

REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

1156 15th St. NW, Suite 1250
Washington, D.C. 20005
(202) 795-9300
www.rcfp.org

Bruce D. Brown
Executive Director
bbrown@rcfp.org (202) 795-9301

STEERING COMMITTEE

STEPHEN J. ADLER
Reuters

SCOTT APPLEWHITE
The Associated Press

WOLF BLITZER
CNN

DAVID BOARDMAN
Temple University

CHIP BOK
Creators Syndicate

JAN CRAWFORD
CBS News

MICHAEL DUFFY
Time

RICHARD S. DUNHAM
Tsinghua University, Beijing

ASHLEA EBELING
Forbes Magazine

SUSAN GOLDBERG
National Geographic

FRED GRAHAM
Founding Member

JOHN C. HENRY
Freelance

NAT HENTOFF
United Media Newspaper Syndicate

JEFF LEEN
The Washington Post

DAHLIA LITHWICK
Slate

TONY MAURO
National Law Journal

JANE MAYER
The New Yorker

DAVID McCUMBER
Hearst Newspapers

JOHN McKINNON
The Wall Street Journal

DOYLE MCMANUS
Los Angeles Times

ANDREA MITCHELL
NBC News

MAGGIE MUL VEHILL
Boston University

SCOTT MONTGOMERY
NPR

BILL NICHOLS
Politico

JEFFREY ROSEN
The National Constitution Center

CAROL ROSENBERG
The Miami Herald

THOMAS C. RUBIN
Seattle, Wash.

ERIC SCHMITT
The New York Times

ALICIA SHEPARD
Freelance

MARGARET LOW SMITH
The Atlantic

JENNIFER SONDAG
Bloomberg News

PAUL STEIGER
Pro Publica

PIERRE THOMAS
ABC News

SAUNDRA TORRY
USA Today

JUDY WOODRUFF
PBS/The NewsHour

Affiliations appear only
for purposes of identification.

June 19, 2015

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

Re: Letter of *Amici Curiae* in Support of the Petition for Review in
*American Civil Liberties Union Foundation of Southern California et
al. v. Superior Court of Los Angeles County*

To the Honorable Chief Justice and Associate Justices:

Pursuant to rule 8.500, subdivision (g) of the California Rules of Court, *amici curiae*, the Reporters Committee for Freedom of the Press (the “Reporters Committee”), Californians Aware, the California Newspaper Publishers Association, Los Angeles Times Communications, LLC, and The McClatchy Company, respectfully submit this letter in support of the petition for review filed in *American Civil Liberties Union Foundation of Southern California et al. v. Superior Court of Los Angeles County*, case number S227106, on June 15, 2015.

I. INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors that works to safeguard the First Amendment’s guarantee of a free and unfettered press, and the public’s right to be informed, through the news media, about the government. The Reporters Committee has provided guidance and research in First Amendment and freedom of information litigation since 1970.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public’s rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

The California Newspaper Publishers Association is a nonprofit trade association representing the interests of newly 850 daily, weekly and student newspapers throughout California. For over 130 years, CNPA has worked to protect and enhance the freedom of speech guaranteed to all citizens and to the press by the First Amendment of the United States Constitution and Article 1, Section 2 of the California Constitution. CNPA has dedicated its efforts to protect the free flow of information concerning

government institutions in order for newspapers to fulfill their constitutional role in our democratic society and to advance the interest of all Californians in the transparency of government operations.

Los Angeles Times Communications LLC publishes the *Los Angeles Times*, the largest metropolitan daily newspaper in the country. The *Los Angeles Times* operates the website www.latimes.com, a leading source of national and international news.

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States with 30 daily newspapers and related websites as well as numerous community newspapers and niche publications. The McClatchy Company is owner of *The Sacramento Bee*, *The Fresno Bee*, *The Modesto Bee*, *Merced Sun-Star* and *The (San Luis Obispo) Tribune*.

This case is of significant interest to *amici* because the decision of the Court of Appeal, Second Appellate District, Division Three, undermines core provisions of the California Public Records Act, Government Code § 6250, *et seq.* (“PRA”) that ensure meaningful public access to police records that are not gathered for or used in connection with any criminal investigation. *Amici*, as representatives and members of the news media, have a substantial interest in ensuring that the PRA remains a strong and effective tool for journalists and the public to obtain information about law enforcement activities.

II. WHY REVIEW SHOULD BE GRANTED

A. The Petition presents an issue of first impression that is of importance to the press and the public.

The Court of Appeal concluded that data generated when Real Parties in Interest the City and County of Los Angeles use Automatic License Plate Reader (“ALPR”) technology is exempt from disclosure under the PRA on the grounds that such data is “investigatory” in nature. ALPR systems automatically, and without suspicion, scan the license plates of nearby cars and cross-reference them against a “hot list” of license plates that correspond to stolen vehicles. The Court of Appeal’s broad interpretation of Government Code section 6254, subdivision (f)—the so-called investigatory records exemption—is a novel construction of the PRA that runs counter to the statutory language and this Court’s precedent, and is of particular concern to journalists and news organizations who regularly rely on the PRA to gather news and keep the public informed about how state and local law enforcement agencies operate within their communities.¹

The California Constitution expressly mandates that the investigatory records exemption—like all exemptions to disclosure under the PRA—be interpreted narrowly. (Cal. Const., art. I, § 3 subd. (b)(2).) Section 6254, subdivision (f), provides that the “records of investigation” of a local police force may be withheld from disclosure. While the PRA does not explicitly define “records of investigation,” this Court has previously

¹ All statutory citations herein are to the California Government Code, unless otherwise stated.

held that the “records of investigation exempted under section 6254(f) encompass only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred.” (*Haynie v. Superior Ct.* (2001) 26 Cal.4th 1061, 1071 (“*Haynie*”).)

As the Court of Appeal acknowledged, this case presents an issue of first impression; “no case has considered whether records generated by an automated process, like that performed by the ALPR system, qualify for exemption under subdivision (f).” (*American Civil Liberties Union Foundation of Southern California et al. v. Superior Court of Los Angeles County* (2015) 236 Cal. App. 4th 673, 680 (“*ACLU*”).) And, notwithstanding the requirements of the California Constitution, and the guidance given it by this Court in *Haynie*, the Court of Appeal concluded that data collected by “the ALPR system”—a system that scans “every license plate within view,” regardless of investigatory value—are records of “an investigation to locate automobiles associated with specific suspected crimes.” (*Ibid.* at 684.) As a result, the Court of Appeal determined that all records generated by the ALPR system, regardless of whether or not they are associated with any crime, are investigatory records exempt from disclosure under the PRA.

The Court of Appeal’s published decision could have broad ramifications for journalists and reporters seeking to obtain information about law enforcement practices that are independent of any prior or current investigation. Because journalists rely on access to law enforcement records under the PRA in order to gather and report news of vital importance to the public, this Court should grant review in this case.

B. The Court of Appeal’s broad interpretation of the scope of the PRA’s exemption for “records of investigation” ignores constitutional mandates.

In 2004, California voters overwhelmingly approved Proposition 59, enshrining the public’s right of access in California’s Constitution, and mandating—as a matter of state constitutional law—that access to government information afforded under the PRA be construed “broadly.” (*See* Cal. Const., art. I, § 3 subd. (b)(2).) Accordingly, an exemption under the PRA must be “narrowly construed if it limits the right of access.” (*Id.*; *see also International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 348 (conc. & dis. opn of Kennard, J).) Yet, in concluding that a broad swath of law enforcement records—the vast majority of which have no connection, whatsoever, to the investigation of any particular crime or criminal activity—are exempt from disclosure under the PRA, the Court of Appeal ignored this constitutional requirement.

The Court of Appeal took an exceedingly broad view of the PRA’s investigatory records exemption. It concluded that because the ALPR system automatically cross-references scanned license plates with a database of license plates corresponding with stolen vehicles, “the plate scans performed by the ALPR system are precipitated by specific criminal investigations—namely, the investigations that produced the ‘hot list’ of license plate numbers associated with suspected crimes.” (*ACLU* at 684.) This rationale unreasonably and impermissibly expands the scope of the PRA’s narrow exemption for

“records of investigation.” Many police activities relating, for example, to crime prevention could theoretically be described as having generally been “precipitated by specific criminal investigations,” in this same manner, yet properly are not shielded from public scrutiny by Section 6254, subdivision (f). The license plate scans performed by the ALPR system, as the Court of Appeal acknowledged, are done without suspicion, and on an indiscriminate and regular basis. Such data is not tied to any specific investigation of any specific crime. The fact that a “hot list” of license plate numbers also exists and is later cross-referenced with the data collected by the ALPR system does not transform all ALPR data that is gathered by law enforcement into a “record of investigation” within the meaning of the PRA.

In order to “narrowly” construe the exemption set forth in Section 6254, subdivision (f)—as required by the California Constitution—the Court of Appeal was obligated to interpret the terms “investigation” and “record of investigation” narrowly. It failed to do so. This Court should grant review to ensure that the PRA’s exemption for “records of investigation” is construed in a manner that is consistent with constitutional mandates.

C. The Court of Appeal’s decision is inconsistent with the statutory language of Section 6254, subdivision (f), and prior decisions of this Court and other courts of appeal.

In *Haynie*, this Court distinguished records that are exempt under Section 6254, subdivision (f)—which “encompass only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred”—from non-exempt records concerning “related to crime prevention and public safety that are unrelated to either civil or criminal investigations.” (*Haynie, supra*, 26 Cal.4th at p. 1071.) In repudiating the notion that a record may be exempt from disclosure simply because it is related to “crime prevention and public safety,” this Court in *Haynie* recognized that “to shield everything law enforcement officers do from disclosure” would defeat the purpose of the PRA. (*Ibid.*)

Other decisions that preceded *Haynie* also support a narrow construction of Section 6254, subdivision (f). In *Uribe*, the Court of Appeal, Fourth Appellate District, considered the exemption for “investigatory files.” (*Uribe v. Howie* (1971) 19 Cal.App.3d 194, 212–13 (“*Uribe*”).) It concluded that under Section 6254, subdivision (f), “investigatory files” could be exempt from disclosure “only when the prospect of enforcement proceedings is concrete and definite.” (*Ibid.* at p. 212, emphasis added.) Although the investigatory files exemption is distinct from the investigatory records exemption, the logic of *Uribe* is applicable here. Section 6254, subdivision (f), should not be read so as “to create a virtual carte blanche for the denial of public access to public records,” because such a perverse result “could not have been the intent of the Legislature.” (*Ibid.* at p. 213.)

Eleven years later, this Court rejected a similarly expansive reading of the “intelligence information” exemption in Section 6254, subdivision (f). (See *American Civil Liberties Union v. Deukmejian* (1982) 32 Cal.3d 440, 449 (“*Deukmejian*”).) In *Deukmejian*, the Supreme Court refused to interpret that exemption to apply to “all information which is

reasonably related to criminal activity,” reasoning that such a broad construction of that exemption would “effectively exclude the law enforcement function of state and local governments from any public scrutiny under the [PRA], a result inconsistent with its fundamental purpose.” (*Id.*, quotation marks omitted.) *Haynie, Deukmejian, and Uribe* all make clear that an expansive reading of Section 6254, subdivision (f), conflicts with legislative intent and the purpose of the PRA.

The statutory language of Section 6254, subdivision (f), on its face, also supports a definition of “investigation” that is far narrower than the one adopted by the Court of Appeal. State and local law enforcement agencies must make public, among other things, the following information about records that are exempt from disclosure under that provision—“except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation”:

[T]o the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. . . .

(Gov’t Code, § 6254(f)(2).)

Any interpretation of the term “investigation” for purposes of construing the scope of the PRA’s exemption for “records of investigation” should take into account the specific characteristics of an “investigation” that are outlined in Section 6254, subdivision (f)(2). Specifically, this provision anticipates the “completion of the investigation or a related investigation,” an objective that cannot reasonably be fulfilled if the definition of “investigation” encompasses ongoing, general efforts by law enforcement to “scan[] every car in view.” (*ACLU* at 684.) In addition, that Section 6254, subdivision (f)(2), refers to specific information about “crimes alleged or committed or any other incident investigated,” further supports interpreting the term “investigation” to mean the targeted investigation of a specific crime or reported incident. In sum, the statutory language does not support the expansive, vague definition of “investigation” relied upon by the Court of Appeal, below.

D. Construing “investigatory records” under Section 6254, subdivision (f), to exempt all ALPR data from disclosure will impair the ability of the press to keep the public informed.

The Court of Appeal’s decision limiting the ability of the press and the public to access ALPR data collected by law enforcement has a significant, damaging impact on the ability of the press to perform its fundamental and constitutionally recognized duty to gather the news and keep citizens informed about the actions of their government. Reporters in California, like reporters around the nation, routinely rely on freedom of information laws like the PRA to access governmental records and information in order

to bring important issues to the attention of the public. Journalists are increasingly relying on freedom of information laws to gain access to large datasets in order to identify trends and systemic issues. This is particularly true when it comes to reporting on the activities of law enforcement. Exempting records like ALPR data from disclosure under the PRA significantly impedes California journalists' ability to report on important matters of public interest and concern.

As the Petition details, extensive reporting on law enforcement use of ALPR systems, specifically, has provoked public debate nationwide, and prompted some jurisdictions to establish new or different rules governing the retention of such data. (Pet. for Writ of Mandate, 37–38.) For instance, in 2013, Cyrus Farivar, a journalist in the Bay Area, filed PRA requests in multiple counties throughout California seeking ALPR data pertaining to his own vehicle. (Cyrus Farivar, *The cops are tracking my car—and yours*, Ars Technica (July 18, 2013, 9:00 A.M.), arstechnica.com/tech-policy/2013/07/the-cops-are-tracking-my-car-and-yours/1/.) The responses Farivar received to the fourteen PRA requests he submitted varied widely. While some law enforcement agencies responded by producing the requested data, Farivar reported that the LAPD and the Los Angeles County Sheriff's Department—Real Parties in Interest in this case—claimed the requested records were exempt from disclosure. (*Id.*) Farivar wrote: “It’s a bit hard to understand how as a law-abiding citizen, asking for my own data constitutes either an ‘investigation,’ a ‘record of intelligence information or security procedure,’ or an ‘investigatory or security file.’” (*Id.*) Earlier this year, the Oakland Police Department provided eight days of ALPR data in response to another PRA request by EFF. (Jeremy Gillula and Dave Maass, *What You Can Learn from Oakland's Raw ALPR Data*, Electronic Frontier Foundation (Jan. 21, 2015), <http://bit.ly/1BIowul>.) Reporters analyzing that data observed that vehicles were more likely to be photographed in low-income areas. (Darwin BondGraham, *Drive a Car in Oakland? Your Movements Are Being Tracked by the Oakland Police, Especially if You're in a Low-Income Area*, East Bay Express (Jan. 23, 2015), <http://bit.ly/1IIIw2w>.) These reports prompted additional discussion of the need for appropriate retention and dissemination policies relating to ALPR data. (See, e.g., Colin Wood, *How Are Police Departments Using License Plate Reader Data?* Government Technology (Jan. 23, 2015), <http://bit.ly/1DdKFzP>.)

The potential implications of this case, however, extend beyond any one law enforcement tool or method. Exempting records not associated with any specific investigation from disclosure under the PRA on the grounds that they are “investigative records” would work an unwarranted expansion of that exemption that could encourage law enforcement agencies to refuse disclosure in other contexts as well. Because journalists rely on the PRA to gain access to public records and information in connection with day-to-day reporting, as well as more in-depth and investigative stories, the Court of Appeal’s ruling is deeply troubling.

There are numerous examples of powerful, important news stories that were possible only because of journalists’ access to large datasets maintained by state and local law enforcement agencies in California. In August 2014, the *Los Angeles Times* reported that the LAPD had misclassified over 1,000 violent crimes over a one year period between

2012 and 2013, resulting in inaccurate information being presented to the public regarding the crime rate in Los Angeles. (Ben Poston & Joel Rubin, *LAPD Misclassified Nearly 1,200 Violent Crimes as Minor Offenses*, L.A. Times (Aug. 9, 2014, 6:04 PM), <http://lat.ms/1IT9MBW>.) The investigative journalism that exposed these errors was only possible because of “the California Public Records Act, [through which the *Los Angeles Times*] obtained computerized crime data for more than 94,000 incidents recorded by the Los Angeles Police Department in the year ending Sept. 30, 2013.” (Ben Poston & Joel Rubin, *LAPD’s misclassified incidents: How we reported this story*, L.A. Times, (Aug. 9, 2014, 6:04 PM), <http://lat.ms/1ul6ucf>.) And, after the reporters brought the issue of LAPD underreporting of violent crimes to the attention of the public, the police department took steps to improve the accuracy of its reporting. (Poston & Rubin, *LAPD Misclassified Nearly 1,200 Violent Crimes as Minor Offenses*, *supra*.)

Los Angeles school police also came under public scrutiny as a result of data obtained under the PRA that was analyzed and reported by researchers and journalists. This data, “obtained as a result of a public records request,” showed that Los Angeles school police issued more than 33,500 court summonses to youths between the ages of 10 and 18 over a three year period from 2009–2011. (Susan Ferriss, *School discipline debate reignited by new Los Angeles Data*, The Center for Public Integrity, (Apr. 24, 2012, 3:56 PM), <http://bit.ly/1osjI19>; Vanessa Romo, *LA School Police ticket more than 33,000 students, many are middle schoolers*, 89.3 KPCC Southern California Public Radio, (April 27, 2012), <http://bit.ly/1qEDkn7>.) Almost a quarter of those citations were issued to middle school students, with some being issued to students as young as seven years old. The data obtained under the PRA also showed that black and Latino students were given a disproportionate number of tickets compared to white students, and that the citations were concentrated in low-income areas. (Susan Ferriss, *Los Angeles school police citations draw federal scrutiny*, The Center for Public Integrity, (May 21, 2012, 6:00 AM), <http://bit.ly/1ITalf9>.) This data shined a light on a growing trend of police and court involvement in minor disciplinary events that used to be handled by school officials, which, in turn, sparked protests by students and parents, and eventually led to dialogue between police and the community, as well as policy reform. (*See id*; *see also* Jennifer Medina, *Los Angeles to Reduce Arrest Rate in Schools*, The New York Times, (Aug. 18, 2014), <http://nyti.ms/1wfTJ1S>.)


Finally, another California media organization recently obtained and analyzed information under the PRA to report on the relationship between police stops in San Francisco and race. “[I]n response to a public records request,” a reporter was able to obtain information on the race of persons stopped by the San Francisco police from January to December of 2013, a 12 month period. (Vivian Ho, *Police rarely analyze, share racial data on stops*, SFGate (Aug. 19, 2014, 8:04 AM), <http://bit.ly/1nL9jgO>.) The story showed that while San Francisco police were collecting stop data, they did not have the resources to analyze it. *Id*. It was up to the reporter who requested the data to scrutinize the numbers and inform the public that African American drivers made up 17% of stops, while only comprising 6% of the city’s population. *Id*.

These are but a handful of examples of the powerful reporting that journalists and news organizations in California are able to do by obtaining data from law enforcement agencies under the PRA. If law enforcement agencies are encouraged to invoke Section 6254, subdivision (f), to withhold records related to crime prevention or evidence gathering in response to PRA requests, many important stories like these may go unreported. Such a result runs contrary to the very purpose of the PRA, which is to ensure "the accountability of government to the public." (*Register Div. of Freedom Newspapers Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 901.)

III. CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the Petition for Review filed by the American Civil Liberties Union and the Electronic Frontier Foundation.

Sincerely,



Katie Townsend (Bar No. 254321)
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
Counsel for *Amici Curiae*

Additional *amici* counsel:

Terry Francke
General Counsel
Californians A ware
2218 Homewood Way
Cannichael, CA 95608
Counsel for Californians Aware

Jim Ewert
General Counsel
Respectfully submitted,
California Newspaper Publishers Association
2000 O Street, Suite 120
Sacramento, California 95811
Counsel for California Newspaper Publishers Association

Jeffrey Glasser
Senior Counsel
Tribune Company
202 West First Street
Los Angeles, CA 90012
Counsel for the Los Angeles Times

Karole Morgan-Prager
Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816
Counsel for The McClatchy Company