Supreme Court Case No. S200872

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LONG BEACH POLICE OFFICERS ASSOCIATION AND DOE OFFICERS 1-150,

Plaintiffs and Appellants,

vs.

CITY OF LONG BEACH, a municipal corporation, LONG BEACH POLICE DEPARTMENT, JAMES McDONNELL, Chief of Police,

Defendants and Appellants.

LOS ANGELES TIMES COMMUNICATIONS, LLC.,

Real Party in Interest and Respondent.

Court of Appeal of the State of California
Second Appellate District, Division Three
Case No. B231245

Superior Court of the County of Los Angeles
Case No. NC055491
Hon. Patrick T. Madden, Judge, Dept. B

APPLICATION TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE BY THE CALIFORNIA AFFILIATES OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF LOS ANGELES TIMES COMMUNICATIONS, LLC.

PETER BIBRING (SBN 223981)
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, California 90017
(213) 977-9500; (213) 977-5297 Fax

MICHAEL T. RISHER (SBN 191627)
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm Street, 2nd Floor
San Francisco, California 94111
(415) 621-2493; (415) 255-1478 Fax

DAVID BLAIR-LOY (SBN 229235)
ACLU FOUNDATION OF
SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, California 92138-7131
(619) 232-2121; (619) 232-0036 Fax

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f), proposed amici,[1] the American Civil Liberties Union of Southern California, American Civil Liberties Union of Northern California, and American Civil Liberties Union of San Diego & Imperial Counties (collectively "California ACLU affiliates") hereby respectfully apply to this Court for leave to file the accompanying Brief of Amicus Curiae in Support of Respondent Los Angeles Times Communications LLC in the above-captioned case.

Proposed Amici are the California affiliates of the American Civil Liberties Union ("ACLU"), a national, nonprofit, nonpartisan civil liberties organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and our nations' civil rights law. Since their founding, both the national ACLU and California ACLU affiliates have had an abiding interest in the promotion of the guarantees of liberty and individual rights embodied in the federal and state constitutions, including the freedom of speech and freedom of the press guaranteed by the First Amendment to the United

[1] No party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part; or made a monetary contribution intended to fund the preparation or submission of the brief. No person made a monetary contribution intended to fund the preparation or submission of the proposed brief, other than the proposed amici curiae, its members, or its counsel. *See* Cal. R. Court 8.520(f)(4).

States Constitution and the Liberty of Speech Clause of the California Constitution. The ACLU has also been committed to transparent and open operation of government in general, and police departments in particular.

The California ACLU affiliates have been involved in a number of cases and legislative campaigns involving the balance between the open, transparent and accountable operation of police departments and the rights of officers. For example, in addition to filing an amicus brief in the Court of Appeal in this matter, the California ACLU affiliates have filed amicus briefs and/or participated in oral arguments in *Commission on Peace Officer Standards and Training (POST) v. Superior Court*, 42 Cal.4th 278 (2007) (hereinafter "*POST*"); *Copley Press, Inc. v. Superior Court*, 39 Cal.4th 1272 (2006); and *Berkeley Police Ass'n v. City of Berkeley*, 167 Cal. App. 4th 385 (2008), and represented parties in numerous cases involving operation of police departments or access to state and federal law enforcement records, *see, e.g.*, *People v. Stanistreet*, 29 Cal.4th 497 (2002) (raising First Amendment challenge to statute imposing criminal penalties for false complaints against police officers); *Islamic Shura Council of So. Cal. v. FBI*, 635 F.3d 1160 (9th Cir. 2011) (representing plaintiffs in FOIA request regarding FBI investigations of Los Angeles and Orange County Muslim communities); *Chaker v. Crogan,* 428 F.3d 1215 (9th Cir. 2005) (habeas challenge to statute at issue in *Stanistreet*); *Council on American-Islamic Relations, California v. FBI*, 749 F. Supp. 2d 1104 (S.D.

Cal. 2010) (representing plaintiffs in FOIA litigation regarding FBI surveillance of Muslim community in San Diego); *Pike v. Regents of the Univ. of California*, Alameda Sup. Ct. No. RG12-619930) (filed March 6, 2012) (intervening to ensure release of official report on U.C. Davis pepper-spray incident); *ACLU of Northern California v. City of Fresno*, Fresno Sup. Ct. No. 09CECG01765 (filed May 19, 2009); *United States v. City of Los Angeles*, Case No. CV 00-11769 (C.D. Cal.) (representing intervenors in a federal consent decree over the Los Angeles Police Department brought by the U.S. Department of Justice). *POST* and *Copley Press* both directly addressed the scope of confidentiality conferred on peace officer records under Penal Code §§ 832.7 and 832.8, which is the significant issue amici address in this case.

The California ACLU affiliates have also engaged in litigation and advocacy to protect the privacy and employment rights of peace officers, including their support for the Peace Officer Procedural Bill of Rights (POBOR), Chapter 465, Statutes of 1976 (AB 301, Keysor), and litigation including *Trujillo v. City of Ontario,* 428 F. Supp. 2d 1094 (C.D. Cal. 2006) and 2009 WL 2532723 (C.D. Cal. Aug. 24, 2009) (representing police officers subjected to warrantless video surveillance in their locker room against their department); *City of Ontario v. Quon*, __ U.S. __, 130 S. Ct. 2619 (2010) (amicus brief in support of officers suing department for warrantless search of pager messages).

Because this case presents important questions concerning police accountability and public access to information about the operation of police departments, and the proper balance between accountability and officer privacy, proper resolution of the matter is of significant concern to amici and their members.

Because of the ACLU/SC's longstanding commitment to these issues, it has developed experience both in the legal issues surrounding the disclosure of information on governments, and police in particular, and in the repercussions for decisions on governance of police and police-community relations. The attached proposed amicus brief both addresses legal issues and sets forth the implications of the decisions for public policy and the operation of police departments statewide. Amici believe its experience in these issues will make this brief of service to the Court.

Dated: September 17, 2012

Respectfully submitted,

ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

ACLU FOUNDATION OF
NORTHERN CALIFORNIA

ACLU FOUNDATION OF
SAN DIEGO & IMPERIAL COUNTIES

By: _____
Peter Bibring
Attorneys for Proposed Amici Curiae

BRIEF OF AMICUS CURIAE

I. INTRODUCTION

At issue in this case is whether the public is entitled to the most basic and important facts about the operation of its government: the names of the officers involved when a civilian is shot by police.

On the afternoon of Sunday, December 12, 2010, officers from the Long Beach Police Department ("LBPD" or the "Department") shot and killed 35-year-old Douglas Zerby when they mistakenly believed the garden hose nozzle he was holding was a gun. The shooting death sparked not only outrage in the community, but mounting questions over police tactics as the Department called in outside agencies to investigate and additional facts were revealed — that Zerby had simply been drinking on the back porch of his best friend's apartment playing with the hose nozzle; that officers had arrived on scene and requested backup, but had neither identified themselves as police nor asked him to drop the nozzle before they fired with a handgun and shotgun.[2] In response to the concerns that the shooting might indicate deeper problems at the LBPD, a Los Angeles Times reporter requested the names of the officers involved in any shooting for the previous five years

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[2] *See, e.g.*, Tracy Manzer, *Seven months later, still more questions than answers in Zerby case*, Long Beach Press-Telegram (July 9, 2011), available at http://www.presstelegram.com/ci_18448063; Tracy Manzer, *LBPD chief expresses condolences to family of man shot by officers in Belmont Shore*, Long Beach Press-Telegram (Dec. 13, 2010), available at http://www.presstelegram.com/ci_16849588 (last visited Sept. 14, 2012).

under the California Public Records Act, Gov't Code § 6250 *et seq.*

In careful and thorough orders, both the Superior Court and a unanimous Court of Appeal properly held that the names of officers involved in shootings are not confidential under California law, because identifying such officers discloses neither "personnel records" made confidential under Penal Code §§ 832.7 and 832.8 nor "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" under Gov't Code § 6254(c). In so doing, the lower courts rightly rejected Appellants' sweeping interpretation of the statutes conferring limited confidentiality for officer records that would result in unprecedented secrecy for police operations and dramatically hinder the public's ability to know how its police departments operate and hold them accountable for mismanagement in perhaps the greatest authority a people can confer upon their government: the right to use deadly force against citizens.

Because, as set forth below, the lower courts' reasoning comports with not only the statutory text and legislative history, but the opinion of the Attorney General, and the prior holdings of this Court interpreting §§ 832.7 and 832.8, this Court should affirm the Court of Appeal's order.

II. INTEREST OF AMICUS CURIAE

Amici are the California affiliates of the American Civil Liberties Union ("ACLU"), a national, nonprofit, nonpartisan civil liberties

organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and our nations' civil rights laws. Since their founding, both the national ACLU and California affiliates have had an abiding interest in the promotion of the guarantees of liberty and individual rights embodied in the federal and state constitutions, including the freedom of speech and freedom of the press guaranteed by the First Amendment to the United States Constitution and the Liberty of Speech Clause of the California Constitution. The ACLU has also been committed to the transparent and open operation of government in general, and police departments in particular.

As discussed in the application to file this brief, the California ACLU affiliates have been involved in a number of cases and legislative campaigns involving the balance between the open, transparent and accountable operation of police departments and the rights of officers, as well as in litigation and advocacy to protect the privacy and employment rights of peace officers, including its support for California's Peace Officer Procedural Bill of Rights.

Because this case concerns important questions concerning police accountability and public access to information about the operation of police departments, and the proper balance between accountability and officer privacy, proper resolution of the matter is of significant concern to amici and

their members. Amici believe their experience in these issues will make this brief of service to the Court.

III. ARGUMENT

A. The Names of Officers Involved in a Particular Shooting are Public Records that Must Be Disclosed under the CPRA

The California Public Records Act, Gov't Code §§ 6250 *et seq.*, mandates disclosure of documents unless one of various exemptions apply. Appellants the City of Long Beach (the "City") and the Long Beach Police Officers' Association ("LBPOA") argue that the names of officers involved in shootings must be withheld under § 6254(k), because they are records for which disclosure is prohibited under Penal Code §§ 832.7 and 832.8, Gov't Code §6254(k); and alternatively that they must be withheld because they are "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" under Gov't Code §6254(c).[3] Neither argument has merit.

In this Court, the City for the first time advances the argument that the names of officers are exempt under Gov't Code § 6254(f) as a record of "investigations conducted by . . . any state or local police agency." While Amici certainly concur with the Times that these arguments are waived, they are also meritless.

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[3] All references in this brief to § 832.7 and § 832.8 refer to the Penal Code. All references to § 6254 refer to the Government Code.

1. The Names of Officers Involved in a Shooting Are Not Confidential Personnel Records under Penal Code §§ 832.7 and 832.8.

The Court of Appeal below adhered closely to both its own prior opinion and a recent Attorney General opinion to conclude that §§ 832.7 and 832.8 do not bar disclosure of the names of officers involved in shootings. Both the decision below and the Attorney General's opinion are logically sound, and the Attorney General's opinion is entitled to great weight by this Court. These opinions demand affirmance in this case.

Penal Code § 832.7(a) provides that "[p]eace officer or custodial officer personnel records . . . or information obtained from these records, are confidential." Penal Code § 832.8 provides that, "[a]s used in Section 832.7, 'personnel records' means any file maintained under that individual's name by his or her employing agency and containing records relating to," among other standard employee information, "[e]mployee advancement, appraisal, or discipline," *id.* § 832.8(d); and "[c]omplaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties," *id.* § 832.8(e).

The question before this Court is whether the names of officers involved in shootings — requested not in connection with any disciplinary investigation, proceedings or result — fall into any of the categories exempted from disclosure in §§ 832.7 and 832.8. The text of those

provisions, and their interpretation by this Court's prior opinions, the Attorney General, and the courts of appeal show that names of officers involved in shootings do not fall within any category of exempted information and must be disclosed.

a. The Plain Text of §§832.7 and 832.8 Does Not Make the Names of Officers Involved in Particular, Critical Incidents Confidential.

As the Court of Appeal recognized, "Nowhere in either the language of Penal Code sections 832.7 and 832.8 or the statutes' legislative history is there any indication that these provisions were designed to protect the confidentiality of officer names when those names are untethered to one of the specified components of the officer's personnel file." 203 Cal. App. 4th at 308.

Importantly, the Times' request seeks no documents from disciplinary investigations or complaints. The names of officers involved in shootings will doubtless appear in documents related to the operation of the Department that are not part of any disciplinary action or complaint investigation. Certainly, Appellants have made no showing that the Department cannot comply with the request for the names of officers involved in shootings by providing documents that were generated separately from any disciplinary action or complaint investigation that would fit within the definition of "personnel files" in § 832.8. Instead, the Department argues that the names of officers involved in shootings

inherently constitute exempt information. But the plain text of the statute exempts from disclosure information related to complaints and discipline, but not information related to officers' involvement in shootings or other critical publicly known incidents.

b. This Court's Decisions Do Not Justify Withholding Officers' Names Except When Linked to Information Explicitly Made Confidential in § 832.8.

Because the plain text of the statutes does not justify withholding the names of officers involved in shootings, Appellants claim that this Court's interpretations of the statutes in other contexts exempts this information. In making this argument, Appellants conflate public access to basic information about the operation of the department and information specifically linked to an officer's history of discipline or complaints.Appellants rely heavily on this Court's decision in *Copley Press, Inc. v. Superior Court*, 39 Cal.4th 1272 (2006), which they contend interprets §§ 832.7 and 832.8 so as to bar disclosure of the names of officers involved in shootings. This position both distorts the holding in *Copley* and ignores language in this Court's subsequent opinion in *Commission on Peace Officer Standards and Training (POST) v. Superior Court*, 42 Cal.4th 278 (2007) (hereinafter "*POST*") , which re-affirms that the names of officers must be disclosed unless disclosure would reveal "one of the types of information enumerated in section 832.8." *Id.* at 294-95.

Copley Press did not concern the names of officers involved in shootings. It involved a CPRA request to a civil service commission for extensive records of an officer's appeal from a "termination notice," including not only the deputy's name, but "all documents, evidence, and audiotapes from the appeal." 39 Cal.4th at 1280. While the commission had released some information related to the facts on which the termination rested — that the officer had failed to arrest a suspect in a domestic violence case and falsified reports documenting the evidence — the commission refused the newspaper's request to identify the officer who was being terminated. The documents requested unquestionably involved records of the police department's internal disciplinary process protected as part of the officer's "personnel file," and the question before this Court was whether those records lost protection because the appeal was made to a civil service commission outside the department. This Court held that this entire internal personnel matter was exempt from disclosure under the confidentiality provided to peace officer personnel records by § 832.7. *Id.* at 1296. The officer's name was confidential only because § 832.7 makes information relating to the administrative disciplinary process confidential. *Id.* at 1296-97. In particular, *Copley* reasoned that the provision in § 832.7(c) that allowed disclosure of information about complaints so long as "that information is in a form which does not identify the individuals involved," demonstrated that the provision barring disclosure of information related to

"complaints" in § 832.8(e) was "designed to protect . . . the identity of officers ***subject to complaints***." *Id.* at 2197 (quotation omitted, emphasis added).

Contrary to Appellants' characterizations, *Copley Press* did not hold that the protection of personnel records in § 832.7 allows the government to withhold the names of officers involved in public incidents whenever there is a pending internal investigation into the incident. As the Attorney General has observed, "the holding of *Copley* is more narrow, that is, that a peace officer's name may be kept confidential when it is sought *in connection with* information pertaining to ***a confidential matter*** such as an internal investigation or a disciplinary proceeding." Cal. Atty. Gen. Op. No. 07-208, at 3, 91 Ops. Cal. Atty. Gen. 11 (2008) (emphasis added). As this Court explained only one year after it decided *Copley Press*, peace officer personnel records rendered confidential under §832.7 "include only the types of information enumerated in section 832.8." *POST*, 42 Cal.4th at 293. And "[p]eace officers' names ... are not among the items specifically enumerated in section 832.8." *Id.* at 289. *POST* thus held that §§ 832.7 and 832.8 do not shield peace officer names from disclosure under the CPRA "unless the request encompasses one of the types of information enumerated in section 832.8." *Id.* at 294-95. Under this Court's own description in *POST*, the reason that *Copley Press* denied access to the identity of the

officer was because disclosure of the name would link the officer with the summary of the incident, thus disclosing "one of the types of information enumerated in section 832.8," namely, the officer's disciplinary record, including the department's internal investigations.

Here, in contrast, the identity of officers is sought in connection with particular incidents with members of the public. Unlike the termination proceeding in *Copley* (or the City's hypothetical request for the names of all officers that have been disciplined, see City Reply at 14-15), such officers' names can be readily discerned from non-confidential documents outside of disciplinary investigations or the officers' personnel files. While any information relating to the results of the investigation or discipline arising out of the incident may remain confidential, the mere fact that an officer was involved in a particular incident with a member of the public is not a type of information enumerated in § 832.8, and is therefore not confidential information under § 832.7. The Court of Appeal correctly identified this fallacy, noting that the City's example "ignores the distinction between information, such as medical history, specified in Penal Code section 832.8 and therefore protected from disclosure, and information such as involvement in a shooting or other critical incident that is not."[4] 203 Cal.

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[4] The Court of Appeal referred to "medical history" because the City below argued that finding disclosure here would require disclosure not of requests for all officers that had been disciplined, but of all officers that had

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App. 292, 310 n.8 (2012).

Indeed, the LBPOA in this Court continues to blur this distinction between identifying officers in connection with any activity and identifying them in connection with information explicitly protected by § 832.8. In its opening brief, the LBPOA states that § 832.7(c) allows disclosure of "specified information . . . only 'if that information is in a form which does not identify the individuals involved,'" and *Copley* holds that § 832.7 "was intended to prohibit the disclosure of the identities of the individuals involved in an incident." LBPOA Opening Br. at 17 (citing *Copley*, 39 Cal. 4th at 1297); *see also id.* at 21. But the LBPOA carefully avoids noting that both § 832.7(c) and the cited passage of *Copley* very clearly bar revealing only the names of officers involved in *complaints* (a category specifically protected by § 832.8(e)). By this omission, the LBPOA gives the incorrect impression that the statute and this Court's opinion in *Copley* both bar identifying an officer in connection with *any* "incident" — indeed, it goes so far as to make the stunning claims that § 832.7(c) "evinces an overt intent to protect the identity of an officer involved in a critical incident such as a shooting." LBPOA Reply at 6. But as the Court of Appeal recognized, such a result squarely contradicts this Court's holding in *POST* that "peace officer

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cancer. Though the hypotheticals differ slightly, the flaw in the City's logic is the same.

personnel records" protected from disclosure "include only the types of information enumerated in section 832.8," 42 Cal. 4th at 293, and should be rejected.[5]

c. This Court Has Never Overruled the Holding of the Court of Appeal in *New York Times* that the Names of Officers Involved in Shootings Must Be Disclosed.

The City distorts the decision in *Copley Press* to argue that this Court has already overruled the Court of Appeal in *New York Times* and rejected its holding that the names of officers involved must be disclosed. This Court should reject such a misreading of its own precedent.

In *New York Times Co. v. Superior Court*, 52 Cal. App. 4th 97, 104–05 (1997), *disapproved on other grounds by Copley Press v. Superior Court*, 39 Cal.4th 1272 (2006), a newspaper sought disclosure of the names of five Santa Barbara sheriff's deputies who fired their weapons during a "firefight" in which a civilian was killed. 52 Cal. App. 4th at 99-100. The Court of Appeal rejected arguments that disclosure was prevented by the protection for peace officer personnel records or would otherwise violate officers'

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[5] Penal Code § 832.7(c) further provides that an agency "may disseminate data regarding the number, type, or disposition of complaints . . . if that information is in a form which does not identify the officers involved." Contrary to LBPOA's argument, LBPOA Reply at 6–9, this provision does not provide any additional type of information that may be withheld, but rather clarifies the confidentiality related to complaints set forth in §§ 832.7(a) and 832.8(e), by providing that certain aggregate information related to complaints may be released while the identity of officers subject to particular complaints may not.

privacy rights, and held that, "under the California Public Records Act, the sheriff is required to disclose the names of peace officers who fired shots at a citizen." *Id.* at 99, 100–05. The court reasoned that Penal Code § 832.7 did not preclude disclosure because the request did not seek "citizen complaints against police officers" nor "reports on an internal investigation concerning the misbehavior of a peace officer," but rather "the names of those deputies involved in the shooting ...[which] may be readily provided by the sheriff without disclosure of any portion of the deputies' personnel files." 52 Cal. App. 4th at 103-04. Here, as in *New York Times*, the LBPD seeks to keep secret not information from any internal investigation or personnel files, but basic facts about its operation — namely, which officers were involved in a particular incident about which the public is already aware and which is of enormous public importance.

In holding that the name of an officer is confidential when sought in connection with confidential disciplinary information, *Copley Press* did reject broad language in *New York Times* suggesting that the disclosure of peace officers' names could never be barred by §§ 832.7 and 832.8, regardless of context:

> The [*New York Times*] court ordered disclosure of [the names of officers involved in the shooting], holding in relevant part that it was not confidential under section 832.7. Without any analysis, the court broadly declared that "[u]nder . . . sections 832.7 and 832.8, an individual's name is not exempt from disclosure." As

> the preceding discussion of the statutory language and legislative history demonstrates, the court's unsupported assertion is simply incorrect, ***at least insofar as it applies to disciplinary matters like the one at issue here***. Thus, we disapprove [*New York Times*], to the extent it is inconsistent with the preceding discussion.

Copley Press, 39 Cal.4th at 1298 (emphasis added). This language on its face only criticizes one carelessly broad sentence in *New York Times*, but certainly does not bar the disclosure of officer names except "as it applies to disciplinary matters" or take issue with the decision's core holding that officer names were not confidential when requested in connection with officer-involved shootings. And in another footnote, *Copley Press* made clear that the *New York Times* holding did not bind the court on the very different question whether the name of the officer was confidential when explicitly requested in connection with a department's disciplinary investigation and file:

> The [*New York Times*] court . . . explain[ed] that although the information could be found, among other places, in the officers' personnel files, it could "be readily provided ... without disclosure of any portion of the deputies' personnel files." The court reasoned that the names of the officers, which was "otherwise ... unrestricted information," did not become exempt from disclosure merely by being "plac[ed] into a personnel file...." This reasoning, even if correct, has no application here, because section 832.7, subdivision (a), protects both the specified

records *and* "information obtained from [those] records." *Copley Press*, 39 Cal.4th at 1293 n.15. This Court would not have taken such care to distinguish *New York Times* had it intended to overrule it.

Any doubt that *Copley Press* might have undermined the reasoning of *New York Times* was removed by this Court's reliance on *New York Times* the following year in its holding in *POST* that the names of officers working for particular departments were not confidential under §§ 832.7 and 832.8. The Court first cited *New York Times* for the proposition that "[t]he public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant." *POST*, 42 Cal. 4th at 297 (citing *New York Times*, 52 Cal. App. 4th at 104-05 ("Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers.")).[6] This Court went on to note that while it had, in *Copley Press*, "disagreed with the statement in *New York Times Co. v. Superior Court*, that '[under Penal Code sections 832.7 and 832.8, an individual's name is not exempt from disclosure,' . . . our disagreement was qualified: we concluded that this broad assertion was incorrect 'at least insofar as it

[6]As the Attorney General noted, "The Supreme Court surely would not have cited this language from *New York Times* as support for its holding if, only a year earlier, it had overruled *New York Times* in *Copley*." Atty. Gen. Op. No. 07-208, at 4, 91 Ops. Cal. Atty. Gen. 11 (2008).

applies to disciplinary matters like the one at issue here.'" *POST*, 42 Cal. 4th at 298.

Thus the core holding of *New York Times* — that the names of officers in a critical incident are not confidential under California law — is consistent with both *Copley* and *POST*. Because the request at issue in this case seeks only the names of officers involved in a public incident (information that a bystander to the incident could have read from the officers' name plates) rather than information about an internal disciplinary matter, *Copley Press* is irrelevant. And because Times seeks disclosure of officer names not in connection with any type of information made confidential by Penal Code §§ 832.7 and 832.8, the names cannot be withheld.

d. The Attorney General Has, After *Copley Press* and *POST*, Concluded that the Names of Officers Involved In Shootings Are Not Confidential

The Attorney General in 2008 issued an opinion squarely addressing the very issue presented by this case, and concluded:

> [i]n response to a request made under the California Public Records Act for the names of peace officers involved in a critical incident, such as one in which lethal force was used, a law enforcement agency must disclose those names unless, on the facts of the particular case, the public interest served by not disclosing the names clearly outweighs the public interest served by disclosing the names.

Atty. Gen. Op. No. 07-208, at 10, 91 Ops. Cal. Atty. Gen. 11 (2008).[7]

In reaching this conclusion, the Attorney General reviewed the Supreme Court's recent opinions in *Copley* and *POST* and determined that neither had overturned *New York Times*. In reasoning substantially similar to that set forth above, the Attorney General noted that the Court in *Copley Press* disagreed with the broad language in *New York Times* "at least insofar as it applies to disciplinary matters like the one at issue" before it in that case, *Copley Press*, 39 Cal.4th at 1298. But the Attorney General concluded the "specific and qualified nature of this disagreement" suggested that "the *Copley Press* court did not overrule the central holding of *New York Times* that a peace officer's name is generally subject to disclosure." Atty. Gen. Op. No. 07-208, at 3. The Attorney General drew further support from the opinion in *POST*, in which it described *Copley*'s disagreement with *New York Times* as "qualified" and quoted approvingly from a passage of *New York Times* for the proposition that the names of officers ordinarily should not be considered confidential. *See POST*, 42 Cal. 4th at 297; Atty. Gen. Op. No. 07-208 at 4.

The Attorney General also reasoned that because the *New York Times*

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[7] The last portion of this quotation merely reiterates the catchall exemption in the Public Records Act, which permits a government agency to withhold a record if "on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." Gov't Code § 6255(a).

mandated disclosure of an officer's name only "as long as the disclosure does not reveal confidential information from the officer's personnel file," its rule was in fact consistent with the limitation voiced in *Copley*, which explicitly concerned information from a confidential disciplinary proceeding. Atty. Gen. Op. No. 07-208 at 3. And based on the assumption that law enforcement agencies have some kind of record of the names of the officers who become involved in a critical incident, the Attorney General concluded that because "the name of an officer involved in a critical incident does not, in itself, reveal confidential information from the officer's personnel file," the name is not confidential.

The 2008 Attorney General Opinion is "entitled to considerable weight" and should not lightly be overruled. *Lexin v. Superior Court*, 47 Cal.4th 1050, 1087 n.17 (2010); *Freedom Newspapers, Inc. v. Orange County Employees Retirement System*, 6 Cal.4th 821, 829 (1993); *see also California Assn. of Psychology Providers v. Rank*, 51 Cal.3d 1, 17 (1990) (Attorney General opinions "entitled to great weight"). As this Court has repeatedly stated in following the Attorney General's construction of the Brown open-meeting Act, "[t]his is especially true here since the Attorney General regularly advises many local agencies about the meaning of the [open-government law] and publishes a manual designed to assist local governmental agencies in complying with the Act's open [government] requirements." *Lexin*, 47 Cal.4th at 1087 n.17; *accord Freedom*

Newspapers, 6 Cal. 4th at 829. As with the Brown Act, the Attorney General conducts trainings and publishes a manual on the CPRA.[8] The Supreme Court has repeatedly followed the Attorney General's interpretation of the CPRA, particularly when the Attorney General agrees that the public has a right to know the names and duties of public employees. *I.F.P.T.E., Local 21 v. Superior Court*, 42 Cal.4th 319, 331 (2007) (citing and following three such opinions under CPRA); *POST*, 42 Cal.4th at 296 (citing and following two such opinions in holding that peace-officer names must be released under the CPRA).

e. Appellants' Interpretations of Penal Code §§ 832.7 and 832.8 Are Inconsistent with Statutes and Case Law and Should Be Rejected

As the City plainly states, "Since this case began, the City has asserted that an officer's name, when linked to a critical incident such as a shooting, is exempt from disclosure in response to a request for public records" under Penal Code §§ 832.7 and 832.8. (City Reply at 4.) This is a far broader formulation than this Court's observation that the "legislative concern [behind Penal Code §§ 832.7 and 832] appears to have been with linking a named officer to the private or sensitive information listed in

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[8]Office of the California Attorney General, Public Records Act Training available at http://ag.ca.gov/open_government/pra.pdf (last visited Sept. 11, 2012); California Attorney General's Office, Summary of the California Public Records Act 2004, available at http://ag.ca.gov/publications/summary_public _records_act.pdf (last visited Sept. 11, 2012).

section 832.8." *POST*, 42 Cal.4th at 295. Section 832.8 renders confidential "[e]mployee advancement, *appraisal*, or *discipline*," or "[*c*]*omplaints, or investigations of complaints,* concerning an event or transaction in which [a peace officer] participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties." Penal Code § 832.8(d, e) (emphasis added). Under the statute, it is not specific events or incidents that an officer cannot be linked to; it is complaints or internal discipline and appraisal. As the Court of Appeal noted, the City's argument, "ignores the distinction between information . . . specified in Penal Code section 832.8 and therefore protected from disclosure, and information such as involvement in a shooting or other critical incident that is not." 203 Cal App. 292, 310 n.8 (2012).

On its face, the City's approach would lead to absurd results. Because there is nothing limiting such a rule to "critical" incidents, the City's position would prohibit departments from identifying officers in connection with any action or assignment — departments could not identify an officer who conducted a particular investigation, produced a particular report, spoke to a citizen in a particular instance, or even performed a heroic deed, because to do so would "link [that officer] to a specific event." City Reply at 13. Officers' names would have to be redacted from police reports before they are filed with a court and therefore become open to public inspection. Indeed, such a broad rule would conflict directly with the

statutory requirement that uniformed peace officers clearly display names or badge numbers. *See* Penal Code § 830.10 (requiring uniformed peace officers to wear badge, nameplate, or other device "which bears clearly on its face the identification number or name of the officer"). That requirement is obviously designed not just to identify which officers work for a department, but to allow the public to link the actions they observe with a particular officer. Or, even more implausibly, because courts have held that district attorneys are exempt from § 832.7 only when investigating the conduct of police officers or police agencies, *People v. Superior Court (Gremminger)*, 58 Cal. App. 4th 397, 404-05 (1997), police departments could not share the names of investigating or arresting police officers with district attorneys' offices without violating the law. Even if this were a plausible alternate construction of the statutory text, this Court should reject an interpretation that leads to such absurd results. *Webster v. Superior Court*, 46 Cal.3d 338, 343 (1988) (where more than one statutory construction is possible, courts should "favor the construction that leads to the more reasonable result").

In an attempt to transform the Times' request for names into something that will fit within one of the categories of information protected by § 832.8, Appellants suggest that the LBPD has a policy of investigating every officer-involved shooting, and argue that identifying the officers involved in a shooting, and thus revealing that those officers were the

subject of such a mandatory administrative report, would reveal information about "[e]mployee advancement, appraisal or discipline" as prohibited by §832.8(d). *See* City Opening Br. at 20; LBPOA Opening Br.at 18, 22. This argument fails, for several reasons. *See* also Times Ans. Br. at 28-29.

First, Appellants' suggestion that these investigations are confidential personnel matters blurs the distinction between a department's after-action review that necessarily looks into what happened in a critical incident, and the employee disciplinary investigation and proceedings that are contemplated by "employee advancement, appraisal, or discipline" in Penal Code § 832.8(d). Indeed, a similar, routine after-action investigation occurred in *New York Times*, where this Court reasoned that disclosure of the names was required because "the names of the specific deputies [involved in the shooting] were determined as a result of an investigation that is standard procedure when a shooting occurs and not as a result of a citizen complaint" nor from "an internal investigation concerning the misbehavior of a peace officer." *New York Times*, 52 Cal. App. 4th at 103.

Even if an internal affairs investigation were initiated in every officer-involved shooting, that policy alone would not mean that revealing the names of officers would disclose "records relating to . . . [e]mployee advancement, appraisal, and discipline" under § 832.8. Where investigation is routine, as Appellants argue it is here, the fact of an investigation reveals nothing about the department's views of the officer: Appellants assert that

the Department investigates a shooting whether it believes the officers involved acted heroically or mistakenly, or whether it has no judgment whatsoever about the officers' actions. The fact that a mandatory investigation was initiated therefore does not constitute any kind of "appraisal," nor indicate anything about whether "discipline" will be imposed. Nor does responding to a request about the identities of officers involved in a shooting require reference to files related to "appraisal" or "discipline."The City caricatures the Times' position as allowing the release of "just a name" in response to nearly any kind of records request, and argues that, under such an approach, an agency would have to provide the names of all officers who have been disciplined. City Reply 14-15. But this straw man is not the Times' position (and the statement of this Court in *POST*) that names are confidential when revealing them would reveal information enumerated in § 832.8. Releasing names that reveal that particular officers were disciplined would by definition reveal information about those officers' "discipline," which is barred under § 832.8(d). But revealing that an officer was involved in a shooting does not reveal information about "advancement, appraisal, or discipline" or any other protected category of information and so is mandatory under the CPRA. The City again misses the distinction between impermissibly identifying officers in connection with information protected by § 832.8 and permissibly identifying officers in connection with information that is not made

confidential.Here, the Times has not requested that the Department identify officers that it has investigated, but those involved in shootings. Whether or not the Department investigated those individuals is simply irrelevant to the Times' request, and the Department's policies on shooting investigations provide no basis to hold the identities of officers confidential under §832.8. To hold that a department could not disclose an officer's identity where doing so would reveal that the officer had been the subject of a routine evaluation would also lead to absurd results: under such a rule, a department with a policy of conducting annual evaluations could not reveal the identity of officers that worked in the department because to do so would reveal the fact that they had been evaluated or "appraised" (a result contrary to the holding of *POST*, 42 Cal. 4th 284); or, because Penal Code § 832.8 bars disclosure of records related to "advancement," departments could not reveal the rank of officers because that would indicate the fact that they had advanced.[9] Under the LBPOA's rule, whether or not the names of officers involved in shootings are confidential would also vary from department to department based on whether the particular department had a policy of

[9] The question posed would be very different if the Department initiated investigations only into officers suspected of improper shootings, and the Times had requested the names of officers investigated for such improper uses of force. In such an instance, whether an investigation had been initiated might be discernible only from records related to "appraisal" of the officer's performance. But the Court need not address that question here, as the request at issue seeks the identities of officers involved in shootings (not those investigated).

initiating internal affairs investigations in every shooting. This Court should reject such an absurd and inconsistent result. *See POST*, 42 Cal. 4th at 290-91 (rejecting interpretation of statute under which police departments could make a document confidential, regardless whether it was of personal or private nature, by placing in a personnel file).

The same rationale precludes Appellants' arguments that revealing the names of officers involved in shootings would impermissibly reveal information about "[c]omplaints, or investigations of complaints." These arguments stretch language and logic beyond recognition.

LBPOA argues that the Court should interpret "complaint" in 832.8(e) "to encompass any and all question about what an officer perceived or about the manner in which the officers performed his or her duties." LBPOA Opening Br. at 21-24. LBPOA reaches an interpretation completely divorced from the plain language of the statute on its unsupportable assumption that a request for the name of an officer involved in a shooting would be met with disclosure if no complaint had been filed, and nondisclosure if a complaint had been filed. *See id.* at 23; *see also* City Reply at 12. While such a result would be inconsistent, it is not what the Times argues or the statute mandates. As with discipline above, whether or not a complaint has been filed is simply irrelevant to a request for the names of officers involved in a shooting. Revealing the names in response to such a request would not tell the requestor whether or not a complaint had been

filed, and so would not impermissibly reveal information about "complaints, or investigations of complaints." §832.8(e). And again, the LBPOA's position proves too much — under its argument that the existence of a pending complaint bars disclosure of the name of an officer (even when the requestor has not asked in a manner that will reveal the existence of the complaint), a request for the names of all the officers employed with a department would not allow disclosure of names of officers who had been subject to complaints. Surely this Court's holding in *POST* that the names of officers employed by a department did not contemplate such a gaping exception.

In a further attempt to rely on protection for "complaints," the City bizarrely asserts that because the legislature referred to "complaints" rather than "citizen's complaints," construing "complaints" to mean complaints by citizens (as suggested by the legislative history) would render the word "complaints" surplusage, and concludes that the word "complaint" should be read broadly to include any investigation. City Reply at 13. Aside from the sheer lack of any logic or textual support to this argument, the City simply misses the point. For the reasons set forth above, a request that asks only for the name of officers involved in certain critical incidents does not require disclosure of confidential information about internal investigations or District Attorney investigations any more than it would require disclosure of citizen complaints — and so is not exempt from the CPRA so long as

information relating to those investigations is not disclosed.

f. Amici Agree with the Times' Arguments that Rules of Statutory Construction and the Legislative History of §§ 832.7 and 832.8 Support Disclosure

Amici also voice their agreement with the Times on two specific points, summarized here but not restated:

First, while the plain language of the provisions at issue and governing precedent clearly mandate disclosure, a contrary interpretation would also conflict with the strong constitutional preference for construing statutes to allow the release of information. *See, e.g.*, Cal. Const. Art. I, § 3(b)(2) ("A statute, court rule, or other authority . . . shall be broadly construed if it furthers the people's right of access [to information on the conduct of government business], and narrowly construed if it limits the right of access."); *see also Sacramento County Employees' Ret. Sys. v. Superior Court*, 195 Cal. App. 4th 440 (2011) (applying "the familiar rule that [courts] must construe statutory exemptions narrowly" to hold records did not fit within statutory exemptions to the disclosure requirements of the CPRA). (*See* Times Ans. at 20-23.) The City attempts to distinguish *Sacramento County*, apparently on grounds that the City agrees that the information there was a matter of public record, while it maintains that the names of officers involved in a shooting are not under the "plain meaning" of the statute. City Reply at 8. But saying the rule of construction yields the

right outcome in that case but not this one hardly provides principled grounds not to apply it here. To the extent the City means only that a rule of narrow construction need not apply where the meaning of the text is plain, they are correct in theory, but they nowhere show how the plain language of §§ 832.7 and 832.8 explicitly makes confidential the names of officers involved in particular incidents — nor could they, given that the text mandates the opposite result, as both the trial court and Court of Appeal held.

Second, as the Times sets forth (Times Ans. at 35-39), the legislative history of Penal Code §§ 832.7 and 832.8 reveals no indication that the provisions rendered confidential basic facts about a police department's operation such as what officers were involved in critical incidents, but instead reveals that the chief focus of the statute was to limit broad discovery requests for complaints and officers' personnel files by civil and criminal litigants (and to prevent the willful destruction of these documents by Departments that had resulted from such discovery requests). It is worth noting that neither Appellant refuted this legislative history in any way — the City argued only that the legislative history shows a general concern for peace officers' privacy (and that the statutes are so clear as to preclude the need to consult the legislative history — despite the fact that the lower courts and the Attorney General have interpreted them differently from the City), while the LBPOA ignores the legislative history altogether.

2. Disclosure of the Names Would Not Constitute an Unwarranted Invasion of Personal Privacy under Gov't Code §6254(c)

LBPOA argues that the names of officers involved in shootings should also be withheld, not under any specific protections for police officers, but under the CPRA's exemption for "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Gov't Code § 6254(c). As the Supreme Court recognized in rejecting a similar argument in *POST*, § 6254(c) "requires [a court] to balance the privacy interests of peace officers in the information at issue against the public interest in disclosure, in order to determine whether any invasion of personal privacy is 'unwarranted.'"

The Times' brief details the inquiry in *POST* and the rejection of the same sort of vague and speculative claims of threats toward police officers in general that Appellants proffer here. *See* Times Ans. at 58-64. Without repeating the Times' arguments, Amici address two points. First, the LBPOA in its reply advances a standard under which records should be exempt from disclosure if an officer "could" come to harm as a result, a standard which finds no basis in the law and is inconsistent with the standard used by this Court in *POST*. Second, Amici, as organizations concerned with government accountability and police reform, stress that the release of names of officers involved in shootings serves an extraordinarily strong public interest in holding police departments accountable for policies or

failures in management that allow repeated and unnecessary shootings.

a. The LBPOA's Argument That There Would Be An Unwarranted Invasion of Privacy Where Disclosure "Could" Lead to Threats Is Unsupported in Law

The Court of Appeal correctly held that, given the core importance of police conduct to the public, an officer cannot establish that his or her privacy interests outweigh that public concern "absent any evidence indicating that the safety or effectiveness of any particular officer was threatened by the disclosure of his or her name." 203 Cal. App. 4th at 886. The court based this standard on this Court's requirement in *POST* that nondisclosure be justified by more than a "mere assertion of possible endangerment," and some "evidence that such a scenario [of violence to officers] is more than speculative," *POST*, 42 Cal. 4th at 302, as well as the Attorney General's conclusion that "[a]t least as a general matter, the perceived harm to peace officers from revelation of their names as having fired their weapons in the line of duty and resulting in a death does not outweigh the public interest in disclosure of their names." Atty. Gen. Op. No. 07-208, at 4 (citation omitted).

The superior court held that Appellants had not met this showing based on their declarations that officers generally face threats — and especially in light of the fact that friends and relatives of any person shot by police (presumably those most likely to respond with violence) would be

able to learn the identity of the officers involved through a civil suit. The trial court had broad discretion to evaluate this evidence, and this Court will not interfere with that discretion unless that court "exceeded the bounds of reason or contravened the uncontradicted evidence." *Continental Baking Co. v. Katz*, 68 Cal.2d 512, 527 (1968) (citations omitted); *see also IT Corp. v. County of Imperial*, 35 Cal.3d 63, 69 (1983).

But the LBPOA argues that no showing of a particularized threat to officers involved is necessary to withhold documents — rather, they suggest, disclosure should be barred because it "**could** lead to threats to [officers'] safety." LBPOA Opening Br. at 29 (emphasis in original).

LBPOA pulls this standard from thin air — there is no case, nor any statutory provision, that purports to exempt records from disclosure because they "could" lead to threats against any individual. Given the First Amendment right to speak out on official conduct, such a standard would be so broad as to justify withholding all personally identifiable information from all but the most mundane set of document requests. This is not the law. *See Sacramento County Employees' Ret. Sys.*, 195 Cal. App. 4th at 446 (neither "public outcry" nor "speculative threats" could justify withholding names and pension amounts of former government employees).

The only support LBPOA provides for this lower standard is a citation to *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325 (1991) — but that case addressed whether the governor's detailed personal calendars

were exempt from disclosure under the catchall "public interest" exemption of Gov't Code § 6255 (an exemption not asserted here), which considers whether the ***public*** interest in nondisclosure outweighs public interest in disclosure. After a lengthy discussion, the Court held (in an analogy to the "deliberative process" exemption to federal public records laws) that the public's interest in disclosure of the schedules was outweighed by its interest in nondisclosure, which would allow the governor to consult freely with individuals and groups without fear that the details of each meeting would be disclosed and scrutinized in a way that would hinder the governor's "deliberative process." *Id.* at 1339-46. In a few sentences, the Court also noted that its decision that nondisclosure was in the public interest "f[ound] further support" in concerns for the governor's security, because having the details of his movement revealed to the public would seriously compromise his security and pose a threat to his safety. *Id.* at 1346.

Times Mirror's analysis is simply inapposite here. First, the question under Gov't Code § 6255 of whether ***public*** interest in nondisclosure outweighs public interest in disclosure is very different from the much more demanding inquiry under § 6254(c) into whether the public interest disclosure is outweighed by the officers' ***private*** interest in preventing an "***unwarranted*** invasion of personal privacy." (emphasis added). Second, the decision in *Times Mirror* rested primarily on the public's interest in preserving the governor's "deliberative process," and only secondarily in

concerns about the governor's security. No such rationale would justify nondisclosure here. And finally, even *Times Mirror* does not purport to set a "could"-lead-to-threats standard for nondisclosure that LBPOA here advances. To the extent the case uses the word "could," it does so to indicate an ability to identify weaknesses in the governor's security system, not in the sense of a possible contingency, as the LBPOA uses it here. These two meanings of the term are distinct and should not be conflated. *See, e.g.*, American Heritage Dictionary of the English Language (1981) ("can," past tense "could," definitions 1 ("ability") and 4 ("possible contingency")).

This Court should reject LBPOA's attempt to forge a new standard for withholding documents not rooted in any case law, and affirm the opinions below.

b. The Need for Accountable Police Provides Strong Public Interest in the Identity of Officers Involved in Major Incidents

The public's access to information about their government is a foundation of democracy. Disclosure of information about the actions and operations of police is vital to maintaining responsible, accountable police departments. The public airing of information about significant incidents — including the names of the officers involved — both deters misconduct and provides the knowledge necessary for the public to hold police accountable for poor policies or bad management. Conversely, secrecy over the handling

of major episodes increases public suspicion of departments and sows mistrust between police and the communities they serve — a mistrust that threatens to undermine the cooperative project of public safety.

The need for broad public access to information on government operations has been widely recognized, perhaps most powerfully by the people of California in elevating such access to a constitutional priority. Proposition 59, passed by California voters overwhelmingly in 2004,[10] revised Article I, section 3 of the California Constitution to recognize that "[t]he people have the right of access to information concerning the conduct of the people's business," to make meetings public and "the writings of public officials and agencies . . . open to public scrutiny," and requiring that statutes or other rules be construed so as to "further[] the people's right of access." Cal. Const Art. I, § 3(b)(1,2). The ballot argument in favor made the connection between access and accountability clear:

> A government that can hide what it does will never be accountable to the public it is supposed to serve. We need to

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[10] Proposition 59 passed by a margin of 83.4% in favor, 16.6% opposed. *See* Summary Statement of Vote, Cal. Sec. of State, *available at* http://www.sos.ca.gov/elections/sov/2004_general/sov_pref21_votes_for_and_against.pdf (last visited Sept. 11, 2012). And even the argument in opposition did not oppose public access, but reasoned that the proposed measure "d[id] not go far enough in guaranteeing the people access to information and documents possessed by state and local government agencies." Ballot Arg. in Opposition to Proposition 59, Cal. Sec. of State, available at http://vote2004.sos.ca.gov/voterguide/propositions/prop59-arguments.htm (last visited Sept. 11, 2012).

> know what the government is doing and how decisions are made in order to make the government work for us.

Ballot Argument in Support of Proposition 59, Cal. Sec. of State, *available at vote2004.sos.ca.gov/voterguide/propositions/prop59-arguments.htm* (last visited Sept. 14, 2012).

Judges, too, have consistently recognized the importance of public disclosure in promoting responsible government. Justice Louis Brandeis famously noted, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933) (quoted in *Buckley v. Valeo*, 424 U.S. 1, 67 (1976)); *accord Fellows v. National Enquirer, Inc.*, 42 Cal.3d 234, 252 (1986) (Bird, *C.J.*, concurring); *see also Buckley*, 424 U.S. at 67 n.79 ("We have said elsewhere that 'informed public opinion is the most potent of all restraints upon misgovernment.'") (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)).

LBPOA cavalierly dismisses the public's interest in knowing the particular officers involved in shootings as having "not much" value. LBPOA Reply at 28. But that assessment flies in the face of this Court's teachings and recent history.

This Court in *POST* recently observed (as did the trial court below) that the need for information applies powerfully to the conduct of individual

police officers whom the public entrusts to walk among them with the extraordinary power to detain, to arrest, to use force and even, where necessary, to kill:

> The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant. "Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers." [Citation.] "It is undisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm."[Citation.]

POST, 42 Cal.4th at 297–98 (quoting *New York Times*, 52 Cal. App. 4th at 104–05 and *Coursey v. Greater Niles Township Publishing Corp.* 40 Ill.2d 257, 239 N.E.2d 837, 841 (1968)). This Court went on to observe that this public interest is strong enough that peace officers have been widely held to be public officials who must establish actual malice in order to prevail on a defamation claim under *New York Times v. Sullivan,* 376 U.S. 254 (1964). The Court rested its conclusions in part on state-court opinions stressing the extent of "the public's interest in the activities of peace officers at every

level." *POST*, 42 Cal. 4th at 297 n.7 (*quoting Moriarty v. Lippe* 162 Conn. 371, 294 A.2d 326, 330-331 (1972) ("Although a comparatively low-ranking government official, a patrolman's office, if abused, has great potential for social harm and thus invites independent interest in the qualifications and performance of the person who holds the position."); *Roche v. Egan* 433 A.2d 757, 762 (Me. 1981) ("The police detective, as one charged with investigating crimes and arresting the criminal, is in fact, and also is generally known to be, vested with substantial responsibility for the safety and welfare of the citizenry in areas impinging most directly and intimately on daily living: the home, the place of work and of recreation, the sidewalks and streets.")).

The importance of public access to information about police has been recognized not just by this Court, but by experts in law enforcement governance. One of the core recommendations of the Christopher Commission, which examined the LAPD in the wake of the Rodney King beating and the resulting riots, was to achieve public accountability through published reports by the LAPD's civilian overseers. Report of the Independent Commission on the Los Angeles Police Department, 178 (1991). *See also* Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 St. Louis U. Pub. L. Rev. 151, 158 (2003) ("There is increasingly broad agreement that whether or not the police retain the power to investigate themselves, law enforcement's business, in general, is the

public's business, and therefore must be an open and transparent process."); *Revisiting 'Who Is Guarding the Guardians?' A Report on Police Practices and Civil Rights in America*, U.S. Civil Rights Commission, at ch. 4 (November 2000), *available at* http://www.usccr.gov/pubs/guard/ch4.htm (observing that withholding information about complaints and disciplinary actions about officers "fosters distrust and animosity between police officers and the communities they serve"). Indeed, the idea that public access to information provides the best check against abuse is not limited to local policing. *See, e.g.*, National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States, at 103 (2004) (noting that oversight committees that operate secretly "cannot take advantage of democracy's best oversight mechanism: public disclosure").

The release of the names of officers involved in important incidents is the most basic level of this transparency. One former police reporter recently described the importance of naming officers involved in individual incidents: "Without a name, there's no way for anyone to evaluate an officer's performance independently, to gauge his or her effectiveness and competence, to know whether he or she has shot one person or 10." David Simon, *In Baltimore, No One Left to Press the Police*, Baltimore Sun, at B1 (Mar. 1, 2009). Indeed, in the incident that reporter addressed — a shooting that occurred in part because an officer lost control of her gun — the

reporter ultimately obtained the name of the officer and, through it, unearthed a previous instance in which she had shot a suspect after losing control of her gun — raising important questions about both the officer's fitness and the department's management. *Id.*

In California, at least three police departments have recently been called to account for the fact that the same officers had been involved in multiple shootings:

- Following a string of four fatal shootings by Inglewood police officers over four months in 2008, local media identified that two officers had been involved in prior shootings, one in two fatal shootings only two months apart.[11] The apparent mismanagement led to calls for accountability at the Inglewood Police department and ultimately changes in training and an investigation by the U.S. Department of Justice.[12]
- A reporter's public records request revealed that 27 Fresno police officers had been involved in repeat shootings of civilians from

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[11] Ari B. Bloomekatz and Jack Leonard, *Inglewood officers identified: Eight are named in the fatal shooting of a homeless man*, LOS ANGELES TIMES (Sept. 6, 2008).

[12] Andrew Blankstein and Joanna Lin, *Inglewood police face new training: Officers will learn about tactical decision-making in the wake of four deadly shootings*, LOS ANGELES TIMES (Oct. 23, 2008); Ari B. Bloomekatz and Jack Leonard, *U.S. probes Inglewood police force*, LOS ANGELES TIMES (Mar. 13, 2009).

2002 through 2009 (including four who had been involved in three shootings and one who had been involved in four), 25 of whom remained on active duty in 2010. The deputy chief in charge of internal affairs told the reporter that he had been "unaware of the number of officers involved in repeat shootings."[13]

- A reporter's inquiry into the Oakland Police Department revealed that an officer who led a SWAT team into a confrontation that led to the deaths of two officers had shot four civilians (three fatally) over the course of his career at the Department, and that just 16 officers in the Department were responsible for 40 of the department's 85 shootings between 2000 and 2010.[14]

As these examples illustrate, the names of individual officers are relevant not just to the effectiveness and competence of that officer, but to the operation of the entire department. Does the department retain officers who commit multiple questionable uses of force or who have been involved

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[13] Ali Winston, *Fresno Cops Involved in Repeat Shootings Still on Duty*, ColorLines (Apr. 26, 2010), available at http://colorlines.com/archives/2010/04/fresno_cops_involved_in_repeat_shootings_still_on_duty.html.

[14] Ali Winston, *Deadly Secrets: How California Law Shields Oakland Police Violence*, ColorLines (Aug. 19, 2011), available at http://colorlines.com/archives/2011/08/deadly_secrets_how_california_law_has_shielded_oakland_police_violence.html.

in multiple car accidents? Does the department assign officers appropriately and provide necessary training? Without the ability to identify officers and track patterns within the department, the public loses crucial information about its departments and, in turn, police departments become less accountable to the public they serve.

3. The Names of Officers Involved in Critical Incidents Is Not Confidential Under § 6254(f)

Appellants argue that disclosure of the names of officers involved in shootings is protected by the CPRA's exemption for law enforcement investigations under § 6254(f). Amici fully support the Times' position that these arguments are both untimely and meritless, LA Times Answer Brief at 67-70, and add only two points here.

First, in response to the Times' argument that the mere presence of the officers' name in an investigatory file cannot be used to exempt disclosure of that name other than through those investigatory materials, the City offers only the naked assertion that the presence of an officer's name elsewhere in department records does not mean that the name was not derived from an investigation file. City Reply at 25-26. This broad assertion ignores the crux of the argument, that the presence of an officer's name in both privileged and non privileged documents does not prevent the disclosure of the non privileged information. Under the City's view, a municipality responding to a request for the names of all officers (or even all

employees) could not include in the response the name of any individual potentially under investigation. That reaches far beyond the purpose of the exemption for law enforcement investigations.

Second, while acknowledging that California courts have required that there be a "concrete and definite prospect" of an investigation before allowing an agency to withhold on this ground, *see* City Reply at 25-26 (citing *Williams v. Superior Court*, 5 Cal.4th 337, 356 (1993)), the City attempts to undermine that standard by focusing on the word "prospect," which the City defines as "potential or possibility." *Id.* But the fact that one word might on its own have such a broad definition (although the City provides no support for theirs), does not justify ignoring courts' clear limitation that such prospect be "concrete and definite." *See Williams*, 5 Cal.4th at 356; *Office of Inspector General v. Superior Court*, 189 Cal.App.4th 695, 709 (2010). Nor is the City's reliance on *Office of Inspector General* persuasive. There, various media outlets requested the release of materials and confidential information gathered by the Inspector General in preparation for its report on the failure of the CDCR to adequately supervise a parolee, resulting in the kidnap and sexual assault of multiple victims in a high profile incident. *Id.* at 710. The court found that the investigatory materials sought—which included "the complete record of supervision of Garrido, records of any Penal Code section 290 sweeps of his residence, and information relating to any parole searches of Garrido and his

property" among others classes of information—were protected from disclosure. *Id.* at 701, 710. Importantly, the classification of the desired materials as exempt was undisputed in *Office of Inspector General*, a posture not shared in this case. *Id.* As the City itself concedes, "In *OIG*, the materials sought were compiled and used primarily, if not exclusively, in the conduct of OIG's investigation of CDCR," City Reply Br. at 27, a contention that cannot be made here, where the Times has both explicitly challenged the nature of the documents as investigatory and asserted that the information sought is available from unprotected sources. Times Ans. Br. at 67-68.

The intent of the legislature, made evident through the plain language of Section 6254(f) was simply to protect the identity of crime victims and witnesses and to ensure the efficacy of the investigatory process; they could not have intended to permanently prevent the disclosure of basic facts about the operation of police departments, including the identities of officers whose reckless use of force has endangered the lives of their citizenry.

4. Neither the Internet Nor Statutory Restrictions on Posting Officers' Home Addresses Renders Officer Names Confidential

The City argues at length that information available on the Internet allows officers' home addresses to be found easily using their names, and that the existence of statutes aimed at keeping officers' home addresses confidential evinces such a powerful Legislature's interest in accomplishing

that end that it justifies interpreting the §§ 832.7 and 832.8 to restrict disclosure of officer names as well.

In part, the City simply rehashes an argument about the ease of turning officer names into home addresses that this Court rejected in *POST* and, like the agency there, has "offered no evidence that such a scenario is more than speculative, or even that it is feasible." *See POST*, 42 Cal.4th at 302. Moreover, there is substantial reason to doubt that obtaining addresses is so easy. As this Court noted in *POST*,

> The Legislature already has taken steps to protect peace officers from persons who might do them harm by requiring that at the request of an officer, his or her home address as listed in Department of Motor Vehicle records be kept confidential (Veh.Code, § 1808.4 subd. (a)(11)), and prohibiting the disclosure of officers' home addresses on voter registration cards (Elec.Code, § 18110). In addition, the disclosure or distribution of a peace officer's home address is, under some circumstances, a crime. [Gov't Code §§ 6254.21 & 6254.24; Pen. Code §146e(a).]

Id. at 302 n.13. Contrary to the City's position that these provisions evince a generalized concern for officer safety that should be read to limit disclosure of officer names, the fact that the Legislature has singled out officers' address information for protection both makes it less likely that individuals will be able to find officers' addresses and suggests that the Legislature has focused on restricting access to officers' home addresses, not names of officers that play an important role in the transparency and accountability of

officers that play an important role in the transparency and accountability of police. Moreover, the City's position ignores that the individuals affected most directly by an officer-involved shooting — the friends and family of the person shot — are likely to obtain the identity of the officer through civil litigation.

CONCLUSION

For the foregoing reasons, Amici California ACLU affiliates respectfully request that this Court affirm the opinion of the Court of Appeal below.

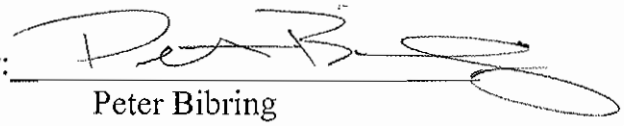
Dated: September 17, 2012

Respectfully submitted,

ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

ACLU FOUNDATION OF
NORTHERN CALIFORNIA

ACLU FOUNDATION OF
SAN DIEGO & IMPERIAL COUNTIES

By: 

Peter Bibring
Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

WITH APPECLLATE RULE 8.204(b)(2)(3)(4)

Petitioners CALIFORNIA AFFILIATES OF THE AMERICAN CIVIL LIBERTIES UNION certify that their brief is in a proportionately spaced type face (Times New Roman) of 13 point, that it is double-spaced, and that it contains 10,768 words.

Dated: September 17, 2012

By: _____

Peter Bibring
ACLU Foundation of
Southern California

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1313 West Eight Street, Los Angeles, California 90017. I am employed in the office of a member of the bar of this court at whose direction the service was made.

On September 17, 2012, I served:

1. **APPLICATION TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE BY THE CALIFORNIA AFFILIATES OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF LOS ANGELES TIMES COMMUNICATIONS, LLC.**

on the parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope, addressed as follows:

James E. Trott
Larry J. Roberts
Law Offices of James E. Trott
8840 Warner Avenue, Suite 101
Fountain Valley, CA 92708

Attorneys for Long Bch Police Officers Asscociation and Doe Officers 1-150

Robert E. Shannon, City Attorney
Christina L. Checel, Sr. Dep. City Atty.
333 W. Ocean Boulevard, 11th Floor
Long Beach, CA 90802

Attorneys for City of Long Beach; Long Beach Police Department; James McDonnell, Chief of Police

Karlene W. Goller
Los Angeles Times Communications LLC
202 West First Street
Los Angeles, CA 90012

Kelli L. Sager
Rochelle L. Wilcox
Jeff Glasser
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017-2566

Attorneys for Los Angeles Times Communication LLC

[X] **BY MAIL:** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, CA in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing of an affidavit.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed on September 17, 2012, at Los Angeles, California.

Christian Lebano