IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

NO. C082096

THE CITY OF SACRAMENTO,

Defendant and Appellant,

v.

SUPERIOR COURT IN AND FOR THE COUNTY OF SACRAMENTO,

Respondent,

RICHARD STEVENSON and KATY GRIMES,

Petitioners and Real Party in Interest.

Appeal from an Order of
The Superior Court, County of Sacramento
Case No. 34-2015-80002125
Honorable Shelley Anne W. L. Chang, Judge

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF SACRAMENTO; PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF SACRAMENTO

ALESHIRE & WYNDER, LLP
Joseph W. Pannone (State Bar. No. 94239)
Elena Gerli (State Bar No. 228866)
2361 Rosecrans Ave., Suite 475
El Segundo, California 90245-4916
Telephone: (310) 527-6660
Facsimile: (310) 532-7395
E-Mail: jpannone@awattorneys.com
egerli@awattorneys.com

Attorneys for *Amicus Curiae* LEAGUE OF CALIFORNIA CITIES

Received by Third District Court of Appeal

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rules 8.208

Pursuant to the California Rules of Court, as counsel for *amicus curiae* League of California Cities ("League"), I hereby certify the *amicus curiae* party is not a "party" in this case.

Additionally, no party or counsel for a party in this appeal authored any part of the attached *amicus curiae* brief or made any monetary contribution to fund the preparation of the brief. No person or entity other than the League of California Cities and their attorneys made any monetary contribution to fund the preparation of the brief. Thus, I know of no entity or person that must be disclosed in this case under California Rule of Court 8.208(c), subdivisions (1) or (2).

DATED: September 1, 2017 ALESHIRE & WYNDER, LLP

/s/ Joseph W. Pannone
Joseph W. Pannone, State Bar No. 94239
Elena Gerli, State Bar No. 228866
Attorneys for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF ON BEHALF OF THE LEAGUE OF CALIFORNIA CITIES

Pursuant to rule 8.200(c) of the California Rules of Court, the League of California Cities ("League") respectfully requests permission to file an *amicus curiae* brief in support of Defendant and Appellant City of Sacramento. This application is timely made within 14 days after the filing of Respondents' reply brief.

The League represents cities throughout California with substantial interest here because all of its members will necessarily be affected by the outcome of this case: California Public Records Act ("CPRA") requests involve expenditures of time, effort, and limited public resources required to review records before they can be disclosed, if at all. How many resources are expended in responding to such requests vary widely, from a few hours to hundreds of hours, and this is a cost that cities bear to ensure the public has its rightful access to government records. However, if the lower court's ruling is upheld, allowing petitioners to obtain attorneys' fees in cases where the litigation did not result in the disclosure of records that are improperly withheld, the potential cost for cities to handle requests is likely to skyrocket, with little, if any, corresponding public benefit.

The lower court ruling incentivizes Plaintiffs' attorneys to run to court before cities have a chance to respond–even before petitioners have formulated requests to which cities can respond–by awarding attorneys' fees whenever records are ultimately disclosed, even if the city never withheld records in violation of the CPRA. Such a perverse incentive will result in a severe strain on already limited city and judicial resources. Therefore, the Court of Appeal's decision in this case will not only affect

the City of Sacramento, but is likely to have repercussions for cities and courts across the entire State.

IDENTITY OF *AMICUS CURIAE* AND STATEMENT OF INTEREST

The League of California Cities is an association of 475 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. The League 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.

DATED: September 1, 2017

Respectfully submitted
ALESHIRE & WYNDER, LLP

/s/ Joseph W. Pannone
Joseph W. Pannone, State Bar No. 94239
Elena Gerli, State Bar No. 228866
Attorneys for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES

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PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF SACRAMENTO

ALESHIRE & WYNDER, LLP
Joseph W. Pannone, (State Bar No. 94239)
Elena Gerli (State Bar No. 228866)
2361 Rosecrans Ave., Suite 475
El Segundo, California 90245-4916
Telephone: (310) 527-6660
Facsimile: (310) 532-7395
E-Mail: jpannone@awattorneys.com
egerli@awattorneys.com

Attorneys for *Amicus Curiae* LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF INTERESTED PARTIES

Amicus Curiae League of California Cities herein certifies, pursuant to Rule 8.208 of the California Rules of Court, it knows of no entity or person that must be listed under Rule 8.208(e)(1) or 8.208(e)(2) of the California Rules of Court.

DATED: September 1, 2017 ALESHIRE & WYNDER, LLP

/s/ Joseph W. Pannone
Joseph W. Pannone, State Bar No. 94239
Elena Gerli, State Bar No. 228866
Attorneys for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES

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BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES

I.
INTRODUCTION

Through their communications with and requests to the City of Sacramento (the "City") and during this litigation, Petitioners and Respondents, Richard Stevenson and Katy Grimes, ("Respondents") have mounted, purportedly under the guise of a California Public Records Act ("CPRA") request, what the trial court deemed a collateral attack on the City's duly adopted records retention policy. Respondents have yet to obtain the disclosure of any records that were improperly withheld by the City. Notwithstanding the foregoing, Respondents have been rewarded for those efforts by an award of attorneys' fees, again purportedly pursuant to the CPRA.

The CPRA mandates cities provide the public access to and copies of public records that are not exempt from disclosure. Cities may not destroy records that are subject to a legitimate request. If a city fails to comply with those requirements, then attorneys' fees can rightly be awarded. Here, however, attorneys' fees were awarded even though the City was and remains in full compliance with the CPRA, and even though Respondents obtained an order that grants nothing more than what the City was already doing in adherence with the CPRA -- this is what prompted the League to take notice of this case and why it feels compelled to file this brief.

A validation of the lower court's ruling, whether published or not, would reach far beyond this case. An award of attorney's fees in this matter would be a very troublesome outcome. Respondents, without having first exhausted the clearly delineated process established by the State Legislature in the CPRA, rushed into court alleging violations of the CPRA with the underlying purpose of challenging a duly adopted records retention policy. After that mad dash, and taking the court's time and limited City resources to defend that rush to the courthouse, Respondents obtained no more than what they otherwise would have if they had simply followed through with a CPRA request. Validating the trial court's award of attorneys' fees in this case would make the CPRA akin to a strict liability statute that will put an extraordinary and unnecessary burden on cities and courts across the state, without an appreciable benefit to the public.

Such an award will create an incentive for attorneys to prematurely involve trial courts in matters the Legislature has clearly directed be handled at the local government level. Only when that process fails should the courts intercede. That bifurcated process fundamentally derives from the treasured doctrine of separation of powers, which is fundamental to our three-branch governmental system. Awarding fees at an early stage of the CPRA process deprives cities of the ability to comply with the CPRA and encourages lawsuits that will unnecessarily interject the courts into a procedure that has not concluded. For these reasons, *amicus curiae* League

of California Cities respectfully urges the Court of Appeal to reverse the Superior Court's ruling.

II.
SUMMARY OF ARGUMENT

In 2007, the City adopted a record retention policy that provided for destruction of all correspondence older than two years, including emails. Due to technical constraints, the policy could not be effectuated until July 1, 2015 as to emails. On June 26, 2015, Respondents made a CPRA request for all emails scheduled for destruction. The City postponed the scheduled destruction to July 8, 2015, requesting Respondents narrow their request prior to that date. Respondents, instead, filed an *ex parte* application for temporary restraining order and order to show cause. The lower court issued a TRO to prevent the destruction of the emails and ordered Respondents to provide the City with a list of topics by the next day. The City, once it received the list of topics, placed a hold on 15 million potentially responsive emails. The lower court limited its preliminary injunction to those 15 million emails and, despite not ordering the disclosure of any improperly withheld documents or the preservation of any more documents than the City would have preserved pursuant to a properly presented CPRA request, granted Respondents' attorneys' fees award.

The League urges the Court of Appeal to reverse the Superior Court's attorneys' fees award in this case.

First, even the lower court recognized Respondents' request was a thinly veiled attack on the City's retention policy, many years after its adoption, rather than a legitimate CPRA request. The trial judge issued a temporary restraining order to prevent the destruction of emails until Respondents could narrow their request, which the judge also ordered by 10:00 a.m. the day following the hearing. In the time between the TRO hearing and the hearing for the preliminary injunction, Respondents attempted to add more categories to their request, and finally admitted they wanted all of the emails that were scheduled for destruction. Granting Respondents attorneys' fees rewards their untimely attack on the City's Retention Policy rather than corrects a violation of the CPRA.

Second, the CPRA has a process in place that has been carefully articulated by the Legislature. Section 6259 of the Government Code provides a court shall order disclosure of records "[w]henever it is made to appear [that such records] are being improperly withheld from a member of the public or show cause why he or she should not do so." If the court finds the record was improperly withheld, then the judge shall order the disclosure of the record; if the court finds the record was properly withheld, then the judge must issue an order supporting the withholding of the record. A plaintiff who obtains disclosure of improperly withheld documents is entitled attorneys' fees. (§ 6259, subd. (d).) "This serves to encourage 'members of the public to seek judicial enforcement of their right to inspect

public records subject to disclosure.' " (*Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1088.) The CPRA attempts to strike a balance between the right of the people to open government and access to information, and the government's ability to conduct its business efficiently. An award of attorneys' fees this early in the CPRA process, where the court proceedings did not result in disclosure of any documents improperly withheld, short circuits the CPRA process and turns the statute into a strict liability law for cities.

Finally, the lower court's ruling violates the constitutional requirement of separation of powers. Attorneys' fees under the CPRA are awarded only to a party that obtains disclosure of improperly withheld documents through a court action. (*Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 898.) The retention of 15 million emails by the City based on the 30 topics provided by Respondents does not constitute disclosure of improperly withheld documents. Respondents did not obtain any relief they would not have obtained had they followed the prescribed CPRA process. To sustain the attorneys' fees award here is to substitute the Court's judgment for the Legislature's regarding at what stage courts should interfere in the process.

III.
STATEMENT OF THE CASE

Amicus adopts the Statement of the Case prepared by the City. (Appellant's Opening Brief, pp. 7-8.)

IV.
STATEMENT OF FACTS

Amicus adopts the Statement of Facts prepared by the City, (Appellant's Opening Brief, pp. 8-14), highlighting only the facts most relevant to *amicus's* arguments.

On May 15, 2007, the City Council of the City adopted Resolution No. 2007-276, providing for the destruction of the City's records, whereby correspondence, including email, is retained for two-years (the "Retention Policy"). (1 CT 144-145, 149-150.) Aged correspondence, including email, older than two years is disposed of unless required by law to be retained. (1 CT 144-147.) The policy could not be implemented until 2014, when the City's technological abilities made it possible to do so. In 2014 and 2015, the City publicized its retention schedule by informing media and citizen groups the automated deletion of emails older than two-years would begin on July 1, 2015, including through articles in the *Sacramento Bee* and the *Sacramento News and Review*. (1 CT 55-58.)

Four days before the July 1, 2015, automated email deletion, Petitioners submitted requests to the City for email records potentially

slated for deletion. (1 CT 11, 18.) Grimes requested all email records "by the City of Sacramento and its employees, elected and appointed officials and anyone acting on the City's behalf from January 1, 2008 until the present date." (1 CT 11.) Stevenson requested, "All emails currently scheduled to be deleted from City records July 1, 2015." (1 CT 18.)

In response, the City agreed to postpone its automatic deletion date from July 1, 2015 until July 8, 2015, to provide Respondents an opportunity to identify specific records before the record retention policy took effect. (1 CT 47-49.) Rather than providing clarification for their CPRA request, the next day, July 2, 2015, Respondents filed a Petition for Alternative and Peremptory Writ of Mandate and Complaint, and an *Ex Parte* Application for a Temporary Injunction asking the Superior Court to enjoin the City from implementing its record retention policy and deleting any email records. (1 CT 47-49.) The hearing was scheduled for July 7, 2015. At oral argument, held on July 7, 2015, the Court said the following about the CPRA requests: "It appears...that this Public Records Act request ... [is], in fact, a challenge to the City's records retention policy, that this is somehow not really a public records application request, but sort of a collateral attack, if you will, upon the City's document retention policy." (RT 5.)

The Superior Court issued a temporary restraining order ("TRO") but made no ruling on the merits: "The only reason why I am doing this is to preserve the status quo...I'm not making any determination with

regard...to the merits of the petition or the balance of harms, which is [sic] the normal standards...for a Court issuing any kind of injunctive relief." (RT 25.) The TRO prevented the City from deleting any email records and required Respondents to provide the City with categories of requests by no later than 10:00 a.m. the following day. (RT 25, 1 CT 163-164.)

On July 8, 2015, Respondents submitted 30 categories of requests to the City. (1 CT 166-170.) The City performed a search for each category and identified approximately 15,000,000 potentially responsive emails. (1 CT 144-147.) The City placed the equivalent of litigation holds on potentially responsive emails to ensure none would be lost or deleted. (1 CT 146.) Following the submittal of the initial 30 categories of topics, Respondents attempted to add additional categories, and again resorted to asking for all of the emails slated for deletion. (1 CT 117-118, 160-161, 178-180, 196-201.)

At the hearing on the preliminary injunction on July 24, 2015, Respondents argued the City should continue to be enjoined from implementing its record retention policy and deleting any emails so they could submit additional CPRA requests. (RT 34-40.) The City continued to assert this case presented an abuse of the CPRA by using it to attack a record retention policy. (RT 43-44.) The Court stated the following:

> The City has not refused to produce anything. The court's only obligation under the Public Records Act litigation is to order the City to turn over documents that the City has refused to turn over. That

> hasn't come to pass yet. So I agree on a certain level, there's really not much more for the court to adjudicate at this point because the City hasn't refused to produce anything at this point. (RT 56.)

On August 28, 2015, the Court issued an Order dissolving the TRO and establishing a preliminary Injunction only as to those 15,000,000 email records identified by the City as being potentially responsive to Petitioners' CPRA request. (1 CT 275-276.) By and through this ruling, Petitioners CPRA request was determined to be those 30 categories submitted to the City at 9:43 a.m. on July 8, 2015. (RT 66-67.)

On October 30, 2015, after the City had produced records responsive to Respondents' CPRA request, Respondents filed a Motion for Attorneys' Fees pursuant to Government Code § 6259(d) seeking approximately $250,000 from the City. (1 CT 282-290.) On March 24, 2016, the Court granted Respondents' motion and awarded attorneys' fees in the total amount of $60,775, holding Respondents' actions "had the effect of motivating the City to preserve and eventually produce documents." (3 CT 629-633.) Relying on *Galbiso v. Orosi Pub. Utility Distr.* (2008) 167 Cal.App.4th 1063, the Court held an award of attorneys' fees was appropriate because "it is clear that the City intended to implement its email retention policy by deleting emails, thereby utilizing a means that would have denied Petitioners access to the public records sought." (3 CT 632.)

V.
ARGUMENT

A. An Award of Attorneys' Fees Rewards an Untimely Attack on the City's Retention Policy Rather Than Corrects a Violation of the CPRA.

The City adopted its Retention Policy per Section 34090 *et seq.* of the Government Code (the "Retention Policy"). The Retention Policy was effective as of May 15, 2007, and was to commence being implemented as to emails on July 1, 2015. (1 CT 144-145, 149-150, 55-58.). Pursuant to Section 1094.6 of the Code of Civil Procedure, any such challenge to the Retention Policy must have been commenced by filing a writ of mandate with the Superior Court within 90 days after the effective date of the resolution adopting the Retention Policy, *i.e.*, on or before August 15, 2007. Respondents never challenged the Retention Policy. Instead, after over two-years of notices from the City to the public about the timing of the implementation of the Retention Policy, Respondents waited until the eve of implementation to make a CPRA request for all emails that were to be destroyed in accordance with the Retention Policy.

In response to that request and pursuant to the CPRA provisions, the City agreed to delay the implementation of its Retention Policy for a week to allow Respondents to clarify their CPRA request. Rather than clarify their request, Respondents sought an *ex parte* temporary restraining order ("TRO") from the court, in essence, to prevent the City from implementing

its then long-standing Retention Policy. As a result of the *ex parte* action, the trial court directed Respondents to clarify their CPRA request. Respondents provided that clarification the next morning. Pursuant to that clarification, the City put a hold on the destruction of 15 million emails. So in essence, Respondents obtained no more than they would have had they responded to the City's initial request for clarification.

Based on the foregoing, any award of attorneys' fees in this case would not be for the City improperly withholding records – which, as the trial court acknowledged, the City never did – but would be for Respondents' untimely attack on the Retention Policy. This Court is requested not to validate such an inappropriate award, but instead to make it clear the courts will not condone a surreptitious attack on a validly adopted retention policy. If allowed to stand, then the trial court's ruling could have the practical effect of requiring cities to pay attorneys' fees whenever an individual submits a CPRA request immediately before the city implements a record destruction policy under Government Code section 34090.

B. The Trial Court Did Not Follow the Provisions of the CPRA.

"The [CPRA] was enacted in 1968 to: (1) safeguard the accountability of government to the public, (2) promote maximum disclosure of the conduct of governmental operations and (3) explicitly acknowledge the principle that secrecy is antithetical to a democratic

system of 'government of the people, by the people and for the people.'" (*The People's Business, A Guide to the Public Records Act,* League of California Cities, Revised 2017, p. 5[1]; Gov't Code, § 6250 *et seq*.)

The CPRA attempts to strike a balance between the right of the people to open government and access to information, and the government's ability to conduct its business efficiently. In order to strike that balance, the CPRA has a limited number of narrowly tailored exceptions that allow local agencies to withhold certain records, such as records subject to the attorney-client privilege, document drafts, police reports for open investigations, records subject to the deliberative process privilege, etc. (Gov't Code §§ 6254 - 6255). The CPRA also provides for attorneys' fees for a petitioner who obtains disclosure of records that were improperly withheld, *but only* when those records were improperly withheld.

In relevant part, Section 6259 of the Government Code provides:

> (a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so. …
> (b) If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, he or she shall order the public official to make the record public. …
> …

[1] Found here: https://www.cacities.org/Resources/Open-Government/THE-PEOPLE%E2%80%99S-BUSINESS-A-Guide-to-the-California-Pu.aspx

> (d) The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. …

Thus, an action under the CPRA that results in the release of previously withheld records would support an attorneys' fee award *only if the lawsuit motivates the defendants to produce the records*. (*Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212; *Los Angeles Times v. Alameda Corridor Transportation Authority, supra,* 88 Cal.App.4th at 1391; *Belth v. Garamendi*, *supra*,232 Cal.App.3d 896, 898.)

The attorneys' fee provision of the CPRA should be interpreted in light of its overall purpose of broadening access to public records -- to provide protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure. (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385.) However, nothing in the record here shows the City ever denied Respondents' request for the records they sought. Nor was a court order issued compelling the City to provide access to records it had denied.

Upholding the Superior Court's ruling would, in essence, turn the CPRA into a strict liability statute. Any time a court action is brought in a CPRA case and records are released (which they usually are), regardless of what prompts the release, petitioners would be entitled to attorneys' fees; public entities would have no opportunity to properly disclose records, and

cities' efforts to comply with the CPRA would make no difference in the determination of whether to award attorneys' fees.

The lower court's ruling is inconsistent with the appellate case law. The courts of appeal have repeatedly held that attorneys' fees are only appropriate when a petitioner has obtained disclosure of documents improperly withheld. (*Caldecott v. Superior Court*, *supra*, 243 Cal.App.4th 212; *Los Angeles Times v. Alameda Corridor Transportation Authority*, *supra*, 88 Cal.App.4th at 1391; *Belth v. Garamendi*, *supra*, 232 Cal.App.3d at 898.) An appellate ruling upholding this attorneys' fee award will cause more litigation, as plaintiffs' attorneys seek fee awards and cities appeal such awards. Not only will cities be burdened by additional and unnecessary court actions if the lower court's ruling is upheld, but so will the courts. The courts can expect an increase in premature lawsuits being filed by CPRA requestors' attorneys who are all but guaranteed to obtain some form of court relief in at least the preliminary stage of litigation, by simply obtaining an order from the courts that cities do what they are already bound to do by the CPRA.

C. The Lower Court's Ruling Violates the Constitutional Requirement of Separation of Powers.

California has long recognized the importance of the fundamental tenet of the three branches of government: legislative, executive and judicial. That principle is enshrined in the State's Constitution: "The