CASE NO. B322230

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

LOS ANGELES TIMES COMMUNICATIONS LLC, THE ASSOCIATED PRESS, and SCRIPPS NP OPERATING, LLC, publisher of the VENTURA COUNTY STAR,

Respondents,

v.

ARIK HOUSLEY, et al.,

Plaintiffs-Appellants;

COUNTY OF VENTURA,

Real Parties in Interest.

From an Order of the Ventura County Superior Court
Case No. 56-2019-00523492-CU-WM-VTA
Honorable Mark S. Borrell

BRIEF OF
GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Appellants have endured the unimaginable. They lost loved ones in the deadly mass shooting at the Borderline Bar & Grill,[1] and now are left to mourn under the public gaze. They began fielding calls from reporters the day after the shooting[2] and had to endure members of the press as they grieved at funeral services.[3] Appellants ask only to be shielded from further unnecessary—even wanton—trauma that would result from the publication of their murdered family members' autopsy reports, and the exemptions to the California Public Records Act (CPRA) provide ample protection. Importantly, Appellants have shown that the autopsy records are uniquely sensitive with minimal corresponding public value and thus fall outside the general public interest in disclosure. The autopsy reports do little to

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[1] The Borderline shooting is also commonly known as the Thousand Oaks shooting; the Borderline Bar and Grill is located in Thousand Oaks, California.

[2] *See, e.g.*, Dana Goldstein and Karen Zraick, *The Thousand Oaks Shooting Victims: These Are Their Stories*, N. Y. Times, https://www.nytimes.com/2018/11/08/us/thousand-oaks-shooting-victims.html (last visited Sept. 27, 2021) ("'He was killed last night at Borderline,' Susan Orfanos, the mother of the 27-year-old, said in a phone interview. 'He made it though [sic] Las Vegas, he came home. And he didn't come home last night, and the two words I want you to write are: gun control. Right now — so that no one else goes through this. Can you do that? Can you do that for me? Gun control.' Ms. Orfanos then hung up the phone.").

[3] *See, e.g.*, Jonah Valdez and Eric Licas, *At funeral, a victim of Borderline shooting, Cody Coffman, remembered as kind caring soul*, L. A. Daily News, https://www.dailynews.com/2018/11/14/at-funeral-a-victim-of-borderline-shooting-cody-coffman-remembered-as-kind-caring-soul/ (last visited Sept. 27, 2021).

increase government transparency beyond the extensive report and records that have already been released, and release of the autopsy reports will violate the families' privacy interests in safeguarding intimate details surrounding their loved one's bodies and violent deaths. Indeed, disclosure here risks causing the public harm by emboldening copy-cat shooters, some of whom have been inspired by graphic descriptions and depictions of past mass shootings, a concern that applies to these autopsy reports.

Amicus curiae Giffords Law Center urges the Court to reverse the trial court's denial of a preliminary injunction and protect the privacy of Appellants, who are likely to succeed on the merits of their claim.

The Borderline victims' autopsy reports may be properly withheld pursuant to three distinct exemptions to the California Public Records Act. Because the autopsies were conducted as part of an investigation into the Borderline mass shooting that had the concrete potential to result in criminal charges, they may be withheld pursuant to the CPRA's investigatory records exemption. The CPRA's medical files provision also exempts the records from disclosure because the limited public interests proffered by these particular records are outweighed by the invasion of privacy that Appellants would suffer. Finally, the autopsy reports may be withheld pursuant to the CPRA's "catch-all" provision, which balances the public interest in nondisclosure—avoiding copy-cat shooters and protecting victim privacy—against the public's interest in disclosure.

ARGUMENT

I. The Borderline Victims

This brief will sometimes refer generally to "the Borderline victims," but we must not lose sight of their humanity; Appellants' loved ones were real people. Alaina Maria Housley, a singer and college freshman planning to major in English literature.[4] Blake Dingman, a 21-year-old whose parents and younger brother rushed immediately to the bar when news broke in the hope that he had survived.[5] Cody Coffman, who was planning to join the army and was reportedly killed while shielding a survivor with his body.[6] Dan Manrique, a Marine Corp veteran who volunteered to support disabled veterans.[7] Justin Meek, a caregiver for children with disabilities who had just received his bachelor's degree.[8] Kristina Morisette, who had just interviewed for an internship training police dogs.[9] Marky Meza, a student who was excited to turn 21 in twelve days.[10] Sean Adler, a father who had just realized his dream of opening a coffee shop.[11] And Telemachus Orfanos, who had previously survived the Route 91 Harvest music festival mass shooting, and who helped others escape the Borderline shooting before running

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[4] Goldstein, *supra* note 2.
[5] *Id.*
[6] Valdez, *supra* note 3.
[7] Goldstein, *supra* note 2.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

back into the bar to try to save more lives—and ultimately sacrificing his own.[12]

These are the individual people behind each autopsy report—a record that may describe underlying medical conditions, substance use and abuse, measurements of their organs, the path each bullet carved through their bodies, graphic descriptions of genitalia, and gruesome details about the condition of the body after death. Appellants have already suffered the unimaginable loss of their loved ones; given the minimal public interest in this information, this Court should decline the invitation to compound their trauma and reverse the trial court's denial of the preliminary injunction.

II. Background on the CPRA

The California Public Records Act (Cal. Gov't Code, § 6250 et seq.) (CPRA) was enacted in 1968 to "safeguard the accountability of government to the public, for secrecy is antithetical to a democratic system" of government. *San Gabriel Trib. v. Superior Ct.* (1983) 143 Cal. App. 3d 762, 771.

While legislative policy generally (and in Amicus's view appropriately) favors disclosure, the right of access to public records is not absolute. *Copley Press, Inc. v. Superior Ct.* (2006) 39 Cal. 4th 1272, 1282 ("In enacting the CPRA, the Legislature, although recognizing this right, also expressly declared that it

[12] Tom Kisken, *Borderline shooting victim and hero remembered in wake*, Ventura County Star, https://www.vcstar.com/story/news/local/2019/01/27/borderline-shooting-victim-tel-orfanos-wake/2618315002/ (last visited Aug. 10, 2021).

was 'mindful of the right of individuals to privacy.'"). Requests for disclosure of public records implicate two competing interests: (1) the general public's right of access to information concerning government conduct, and (2) an individual right to privacy. Cal. Gov't Code, § 6250. The California Supreme Court has affirmed the "narrower *but no less important* interest [in] the privacy of the individuals whose personal affairs are recorded in government files." *CBS, Inc. v. Block* (1986) 42 Cal. 3d 646, 651 (emphasis added). Decisions interpreting the CPRA seek to balance these fundamental rights, as well as the government's interest in preserving confidentiality. *Am. C.L. Union Found. v. Deukmejian* (1982) 32 Cal. 3d 440, 447.

Records may be properly withheld under any of the CPRA's enumerated exemptions, which serve the important objective of "protect[ing] the privacy of persons whose data or documents come into governmental possession." *Copely Press*, 39 Cal. 4th at 1282; Cal. Gov't Code, § 6254, subs. (a) through (d). In addition to these expressly enumerated exemptions, the CPRA also contains a "catch-all" exemption empowering agencies to weigh the public's interest in favor of and against disclosure. Cal. Gov't Code, § 6255. This "catch-all" exemption permits records to be withheld when the public interest served by nondisclosure "clearly outweighs" the public interest served by disclosure. *Id.*; *see also Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal. 4th 59, 60.

The California Supreme Court has repeatedly affirmed the legitimacy and importance of each of these legislatively created

exemptions. *See, e.g.*, *Am. C.L. Union of N. California v. Superior Ct.* (2011) 202 Cal. App. 4th 55, 64 (holding that public interest in nondisclosure outweighs public interest in disclosure of license plate data); *Haynie v. Superior Ct.* (2001) 26 Cal. 4th 1061, 1071 (exempting from disclosure police files pursuant to the investigatory records exemption); *Times Mirror Co. v. Superior Ct.* (1991) 53 Cal. 3d 1325 (exempting from disclosure the governor's appointment calendars under the catch-all public interest exemption); *Deukmejian*, 32 Cal. 3d 440 (exempting from disclosure law enforcement files under the catch-all public interest exemption).

III. A Reverse-CPRA Mandamus Action Is Proper

Appellants seek adjudication of the proper interpretation of the CPRA's enumerated exemptions. The California Code of Civil Procedure authorizes any court to issue a writ of mandate to compel the performance of an act which the law specifically requires. Cal. Civ. Proc. Code § 1085. The fact that the desired result is for the agency to refrain from a course of action, even if that action is discretionary, does not preclude the use of the writ of mandate: "Mandamus may issue . . . to compel an official both to exercise his discretion (if he is required by law to do so) and to exercise it under a proper interpretation of the applicable law." *Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal. App. 4th 1250, 1266. This Court has endorsed this type of

action as a "reverse-CPRA"[13] lawsuit that allows affected parties to seek judicial review of an agency's decision to disclose certain documents. *Id.* at 1265.

This means that while agencies like the Ventura County medical examiner's office are responsible for the initial determination of whether the requested records may be properly disclosed, including whether any statutory exemptions apply, that determination may then be challenged by parties that would be adversely affected by disclosure. Cal. Gov't Code, § 6253; *Marken*, 202 Cal. App. 4th at 1262. The party seeking judicial review in a reverse-CPRA action bears the burden of proving that an exemption should apply to prevent disclosure. *Long Beach Police*, 59 Cal. 4th at 70.

There is no indication from statute or case law that an agency's initial determination should enjoy the type of judicial deference the media company Respondents argue for. In fact, the California Supreme Court has held that review at the appellate level necessitates an independent reweighing of the factors for and against disclosure. *See Michaelis, Montanari & Johnson v. Superior Ct.* (2006) 38 Cal. 4th 1065, 1072.

Preliminary injunctions to maintain the *status quo* are especially critical in the context of a reverse-CPRA action, where the core purpose of the action—to prevent disclosure—would be fatally undercut. The California Supreme Court has recognized that the proverbial bell cannot be un-rung once disclosure has

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[13] Such actions are also referred to as "reverse-PRA" actions. *See, e.g.*, *Pasadena Police Officers Ass'n v. City of Pasadena* (2018) 22 Cal. App. 5th 147.

been made, acknowledging that "once information is held subject to disclosure under the Act, the courts can exercise no restraint on the use to which it may be put." *Deukmejian*, 32 Cal. 3d at 451.

IV. Appellants' Reverse-CPRA Action is Likely to Succeed

The issue before this Court is straightforward at both a legal and human level. Appellants have already had to share their loved ones' violent deaths with the public. A thorough investigation into the shooting and law enforcement's response produced a detailed report that is available for public consumption.[14] Under these circumstances—involving the victims of California's third deadliest mass shooting—there is minimal public interest in incredibly intimate accounts of Appellants' family members' bodies that is not outweighed by fundamental familial privacy interests. Furthermore, the general public has an interest in avoiding copy-cat shooters inspired by graphic depictions of murder victims' injuries. Several exemptions to the California Public Records Act apply in this case.

A. The Investigatory Records Exemption Applies

Exemption 6254(f) encompasses records of investigations tasked with determining whether a violation of the law has

[14] District Attorney, County of Ventura, *Report on the November 7, 2018, Use of Deadly Force by California Highway Patrol Officer Todd Barrett and Ventura County Sheriff's Sergeant Ronald Helus at the Borderline Bar & Grill Mass Shooting Incident* (Dec. 17, 2020) www.vcdistrictattorney.com/wp-content/uploads/2020/12/Borderline-Bar-Grill-OIS-Report-12-17-2020.pdf (hereafter "Borderline Investigation Report").

occurred—and if a violation or potential violation has been discovered, the exemption extends to information surrounding the commission of the violation. *Haynie*, 26 Cal. 4th at 1071. The prospect of criminal proceedings must be "concrete and definite" for the exemption to apply, and the exemption's protections do not expire upon the completion of the investigation. *Williams v. Superior Ct.* (1993) 5 Cal. 4th 337, 356, 361.

Autopsy records in particular may be properly withheld under the CPRA's investigatory records exemption. *See Dixon v. Superior Ct.* (2009) 170 Cal. App. 4th 1271. "It is through the coroner and autopsy investigatory reports that the coroner 'inquire[s] into and determine[s] the circumstances, manner, and cause' of criminally-related deaths. And officially inquiring into and determining the circumstances, manner, and cause of a criminally-related death is certainly part of law enforcement investigation." *Id.* at 1277.

1. Concrete and Definite Enforcement Prospects Existed at the Start of the Investigation

The heinous criminal nature of the underlying act is and was indisputable, but much was still unknown when the investigation began. A night of terror had taken the lives of eleven bar-goers, a police sergeant, and the shooter himself. The complexity of this tragedy was compounded by the friendly-fire death of a first responder. Many questions remained, including whether any other injuries were the result of friendly fire, how the shooter had acquired his firearm, what types of ammunition and accessories were used, and whether any other parties may be criminally liable for their role, large or small, in enabling the tragedy. Any

one of these unanswered questions, many of which were addressed in the subsequent investigation, could have given rise to criminal enforcement proceedings.

The Ventura County Sheriff's Office conducted an investigation of the Borderline shooting, including law enforcement's use of deadly force. The records and results of this investigation were submitted to the Office of the District Attorney, who was tasked with determining whether law enforcement's use of deadly force "was justified, and if not, *whether criminal charges should be filed*."[15]

The Borderline Investigation Report, which is publicly available on the Ventura County District Attorney's website, describes how autopsies were conducted on each of the victims, during which all penetrating bullets were recovered and examined. Autopsies conducted on the eleven civilian victims ultimately determined that none of the wounds were made by the .223 round ammunition used by law enforcement.[16] But at the time the investigation came into being, there was a concrete and definite *prospect* of criminal enforcement proceedings, and the victims' autopsies were a necessary component of determining the outcome of the investigation. Indeed, it is difficult to imagine information more salient to prospective criminal enforcement proceedings than the precise causes of death of each of the deceased.

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[15] *Id.* at 3 (emphasis added).
[16] *Id.* at 45.

2. *The Investigatory Records Exemption Does Not Terminate Upon the Conclusion of the Investigation*

The California Supreme Court has definitively held that if a record is properly exempted from disclosure under Section 6254(f), the exemption's protections do not terminate upon the conclusion of the investigation. *Williams*, 5 Cal. 4th at 361. Indeed, a time limitation on the investigatory records exemption would be "virtually impossible to reconcile with the language and history of subdivision (f)." *Id.* at 355. This is an area in which the FOIA and the CPRA differ substantively. *Id.* at 360 ("Congress and the [California] Legislature have taken very different approaches to the problem of limiting the exemption for law enforcement investigatory records."). Importantly, the California Supreme Court observed that nothing in the text of subsection (f) suggests that the legislature intended to place a time limit on the exemption, despite ample opportunity to include language that would achieve this effect. *Id.* at 350.

Here, the prospect of "concrete and definite" criminal enforcement proceedings outlived the shooter, as evidenced by the subsequent investigation and law enforcement report.[17] Because the autopsy reports are properly categorized as investigatory records, *see* Sec. IV.A.1., *supra*, they continue to be exempt even though the investigation that triggered the exemption has concluded.

[17] *See generally*, Borderline Investigation Report, *supra* note 14.

B. The Exemption For Unwarranted Invasions of Privacy Applies

Appellants individually hold significant privacy interests in the autopsy reports of their loved ones that are protected under CPRA's exemption for unwarranted invasions of privacy.[18] Cal. Gov't Code, § 6254(c). This exemption applies where disclosure of the requested records would invade an individual's right to privacy, and such invasion is not justified by countervailing public interests. *LA Unified Sch. Dist.*, 228 Cal. App. 4th at 239.

1. Appellants Have a Cognizable Privacy Interest in the Autopsy Records of Their Loved Ones

The U.S. Supreme Court formally recognized the personal privacy rights family members have on behalf of deceased loved ones in a 2004 decision rejecting the disclosure of certain death scene photos under FOIA's privacy exemption.[19] *Nat'l Archives & Recs. Admin. v. Favish* (2004) 541 U.S. 157, 167 ("We think it proper to conclude from Congress' use of the term 'personal privacy' that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions."). The Court observed that "[f]amily members have a personal stake in honoring and mourning their dead and

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[18] Sixteen Appellants seek to prevent the disclosure of their child's autopsy reports. One Appellant seeks to protect her husband's autopsy report from disclosure.

[19] *Nat'l Archives* concerned application of a FOIA personal privacy exemption. FOIA's exemption is nearly verbatim to the CPRA's, with the sole addition of "clearly" before "unwarranted," thus heightening the standard that must be met under FOIA as compared to the CPRA. 5 U.S.C. § 552(b)(6).

objecting to unwarranted public exploitation that, by intruding on their own grief, tends to degrade the rites and respect they seek to accord the deceased person who was once their own." *Id.* at 168.

California's Fourth District Court of Appeal relied on the reasoning in *National Archives* in a landmark familial privacy case. *See Catsouras v. Dep't of California Highway Patrol* (2010) 181 Cal. App. 4th 856. The court held that family members of an 18-year-old who died in a gruesome car crash had sufficient privacy interests in photographs of the scene to maintain an invasion of privacy action. *Id.* at 874. Such actions continue to be brought in California against those who disseminate private photographs and details about deceased persons. *See, e.g.*, *Vanessa Bryant v. Cty. of Los Angeles et al.*, 2:2020-cv-09582 (C.D. Cal. filed Oct. 19, 2020) (invasion of privacy action by Kobe Bryant's widow against sheriffs' deputies who took and shared photos of her husband and daughter's bodies at the scene of their helicopter crash). Many other jurisdictions have recognized a familial privacy right in relation to death scene and autopsy images of a decedent. As of 2012, roughly one-quarter of states expressly prohibited public access to autopsy records.[20]

Post-mortem photographs and videos viscerally take family members back to the terrible moment in which their loved ones were lost. The Court in *National Archives* quoted the decedent's

[20] Jeffrey R. Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 Cornell J.L. & Pub. Pol'y 237 (2012).

sister explaining why she opposed disclosure: "every time I see [the photograph], I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life." 541 U.S. at 167.

Autopsy reports, like post-mortem photographs, have a traumatizing effect on family members. Autopsy reports—particularly for victims of mass violence—may contain intimate details with little to no public value, including comprehensive descriptions of genitals and undisclosed, private health conditions.

Courts in other jurisdictions have acknowledged the graphic, intimate nature of autopsies:

> An autopsy is an *interrogation of the body*. It is not pleasant for the "layman" to contemplate what actually is done to accomplish an autopsy; politely put, it is ***comprehensively deconstructive of the body.*** Being necessarily comprehensive, autopsies reveal volumes of information, much of which is sensitive medical information, irrelevant to the cause and manner of death. Private medical information protected in life ***does not automatically become less private because of the person's death***.

Penn Jersey Advance, Inc. v. Grim (Pa. 2009) 599 Pa. 534, 543 (Eakin, J., concurring) (emphasis added). Autopsies are "diagnostic in nature and yield detailed, intimate information about the subject's body and medical condition." *Globe Newspaper Co. v. Chief Med. Exam'r* (Mass. 1989) 404 Mass. 132, 134 (holding that autopsy reports are medical files exempt from disclosure under the state's equivalent public records act).

Finally, while there has been limited consideration in this jurisdiction of the application of familial privacy rights to autopsy

reports in particular, the Washington Supreme Court has addressed this issue directly, and concluded unambiguously that "immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent." *Reid v. Pierce Cty.* (Wash. 1998) 136 Wash. 2d 195, 213.

The U.S. Supreme Court cited *Reid* in reaching the same conclusion regarding immediate relatives' privacy interests in autopsy records. *Nat'l Archives*, 541 U.S. at 169. The concurring opinion in *Catsouras* also cited *Reid* in recognizing familial privacy rights regarding images of decedents in California. 181 Cal. App. 4th at 905 (Aronson, J., concurring). These same rationales and principles apply in equal force to autopsy reports.

2. Disclosure of the Autopsy Reports Would Constitute an Unwarranted Invasion of Privacy

"[P]ersonnel, medical, or similar files" are exempted from disclosure under the CPRA where such disclosure would constitute an unwarranted invasion of personal privacy. Gov't Code, § 6254(c). In considering what constitutes an unwarranted invasion of personal privacy, courts look to the public's interest in the disclosure. The party opposing disclosure has the burden of showing that the privacy interests outweigh the public interest in the information's disclosure. *Long Beach Police*, 59 Cal. 4th at 464. However, permitting disclosure is only permissible if "the records sought [] pertain to the conduct of the people's business[.]" *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 242.

"A particular class of information is private when well-established norms recognize the need to maximize individual

control over its dissemination and use to prevent unjustified embarrassment or indignity." *Comm'n on Peace Officer Standards & Training v. Superior Ct.* (2007) 42 Cal. 4th 278, 300. Information that is "of a more personal nature" carries a greater chance of constituting an unwarranted invasion of privacy. *Braun v. City of Taft* (1984) 154 Cal. App. 3d 332, 344. Furthermore, an invasion of privacy need not rise to the level of a violation of the constitutional right to privacy in order for Section 6254(c) to apply. *Comm'n on Peace Officer Standards*, 42 Cal. 4th at 300 n.11.

California courts have long recognized the tension between the aforementioned privacy interests and the public's right to know. "One way to resolve this tension is to try to determine 'the extent to which disclosure of the requested item of information will shed light on the public agency's performance of its duty.'" *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 241. The weight of public interest is determined by the extent to which the disclosure "would contribute significantly to public understanding of government activities." *Id.*

> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community . . . . The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a ***morbid and sensational prying*** into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern.

Catsouras, 181 Cal. App. 4th at 874.

Relatedly, the weight of the public's interest is "proportionate to the gravity of the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate." *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 242. A "minimal or hypothetical" public interest will not compel disclosure. *Id.* at 248. Public interest is "minimal" when there is "an alternative, less intrusive means of obtaining the information sought." *Id.*

Disclosure of the Borderline victims' autopsy reports would constitute an unwarranted invasion of Appellants' personal privacy. Disclosure of the autopsy reports bears only a remote connection to the public's interest in "shedding light on an agency's performance of its statutory duties." *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 241. The victims' autopsy reports will not tell the public whether law enforcement responded expeditiously, whether mass shooting threat assessments or gun safety legislation could have prevented this tragedy, or whether any other government agency satisfactorily performed its duties.

To the extent the public has an interest in assessing law enforcement's response to the mass shooting, there are ample—considerably more illuminating—alternatives that render such interest "minimal." *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 248. The District Attorney's already-public report contains witness statements, transcribed audio communications, marked-up photographs, a comprehensive timeline, and stills from security footage. The Report also states clearly that no civilians were struck by the .223 round ammunition used by law

enforcement on the night of the attack. Unlike highly personal information in the autopsy reports, this comprehensive, already-public report serves the CPRA's legislative purpose: transparency concerning the function and performance of government agencies. In contrast, the victims' autopsy reports will only illustrate the suffering the victims endured during their final moments, as well as private aspects of their personal health while alive.

In sum, the nature of the information sought by Appellants is inapposite to the longstanding purpose of the CPRA. This Court has clearly held that, "as a threshold matter, the records sought must pertain to the conduct of the people's business." *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 242. The autopsy reports would not help "contribut[e] to the public's understanding of government," as required. *Id.* at 246. They would simply reopen Appellants' wounds and set the most intimate details of their loved ones' bodies on public display.

B. The Catch-All Exemption Applies

The final mechanism by which the California Public Records Act exempts the Borderline victims' autopsy records from disclosure is Section 6255, referred to by courts as the "catch-all" provision. Cal. Gov't Code, § 6255; *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 239. Instead of weighing the private interest against the purported public interest, the "catch-all" exemption requires the party opposing disclosure to demonstrate that the *public* interest in withholding the record outweighs the *public* interest in releasing it. *Id.* at 240.

Section 6255 claims have been adjudicated using a three-pronged test:

> (1) We determine if there is a public interest served by nondisclosure of the records; (2) If so, we determine if a public interest is served by disclosure of the records; and (3) If both are found, we determine whether (1) clearly outweighs (2). If it does not, the records are disclosed.

Id. at 243. "[T]o determine if there is a public interest in disclosure, a court must look to the nature of the information sought and whether release of that information would contribute to the public's understanding of government; whether it would shed light on what 'the government has been up to.'" *Id.* at 246. The weight of public interest is determined by the extent to which the disclosure "would contribute significantly to public understanding of government activities." *Id.* at 243.

1. The Public Interest Would Be Served by Nondisclosure

There are two predominant public interests that would be served by nondisclosure: (1) ensuring that our government institutions effectuate a longstanding cultural tradition of protecting familial control over a decedent's body and images and, (2) deterring potential copy-cat attacks in the interest of public safety.

The "well-established cultural tradition" of familial control over a deceased loved one's body, and the extension of privacy rights to decedents' family members, was recognized in in *National Archives*. 541 U.S. at 168. The Court cited burial rites "in almost all civilizations from time immemorial" to help

illustrate "the interests decent people have for whom they have lost." *Id.*

California courts have recognized that not every interest proffered by a public person or entity is a public interest: "the fact that a member of the public is interested in a matter does not, by itself, make it a matter of public interest." *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 248. The public has a vested interest in ensuring that government institutions effectuate the cultural tradition of protecting private information regarding decedents' bodies.

The public interest in preventing potential copy-cat attacks is especially weighty as it implicates future threats to public safety. The copy-cat or contagion effect describes a phenomenon supported by a "growing body of evidence [that] indicates a connection between news media coverage and subsequent mass shootings."[21] The copy-cat effect can be mitigated in part by presenting the facts in a manner that avoids fostering notoriety for the shooter personally.[22] But any sensationalized content that gives the public an intimate, gruesome look into the tragedy being reported can exacerbate the copy-cat effect.[23] This is

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[21] Nicole Smith Dahmen, *Visually Reporting Mass Shootings: U.S. Newspaper Photographic Coverage of Three Mass School Shootings*, Am. Behavioral Scientist 62, no. 2 (2018): 163–80, https://doi.org/10.1177%2F0002764218756921.

[22] *See e.g.*, DON'T NAME THEM, https://www.dontnamethem.org/ (last visited Sep. 30, 2021) (When reporting on attackers "[d]on't sensationalize the names of the shooters in briefings – or in reporting about active attack events.").

[23] Dahmen, *supra* note 21 ("Showing the victim from the killer's perspective at the moment of her death is beyond the pale of

because details can "turn abstract frustrations into concrete fantasies."[24]

This threat to public safety is not speculative; the media's power to inspire a future mass shooter is "a reason and serious implication of news coverage of mass shootings."[25]

> When mass shooters imitate other mass shooters, they are generally not imitating personally observed events . . . In each case in which the event is unobserved, all information that could serve as a model for imitative behavior was provided via various media sources (legacy media, social media, new media), and research has demonstrated that media can influence imitation.[26]

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exploitation. It is death porn." (quoting Justin W. Moyer, *Graphic N.Y. Daily News cover on Virginia shooting criticized as "death porn."*, THE WASH. POST (Aug. 27, 2015) https://www.washingtonpost.com/news/morning-mix/wp/2015/08/27/n-y-daily-news-executed-on-live-tv-cover-criticized-as-death-porn/)).

[24] Ari N. Shulman, *What Mass Killers Want and How to Stop Them*, THE WALL STREET J. (Nov. 8, 2013) https://www.wsj.com/articles/SB10001424052702303309504579181702252120052. This contagion effect, and the media's power to affect private action was put to the test after a surge in suicides in the Vienna subways in the 1980s.

> Three years into the epidemic, [] researchers persuaded local media to change their coverage by minimizing details and photos, avoiding romantic language and simplistic explanations of motives, moving the stories from the front page and keeping the word "suicide" out of the headlines. Subway suicides promptly dropped by 75%.

Id.

[25] Dahmen, *supra* note 21.

[26] J. Meindl & J. Ivy, *Mass Shootings: The Role of the Media in Promoting Generalized Imitation*, AM. J. PUBLIC HEALTH 107, no.

The contagion effect of mass killings has even been statistically modeled, with one study finding "significant evidence of contagion in mass killings and school shootings" involving 4 or more deaths in that these "mass killings involving firearms are incented by similar events in the immediate past."[27] At the same time, there was "no significant evidence of contagion in mass shootings that involve three or fewer people killed, possibly indicating that the much higher frequency of such events compared with mass killings and school shootings reduces their relative sensationalism, and thus reduces their contagiousness."[28]

This "copy-cat effect" has also been judicially acknowledged, including by one court in relation to the public disclosure of certain materials related to the Columbine shooting. *Taylor v. Solvay Pharms., Inc.* (D. Colo. 2004) 223 F.R.D. 544.

The public has an interest in protecting victims of horrific mass shootings, like that suffered by the Borderline victims, as well as in avoiding placing information into the public sphere that may serve to embolden or encourage future mass shooters to commit similar atrocities. Here, non-disclosure serves the public interest.

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3 (2017): 368–70, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5296697/.

[27] Sherry Towers et al., *Contagion in Mass Killings and School Shootings*, PLOS ONE 10, no. 7 (2015) https://doi.org/10.1371/journal.pone.0117259.

[28] *Id.*

2. *The Public Interest Would Not Be Served by Disclosure*

There is insufficient public interest in the disclosure of the requested autopsy reports to support their disclosure. The threshold inquiry is whether the records sought "pertain to the conduct of the people's business." *Los Angeles Unified Sch. Dist.*, 228 Cal. App. 4th at 242. The autopsy records sought here do not meet this minimum threshold.

Since the District Attorney's report concluded that no civilians were struck with ammunition used by law enforcement, these records cannot conceivably serve to shed light upon the conduct or functioning of public agencies or officials.[29] In the presence of "little or no public interest in disclosure, the balance . . . will easily tilt in favor of nondisclosure." *Los Angeles Unified Sch. Dist.*, 228 Cal. App. at 246.

The importance of press freedom and public access to government records cannot be overstated. That is why the CPRA favors disclosure and, apart from the categorial exceptions, requires that potential exemptions are carefully considered on a case-by-case basis using the aforementioned balancing tests. But "the CPRA does not differentiate among those who seek access to [public records]." *Los Angeles Unified Sch. Dist.*, 228 Cal. App. at 242; *see also, Dixon*, 170 Cal. App. 4th at 1279 ("[I]t is irrelevant that the party requesting the public records is a newspaper or other form of media, because it is well established that the media

[29] *See Borderline Investigation Report*, *supra* note 14, at 2.

has no greater right of access to public records than the general public.”).

That newspapers are among the requesting parties does not lessen the public interest showings required, it does not mitigate Appellants’ serious privacy concerns, and it does not lessen the public’s interest in avoiding invasions of privacy and contributing to future tragedies. Nor can the media be relied upon to self-regulate its reporting in the public interest.[30]

CONCLUSION

Appellants are entitled to a preliminary injunction; the trial court should be reversed. A preliminary injunction is particularly important in reverse-CPRA actions like this because the irreparable harm that would result from altering the *status quo* to allow disclosure is identical to an adverse decision on the merits. Furthermore, Appellants are likely to succeed in preventing disclosure in this action. Because disclosure of the Borderline victims’ autopsy reports would implicate significant familial privacy rights while resulting in limited public benefits, and could invite threats to public safety, three distinct CPRA exemptions apply to protect the reports against disclosure. This Court should reverse and grant Appellants the preliminary injunctive relief they seek.

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[30] *See* Meindl & Ivy, *supra* note 26 (“Changing the way in which the media report a mass shooting could be difficult given that sensationalizing a tragic event brings in both viewers and revenue, which is a powerful incentive.”).

DATED: November 30, 2022 Respectfully submitted,

/s/ Esther Sanchez-Gomez

Esther Sanchez-Gomez
Attorney for *Amicus Curiae*
GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE

PROOF OF SERVICE

I work within the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 268 Bush St. # 555, San Francisco, CA 94104.

On November 30, 2022, I served the foregoing documents described as BRIEF OF GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS on the parties in this action as listed in the attached service list by the following means:

SERVICE LIST

PLEASE SEE ATTACHED

X ELECTRONIC SERVICE: In accordance with Code of Civil Procedure sections 1010.6 and 1013, California Rules of Court, Rule 2.251, an order of the court, and/or an agreement of the parties, I caused the documents to be sent to the person at the email address listed below via email or via an electronic filing provider. After transmission, I did not receive, within a reasonable period of time, any electronic message or other indication that the transmission was unsuccessful.

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

DATED: November 30, 2022 By: *_/s/ Esther Sanchez-Gomez_*
ESTHER SANCHEZ-GOMEZ

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