BENBROOK LAW GROUP, PC
BRADLEY A. BENBROOK (SBN 177786)
STEPHEN M. DUVERNAY (SBN 250957)
701 University Avenue, Suite 106
Sacramento, CA 95825
Telephone: (916) 447-4900
brad@benbrooklawgroup.com

CONSOVOY MCCARTHY PLLC
J. MICHAEL CONNOLLY (*pro hac vice*)
STEVEN C. BEGAKIS (SBN 314814)
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
Telephone: (703) 243-9423
mike@consovoymccarthy.com
steven@consovoymccarthy.com

Attorneys for Plaintiff/Petitioner Parents Defending Education

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

PARENTS DEFENDING EDUCATION,

Plaintiff/Petitioner,

v.

SEQUOIA UNION HIGH SCHOOL DISTRICT,

Defendant/Respondent.

Case No.: 24-CIV-03586

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Date: January 22, 2025
Time: 2:00 p.m.
Judge: Hon. Nicole S. Healy
Department: 28

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

The California Public Records Act exists "to prevent secrecy in government and to contribute significantly to the public understanding of government activities." *Fredericks v. Superior Ct.*, 233 Cal. App. 4th 209, 223 (2015). That is exactly what Parents Defending Education sought to do here when it sent a CPRA request to the Sequoia Union High School District. PDE wanted to investigate why a school-sponsored student newspaper, the *M-A Chronicle*, tried to prevent a documentary filmmaker from using certain photos and videos that depicted the District in a negative light. PDE, as a member of the public, requested copies of the District's public records of the *M-A Chronicle*'s censorship efforts. PDE intended to post these records online to show the public why the *M-A Chronicle* took these actions and whether those actions were supported by taxpayer dollars.

The District does not dispute that PDE has a right to request public records or that the District is a valid recipient of PDE's CPRA request. But the District refused to turn over some of the requested records for three reasons. First, the District asserted that certain records that were "created, held or used by students" were not "public records" because they contained student expression. Verified Pet. ¶¶28-33, Ex. B at 2. But government documents do not cease being "public records" merely because they contain an individual's expression. *See, e.g.*, *Iloh v. Regents of Univ. of Cal.*, 87 Cal. App. 5th 513, 525 & n.5 (2023). Second, the District asserted that records "created, held or used by students" and records of "the advice and supervision the journalism teacher provided to" the *M-A Chronicle* were protected by a "reporter's privilege." Verified Pet. ¶¶35-41, Ex. B at 2. But the CPRA has no "reporter's privilege" exemption, and it wouldn't apply to the withheld records in any case. Finally, the District asserted that disclosing records of "the advice and supervision [of] the journalism teacher" would not be in the public interest because it would "sow discord between parents and teachers and within the community." Verified Pet. ¶¶28, 42-53, Ex. B at 2-3. But these types of "'[v]ague … concerns'" cannot "foreclose the public's right of access." *ACLU Found. v. Superior Ct.*, 3 Cal. 5th 1032, 1046 (2017).

PDE has shown by verified petition that it is entitled to these records under the CPRA, and the burden of proof is on the District, not PDE, to justify withholding them. Because the District cannot carry its burden, the Court must issue a writ of mandate ordering the District to comply with

the CPRA. The Court should grant PDE's petition.

BACKGROUND

I. The Censorship of a Documentary Film Critical of the District

This dispute concerns a CPRA request for records of a public high school newspaper's attempt to censor a documentary film that publicized (in a negative light) two Menlo-Atherton school board meetings in November 2023 and January 2024. *See* Verified Pet. ¶¶10-28. The *M-A Chronicle*—a student newspaper of Menlo-Atherton High School in the Sequoia Union High School District—published two articles on its website about those school board meetings. *See* Verified Pet. ¶¶17-18, 20. These articles, and accompanying short-form videos posted on the *M-A Chronicle*'s TikTok and Instagram accounts, contained photos and video footage of the meetings. *Id.* ¶¶17, 20. The November 2023 school board meeting concerned "detracking"—whether Menlo-Atherton would eliminate "Advanced Standing" classes that "separat[e] students into different classes based on their academic abilities." Arden Margulis, *SUHSD Board Refrains from Vote on Detracking, Advocates for Freshman Electives*, M-A Chronicle (Nov. 16, 2023), https://perma.cc/7U5D-KEF9; Collin Goel, *What the Research Tells Us About Detracking*, M-A Chronicle (Dec. 7, 2022), https://perma.cc/4KQ8-EYP6. The January 2024 school board meeting concerned a "[Menlo-Atherton] Ethnic Studies lesson involving the Israel-Hamas conflict taught by two Ethnic Studies teachers," which involved a "slideshow" with "imagery of [a] Jewish puppet master controlling the world." Ameya Nori, *Board Meeting Erupts Into Arguments Over Ethnic Studies Lesson*, M-A Chronicle (Jan. 22, 2024), https://perma.cc/WQL3-DRXW.

In early 2024, a filmmaker named Eli Steele released a 38-minute documentary film online, and both the trailer and the documentary contained the publicly available photo and video content from the *M-A Chronicle* articles and short form videos about these meetings. *Id.* ¶¶11, 17, 20. This documentary film chronicled Steele's "'deep dive investigation in the Bay Area schools,'" including Menlo-Atherton High School. *Id.* ¶¶12-15. The film was highly critical of the District, and it provoked backlash from the school. *Id.* ¶16. After a screening, the Menlo-Atherton principal criticized the documentary and complained that it "'paint[ed] [Menlo-Atherton] in a negative light.'" *Id.*

On April 2, 2024, Steele received a cease-and-desist letter purporting to come from the *M-A Chronicle* demanding that he remove its footage from the trailer and documentary. *Id.* ¶19. The letter, signed by "'The Editorial Board of the *M-A Chronicle*,'" complained about three pieces of content in the documentary that were created by the newspaper: (1) "'video by the *M-A Chronicle* of [a] January 17th SUHSD Board meeting,'" (2) "'the use of photos of board meetings from two *M-A Chronicle* articles,'" and (3) "'the use of the *M-A Chronicle*'s short form video posted on the *M-A Chronicle*'s Tiktok and Instagram accounts.'" *Id.* ¶¶19-20. The letter claimed that Steele's use of those items constituted copyright infringement, demanded that Steele "'[r]emove all infringing content,'" and threatened to "'take appropriate legal action'" and "'seek all available damages and remedies'" if he did not comply. *Id.* The students on the editorial board claimed that they had decided to send the cease-and-desist letter "'without communicating with or being influenced by [the Menlo-Atherton] administration.'" *Id.* ¶21.

On April 4, Steele received notice from YouTube that the platform had removed the trailer to the documentary following a copyright removal request from the *M-A Chronicle*. *Id.* ¶22. Steele responded to the YouTube complaint and explained that his use of the footage from the school board meetings was protected by the Fair Use doctrine. *Id.* ¶23. Steele also decided to release the full 38-minute documentary on YouTube and Vimeo on April 5, but the documentary was removed from those platforms in response to further complaints from the *M-A Chronicle*. *Id.* ¶¶24-25.

II. PDE's CPRA Request

PDE is a nationwide, grassroots membership organization whose members include parents, students, and other concerned citizens, many of whom reside in California. *Id.* ¶6. PDE wanted to better understand why a school-sponsored newspaper would seek to block a documentary film from public circulation. From the outside, it appeared that these efforts were not about copyright concerns—instead, they appeared to be a classic attempt to shut down disfavored speech, including speech that was critical of the District. PDE thus sent the District a CPRA request on April 4, 2024, requesting records containing phrases such as "Eli Steele," "documentary," and "YouTube," in the possession of certain identified board members, district employees, and students between the dates of January 18 and April 4, 2024. Verified Pet. ¶¶4, 26-27.

In its records request, PDE explained that the "'primary purpose of th[e] request is to inform the public's understanding of the M-A Chronicle's copyright removal request filed against'" Eli Steele. *Id.* ¶27. PDE also wanted to uncover the extent to which the *M-A Chronicle*'s efforts were supported by taxpayer dollars. *Id.* ¶4. PDE specified in its CPRA request that its intent was to publicize the results of its request on PDE's website, *id.* ¶27, and that PDE "d[id] not intend to use the requested records for private commercial interests," *id.* Ex. A at 1.

III. The District's Refusal to Produce Records

On April 15, 2024, the District partially denied PDE's request, specifying two categories of records that it believed were exempt from disclosure: (1) "records created, held or used by students to develop material for the student newspaper, participate in a journalism class, or make editorial decisions about student publications," and (2) "records relating to the advice and supervision the journalism teacher provided to students relating to their editorial decisions." *Id.* ¶28, Ex B at 2. The District made three arguments for withholding the records: (1) some of the records were not "public records" because they contained student expression; (2) all of the records were protected by a "reporter's privilege," and (3) some of the records were protected by the CPRA's "catchall" exemption, which protects records from disclosure based on a balancing of public interests. *Id.* ¶¶28-53, Ex. B at 2-3.

The District argued that the first category of records—those "created, held or used by students"—were not public records subject to disclosure because they were "neither District records nor reflective of the 'public's business.'" *Id.* ¶30, Ex. B at 2. The District's only justification for this assertion was that "[s]tudents have the right to express themselves through the student newspaper, and retain editorial control over that publication, subject to the supervision of the assigned teacher." *Id.* Ex. B at 2.

The District also argued that both categories of records were exempt from disclosure because they qualify for a "reporter's privilege." *Id.* ¶¶35-41. According to the District, "reporters, including student reporters, have a privilege to withhold records pertaining to their news gathering that does not wind up in a published story." *Id.* Ex. B at 2. The District also believed that this privilege covered "records relating to the advice and supervision the journalism teacher provided to students relating

to their editorial decisions." *Id.* With no further explanation, the District asserted that these records were exempt from disclosure pursuant to Cal. Gov't Code §7927.705, which exempts documents covered by a "privilege" in the California Evidence Code. *Id.*

As for the second category of records—those "relating to the advice and supervision [of] the journalism teacher"—the District invoked the CPRA's "catch-all" exemption, arguing that the "public interest served by not disclosing such records clearly outweighs the public interest served in disclosing them." *Id.* ¶42, Ex. B 2-3. To justify invoking this exemption, the District cited *LAUSD v. Superior Ct.*, 228 Cal. App. 4th 222 (2014), and it argued that *LAUSD* "held that the school district was not obligated to identify teachers by name in reports of aggregated student standardized test scores since disclosure of each teacher's performance would sow discord between parents and teachers and within the community." Verified Pet. Ex. B at 2-3. The District then asserted that, "[f]or the reasons articulated in that case … the public interest in disclosing records generated in connection with student journalist decision-making and in the managing of a classroom are clearly outweighed by the public's interest in not disclosing such information." *Id.* Ex. B at 3. The District provided no further explanation.

STANDARD OF REVIEW

The CPRA establishes "'specific procedures'" that govern judicial review of the refusal to produce public records. *City of L.A. v. Superior Ct.*, 9 Cal. App. 5th 272, 283 (2017). "Any person may institute a proceeding for injunctive or declarative relief, or for a writ of mandate, in any court of competent jurisdiction, to enforce that person's right under this division to inspect or receive a copy of any public record or class of public records." Cal. Gov't Code §7923.000. When a requester shows by "verified petition" that "public records are being improperly withheld" from him, "the court shall order the officer … charged with withholding the records to disclose those records." *Id.* §7923.100. "If the court finds that the public official's decision to refuse disclosure is not justified under [a statutory exemption] … the court shall order the public official to make the record public." *Id.* §7923.110(a). "The entity attempting to deny access"—here, the District—"has the burden of proof" to "'justify withholding'" records. *LAUSD v. Superior Ct.*, 151 Cal. App. 4th 759, 767 (2007).

ARGUMENT

PDE is entitled to the records it has requested. The District does not dispute that the CPRA gives PDE, as a member of the public, a right to the District's public records. PDE requested such records from the District and has proven that these records are "public"—that they "relat[e] to the conduct of the public's business." Cal. Gov't Code §7920.530(a). Despite PDE's right to inspect those records, the District has withheld them. The District therefore has the burden of proving that the withheld records are either not "public records" or are subject to an express CPRA exemption.

The District cannot carry this burden for multiple reasons. In its letter rejecting PDE's requests, the District argued that certain records were not "public records" if they contained student expression, even though public records often contain expressive activity. It argued that the records were exempt because of the so-called "reporter's privilege," even though this "privilege" is not recognized by any CPRA exemption and would not even apply to the requested records. The District also asserted that disclosing records of a journalism teacher's "advice and supervision" of the school newspaper would not be in the public interest because it would "sow discord between parents and teachers and within the community." Yet the District never explained this vague and speculative assertion of harm, and the public interest favors disclosure in any case. Because the District cannot carry its burden of withholding records, the Court must grant the petition for writ of mandate.

I. The Constitution and CPRA create a strong presumption of disclosing public records.

In California, "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. art. I, §3(b)(1). To secure this right, "[t]he Public Records Act was enacted 'for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies.'" *Galbiso v. Orosi Pub. Util. Dist.*, 167 Cal. App. 4th 1063, 1083 (2008).

The CPRA reflects "'legislative impatience with secrecy in government'" and "safeguard[s] the accountability of government to the public, for secrecy is antithetical to a democratic system of 'government of the people, by the people [and] for the people.'" *San Gabriel Tribune v. Superior Ct.*, 143 Cal. App. 3d 762, 771-72 (1983). "Openness in government is essential to the functioning

of a democracy." *Int'l Fed'n of Pro. & Tech. Eng'rs, Loc. 21, AFL-CIO v. Superior Ct.*, 42 Cal. 4th 319, 328 (2007). "'Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.'" *Id.* at 328-29. Disclosure of public records is necessary "'to expose corruption, incompetence, inefficiency, prejudice, and favoritism.'" *Id.* at 333.

"Modeled after the federal Freedom of Information Act," the CPRA "provide[s] the public with a broad right of access." *L.A. Cty. Bd. of Supervisors v. Superior Ct.*, 2 Cal. 5th 282, 290 (2016). "Consistent with th[e] fundamental right of access to information, the CPRA dictates that 'every person has [the] right to inspect any public record,' except those records expressly exempted from disclosure." *Iloh*, 87 Cal. App. 5th at 523 (quoting Cal. Gov't Code §7922.525(a)). "The CPRA broadly defines 'public records' to include 'any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency.'" *Id.* (quoting Cal. Gov't Code §7920.530(a)).

The "basic legislative policy" underlying the CPRA is that "'access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.'" *Galbiso*, 167 Cal. App. 4th at 1083 (quoting Cal. Gov't Code §7921.000). Judicial interpretation of the CPRA is thus "guided by … the 'constitutional imperative' to construe CPRA in a manner that furthers disclosure." *ACLU Found.*, 3 Cal. 5th at 1039. The law "presum[es] that all governmental records are available to any person" unless the agency demonstrates that nondisclosure is warranted. *ACLU of N. Cal. v. Superior Ct.*, 202 Cal. App. 4th 55, 85 (2011); *see* Cal. Gov't Code §7922.000 ("An agency shall justify withholding any record.").

II. PDE has a statutory right to the records it requested.

Under the CPRA, if "any person" requests a "public record" held by a "local agency," the government must disclose that record unless it carries its burden of proving that the record is not a "public record" or that an exemption applies. *See* Cal. Gov't Code §§7922.000, 7922.525. Here, the District does not dispute that PDE qualifies as a "person" entitled to make a CPRA request or that the District is a "local agency" subject to the CPRA. And PDE has requested "public records." The

District was thus required to produce the documents it withheld.

First, the District does not dispute that PDE is a member of the public entitled to inspect the District's public records. Cal. Gov't Code §§7920.515, 7922.525, 7923.000. "[E]very person has a right to inspect any public record" of a "local agency." *Id.* §7922.525(a); *see also id.* §7923.000. "Every person" means everyone, "includ[ing] 'any natural person, corporation, partnership, limited liability company, firm, or association,'" *LAUSD*, 151 Cal. App. 4th at 765, 768-72 (quoting Cal. Gov't Code §7920.520). This definition includes PDE, a nationwide membership organization with members residing in California. Verified Pet. ¶6. In its email to PDE withholding records, the District agreed to produce some records, acknowledging that PDE is a proper requester, and the District has never disputed that PDE is a member of the public. *See id.* Ex. B. The District also does not dispute that, as a public school district in California, it is a "local agency" within the meaning of Cal. Gov't Code §7920.510. *See* Verified Pet. ¶7, Ex. B; Answer ¶7. PDE thus has a right to the District's public records under the CPRA.

Second, the withheld documents are "public records." A public record is defined expansively to "includ[e] any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov't Code §7920.530(a). This "definition is broad and intended to cover every conceivable kind of record that is involved in the governmental process." *Cmty. Youth Athletic Ctr. v. City of Nat'l City*, 220 Cal. App. 4th 1385, 1418 (2013) (cleaned up); *Rojas v. FAA*, 941 F.3d 392, 408 (9th Cir. 2019) (quoting *DOJ v. Tax Analysts*, 492 U.S. 136, 145 (1989)) (under FOIA, qualifying records broadly include any records that "'have come into the agency's possession in the legitimate conduct of its official duties,' or 'in connection with the transaction of public business'"). PDE's request for "records … in the possession of [certain] board members, district employees, and students" concerning the *M-A Chronicle*'s censorship efforts, Verified Pet. Ex. A at 1, falls squarely within this expansive definition because the requested documents "relat[e] to the conduct of the public's business." Cal. Gov't Code §7920.530(a).

Determining "[w]hether a writing is sufficiently related to public business" often "involve[s] an examination of several factors, including the content itself; the context in, or purpose for which,

it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment." *City of San Jose v. Superior Ct.*, 2 Cal. 5th 608, 618 (2017). Here, an examination of each factor demonstrates that the requested records are inextricably intertwined with the public's business. The "content" of these records are *public* school board meetings. *Id.* The "context" or "purpose" of their creation was a *public* school newspaper's attempt to censor its own photos and videos of those meetings originally posted on a *public* website and *public* social media accounts. *Id.* The "audience" was either *public* officials or the *public*—school officials, *M-A Chronicle* staff, or the readers of the school newspaper, such as students, parents, faculty, or anyone with access to the internet who navigates to the *M-A Chronicle* website or social media accounts. *Id.* And the documents were "records created, held or used by students to develop material for the student newspaper, participate in a journalism class, or make editorial decisions about student publications." Verified Pet. ¶28, Ex. B at 2. While not technically "employees" of the school, *City of San Jose*, 2 Cal. 5th at 618, such "[p]upil editors of official school publications" are "staff" of the school publication, Cal. Educ. Code §48907(c), and records of "staff members who conduct the [government's] affairs" are public records, *City of San Jose*, 2 Cal. 5th at 620. *M-A Chronicle* "staff" were also "subject to the supervision of the assigned teacher," Verified Pet. Ex. B at 2, further confirming that these records were "involved in the governmental process," *Cmty. Youth Athletic Ctr.*, 220 Cal. App. 4th at 1418.

Importantly, whether the withheld records were "created, held or used by students" is irrelevant to whether they are "District records." Verified Pet. Ex. B at 2. "The CPRA is not limited to writings by public officials. The controlling question is whether the request seeks the 'public records' of a state or local agency." *Iloh*, 87 Cal. App. 5th at 525 & n.5 ("[T]he postpublication communications by a professor at a public university regarding articles she authored on topics in her field of study at the university involve the 'public's business.'"). For example, in *Eisen v. Regents of University of California*, the court held that student organization registration statements—records created and held by students and used by students to request campus privileges—were public records subject to disclosure, even though the University did not create them, and they contained sensitive information implicating the student organizations' First Amendment rights. 269 Cal. App. 2d 696,

698, 703, 706 (1969). "Although a person's status as a public official (and resulting reduced expectation of privacy) might be relevant in the CPRA context when evaluating whether an exemption applies … it is not relevant to the threshold question of whether the requested documents qualify as public records under the CPRA." *Iloh*, 87 Cal. App. 5th at 525 & n.5.

These documents thus clearly "relat[e] to the conduct of the public's business." Cal. Gov't Code §7920.530(a). The *M-A Chronicle* is a public high school's student newspaper that is supported by public dollars, and Menlo-Atherton's "journalism class" is a part of the public-school curriculum. Verified Pet. Ex. B at 2; *see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (a school curriculum includes anything "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences," "whether or not [it] occur[s] in a traditional classroom setting"). Any records "created, held or used" by students in relation to this matter, Verified Pet. ¶28, Ex. B at 2, were created "in the scope of" their roles as student journalists for the taxpayer-funded student newspaper. *City of San Jose*, 2 Cal. 5th at 618. What's more, the newspaper's content and censorship actions involved a matter of public controversy that extended well beyond the immediate school community.

Because PDE has a right to the District's public records, and has properly requested public records here, the withheld records are subject to disclosure.

III. The District cannot carry its burden of proving a right to withhold records.

The District makes three arguments for why it can withhold documents. First, it argues that the records "created, held or used by students" are not "public records." Second, it argues that all the withheld documents are exempt from disclosure under a "reporter's privilege." Third, it argues that "records relating to the advice and supervision the journalism teacher provided to students relating to their editorial decisions" are exempt under the CPRA's "catch-all" exemption.

The California Constitution "requires that [CPRA] exemptions be narrowly construed." *Iloh*, 87 Cal. App. 5th at 524; *see, e.g.*, *ACLU of N. Cal.*, 202 Cal. App. 4th at 67; *Rojas*, 941 F.3d at 397. And the District has the burden of proving that it has properly withheld documents. *LAUSD*, 151 Cal. App. 4th at 767; *Rojas*, 941 F.3d at 396-97. It cannot do so for the reasons discussed below.

Importantly, the District bears the burden of *proof*, not simply persuasion. *See, e.g.*, *id.* Here,

the District withheld records based on blanket assertions in a short email, with little or no elaboration. *See* Verified Pet. Ex. B. That email alone is woefully inadequate to carry the District's burden of proof in this litigation. If the District intends to stand on its objections, it must provide PDE with "affidavits" or "a *Vaughn* Index" that are "specific enough to give [PDE] a meaningful opportunity to contest the withholding of the documents and the court to determine whether the exemption applies." *ACLU of N. Cal.*, 202 Cal. App. 4th at 83 (quotation marks omitted). The District must do this on a document-by-document basis and cannot rely on "[c]onclusory or boilerplate assertions that merely recite statutory standards." *Id.*

A. The District cannot show that records "created, held or used by students" are not "public records."

The District argues that "records created, held or used by students to develop material for the student newspaper, participate in a journalism class, or make editorial decisions about student publications are neither District records nor reflective of the 'public's business.'" Verified Pet. Ex. B. "The burden is on the [District] to demonstrate, not the requester to disprove, that the materials sought are not [public records] or have not been improperly withheld." *Rojas*, 941 F.3d at 396 (cleaned up) (quoting *Tax Analysts*, 492 U.S. at 142 n.3); *accord Regents of Univ. of Cal. v. Superior Ct.*, 222 Cal. App. 4th 383, 398 n.10 (2013) (following *Tax Analysts* and "assum[ing], without deciding, that the [government] has the burden" to prove documents are not public records).

The District gives only one argument for why the records are not "public records": "Students have the right to express themselves through the student newspaper, and retain editorial control over that publication, subject to the supervision of the assigned teacher." Verified Pet. Ex. B at 2 (citing Cal. Educ. Code §48907(c)). This does not even come close to satisfying the District's burden. It makes no difference whether the withheld records involve expression. *See, e.g.*, *Iloh*, 87 Cal. App. 5th at 525 & n.5 ("[C]ommunications by a professor at a public university regarding articles she authored on topics in her field of study at the university involve the 'public's business.'"); *see also Eisen*, 269 Cal. App. 2d at 698, 703, 706 (records created, held, and used by students, implicating their First Amendment rights, were public records). Most (if not all) records subject to disclosure under the CPRA involve expressive activity of some sort—after all, they are "writings." Cal. Gov't

Code §§7920.530 (defining "'public records'" to include "writing[s]"); 7920.545 (defining "'writing'" broadly). Even so, the people of California through the State Constitution and the CPRA have concluded that the public's right to review public records—even those containing individual expression—is "fundamental and necessary." *Id.* §7921.000.

Iloh proves this point. In that case, an organization submitted a CPRA request seeking communications involving a professor, a university, and journals that the professor had submitted articles to for publication. 87 Cal. App. 5th at 518-19. These records contained the professor's communications with the journals about her publications in the journals—speech that is clearly protected by the First Amendment—but the court held that they were public records because the substance of the communications was not "primarily personal" but "'relate[d] to the conduct of the public's business.'" *Id.* at 524-25. The court rejected the professor's argument that the records were not "public records" because she was "not a 'public official,'" but was speaking as a private individual. *Id.* at 525 n.5. "This argument reflect[ed] a fundamental misunderstanding of the CPRA's scope," which is broad, not "limited." *Id.* Indeed, a rule that "public records" cannot contain constitutionally protected speech would exclude most records, effectively neutering the CPRA.

It is thus irrelevant whether Menlo-Atherton students had editorial control over records or whether those records contained the students' expression. *See, e.g.*, *id.* at 525 & n.5. The District cannot prove that these records were not "relating to the conduct of the public's business" or "involved in the governmental process," *Cmty. Youth Athletic Ctr.*, 220 Cal. App. 4th at 1418 (cleaned up).[1]

B. The District cannot justify its withholding based on a reporter's privilege.

The District also cannot carry its burden of showing that "records created, held or used by students to develop material for the student newspaper, participate in a journalism class, or make editorial decisions about student publications," as well as "records relating to the advice and

[1] To the extent that the District is arguing that records "created, held or used by students" are *exempt* from disclosure because they are the product of the students' "right to express themselves," that argument plainly fails. Verified Pet. Ex. B at 2. The CPRA contains no exemption for expressive activity. *See infra* at 12-13. And PDE is aware of no precedent allowing the government to withhold documents merely because they contained speech protected by the First Amendment.

supervision the journalism teacher provided to students relating to their editorial decisions," are exempt under the CPRA because they are covered by a "reporter's privilege." Verified Pet. ¶¶28, 35-41. This argument fails for at least five reasons.

First, there is no "reporter's privilege" exemption under the CPRA. "'[A]ll public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary.'" *Pasadena Police Officers Assn. v. Superior Ct.*, 240 Cal. App. 4th 268, 283 (2015) (emphasis added); *see* Cal. Gov't Code §7922.525(a) ("[E]very person has a right to inspect any public record, *[except] as otherwise provided*." (emphasis added)); *Bakersfield City Sch. Dist. v. Superior Ct.*, 118 Cal. App. 4th 1041, 1045 (2004) ("Any refusal to disclose public information must be based on a specific narrowly construed exception to that policy."). And there is no "reporter's privilege" exemption anywhere in the CPRA. *See* Cal. Gov't Code §7923.600 *et seq.*; *see CBS, Inc. v. Block*, 42 Cal. 3d 646, 655 (1986) (holding that records of concealed carry licenses must be disclosed under the CPRA because "the Legislature did *not* create an exemption … for concealed weapons licenses," and no other exemption applied).

Second, the District invokes Cal. Gov't Code §7927.705, which exempts documents covered by a "privilege" in the California Evidence Code, but the so-called "reporter's privilege" is not a privilege at all. It is a limited immunity from contempt. The relevant provisions in the California Constitution and Evidence Code specify that a reporter who refuses to disclose his sources or other unpublished information "cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas." Cal. Evid. Code §1070(a); *see* Cal. Const. art. I, §2(b). And cases discussing this immunity explain that it is not absolute. *See, e.g.*, *Delaney v. Superior Ct.*, 50 Cal. 3d 785, 797 n.6, 805-06 & n.20 (1990) (explaining that the shield law "provides only an immunity from contempt, *not a privilege*" against disclosure, and that the "protection is overcome in a criminal proceeding on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial" (emphasis added)).

Third, this limited immunity for journalists has no application whatsoever in the context of a public records request. It is relevant only in "proceedings" as defined in Cal. Evid. Code §901. *See id.* §1070. It applies to "any action, hearing, investigation, inquest, or inquiry (whether conducted

by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given." *Id.* §901. A public-records request is not a "proceeding" in which "testimony can be compelled to be given," so the so-called "reporter's privilege" does not apply at all. *Id.*

Fourth, it's unlikely that student reporters and journalism teachers would even be eligible for this immunity. The immunity applies to a "publisher, editor, reporter, or other person connected with or employed upon a newspaper." *Id.* at §1070(a). Neither the students nor the teachers are employed by a news organization, and the District has identified no case where a student or teacher associated with a school newspaper has been granted this limited immunity. Nor would such immunity apply to "advice and supervision the journalism teacher provided to students relating to" their efforts to censor a documentary film that uses photos and videos that were posted on the *M-A Chronicle*'s website and social media accounts. Verified Pet. ¶28, Ex. B at 2. Such "advice and supervision" has nothing to do with "editorial decisions," *id.*—such as deciding what information to publish—and certainly has nothing to do with protecting sources or information from being disclosed in a "proceeding." Cal. Evid. Code §1070.

Fifth, the so-called "reporter's privilege" and the CPRA share the same fundamental goal: to protect and support the public's access to information. *See Rancho Publ'ns v. Superior Ct.*, 68 Cal. App. 4th 1538, 1543 (1999) (recognizing that the purpose of the reporter's shield law is "to promote the free flow of information to the public"); Cal. Gov't Code §7921.000 (recognizing that the CPRA exists to protect the "fundamental and necessary right" to access "information concerning the conduct of the people's business"). The District's use of a reporter shield law to withhold information from the public is thus entirely inconsistent with the purpose of this legal immunity.

C. The District cannot justify its withholding based on the catch-all exemption.

Finally, the District cannot carry its burden of withholding "records relating to the advice and supervision the journalism teacher provided to students relating to their editorial decisions" under the CPRA's "catchall" exemption. Verified Pet. ¶28, Ex. B at 2. The District's burden of proof to rely on this exemption is unsurprisingly high. It "must establish a *clear overbalance* on the side of nondisclosure." *Iloh*, 87 Cal. App. 5th at 526 (cleaned up) (emphasis added). In addition, the

catchall exemption is a "balancing test" that is "highly fact dependent and … applied on a case-by-case basis." *Iloh*, 87 Cal. App. 5th at 526 (cleaned up). Even if "the particular facts in [one] decision justified nondisclosure, … in another case, with different facts, the balance might tip in favor of disclosure." *Becerra v. Superior Ct.*, 44 Cal. App. 5th 897, 933 (2020) (quotation marks omitted).

The District argues that the "public interest served by not disclosing such records clearly outweighs the public interest served in disclosing" these records because disclosing "student journalist decision-making and … the managing of a classroom" would "sow discord between parents and teachers and within the community." Verified Pet. Ex. B at 2-3 (citing *LAUSD*, 228 Cal. App. 4th 222). The District gives no specifics and no further explanation of this supposed "discord" that would ensue. The District has thus failed to carry its burden of invoking this exemption. Indeed, the public interest strongly favors disclosure.

First, the District has not even bothered to explain why confidentiality is needed to prevent "discord between parents and teachers and within the community." *Id.* A court applying the catchall exemption "cannot allow '[v]ague … concerns' to foreclose the public's right of access." *ACLU Found.*, 3 Cal. 5th at 1046; *see also Voice of San Diego v. Superior Ct.*, 66 Cal. App. 5th 669, 688-89 (2021) (collecting cases that rejected application of the catchall exemption based on the government's vague or speculative assertions of harm). But that is exactly what the District is doing here. The District never explains how disclosing records of the "advice and supervision" of Menlo-Atherton's "journalism teacher" relating to the *M-A Chronicle*'s attempt to censor a documentary film would "sow discord between parents and teachers and within the community." Verified Pet. Ex. B at 2-3. More likely, the District is simply trying to maintain "secrecy" to frustrate "public understanding of government activities." *Fredericks*, 233 Cal. App. 4th at 223. After all, the *M-A Chronicle* successfully censored a documentary film that the school principal publicly criticized as painting Menlo-Atherton "'in a negative light.'" *Supra* at 2. And these censorship efforts targeted the documentary film's depiction of controversial Menlo-Atherton school board meetings about eliminating advanced classes and a teacher using "imagery of [a] Jewish puppet master controlling the world." *Supra* at 2. If these censorship efforts were supported, endorsed, or directed by school officials—like the journalism teacher—those would be the kinds of embarrassing records that the

District would rather not disclose. But that is why the CPRA exists—to allow members of the public, like PDE, to "she[d] light" on the District's activities. *Edais v. Superior Ct.*, 87 Cal. App. 5th 530, 543 (2023) (cleaned up).

The District merely contends, without elaboration, that the public interest favors nondisclosure "[f]or the reasons articulated in" the *LAUSD* case—a very different case from this one. Verified Pet. Ex. B at 2-3; *see Becerra*, 44 Cal. App. 5th at 933 ("[I]n another case, with different facts, the balance might tip in favor of disclosure."). Indeed, none of the factors relevant to the court's decision in *LAUSD* are present here. *LAUSD* involved "AGT scores," which measured teachers' effectiveness on their students' performance on standardized tests. 228 Cal. App. 4th at 230. The school district publicly released these scores but redacted the names of individual teachers. *See id.* The court considered whether the district court was required to produce the names of the individual teachers associated with each AGT score. *See id.* at 230-31. It held that the "public interest served by not disclosing the teachers' names clearly outweighs the public interest served by their disclosure." *Id.* at 231.

The school district in *LAUSD* thus showed an interest in nondisclosure by showing that disclosing the teachers' names "could spur unhealthy comparisons among teachers and breed discord in the workplace, discourage recruitment of quality candidates and/or cause existing teachers to leave the District, disrupt the balance of classroom assignments … , and adversely affect the disciplinary process." *Id.* at 245. None of these factors are relevant here. Unlike the AGT Scores in *LAUSD*, nothing in the records that PDE requested compares teachers to one another. Releasing records belonging to one journalism teacher would not "spur unhealthy comparisons among teachers," "breed discord in the workplace," "discourage recruitment of quality candidates," or "cause existing teachers to leave the District." *Id.*

Nor would releasing records "relating to the advice and supervision the journalism teacher provided to students," Verified Pet. Ex. B at 2, "disrupt the balance of classroom assignments" or "adversely affect the disciplinary process." *LAUSD*, 228 Cal. App. 4th at 245. Although the District mentions a vague "public interest … in the managing of a classroom," Verified Pet. Ex. B at 3, it does not even try to explain how releasing records relating to the journalism teacher's advice in this

matter would interfere with that teacher's ability to manage the classroom moving forward.

Moreover, in *LAUSD*, the balancing of interests was easy because it was one-sided in favor of the school district. The interests supporting disclosure in that case were not public interests at all, but private interests of parents who wanted to get their children into "classes with the highest scoring teachers." 228 Cal. App. 4th at 247-48 (the parents' interest in "maximizing the educational opportunities for [their] child[ren] … does not directly assist in determining whether the District is fulfilling its statutory obligations; it does not illuminate whether, or how, the government agency is doing its job … [and] [w]hile it may give parents a tool with which to assist their own child, it does not help them understand the workings of the agency itself"). Not so here. In this case, PDE has demonstrated a public interest in disclosure, and the District has not shown that this public interest is clearly outweighed by a need for secrecy.

In any case, the public interest weighs in favor of disclosure. The burden is on the District to show why, on the facts of each particular case and for each particular record, the need for secrecy "'*clearly* outweighs'" the constitutional public interest in disclosure. *ACLU of N. Cal.*, 202 Cal. App. 4th at 68 (emphasis added); *see, e.g.*, Cal. Gov't Code §7922.000. And here, disclosure clearly serves the public interest. The "only relevant public interest in the [CPRA] balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *LAUSD*, 228 Cal. App. 4th at 241 (cleaned up). That is precisely PDE's interest here: Its goal is to understand to what extent employees of the District were involved in the *M-A Chronicle*'s efforts to censor a documentary film that was critical of the District. PDE has no private purpose for the records. It intends to publish them on its website for the public to see. In other words, PDE seeks information that "would … shed light on [the District's] performance" and "let citizens know what [the District] is up to." *Id.* at 249. By contrast, the District cannot show "'a clear overbalance on the side of confidentiality.'" *Id.* at 240. The District never identifies a single concrete harm that would result from disclosing records containing the "advice and supervision" of Menlo-Atherton's journalism teacher.

In sum, the District cannot carry its burden to demonstrate "on the *facts of the particular*

case [that] the public interest served by not disclosing the record *clearly outweighs* the public interest served by disclosure." Cal. Gov't Code §7922.000 (emphasis added). It has made no attempt to explain why the facts here justify nondisclosure. Instead, it merely cites *LAUSD* and summarily concludes that "the reasons articulated in that case" support nondisclosure of "records generated in connection with student journalist decision-making." Verified Pet. Ex. B at 2-3. That is insufficient.

CONCLUSION

For the foregoing reasons, the Court should grant PDE's petition for writ of mandate and order the District to comply with the CPRA and disclose the remaining records.

Dated: October 23, 2024

By /s/ *J. Michael Connolly*

BENBROOK LAW GROUP, PC
BRADLEY A. BENBROOK (SBN 177786)
STEPHEN M. DUVERNAY (SBN 250957)
701 University Avenue, Suite 106
Sacramento, CA 95825
Telephone: (916) 447-4900
brad@benbrooklawgroup.com

CONSOVOY MCCARTHY PLLC
J. MICHAEL CONNOLLY (*pro hac vice*)
STEVEN C. BEGAKIS (SBN 314814)
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
Telephone: (703) 243-9423
mike@consovoymccarthy.com
steven@consovoymccarthy.com

Attorneys for Plaintiff/Petitioner Parents Defending Education

CERTIFICATE OF SERVICE

I, J. Michael Connolly, hereby certify as follows:

I am an active member of the State Bar of Virginia and admitted *pro hac vice* in this action. I am not a party to this action. My business address is 1600 Wilson Boulevard, Suite 700, Arlington, VA 22209, and my electronic service address is mike@consovoymccarthy.com.

On October 23, 2024, I caused the foregoing document, namely:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

to be electronically served on the following person(s):

Amy Levine	alevine@dwkesq.com
William G. Ash	wash@dwkesq.com
William B. Tunick	wtunick@dwkesq.com
Suvarna Bhopale	sbhopale@dwkesq.com
Copy to: Tamara Rosado	trosado@dwkesq.com

Attorneys for Defendant / Respondent Sequoia Union High School District

/s/ J. Michael Connolly
J. Michael Connolly