 Facsimile: 530-924-4784 Email: matt@mjdedlaw.com	Defendants/Respondents Willows Unified School District and Steve Olmos
[FD]	Donald A. Velez Amy E. Hoyt Burke Williams & Sorensen, LLP 1901 Harrison Street, 9th Floor Oakland, CA 94612 Telephone: 510-273-8780 Facsimile: 510-839-9104	Defendants/Respondents Willows Unified School District and Steve Olmos
[M]	Honorable Peter Twede c/o Clerk of the Court Glenn County Superior Court Willows Branch-main Courthouse 526 West Sycamore Street Willows, CA 95988	One Copy
[M]	Clerk of the Supreme Court California Supreme Court 350 McAllister Street San Francisco, CA 94102-7303	Four Copies