REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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Bruce D. Brown, Executive Director

February 28, 2020

Via TrueFiling

The Honorable Chief Justice Tani Cantil-Sakauye
and the Associate Justices of the Supreme Court of California
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Becerra v. Superior Court*, Court of Appeal Case No. A157998 [2020 WL 486863], Letter of Amici Curiae the Reporters Committee for Freedom of the Press and 28 media organizations in support of the request for depublication

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

The Reporters Committee for Freedom of the Press and the 28 media organizations listed below (hereafter, "amici curiae") write pursuant to California Rule of Court 8.1125(a) to respectfully urge this Court to depublish Part D of the Court of Appeal's opinion in *Becerra v. Superior Court* (Cal. Ct. App. 2020) 2020 WL 486863 (*Becerra*). Amici curiae agree that Part D of the opinion should be depublished for the reasons stated by the First Amendment Coalition and KQED Inc. ("Petitioners") and write to emphasize that that Part D of the opinion should be depublished because it is contrary to the Legislature's purpose and intent in enacting Senate Bill No. 1421 ("SB 1421") and will have a profoundly negative impact on the ability of the press and the public to effectively oversee California law enforcement. In the alternative, the opinion should be depublished in its entirety.

In passing SB 1421, which amended Penal Code section 832.7 ("Section 832.7"), the Legislature guaranteed public access to records about law enforcement misconduct and uses of force—records that law enforcement agencies had kept secret for decades. (See Liam Dillon & Maya Lau, *Gov. Jerry Brown Signs Landmark Laws that Unwind Decades of Secrecy Surrounding Police Misconduct, Use of Force*, L.A. Times (Sept. 30, 2018, 6:05 PM), https://perma.cc/HTG3-YQWB.) In doing so, the Legislature made clear that "[t]he public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force." (SB 1421, § 1, subd. (b).) SB 1421 amended Section 832.7 to specify which records must be disclosed and what information may be redacted. (*Id.*) Section 832.7 contains a comprehensive, detailed, and carefully balanced regimen for the disclosure, redaction, and—in strictly limited circumstances—withholding of the records to which it applies. (See Pen. Code § 832.7, subd. (b).)

Contrary to SB 1421's mandate of disclosure, and ignoring the comprehensive disclosure regimen it establishes, the Court of Appeal went beyond the scope of the

case before it and atextually imported all but one of the exemptions of the California Public Record Act (Cal. Gov't Code §§ 6250 et seq., "CPRA" or the "Act") into Section 832.7, as amended. Rather than adhering to the plain text and obvious purpose of Section 832.7(b)—which demands disclosure "[n]otwithstanding . . . any other law" (Pen. Code § 832.7, subd. (b)(1))—the Court of Appeal held that agencies may rely on all but one of CPRA's exemptions to withhold records covered by Section 832.7. (*Becerra,* 2020 WL 486863 at *10.)

Part D of the Court of Appeal's opinion was and is *dicta*. The Court of Appeal did not need to reach the question of whether Government Code section 6255(a) ("Section 6255(a)") permits a public agency to rely on the burden of disclosure to justify denying access to records. As the Superior Court found, and as the Court of Appeal agreed, the Department of Justice failed to make the showing necessary to justify nondisclosure under Section 6255(a). And the Court of Appeals ignored Section 832.7(b)(6), which contains its own version of the balancing test established in Section 6255(a) but limits agencies to redaction rather than withholding of records. By permitting agencies to invoke a balancing test to avoid disclosure altogether, the Court of Appeal's interpretation of Section 832.7(b) in Part D of the opinion renders this test meaningless, in violation of a fundamental principle of statutory construction. (*People v. Fontenot* (2019) 8 Cal.5th 57, 73 ["[W]henever reasonably possible, courts avoid reading statutes in a way that renders 'meaningless' language the Legislature has chosen to enact."].)

The Court of Appeal's interpretation of Section 832.7 also cannot be squared with the text of the statute or the Legislature's clear intent. It undermines Section 832.7's promise of public access except in limited, enumerated circumstances. (See Pen. Code Section 832.7, subd. (b)(5) (explaining in detail when agencies may withhold information).) Under the Court of Appeal's holding, a law enforcement agency may assert, for example, that the individual privacy interests of an officer fired for serious misconduct outweigh disclosure (Gov't Code § 6254, subd. (c)), or that records of such misconduct are "official information" that may be withheld pursuant to the Evidence Code (Evid. Code § 1040; Gov. Code § 6254, subd. (k)). SB 1421 was enacted precisely to eliminate the secrecy created by provisions such as these. Applying the CPRA's exemptions in this context could thus shield from disclosure the very records relating to serious misconduct and use of force by law enforcement officers that the Legislature sought to open.

The Court of Appeal's opinion ignores the mandate that the records described in Section 832.7(b) "shall be made available for public inspection," and that this mandate applies "notwithstanding . . . any other law." (Pen. Code § 832.7, subd. (b)(1).) It does so in reliance on a strained construction of the phrase "pursuant to the California Public Records Act." Its construction of that phrase is not supported by any evidence of legislative intent, and ignores the obvious and more likely meaning—*i.e.*, not that all the *substantive* exemptions in the Public Records Act should be incorporated, but that the *procedural* provisions of the Public Records Act (for making and responding to requests and litigating denials) were to be used, so the Legislature did not have to reinvent the entire enforcement scheme. In addition, inexplicably, Part D of the Court of Appeal's opinion ignores the mandate of Article I, section 3(b)(2) of the California Constitution: "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." The Court of Appeal's interpretation of Section 832.7(b)(1) is an obvious violation of this mandate.

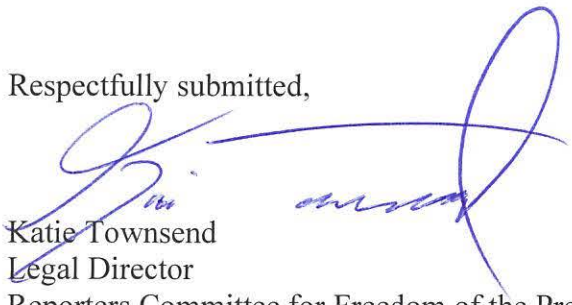
As the Legislature stated, erecting barriers to public access for records relevant to "crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety." (SB 1421 § 1, subd. (b).) For decades, California had been an outlier by denying the public access to those "crucial public safety" records. SB 1421 sought to change that. Senator Nancy Skinner, the bill's author, explained that the bill "lifts decades of secrecy and provides the transparency so necessary to build trust and keep our communities safe." (Senator Nancy Skinner, *California Lifts Secrecy on Law Enforcement Records with Governor's Signature on Senator Nancy Skinner's SB 1421*, Cal. Senate (Sept. 30, 2018), https://perma.cc/K4X2-ZLTQ.) The Court of Appeal's holding threatens to undo that legislative change.

Moreover, allowing agencies to invoke CPRA exemptions to withhold records that must be released under Section 832.7 will create significant delays in and barriers to disclosure, costing the public both time and money. CPRA litigants are well-acquainted with the lengthy process of challenging agency withholdings made pursuant to CPRA exemptions. (See, e.g., Daniel Wolowicz, *Rozanski Admits to Relationship with Lawyer*, Camarillo Acorn (May 5, 2017), https://perma.cc/QDQ8-T9TN (noting that the trial court ordered disclosure in April 2017 regarding a November 2016 CPRA request); Nick Miller, *SN&R Prevails in Yearlong First Amendment Battle with Sacramento Mayor Kevin Johnson*, Sacramento News & Rev. (July 14, 2016), https://perma.cc/E28G-JL3M 25 (noting that the trial court ordered disclosure in July 2017 regarding a March 2016 CPRA request).)

Such delay inhibits effective public oversight of law enforcement conduct. Time spent challenging agency invocations of CPRA exemptions inhibits the press's ability to inform the public of governmental activities in a timely matter and can lessen the newsworthiness of the information released. (See *Int'l News Servs. v. Associated Press* (1918) 248 U.S. 215, 235 ("The particular value of news is in the spreading of it while it is fresh.").) Law enforcement unions across the state have already commenced numerous "reverse-CPRA" actions intended to limit SB 1421's intended effect and delay public access. (See, e.g., Sara Libby, *A Brief History of Police Challenges—and Losses—on SB 1421*, Voice of San Diego (June 10, 2019), https://perma.cc/662X-9MYM.) The Court of Appeal's decision is likely to produce a long-lasting wave of litigation, as officers invoke the CPRA's innumerable exemptions to challenge proposed disclosures. Given its practical effect of thwarting public access, contrary to the Legislature's intent, partial depublication of the Court of Appeal's opinion is warranted.

For these reasons and the reasons in Petitioners' Letter, amici curiae respectfully urge this Court to depublish Part D the Court of Appeal's January 29, 2020 opinion, 2020 WL 486863, or, alternatively, depublish the opinion in its entirety.

Respectfully submitted,



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On behalf of:

The Reporters Committee for Freedom of the Press
The Associated Press
California News Publishers Association
The E.W. Scripps Company
Embarcadero Media
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Reveal from The Center for Investigative Reporting
The San Diego Union-Tribune LLC
Society of Professional Journalists
Tully Center for Free Speech

PROOF OF SERVICE

I, Daniel J. Jeon, 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 St. NW, Suite 1020, Washington, DC 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

On February 28, 2020, I served the foregoing document: ***Becerra v. Superior Court*, Court of Appeal Case No. A157998 [2020 WL 486863], Letter of Amici Curiae the Reporters Committee for Freedom of the Press and 28 media organizations in support of the request for depublication** as follows:

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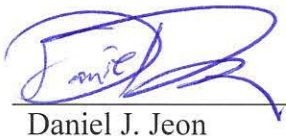
I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on the February 28, 2020, at Washington, D.C.

By: 

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