AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Southern California

Submitted via TrueFiling

June 16, 2022

The Honorable Tani Cantil-Sakauye, Chief Justice
And the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Curiae Letter in Support of Petition for Review
***Kinney v. Superior Court of Kern County*, Case No. S274622**

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

The American Civil Liberties Union of Northern California and of Southern California, Community Coalition, Community Legal Services in East Palo Alto, East Bay Community Law Center, Insight Center for Community Economic Development, Homeboy Industries and the Lawyers' Committee for Civil Rights of the San Francisco Bay Area (hereinafter, "amici curiae"), write pursuant to Rule 8.500, subd. (g) of the California Rules of Court to ask this Court to grant the petition for review of the decision in *Kinney v. Superior Court of Kern County* (2022) 77 Cal.App.5th 168 ("*Kinney*") and reverse the Court of Appeal decision below.

Kinney concerns a California Public Records Act ("CPRA") request seeking limited categories of arrest information. At issue is whether certain arrest information (e.g., names, demographic information and physical descriptions of arrestees, and details regarding the arrest, charges, and bail assessments[1]) is subject to the CPRA's mandatory disclosure obligations pursuant to California Government Code section 6254, subd. (f)(1), notwithstanding the investigative files exemption in section 6254, subd. (f).[2] *Kinney* established a temporal limitation to section 6254, subd. (f)(1), authorizing public access to arrest information only if that information is "contemporaneous"—interpreted by the Court of Appeal to mean only information requested closely following an arrest. Petitioner filed a petition for review before this Court.

This Court should grant the *Kinney* petition for review, and reverse the decision below, because: 1) the Court of Appeal asserted a temporal limitation on access to arrest information which does not exist in the statutory text and rests on an obsolete holding; 2) the opinion is inconsistent with legislative history; 3) the holding jeopardizes public oversight of law enforcement activity, including efforts to address racial bias in policing and the criminal legal system; and 4) no public interest justifies the temporal limitation.[3]

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[1] In *Kinney*, the issue on appeal was only the obligation to disclose names of arrestees. (77 Cal.App.5th at 171.) However, the holding would apply equally to all section 6254, subd. (f)(1) categories of information. (*Id.* at p. 181.)

[2] All references are to the California Government Code unless otherwise noted.

[3] The Court of Appeal itself urged that its "conclusion . . . should be limited as much as possible to the facts of this case." (*Kinney*, *supra*, 77 Cal.App.5th at p. 183.) The court also identified the

INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan membership organization dedicated to the defense and promotion of rights and liberties in the state and federal constitutions. ACLU of Northern California and of Southern California ("ACLU NorCal" and "ACLU SoCal," respectively) are California affiliates of the national ACLU. The ACLU is dedicated to advancing governmental transparency and accountability. As part of its advocacy, the ACLU relies on public records to gather information and ensure that the public is informed about the conduct and practices of public officials. The ACLU routinely litigates under the CPRA, including filing amicus and merits briefs in this Court. (See, e.g., *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272; *ACLU of N. Cal. v. Superior Court* (2011) 202 Cal.App.4th 55.)

Community Coalition is a nonprofit organization that works to help transform the social and economic conditions in South Los Angeles that foster addiction, crime, violence and poverty by building a community institution that involves thousands in creating, influencing and changing public policy.

Community Legal Services in East Palo Alto ("CLSEPA") is a nonprofit organization that offers legal services that improve the lives of low-income families throughout the Bay Area region. CLSEPA is committed to pursuing multiple, innovative strategies, including community education, individual legal advice and representation, legal assistance to community groups, policy advocacy, and impact litigation.

East Bay Community Law Center ("EBCLC") is a nonprofit organization dedicated to the promotion of justice and building a community that is more secure, productive, healthy, and hopeful by providing legal services, policy advocacy, and law training. EBCLC is committed to addressing the causes and conditions of racial and economic injustice and poverty.

Insight Center for Community Economic Development ("Insight") is a national economic justice organization that works to build inclusion and equity for people of color, women, immigrants, and low-income families. Through research and advocacy, narrative change, and thought leadership, Insight aims to ensure that all people become, and remain, economically secure.

Homeboy Industries is a nonprofit organization dedicated to providing hope, training, and support to formerly gang-involved and previously incarcerated people. Homeboy Industries is the largest gang rehabilitation and re-entry program in the world.

Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("LCCRSF") is a nonprofit organization and one of the oldest civil rights institutions on the West Coast dedicated to dismantling systems of oppression and racism, and building an equitable and just society. LCCRSF leads policy development and impact litigation that directly supports the people and movements fighting for an end to police brutality and violent police practices.

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sparse record before it, which lacked any explanation of the trial court's reasoning aside from a summary minute order. (*Id.* at p. 176.) The docket further shows that the Court received limited elaboration of arguments supporting disclosure as Petitioner filed no reply brief and there were no responses to the amicus curiae brief which opposed disclosure. The court also lacked opportunity to further assess arguments supporting disclosure as Petitioner waived oral argument. (Petitioner was represented by different counsel at the trial and appellate courts than before this Court.)

ARGUMENT

I. *Kinney* Rests on a Flawed Analysis of Legislative History and the Law.

A. *Kinney* Resurrects an Obsolete Holding to Justify Its Temporal Limitation on Access to Arrest Information.

In *Kinney*, the Court of Appeal resurrected a decades-old holding—*County of Los Angeles v. Superior Court* ("*Kusar*") (1993) 18 Cal.App.4th 588—to conclude that basic arrest information is only subject to mandatory disclosure under the CPRA when it is "contemporaneous." *Kinney* discounts that no such temporal limitation exists in the statutory text. It also fails to apply the more recent appellate decision in *Fredericks v. Superior Court* ("*Fredericks*") holding *Kusar* no longer valid. (*Kinney*, *supra*, 77 Cal.App.5th at pp. 176–77. But see *Fredericks* (2015) 233 Cal.App.4th 209, disapproved of on other grounds by *Nat'l Lawyers Guild of San Francisco Bay Area Chapter v. Hayward* (2020) 9 Cal.5th 488, 508 fn. 9.) This Court should grant the petition for review and reverse the decision below to ensure fidelity with the statutory text, eliminate inconsistent interpretations of section 6254, subd. (f)(1), and resolve the ambiguity created by the Court of Appeal's holding.

First, the Legislature did not intend a temporal limitation in section 6254, subd. (f)(1). Had that been its intention, the Legislature would have included clear temporal limitations as in other sections. For example, the Legislature crafted clear temporal limits into sections 6254, subd. (f)(4), authorizing agencies to withhold certain records for a specified time. (See Gov. Code § 6254, subd. (f)(4)(A)(i) [authorizing delayed access "for no longer than 45 calendar days"]; Gov. Code § 6254, subd. (f)(4)(A)(ii) [authorizing delayed access for "45 days . . . and up to one year"]; Gov. Code § 6254, subd. (f)(4)(B)(iii) [authorizing delayed access "for 45 calendar days"].) "Clearly the Legislature was capable of articulating additional limitations if that is what it had intended to do." (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 350; cf. *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, 621–22 [had the legislature "intended to impose different disclosure obligations . . . one would expect to find this difference highlighted throughout the statutory scheme"].)

To find a temporal limitation, the Court of Appeal's analysis placed undue weight on certain terms in section 6254, subd. (f)(1) over others. The court noted that section 6254, subd. (f)(1) includes terms suggesting a temporal limitation: "where the individual is currently being held" and "all charges the individual is being held upon." (*Kinney*, *supra*, 77 Cal.App.5th at p. 183.) The court ignores that section 6254, subd. (f)(1) also requires disclosure of "the time and manner of release," thereby expressly contemplating information disclosures *after* an individual is no longer in custody. (Gov. Code § 6254, subd. (f)(1).) No other category in section 6254, subd. (f) contains language suggesting *any* legislative intent to confine the information subject to disclosure to a certain period. A complete read of section 6254, subd. (f)(1) thus confirms that the Legislature contemplated that agencies produce basic arrest information without temporal limitations.

Kinney also discounted the significance of *Fredericks*. More than twenty years after *Kusar*, *Fredericks* declined to follow *Kusar* for reasons that remain valid and applicable to the case at issue. In *Fredericks*, the court reexamined *Kusar*'s temporal holding and subsequent legislative amendments and concluded that no time limits exist as to section 6254, subd. (f)(2)—a provision the Legislature amended along with section 6254, subd. (f)(1) to remove the term "current address." (*Fredericks*, *supra*, 233 Cal.App.4th at p. 236.) *Kusar* had relied on the "'current address' of an arrestee" language previously in the statute in concluding that the disclosure

provision "would make no sense" if applied to non-contemporaneous police activity. (*Kusar*, *supra*, 18 Cal.App.4th at pp. 595–96.) With that language removed, the court in *Fredericks* concluded that "[t]here is *no basis* in the plain language of the statute to read into it any [temporal] limitation on access to disclosable information." (*Id.* at p. 234 [emphasis added].) While *Fredericks* addressed the significance of legislative amendments to section 6254, subd. (f)(2), its analysis and conclusion apply equally to section 6254, subd. (f)(1). The *Fredericks* court, considering the 1995 amendments to sections 6254, subds. (f)(1) & (f)(2), concluded that "[t]he main terms expressly relied upon by the court in *Kusar* . . . to support its conclusions regarding an imposed time limitation upon disclosure obligations are no longer in the statute." (*Id.* at p. 232 [internal citation omitted].) By declining to follow *Fredericks*, *Kinney* applied an analysis superseded by intervening legislation and caselaw, improperly narrowing section 6254, subd. (f)(1)'s temporal scope.

Moreover, after limiting section 6254, subd. (f)(1)'s disclosure requirements to only "contemporaneous" arrest information, the Court of Appeal declined to define this term or explain why the information at issue in the case would not satisfy this vague and arbitrary requirement. (*Kinney*, *supra*, 77 Cal.App.5th at p. 178 [concluding that it did "not need to discern the precise definition of 'contemporaneous'"].) In *Kinney*, the Court of Appeal acknowledged that the Legislature *did not* define the term, either before or after *Kusar* found that a temporal limitation existed. The Legislature's inaction in defining this term following the *Kusar* decision—yet while removing key language relied on by the *Kusar* court—further shows that the Legislature did not intend for the temporal limitation found in *Kusar* to apply.

By failing to establish a definition at all, *Kinney* creates ambiguity as to when a request will be considered "contemporaneous" and leaves the door open for law enforcement agencies to deny requests for information under section 6254, subd. (f)(1) at some undefined period of time after an arrest. As it stands, the *Kinney* opinion risks leading law enforcement agencies, requesters, and courts astray when determining when the right to access arrest information under section 6254, subd. (f)(1) expires. The ambiguity created by *Kinney* with regards to the meaning of "contemporaneous" is yet another reason why this Court should grant the petition to review.

Furthermore, *if* a temporal limitation exists, which amici assert it does not, neither the statute nor the legislative history provides any guidance as to whether "contemporaneous" concerns the time at which the information is recorded or the time at which the request for information is made. As the courts noted in *Kinney*, *Kusar*, and *Fredericks*, even if a temporal limitation were read into the statute, the statutory language suggests a reasonable alternative interpretation "which would authorize the release at a later time of information which was 'current' when compiled." (*Kinney*, *supra*, 77 Cal.App.5th at pp. 180-181 [quoting *Kusar*, *supra*, 18 Cal.App.4th at p. 596, to explain that section 6254, subd. (f)(1) "alone does not conclusively eliminate [such] an interpretation"]; *Fredericks*, *supra*, 233 Cal. App. 4th at pp. 229–34 [same].) While *Kusar* rejected such an interpretation due to its reading of the then-existing legislative history, as detailed herein, that legislative history is no longer controlling and lacked foundation even then. (See, Section I.B, *infra*.) Yet, under this broader alternative interpretation, records created "contemporaneous" with the arrest or investigation that are requested months or years later would remain subject to disclosure, even if a temporal limitation were read into the statute.

This broader reading of section 6254, subd. (f) comports with the constitutional mandate to construe rights of access to information broadly and any restrictions on access to information narrowly. (See Sec. 1B, *infra*.) It also comports with other caselaw that has deemed information to be contemporaneous based on when it was recorded. (See e.g., *People v. Geier* (2007) 41 Cal. 4th 555, 604 [emphasizing that a statement was contemporaneous where it was describing "'events *as they were actually happening*"'] [quoting *Davis v. Washington* (2006) 547 U.S. 813, 827].) If a

temporal limitation exists, the broader interpretation of "contemporaneous" would permit the disclosure of records requested months or years after an arrest due to the "contemporaneous" nature of their recording.

In contrast, the narrow interpretation of the term "contemporaneous," adopted by *Kinney*, would lead to harmful results. Because *Kinney* did not define the term, agencies—without further guidance from this Court—could construe the term narrowly and deny information which would otherwise be subject to disclosure pursuant to section 6254, subd. (f)(1). (See, e.g., Meriam Webster Dictionary [defining "contemporaneous" as "existing, occurring, or originating during the same time"]; *In re AST Rsch. Sec. Litig.* (C.D. Cal. 1995) 887 F. Supp. 231, 234 [adopting a same-day definition of contemporaneous in a case examining stock market sales]; *Neubronner v. Milken* (9th Cir. 1993) 6 F.3d 666, 670 [examining cases where four days were deemed contemporaneous but fourteen days and one month were not]; *In re Gaildeen Indus., Inc.* (B.A.P. 9th Cir. 1987) 71 B.R. 759, 765–66 [finding a 3-day difference to be contemporaneous].)

This Court should grant the petition for review and reexamine the flawed temporal limitation *Kinney* imposed.

B. *Kinney* Rests on a Flawed Analysis of the Legislative History of Section 6254.

The Court of Appeal in *Kinney* misinterprets the legislative history of section 6254, subd. (f)(1). The court was wrong to endorse *Kusar's* legislative history analysis as that analysis was flawed when *Kusar* was decided and is especially wrong now given subsequent legislative amendments. This Court should grant the petition for review to correct this flawed holding, which provides the foundation for the *Kinney* decision.

As an initial matter, *Kinney* places exceptional weight on the findings of the *Kusar* court "that the purpose of the disclosure exceptions in section 6254, subd. (f), was *only* to prevent secret arrests and provide basic law enforcement information to the press." (*Kinney*, *supra*, 77 Cal.App.5th at p. 181 [emphasis in original].) But this conclusion in *Kusar* lacks foundation.

On this point, *Kusar* only stated:

> We believe that this 1982 legislation demonstrated a legislative intent only to continue the common law tradition of contemporaneous disclosure of individualized arrest information in order to prevent secret arrests and to mandate the continued disclosure of customary and basic law enforcement information to the press. It seems clear that the Legislature and the Governor both understood that AB 277 would require no departure from, but simply mandate, what had been basic and customary at common law and, indeed, what many law enforcement agencies were then doing as a matter of course.

(*Kusar*, *supra*, 18 Cal.App.4th at pp. 598–599.) The *only* justification advanced by *Kusar* for this claim is that the legislation establishing section 6254, subd. (f)(1) resulted from a compromise between the press and law enforcement officials following a gubernatorial veto of a pre-existing bill. (*Id.* at pp. 596–599.) But the veto, and the resulting compromise, do not support the assertion that the Legislature intended that the legislation primarily serve as a challenge to secret arrests.

The legislative history is clear that the Governor's veto, and the resulting compromise, was *not* intended to narrow the amendment to only permit challenges to secret arrests. The prior bill, AB 909, would have required law enforcement entities to make all "original entry documents" publicly available, including detailed statements from victims and witnesses, requests for warrants and applications for business licenses. (Off. of Legal Affairs, Enrolled Bill Report on Assem. Bill No.

909 (1981–1982 Reg. Sess.) Sept. 30, 1981. The Governor's Legal Affairs Secretary recommended a gubernatorial veto because the disclosure of "original entry documents" could be interpreted to force disclosure of, i.e., "original investigative reports containing detailed statements from the victim and witnesses, accident reports, their requests for warrants and collateral records such as applications for business license and firearm permits." (*Ibid.*) In vetoing AB 909, Governor Brown identified that the bill "may force the disclosure of confidential information, deter citizens from fully cooperating with law enforcement officials and cause needless additional emotional trauma for victims." (Governor's veto message to Assem. on Assem. Bill No. 909 (October 1, 1981) (1981–1982 Reg. Sess.)) He nonetheless acknowledged "the need for legislation to clarify what records law enforcement agencies should make public." (*Ibid.*) This legislative history does *not* support the interpretation adopted by the *Kusar* and *Kinney* courts that the gubernatorial veto demonstrates that the amendment which was ultimately adopted was exclusively intended to avoid the problem of secret arrests.

In fact, the legislative history demonstrates a clear intent to add sections 6254, subds. (f)(1) & (f)(2), as they existed at the time, to ensure public access to "nonsensitive law enforcement records" and increase public awareness of the "workings of [the] criminal justice system." As the 1981–1982 legislative record elaborates, in explaining the introduction of section 6254, subd. (f)(1):

> The absence of clear legislative guidance has resulted in confusion concerning the access of the public and other parties to criminal proceedings and the access of the public to nonsensitive law enforcement records. Therefore, in order to clarify the rights of the public and others to know about the workings of our criminal justice system, it is necessary that this act become effective immediately.

(Stats. 1982, ch. 83, § 1, pp. 242–244 & § 6, p. 246.). "The effect of the amendments was simply to extend public access to information contained in agency records . . . themselves exempted from disclosure by section 6254, subdivision (f)." (*City of Santa Rosa v. Press Democrat* (1986) 187 Cal.App.3d 1315, 1321 [quotation and citation omitted].) Thus, the central justification for the *Kusar* holding, and the primary authority for the *Kinney* decision, is a flawed interpretation of section 6254, subd. (f)(1)'s legislative history. The legislative history simply does not support the conclusion that section 6254, subd. (f)(1) was solely added to prevent secret arrests and provide basic law enforcement information to the press.

Furthermore, following *Kusar*, the Legislature altered the text and meaning of section 6254, subd. (f)(1) when it removed the term "current address" from the statute. (See Sen. Bill No. 1059 (1995–1996 Reg. Sess.) ch. 778.) These were the main terms expressly relied upon by *Kusar* to support a temporal limitation to the statute. (See *Fredericks*, *supra*, 233 Cal.App.4th at p. 232.) Once the Legislature has removed a term from statute, a court must not "insert what has been omitted." (Code Civ. Proc., § 1858.) "This is particularly true where . . . the term in question previously appeared in the statute but was subsequently omitted." (*Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 892.)

Despite this textual amendment, *Kinney* re-inserted a temporal limitation that the Legislature had removed. Specifically, the Court of Appeal reasoned that because the term "current address" is still part of section 6254, subd. (f)(3)—a separate provision allowing for an arrestee's current address to be disclosed under certain circumstances—"it could be argued that the term 'current address' still serves as language indicating that there must be a temporal connection between the arrest and the information request." (*Kinney*, *supra*, 77 Cal.App.5th at p. 183.) In doing so, the Court of Appeal imported the term "current address" from section 6254, subd. (f)(3) into section 6254, subd. (f)(1), ignoring the Legislature's clear intent to *remove* the application of the term

"current address" from section 6254, subd. (f)(1). Moreover, even though the term "current address" was removed from section 6254, subds. (f)(1) & (f)(2) via the same legislation, the Court of Appeal arbitrarily concluded that the "contemporaneous" limitation no longer applies to section 6254, subd. (f)(2) but *does* as to section 6254, subd. (f)(1). (*Kinney*, *supra*, 77 Cal.App.5th at p. 183.) This reasoning is flawed and inconsistent. The Legislature was clear in its removal of the terms "current address" in both provisions.

To support its holding, the Court of Appeal also relied on *People v. Zambia* (2011) 51 Cal.4th 965, for the proposition that "legislative inaction signal[s] acquiescence" (*Id*. at p. 976) but that reliance is also misplaced. The *Zambia* court noted as especially significant the existence of "both a well-developed body of law interpreting a statutory provision and numerous amendments to a statute without altering the interpreted provision." (*Id.* at p. 976 [quoting *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1156].) Here, rather than a well-developed body of law interpreting section 6254, subd. (f)(1), there are conflicting interpretations.

Moreover, since *Kusar*, the Legislature has expanded access to public records, including records once shrouded in secrecy, and including provisions relied on by *Kusar*. In holding that section 6254, subds. (f)(1) & (f)(2) were limited to "contemporaneous" information, *Kusar* noted that its conclusion was "reinforced by the existence of other statutes which regulate the maintenance and disclosure of historical information of the kind sought by Kusar." (*Kusar*, *supra*, 18 Cal.App.4th at p. 599.) *Kusar* referenced Penal Code section 832.7 for the proposition that the Legislature intended for law enforcement personnel records to remain confidential. (*Id*.) But Penal Code section 832.7 has since been amended. In 2018, the Legislature enacted Senate Bill 1421 (2017–2018 Reg. Sess., ch. 988) to allow for the inspection of certain law enforcement records pursuant to the CPRA. (See Penal Code § 832.7, subds. (b)(1)(A)–(E).) By reforming section 832.7, the Legislature pierced the veil of secrecy to allow public access to serious police misconduct.

Whether *Kusar* was properly decided in 1993 need not be relitigated. Its reasoning and holding are clearly invalid today. This Court should grant the petition for review and reverse the holding below to correct this erroneous analysis of the legislative history of section 6254, subd. (f)(1).

C. <u>The Court of Appeal Effectively Ignores the Constitutional Mandate.</u>

Kinney all but ignores the constitutional mandate requiring broad construction of the right to information and narrow construction of any limits on that right. In a cursory reference to the constitutional imperative, the *Kinney* court writes: "We reach this conclusion aware of our constitutional obligation to 'broadly construe[]' the [Act] to the extent 'it furthers the people's right of access' and to 'narrowly construe[]' the [Act] to the extent 'it limits the right of access.'" (*Kinney*, *supra*, 77 Cal.App.5th at p. 181 [quoting *Sierra Club v. Superior Court* (2013) 57 Cal. 4th 157, 166.] Cal. Const. art. I, § 3, subd. (b), par. (2).) This conclusory line disregards the import of this constitutional shift.

In 2004, the Legislature put forth a constitutional amendment that California voters approved as Proposition 59, thereby elevating governmental transparency to a constitutional mandate. The amendment adds the requirement that:

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.

Cal. Const. Art. I, § 3(b)(2).

As the plain text indicates and this Court has repeatedly recognized, the express purpose of Proposition 59 was to create a new interpretive rule for courts. (See *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal. 4th 59, 68 [explaining that Art. I, § 3(b)(2) "direct[s] the courts to broadly construe statutes that grant public access to government information and to narrowly construe statutes that limit such access"].)[4] In *Sierra Club,* this Court noted that Proposition 59 created a new "rule of interpretation" that supplemented the court's "usual approach to statutory construction." (*supra*, 57 Cal.4th at p. 166.) Where "legislative intent is ambiguous, the California Constitution requires [the court] to 'broadly construe[]' the CPRA to the extent 'it furthers the people's right of access' and to 'narrowly construe[]' the CPRA to the extent 'it limits the right of access.'" (*Id*. [internal citation omitted].)

This Court has recognized this interpretive requirement and applied it in numerous contexts. (*Long Beach Police Officers Assn.*, *supra*, 59 Cal. 4th at p. 68. [analysis of names of officers involved in shootings under Pen. Code, §§ 832.7-832.8]; *Sierra Club, supra*,57 Cal. 4th at p. 167 [exemption for computer software]; *Sander v. State Bar of Cal.* (2013) 58 Cal. 4th 300, 313 [state bar rules]; *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21, AFL-CIO v. Super. Ct.* (2007) 42 Cal. 4th 319, 328–30 [salary information].) "Given the strong public policy of the people's right to information concerning the people's business . . . , and the constitutional mandate to construe statutes limiting the right of access narrowly . . . , all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary." (*Sierra Club*, *supra*, 57 Cal. 4th at p. 167 [internal citations and quotations omitted].)

California appellate courts have similarly recognized that Art. I, § 3, subd. (b)(2) requires them to construe exemptions to the CPRA narrowly. (See *County of Los Angeles v. Super. Ct.* (2012) 211 Cal. App. 4th 57, 63–64, *review den.* (Feb. 20, 2013) 2013 Cal. Lexis 1237 ["records pertaining to pending litigation"]; *Marken v. Santa Monica–Malibu Unified Sch. Dist.* (2012) 202 Cal. App. 4th 1250, 1262, *rev. denied* (May 9, 2012) 2012 Cal. Lexis 4200 [records regarding alleged teacher misconduct]; *Sonoma Cnty. Emps. Ret. Ass'n. v. Super. Ct.* (2011) 198 Cal. App. 4th 986, 1000–04 [records under Gov. Code § 31532]; see also *L.A. Unified Sch. Dist. v. Super. Ct.* (2007) 151 Cal. App. 4th 759, 765–72 [applying Art. I, § 3, subd. (b)(2) to require broad construction of term "person" in interest of furthering transparency].)

While Proposition 59 stated that its terms "do[] not repeal or nullify . . . any constitutional or statutory exception to the right including, but not limited to, any statute protecting the confidentiality of law enforcement . . . records," Cal. Const. Art. I, § 3(b)(5), that language makes clear only that the Legislature and California voters intended to maintain the statutory exemption for law enforcement investigatory records; it does not change the new constitutional requirement that exemptions must be construed narrowly. Nor does the statement that the amendment does not "repeal or nullify" any statutory exception to the CPRA suggest that courts should not reconsider prior case law interpreting those statutory exemptions in light of the amendment's new interpretive rule. The drafters could have exempted prior case law from the application of the constitutional rule and did so elsewhere: Art. I, § 3(b)(3) makes clear that Proposition 59 did not "affect[] the construction of any statute" that protects "information concerning the official performance or professional qualifications of a peace officer." (Art. I § 3(b)(3) [emphasis added].) But the amendment makes no such reservation for information such as that available under section 6254, subd. (f)(1).

[4] See also *Ballot Argument in Favor of Proposition 59*, Cal. Sec. of State, http://vigarchive.sos.ca.gov/2004/general/propositions/prop59-arguments.htm.

The *Kinney* court's failure to apply the narrowing rule of Art. I, § 3, and its reliance on *Kusar*—a decision that predates that constitutional requirement—not only undermines its holding regarding section 6254, subd. (f)(1), but, if left to stand by this Court, would set troubling precedent for future applications of the law enforcement exemption.

Art. I, section 3 must apply with equal force to section 6254, subd. (f)(1) as to other CPRA contexts. Despite the clear mandate of the Constitution's interpretive rule, *Kinney* ignores it almost entirely. *Kinney*—narrowly constructing the people's right to access arrest records, and broadly constructing a limitation of that right—is contrary to the constitutional mandate. This Court should grant the petition for review and reverse on these grounds.

D. The Mandatory Disclosure Obligations of Section 6254, subd. (f)(1) Are Consistent with the Rap Sheet Statutes (Penal Code Sections 13300–13305).

Penal Code sections 13300–13305 prohibit the public disclosure of local summary criminal history, in the aggregate, also known as "rap sheet[s]." (*See Westbrook v. County of Los Angeles* (1994), 27 Cal.App.4th 157, 164.) The statutory prohibitions on disclosing rap sheet information predated the amendment to the investigative files exemption adding section 6254, subd. (f)(1). (See Stats. 1975, ch. 1222 [enacting Pen. Code §§13300–13305]). To be coherent as a statutory regime, section 6254, subd. (f)(1) cannot be rendered irrelevant, or overruled, by Penal Code 13300–13305, a precursor statute.

Further, Respondent misrepresents the application of the 2004 constitutional amendment to statutes enacted before the amendment. It is not the case, as the Real Party in Interest asserts, that "the 2004 constitutional amendment requiring narrow construction of statutes limiting the right to access public records does not apply to statutes enacted prior to the amendment, including Penal Code, sections 11105 or 13300 (each enacted in 1975), which protect the privacy of criminal history information, including arrest records." Answer at 19. It is true that the 2004 constitutional amendment "d[id] not repeal or nullify . . . any constitutional or statutory exception to the right of access to public records [that were] in effect on the effective date of" the amendment, nor did it modify "the construction of any statute" protecting the right of privacy that was enacted before the amendment. (Const. Art. I, sec. 3, subd. (b)(3), (b)(5).) Nevertheless, the constitutional amendment clearly applies to previously enacted statutes, providing that "[a] statute, court rule, or other authority, *including those in effect on the effective date of this subdivision*, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Const. Art. I, sec. 3, subd. (b)(2) [emphasis added]. See also *Sierra Club v. Superior Ct.*, *supra*, 57 Cal. 4th at p. 166 [elaborating on the constitutional amendment's application to different statutes and distinguishing between statutes providing *access* to public records and any *exceptions* to the right of access to public records, the latter which remain unchanged following the constitutional amendment].)

II. *Kinney* Forecloses Access to Arrest Information Critical for Public Oversight of Fundamental Law Enforcement Activity.

There is heightened importance in public access to the basic arrest information at issue here. The public has a particular interest in effective oversight of law enforcement use of arrest authority considering the entrenched legacy of racism in our criminal legal system, and the extraordinary power of the police to use force and restrain liberty. By denying access to critical arrest information, including demographic information, the *Kinney* decision limits analyses of racial biases in policing and prosecution or the excessive use of force.

A. Widespread Racial Disparities in Policing Underscore the Importance of Public Access to Basic Arrest Information.

From the inception of our country's legal codes to our present criminal legal system, race has played a major role in who we criminalize.[5] Widespread racial disparities in stops, arrests, searches, and detentions demonstrate how the criminal legal system is often tainted by racial discrimination at the first point of contact. If *Kinney* is allowed to stand, the public would have scarce access to information about who the police arrest, where, and for what reason.

Racial discrimination has a long and entrenched history in U.S. policing and the criminal legal system. Policing was created in part to maintain slavery and enforce a system of racial apartheid throughout the Southern United States.[6] People of color continue to be stopped, searched, and arrested at higher rates than others for the same conduct.[7] Police officers are more likely to stop people of color for driving, walking, resting, or engaging in other innocuous behavior.[8] In 2018, a study revealed that, across law enforcement agencies, Black and Latine people in California were disproportionately stopped by police officers, with Black people often stopped at a rate multiple times their percentage of the population.[9] This data is particularly troubling when coupled with studies that show that, when California officers search Black and Latine people, officers are less likely to find drugs, weapons, or other contraband compared to when they search white people.[10]

B. Public Access to Arrest Information Is Essential to Analyze and Address Racial Biases in Policing and Prosecution and Police Abuses of Power.

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[5] The Sent'g Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Sept. 2014) p. 3 <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf> (as of June 16, 2022) [synthesizing "two decades of research establishing that skewed racial perceptions of crime have bolstered harsh and biased criminal justice policies"].

[6] Vitale, The End of Policing (Aug. 28, 2018) pp. 45–48.

[7] See Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Legal System* (May 2018) Vera Inst. of Just. p. 7. <https://www.vera.org/downloads/publications/for-the-record-unjustburden-racialdisparities.pdf> (as of June 16, 2022).

[8] Epp et al., Pulled Over: How Police Stops Define Race And Citizenship (2014) p. 7; Hinton, *supra*, at p. 7 fn. 61 [citing Gelman et al., *An Analysis of the New York City Police Department's 'Stop-and-Frisk' Policy in the Context of Claims of Racial Bias* (2007) 102 J. of the Am. Stat. Ass'n 813, 821-22; Stanford Open Policing Project <https://openpolicing.stanford.edu/findings/> (as of June 5, 2022) [racial biases in traffic stops, controlling for age and gender]; May et al., *Pretext Searches and Seizures: In Search of Solid Ground* (2013), 30 Alaska L.Rev. 151, 181.

[9] See CA. Dept. of J. Open J., *2018 Racial and Identity Profiling Act (RIPA)* <https://openjustice.doj.ca.gov/exploration/stop-data> (as of June 16, 2022); Ayres & Borowsky, *A Study Of Racially Disparate Outcomes In The Los Angeles Police Department* (2008) p. 43; Graham, *Black People in California Are Stopped Far More Often by Police, Major Study Proves* (Jan. 3, 2020) The Guardian <https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force> (as of June 16, 2022).

[10] CA. Dept. of J. Open J, *supra*, fn. 9 [Black and Latine people more likely to have "no action" taken in response to a stop as compared with white people].

Public access to the non-contemporaneous arrest information delineated in section 6254, subd. (f)(1) is necessary to analyze and contest racial bias in policing and prosecution. Police arrest reports typically include demographic information of the arrestee, including race or ethnicity. This is typically the primary source of demographic information included in prosecutorial databases.[11] If *Kinney* remains the law, such demographic information could be withheld from public access beginning soon after arrest. This would prevent arrestees, defendants, advocates, researchers, the media, and the public from analyzing and confronting racial bias in policing and prosecution.

Leaving *Kinney* in place creates a monumental shift from current law and practice. Indeed, our organizations often rely on section 6254, subd. (f)(1) to secure access to critical information, after the date of the relevant incidents, to assess law enforcement conduct. For instance, within the last two years, ACLU NorCal obtained, through CPRA requests, arrest records from the Siskiyou County Sheriff's Office, the Santa Cruz Police Department, and the San Francisco Police Department, from incidents that occurred months or years before the date of the requests. Analyses of these records were used to understand, *i.e.*, the racially disparate criminalization of people for cannabis cultivation and local ordinance enforcement in Siskiyou, the targeting of unhoused people for criminalization in Santa Cruz, and the San Francisco City Attorney's disproportionate targeting of ACLU NorCal clients in the City's proposed nuisance injunctions, respectively.[12]

Moreover, access to section 6254, subd. (f)(1) arrest information is critical where there are widespread patterns of excessive use of force and a history of abuse by local law enforcement. This is a notable problem in Kern County, the Respondent in this case. For instance, a 2017 report detailed how Bakersfield Police Department and Kern County Sheriff's Office ("KCSO") use severe force, including canine attacks, beatings, chokeholds, and weapons, against individuals whom they stop and arrest.[13] This excessive use of force "has landed disproportionately on people of color and people with disabilities."[14] As a result of records obtained pursuant to PRA records requests, relying on section 6254, subd. (f)(1), the report documents how KCSO frequently files "resisting" charges, without filing additional charges, against individuals attacked by canines whose "resisting" charges are based on resisting arrest after being bitten.[15] At the same time, data on excessive use of force is not proactively disclosed by law enforcement actors.[16] Without an

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[11] In response to requests for information, ACLU NorCal has repeatedly heard from both district attorneys and superior courts that the demographic information they have in their databases tends to be provided by law enforcement personnel.

[12] See, e.g., *Dilevon Lo v. County of Siskiyou* (E.D. Cal. Mar. 24, 2022) No. 21-CV-00999, Dkt. 60-1 [using Siskiyou County Sheriff's Office data produced in response to CPRA requests to show that law enforcement personnel "are engaged in a pattern of racial profiling and targeted enforcement."]; *California v. Aguilar-Benegas* (Sup. Ct. San Francisco [Apr. 12, 2021]) Case No. CGC-20-586732, [Verner-Crist Declaration ⁋⁋ 3–4; Opp to PI Mtn at p. 3] [using San Francisco Police Department data to challenge the justification put forth about the utility or necessity of an injunction on individuals]).

[13] ACLU California, "Patterns & Practices of Police Excessive Force in Kern County" (Nov. 2017) https://www.aclusocal.org/sites/default/files/patterns_practices_police_excessive_force_kern_county_aclu-ca_paper.pdf, at pp. 8–9.

[14] *Id.* at p. 8.

[15] *Id.* at p. 13, n. 74.

[16] See, e.g., Kern County Sheriff's Office, "Officer-Involved-Shooting (OIS) Incidents," https://www.kernsheriff.org/Transparency/OfficerInvolvedShootings (as of June 16, 2022)

obligation to disclose basic arrest information in response to CPRA requests, there would be limited accountability for these practices.

Kinney also creates inconsistencies with other statutes. The 2020 enactment of the Racial Justice Act ("RJA"), Assembly Bill 2542 (2019–2020 Reg. Sess.) Chapter 317, is intended to remove barriers to challenging racial bias in the criminal legal system. The RJA establishes that it is a violation of state law to "seek or obtain a criminal conviction" or "sentence on the basis of race, ethnicity, or national origin." (Pen. Code, § 745, subd. (a).) *Kinney* erects new, formidable obstacles to demonstrating RJA violations because it decreases access to information about the race or ethnicity of individuals prosecuted, or racially biased arrest practices.

C. The Disclosure of Basic Arrest Information Is of Heightened Importance Due to the Broad Interpretation of the Investigative File Exemption.

Information concerning circumstances of arrests, and the demographics of and charges against those arrested, is essential for the public to exercise accountability over police and prosecutors. This is particularly true given that courts have interpreted the investigative files exemption broadly to shield significant law enforcement records from public view.

Section 6254, subd. (f) exempts from the CPRA's disclosure obligations records of investigations conducted by "any state or local police agency." This Court has adopted a broad reading of the investigative files exemption and allowed indefinite withholding of covered records, even after investigations close. (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 355.) But this Court has recognized such a broad reading of the investigative files exemption as appropriate and consistent with the statutory scheme only because of specific obligations to disclose critical *information within* the investigatory files otherwise subject to indefinite withholding, citing section 6254, subds. (f)(1) & (f)(2) as information which an agency "must still disclose to the public" "even when the CPRA's exemption for law enforcement investigatory files applies." (*Id.* at p. 361.)

This Court has elsewhere recognized that the need for transparency at the heart of the CPRA applies with particular force to police:

> 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. 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.

(*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 297–98 [internal quotations and citations omitted].) As this Court likewise held in *Deukmejian*, the "exclu[sion of] the law enforcement function . . . from any public scrutiny under the California

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[listing "0" OIS's in 2021 despite public reports of at least two such shootings that year]; Kern County Sheriff's Office, "Critical Incident Videos," https://www.kernsheriff.org/Transparency/CriticalIncidents (as of June 16, 2022) [providing no videos later than 2020 and acknowledging that "the data reflected here may be incomplete"].

Act" would produce "a result inconsistent with [the CPRA's] fundamental purpose." (*Am. Civil Liberties Union Found. v. Deukmejian* (1982) 32 Cal. 3d 440, 449.)

Any narrowing of the exceptions to the investigative file exemption severely constrains public access to an already heavily guarded, and uniquely powerful, governmental actor. The provision at issue in *Kinney* is one critical exception to the investigative files exemption. This basic arrest information, expressly delineated by the Legislature and narrowly circumscribed as subject to disclosure "[n]otwithstanding" the investigative files exemption, is essential for any analysis of disparities in arrests, charges, convictions or sentencing.

III. It Is in the Public's Interest to Reject *Kinney*'s Temporal Limitations.

Strong legal arguments and policy justifications support a reading of section 6254, subd. (f)(1), without any temporal limitation. Yet no public interest justification supports a temporal limitation. (See Gov. Code section 6255, subd. (a) [allowing nondisclosure where "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record"].)

All parties acknowledge that, at a minimum, section 6254, subd. (f)(1) information must be disclosed for *some* period of time. Thus, unlike other records legislatively protected by the investigative files exemption, there can be no argument that the temporal limitation is necessary to protect "the very sensitive investigative stages of determining whether a crime has been committed or who has committed it." (See *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1070.) Indeed, the legislative history identifies the section 6254, subd. (f)(1) records as "nonsensitive law enforcement records." (Stats. 1982, ch. 83, § 1, pp. 242–244 & § 6, p. 246.)

Further, unlike when *Kusar* was decided, the information subject to section 6254, subd. (f)(1) is now typically held in computerized form.[17] Thus, contrary to the assertion of *Kusar*, there is no credible argument that governmental efficiency and the preservation of resources would compel the temporal limitation found in *Kinney*. (See *Kusar*, *supra*, 18 Cal.App.4th at p. 601 ["to generate, copy and disclose the requested information would impose a substantial financial burden on the sheriff"].) The categories of information required to be disclosed subject to section 6254, subd. (f)(1) are expressly and narrowly defined, and contrary to the assertion of *Kusar*, could not possibly "come close to consuming the [investigative files] exemption." (*Id.* at p. 596.)

Protecting the public's interest in continued access to the categories of records available under section 6254, subd. (f)(1) compels reading the statute without any temporal limitations.

[17] See, e.g., DOJ Open Justice, "RIPA Stop Data,"
<https://openjustice.doj.ca.gov/exploration/stop-data> (as of June 16, 2022) [Racial Identity Profiling Act of 2015 (RIPA) requires California law enforcement agencies to report stop data to the Attorney General, including both pedestrian and vehicle stops].

CONCLUSION

For the foregoing reasons, we urge this Court to grant the petition for review of the Court of Appeal's opinion in *Kinney v. Superior Court of Kern County*, (2022) 77 Cal.App.5th 168.

Respectfully submitted,

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PROOF OF SERVICE

I, Brandee Calagui, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is bcalagui@aclunc.org. On June 16, 2022, I served the attached,

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***Kinney v. Superior Court of Kern County* (No. S274622)**
(2022) 77 Cal.App.5th 168, Fifth District Court of Appeal No. F082845

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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

Executed on June 16, 2022 in San Francisco, CA.

Brandee Calagui