Court of Appeal Case No. B280021

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

LOS ANGELES TIMES AND CALIFORNIANS AWARE, CALIFORNIA AWARE
Petitioner and Appellants

vs.

SOUTHERN CALIFORNIA REGIONAL RAIL ASSOCIATION,
Defendants and Respondent.

Appeal from the Superior Court of the State of California
for the County of Los Angeles
Superior Court Case BS158628

Honorable Amy Hogue, Judge Presiding

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT SOUTHERN CALIFORNIA REGIONAL RAIL ASSOCIATION

*KENDRA L. CARNEY (SBN 251890)
kcarney@wss-law.com
WOODRUFF, SPRADLIN & SMART, APC
555 Anton Boulevard, Suite 1200
Costa Mesa, California 92626-7670
(714) 558-7000 - FAX (714) 835-7787

NUBIA GOLDSTEIN (SBN 272305)
nubia@churchwellwhite.com
CHURCHWELL WHITE LLP
1414 K. Street, Floor 3
Sacramento, California 95814
(916) 468-0950 - FAX (916) 468-0951

Attorneys for Amici Curiae League of California Cities, California State Association of Counties, and California Special Districts Association

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

DATED: April 27, 2018 Respectfully submitted,

WOODRUFF, SPRADLIN & SMART, APC

By: *s/ Kendra L. Carney*
KENDRA L. CARNEY
Attorneys for *Amici Curiae* League of California Cities, California State Association of Counties, and California Special Districts Association

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.200(c) of the California Rules of Court, the League of California Cities ("League"), California State Association of Counties ("CSAC"), and the California Special Districts Association ("CSDA") respectfully request permission to file an amicus curiae brief in support of the Real Party in Interest, Southern California Regional Rail Association. This application is timely made within 14 days after the filing of Petitioner's reply brief.

The League, CSAC, and CSDA represent cities, counties, and special districts with substantial interest in this matter given that all of their public agency members are required to comply with the Brown Act and most have utilized the security threat provision to hold a closed session meeting at some time. These public agencies will necessarily be affected by the outcome of this case, because a limitation on the application of a Brown Act closed session provision will have a profound impact on a public agency's ability to meet, deliberate, and act in response to perceived safety threats.

The trial court's conclusion here reinforces a principle of substantial importance to the League, CSAC, CSDA and the public their members serve. Specifically, the opinion correctly balances the need for accountability and transparency to the public with a public agency's duty to protect public safety without unnecessary public distribution of information that malfeasants may use to cause harm. Reversal of the trial court would be

contrary to the legislature's intent to protect against dissemination of information that may be used to carry out a threat, and would artificially limit the application of the Brown Act's security threat provision. If the Court adopts a limitation on a public agency's ability to deliberate and prevent a threat in private, it may force agencies to stop communicating the threat altogether to avoid publicizing sensitive information to those who might misuse it. Such a limitation would surely increase the potential for harm to the public as well as important government infrastructure.

Amici's counsel have examined the parties' briefs and are familiar with the issues and the scope of the presentations. The League, CSAC, and CSDA respectfully submit that the proposed amicus brief would be of assistance to this Court. First, the brief provides context to the arguments before this Court by explaining the common practices in California's cities, counties, and special districts with regard to closed session meetings under the Brown Act's security threat provision. Relatedly, the brief explains the practical impact if the trial court's decision is reversed. Requiring public agencies to discuss sensitive security information publicly may provide the very participants involved in a threat with an easy way to learn about security procedures in advance and increase their ability to thwart such plans; and will inevitably lead to a chilling effect on a public agency's ability to deliberate and act on matters posing a threat to the public. Finally, the brief notes the importance of deferring to local agencies in their

interpretation and perception of emergencies and threats, a principle that has broad impact far beyond the facts of this case.

Therefore, and as further amplified in the proposed brief, the League, CSAC, and CSDA respectfully request leave to file the brief combined with this application.

IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

The League of California Cities (League) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The California Special Districts Association (CSDA) is a California non-profit corporation consisting of over 800 special district members that provide a wide variety of public services to urban, suburban and rural communities. CSDA is advised by its Legal Advisory Working Group, comprised of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide or nationwide significance. CSDA has identified this case as having statewide significance for special districts.

CONCLUSION

For these reasons, the League, CSAC, and CSDA request leave to file the proposed amicus curiae brief.

DATED: April 27, 2018 Respectfully submitted,

WOODRUFF, SPRADLIN & SMART, APC

By: *s/ Kendra L. Carney*
KENDRA L. CARNEY
Attorneys for *Amici Curiae* League of California Cities, California State Association of Counties, and California Special Districts Association

BRIEF OF AMICUS CURIAE

1. INTRODUCTION

In 1952, the *San Francisco Chronicle* published a 10-part series entitled "Your Secret Government," exposing the secret meetings conducted by local governments. (League Of California Cities, *Open & Public V: A Guide To The Ralph M. Brown Act 9* (2016)). In response, legal counsel for the League of California Cities drafted state legislation to create a new state open meeting law. (*Ibid*.) Assembly Member Ralph M. Brown carried the legislation, which Governor Earl Warren signed into law on 1953. (*Ibid*.) The act, which came to be known as the Ralph M. Brown Act, or the Brown Act for short, added Chapter 9 [§§ 54950-58] to the California Government Code.

The central purpose of the Brown Act is to ensure the sovereignty of the people over the agencies which serve them. (Gov. Code, § 54950.2.) Essentially, the Brown Act decreed that actions and deliberations of public agencies must be undertaken publicly so that the people could have a voice in shaping policy. (Gov. Code, § 54950.)

Notwithstanding the open government mandate of these provisions, the Brown Act permits closed session meetings that fall within an explicitly delineated exception. (Gov. Code, § 54962.) The closed session exception recognized in Government Code section 54957(a) pertains to matters posing security threats. At its core, Section 54957(a) provides: "This chapter shall not be construed to prevent the legislative body of a local agency from holding closed sessions ... on matters posing a threat to the

security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric services, or a threat to the public's right of access to public services or facilities."

The League, CSAC, and CSDA prioritize transparency and access. Yet, transparency and access must occasionally yield to important considerations, such as public safety. The closed session provisions are exceptions in which the Legislature has weighed the need for strategic negotiating positioning, individual privacy, or public safety against the importance of transparency. These exceptions represent the Legislature's determination of how the balance should be struck between public access to meetings and the need for confidential candor, debate, and information gathering. Making decisions in closed session can help a public agency be a careful steward of public resources in labor negotiations, be respectful of privacy in employment reviews, and best protect the public without revealing security weaknesses. However, since closed sessions are exceptions to open meeting requirements, the authority for such sessions is narrowly construed. (Gov. Code, § 54950.) To this point, many of the exceptions include specific circumstances in which the public may be excluded. (Govt. Code §§ 54957(b) and 54956.8, respectively).

Unlike the exceptions that delineate specific circumstances in which the public may be excluded, in the case of security threats, the exception in Government Code section 54957(a) is, necessarily, broad. Without some freedom to protect sensitive

information and adapt to changing circumstances, security is readily compromised. Therefore, the health and safety of the people of California is enhanced by giving governing bodies the authority to meet in closed session to discuss a variety of security matters with the potential to impact government services, facilities, and public safety. Both the plain language and the purpose of this provision require that it be read and applied broadly to protect against evolving threats resulting from an ever-changing world. To curtail this provision would be to artificially limit the broad protection and discretion already afforded to public agencies by the Legislature.

2. ARGUMENT

A. The Court Should Not Place Artificial Limits on the Broad Scope of Section 54957(a).

The Court's "role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law." (*Haas v. Meisner* (2002) 103 Cal.App.4th 580, 585-586.) The Court's first consideration should be the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, the court should presume the Legislature meant what it said, and the plain meaning of the statute governs. (*Ibid.*; *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.) When the language of the statute is clear, there is no warrant to look beyond the text to legislative history to ascertain the statute's meaning.

1) By Its Plain Meaning, Section 54957(a) is Very Broad in Application.

The text of Section 54957(a) is clear. Its plain meaning explicitly permits only a broad application of the closed session exception for security threats. There are two key elements of the text which establish its plain meaning: "[1] matters posing a threat [2] to the security of public buildings, … to the security of essential public services, … or …to the public's right of access to public services or public facilities."

a) "Matters posing a threat"

The term "matter" (or, as used in Section 54957(a), "matters") refers generally to a "subject [or subjects] under consideration." (en.oxforddictionaries.com. English Oxford Living Dictionaries, 2018. Web. 20 March 2018; bracketed language added.) While this term in various contexts can mean different things, from a physical substance (e.g., "inorganic matter") to trouble or difficulty (e.g., "What's the matter with you?"), in the context of Section 54957(a) it clearly means "[a] subject of concern, feeling, or action: *matters of foreign policy; a personal matter*. (*The American Heritage Dictionary of the English Language* (3d ed. 1992) 1111 (definition 7 of "matter" as noun; italics in original).)

In Section 54957(a), the term "matter" is qualified by the phrase "posing a threat," which, in context, means presenting a risk or danger. While the term "posing" or "to pose" can mean several things, such as sitting for a portrait to be painted, in Section 54957(a) it means "to set forth a matter for

consideration." (en.oxforddictionaries.com. English Oxford Living Dictionaries, 2018. Web. 20 March 2018.) As one dictionary explained – using as an example the precise phrase found in Section 54957(a) – "pose" means "[t]o put forward; present: *pose a threat."* (*The American Heritage Dictionary of the English Language* (3d ed. 1992) 1412 (definition 3 of "pose" as transitive verb; italics in original).) And the common definition of "threat" is "thing likely to cause damage or danger." (en.oxforddictionaries.com. English Oxford Living Dictionaries, 2018. Web. 20 March 2018.).

It is therefore clear that the term "matters posing a threat" in Section 54957(a) means simply (and hence broadly): subjects presenting a risk, potential damage, or danger. The breadth of the plain meaning of the term becomes even more obvious when one considers words omitted from that term – words that could have easily been included had the Legislature intended to limit the scope of the exception. Tellingly, Section 54957(a) does *not* require that the threat posed be:

- "Imminent."
- "Active."
- "Substantial," in terms of magnitude.
- "Substantial," in terms of likelihood of occurrence.
- "Physical," to the exclusion of cyber threats or biological threats.
- Communicated to the local agency by a third party.

In other words, to establish the broad scope of the term "matters posing a threat," the words that are not in Section 54957(a) are

as instructive as those that are included. The Legislature understood that placing limits on the closed session exception for security threats, such as the six bulleted possibilities noted above, would severely compromise that provision, and thereby undermine the safety of the people the provision is designed to safeguard.

The text of Section 54957(a) leaves no room for placing a judicial gloss on the term "matters posing a threat" to limit its scope. The only limits on that term – limits that are minimal at best – may be derived from the other key element of the text: the extremely broad categories of matters identified in Section 54957(a) as the proper subjects of a closed session.

b) "The security of public buildings, … the security of essential public services, … or the public's right of access to public services or public facilities"

Under Section 54957(a), the first type of matter to which a threat may be posed that is the proper subject of a closed session is "the security of public buildings." This term is extremely broad. "Security" means "[f]reedom from risk or danger; safety." (*The American Heritage Dictionary of the English Language* (3d ed. 1992) 1632 (definition 1 of "security" as noun).) And the "building" referenced in Section 54957(a) whose security is threatened merely needs to be "public." The size, structure, function and purpose of the building are not factors. The nature and source of the security threat to the building is not a

consideration. And whether the threat is extrinsic or intrinsic to the building, or both, does not matter. Section 54957(a) recognizes that any type of threat to the security of any type of public building threatens harm to anyone who works there, to any member of the public who may be there to transact business with the government, and to the public at large, which would bear the costs of damage to the building and, depending on the circumstances, could suffer a myriad of harms caused by the breakdown in building security.

The second type of matter under Section 54957(a) that is the proper subject of a closed session is "the security of essential public services." This term is also extremely broad. Section 54957(a) supplies five examples of essential public services: "water, drinking water, wastewater treatment, natural gas service, and electric service." These examples are merely illustrative of the concept, as they are introduced by the term "including," which the law generally recognizes as a term of illustration rather than limitation. (*Hassan v. American Mercy Hospital* (2003) 31 Cal.4th 709, 717 ("the word 'including' in a statute is 'ordinarily a term of enlargement rather than limitation'") (citations omitted).) Just as the legal term "necessary" often has an expansive meaning in legislation, the term "essential" in Section 54957(a) likewise has an expansive meaning. (*Cf. San Francisco Firefighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 671-74 (discussing expansive meaning of the term "necessary").)

One can easily think of examples of essential public services not enumerated in Section 54957(a): police protection, fire protection, housing of prisoners in jails, maintenance of public streets and parks, public transportation, public education, public health programs, and public housing programs, to name but a few. Some of these essential public services have been understood as such for a century or more, and most have been understood as such for at least the better part of a century. But some of the services provided by government today are essential to the wellbeing of the community in ways that were unimaginable at an earlier time; in some cases, even a decade ago. For example, in today's world, public agencies frequently provide free Wi-Fi in locations throughout their jurisdictions. Many individuals who are unable to obtain Wi-Fi independently would consider this service essential to their ability to find work, complete schoolwork, or even connect with their doctor.

The third type of matter under Section 54957(a) that is the proper subject of a closed session is "the public's right of access to public services or public facilities." This term, like the first two, is extremely broad. "[A]ccess to public services" covers all public services, not just "essential" public services. Similarly, "access to public facilities" covers not just "buildings," but also, for example, outdoor spaces that might not be considered buildings. And "access" may include not just physical access in the traditional sense but also, for example, electronic access.

Considered as a whole, the three types of matters identified in Section 54957(a) encompass a very broad range of threats for

which it is proper for a legislative body of a local agency to hold a closed session.

In sum, the plain meaning of Section 54957(a), gleaned from the two key elements of the text, requires a broad application of the closed session exception for security threats. Any narrowing interpretation would represent a break from the legislative intent that is apparent on the face of the statute. Were this Court to narrow the closed session provision, it would have to stretch very far to read into it qualifiers that are not there. This the Court may not do. (*Dyna-Med Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379.) A straightforward, plain reading of Section 54957(a) reveals an extremely broad provision designed to maximize the ability of legislative bodies of local agencies to address an extremely wide range of security threats.

2) The History of Section 54957(a) Reinforces its Plain Meaning.

While the plain meaning of Section 54957(a) is clear, and hence resort to legislative history is unnecessary to ascertain legislative intent, the legislative history of Section 54957(a) reinforces the plain, very broad meaning derived from its text. Section 54957(a) was originally enacted in 1971. From then until now, the Legislature has consistently intended this exception be used by public agencies to protect public services and infrastructure from security threats. Moreover, the Legislature has, over time, refined and expanded the scope of this provision to leave no doubt that it broadly envelops varying forms and stages of potential threats.

In 1971, the California Senate recognized the need for a security-related closed session by expressing a concern that the presence of the press at meetings may publicize plans to address threats to security of public buildings and services, and also that the very participants engaging in security attacks can readily learn about the security plans in advance. (August 11, 1971 Letter from John W. Holmdahl to Governor Reagan, Governor's Chaptered Bill File, Senate Bill 833, Regular Session 1971, 9.) At the time, the executive director of the League of California Cities informed Governor Ronald Reagan that "measures such as SB 833 [the security provision] [were] so essential that even the newspapers recognize[d] the need for authorizing" a closed session meeting. (August 13, 1971 Letter from Richard Carpenter, Executive Director and General Counsel to League of California Cities to Governor Reagan, Governor's Chaptered Bill File, Senate Bill 833, Regular Session 1971, 10.)

In that same year, the Legislature amended the Brown Act to create a public security exception in Government Code section 54957. The exception allowed for closed sessions "with the Attorney General, district attorney, sheriff, or chief of police, or their respective deputies, on matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or public facilities." (Stats. 1971, ch. 587, §1, pp. 1180-1181 (amending Gov. Code, § 54957)). The legislation's sponsors reasoned "that high security trials, bombings of public buildings, and potentially violent mass protests [in the early 1970's] all require[d] planning for the

protection of the public and public employees." (Senate Bill 833, 1971)

After the tragedy of September 11, 2001, additional language expanded the public security exception. (Stats. 2002, ch. 1120, §2, pp. 7183-7184 (amending Gov. Code, § 54957). This amendment added language to specifically include "threat[s] to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electrical service." At the same time, the provision was further expanded to permit agency counsel, a security consultant or a security operations manager to attend the closed sessions. (*Id.*) There was no longer a requirement to meet specifically with a law enforcement or security expert – agency counsel became sufficient.

At the time, it was the intent of the Legislature that public agencies have the ability to adequately and securely prepare for threats to the safety of the public. (Senate Floor Analysis, AB 2645, June 25, 2002.) In 2014, the Legislature further expanded the provision to allow the Governor to meet in closed session with a public agency legislative body. At the time, the Legislature found that "without some freedom to protect sensitive information, security is compromised. Therefore, the health and safety of the people of California are enhanced by giving governing bodies the authority" provided by the further expansion. (Gov. Code, § 54957, Legislative Findings, Section 2.)

This history illustrates the true intent of Section 54957(a), as expressed by its plain meaning: to ensure the ability of

legislative bodies of local agencies to meet in closed session to effectively prepare for a wide variety and manner of threats to the safety of the public. Importantly, the security provision has not narrowed over time, but has grown to be more inclusive and more expansive. Going beyond the plain meaning of Section 54957(a) and delving into the history of that provision reveals no disconnect between the text of Section 54957(a) and its history.

3) Section 54957(a) is Tailored to Adapt to Changed Circumstances and All Manner of Security Threats, Including Ones Now Unforeseen.

At the time the Brown Act was enacted, only about half of U.S. households owned a television set. (Mitchell Stephens, *History of Television*, GROLIER ENCYCLOPEDIA, https://www.nyu.edu/classes/stephens /History %20of%20Television%20page.htm.) In the 1970s, technology had evolved to the point that individuals could purchase unassembled personal computers, but early computers could not perform many of the useful tasks that today's computers can. (History Channel, *Invention of the PC*, http://www.history.com/topics/inventions/invention-of-the-pc.) In 1984, the percentage of U.S. households with home computers was 8%. In 2013, that figure was 85%, with 74% of all households having Internet access. (U.S. Census Bureau, Computer and Internet Use in the U.S., http://www.census.gov/hhes/computer.) In 2015, nearly two-thirds of Americans owned a smartphone and other devices that connect people to the Internet. (Andrew Perrin,

Social Media Usage: 2005-2015, PEW RESEARCH CTR., Oct. 8, 2015, http://www.pewinternet.org/2015/ 10/08/social-networking-usage-2005-2015.)

In the early 1970s, despite fears related to increasing crime, nuclear proliferation, and the oil crisis, the average individual or city councilmember was not concerned that someone would intentionally pilot a plane into a building or carry a bomb the size of a suitcase onto public transportation and ignite it with the push of a cell phone screen. Neither would anyone then have imagined that someone in America could post a picture using a cell phone and reach approximately 2.5 billion people worldwide in less than a day. These technologies have increased the speed, volume, and frequency in which individuals communicate and share information. But, these technologies and the breadth of increasingly available online information have also caused a proliferation of threats and violence which run the gamut from cybercrimes to terrorist truck attacks to active shooter scenarios.

Public agencies experience a plethora of threats that the Legislature cannot conceivably anticipate when drafting or enacting legislation. Unfortunately, many threats remain unknown until a tragedy occurs or technology is developed that enables a dangerous act or circumstance. For example, the terrorist attacks on September 11, 2001, shocked most Americans and changed security protocols here and around the world. It was not until the likewise shocking April 20, 1999, massacre at Columbine High School that school districts began to prepare for active shooter threats, and the wave of school shootings since

then continues to demand innovative strategies to address the problem. Similarly, it was likely not until the February 7, 2008, Kirkwood, Missouri, City Council shooting, during which the City Attorney attempted to defend against an enraged shooter by throwing folding chairs, that city councils and police departments nationwide created security plans and took other measures to prevent a repeat of such a tragedy.

From a technology standpoint, software had to be developed and routinely used by corporations and public agencies before a concept such as "ransomware" could be considered a threat. Many public agencies store constituent data digitally and communicate with the public using a digital platform. A digital data breach may compromise the identities of many members of the public. Similarly, digital devices are frequently used to control transportation services and complex machinery and may be compromised by a computer virus. "Ransomware" is a type of malicious software from cryptovirology that threatens to publish the victim's data or perpetually block access to it unless a ransom is paid. (Young, A.; M. Yung (1996), *Cryptovirology: extortion-based security threats and countermeasures*, IEEE Symposium on Security and Privacy, 129–140.) Advanced malware uses a technique called cryptoviral extortion, in which it encrypts the victim's files, making them inaccessible, and demands a ransom payment to decrypt them. (*Id*.) For a public agency, loss of control of its digital systems can be disastrous. While the best-case scenario may be compromised data, the worst case can easily be

tragic disruption of transportation services or calamitous disruptions of utility services to the mass public.

The security threats closed session provision protects the public against the risk that is posed by discussing sensitive security information publicly. The risk or potential threat does not have to occur immediately, but public agencies should be able to avoid exacerbating a potential problem by discussing sensitive security information publicly. The Legislature has determined the nature of security risks is such that no artificial limitations on the structure of this topic should be permitted. Whether it be public access, digital data, transportation, or utility services, the broad, general language of the statute as written allows public agencies to consider threats to all aspects of the services each provides to prevent a disruption of the public's access to these important services and facilities.

Section 54957(a) is written sufficiently broadly to be adapted to technological, societal, and cultural change – which provides the flexibility needed to address the inevitable changes the future will bring, without distorting the text. Even considering only the technological advances throughout the last decade, it is clear that a plain reading of Section 54957(a) is not only correct as a matter of statutory construction, but also is appropriate to address the challenges, in terms of security threats, that the future inevitably will bring. While all potential threats cannot be foreseen, it is fair to say that both the plain language and the legislative intent of Section 54957(a) are well

suited to address future as well as present security threats, foreseen and unimaginable.

B. The Court Should Deferentially Review a Public Agency's Determination to Convene an Emergency Meeting and to Hold a Closed Session for a Security Threat, Whether Generally or as Part of an Emergency Meeting.

Cities and counties exercise the police power to protect the public health, safety, and welfare of their residents and of those who work in or travel through the jurisdiction. Certain special districts, too, have a responsibility to ensure that those matters within their purview, such as flood control, fire protection, water quality, or transportation, be regulated in a manner that promotes rather than endangers public health and safety. While the Brown Act strives to maximize transparency in public decisions, it recognizes that in certain circumstances maximum transparency contravenes the public interest. Accordingly, it has explicit exceptions—such as the emergency meeting provision (Section 54956.5) and the closed session exception for security threats (Section 54957(a))—that give legislative bodies the necessary flexibility to convene to discuss and address (through prompt, real-time responses, and in closed session when permitted) circumstances carrying the potential for great harm to the public. A public agency's real-time response merits substantial judicial deference for several reasons.

1) A Public Agency's Legislative Body is in the Best Position to Determine What Matters Constitute an Emergency Under Section 54956.5.

Public agencies require flexibility and the ability to move speedily in dealing with emergency situations. Section 54956.5(a) provides that an "emergency" includes "a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a majority of the legislative body." This contrasts with a "dire emergency," a much narrower concept defined in Section 54956.5(b) to mean "a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a legislative body to provide one-hour notice before holding an emergency meeting … may endanger the public health, safety, or both, as determined by a majority of the legislative body." While the term "work stoppage" in Section 54956.5(a) covers a particular type of "emergency," the other types of emergencies that provision recognizes—"crippling activity" and "other activity that severely impairs public health [or] safety"—are much more general categories that could encompass many different types of emergencies.

The plain language of Section 54956.5(a) and Section 54956(b) entrusts the majority of the legislative body of the local agency with determining whether an emergency meeting may be held. For purposes of Section 54956.5(a), this means that a majority of the body must determine whether a certain activity is

"crippling" or "severely impairs the public health [or] safety" of the local community. These are judgment calls about situations posing risks that are often difficult to quantify, comprehensively assess, or predict with certainty.

There are good reasons to leave these judgment calls with legislative bodies rather than courts, except where there has been a clear abuse of the legislative body's power to convene an emergency meeting. A local agency's legislative body is comprised of members of the community who have invested considerable time in understanding how their community functions and how their local agency works. They have become involved with the local agency's internal and external affairs, and, often with the aid of professional and experienced staff, are knowledgeable or can become knowledgeable about assessing and responding to potential crises that could harm the community. This is among their highest responsibilities, and as public officials they will be held accountable by the public for their handling of emergency situations that may be "crippling" or may "severely impair the public health [or] safety" of the community. Legislative bodies are in the best position to use real-time information to identify and address what events or threats comprise an "emergency" within the meaning of Section 54956.5(a). A legislative body's determination of an emergency therefore warrants substantial judicial deference. The same principle would apply to the body's determination of a "dire emergency" under Section 54956.5(b).

Without reasonable judicial deference, the legislative body may act slowly or ineffectively in emergencies for fear of being

found by a court, after the fact, to have violated the Brown Act in holding an emergency meeting to address what the body reasonably perceived to be a "crippling activity" or "activity that severely impair[s] the public health [or] safety." Public officials try to faithfully follow the law, and are presumed as a general matter to regularly perform their official duties. (Evid. Code, § 664.) They do not relish the prospect of receiving the black eye of a Brown Act violation; nor do they welcome placing the public agency's fiscal stability at risk through the award of attorneys' fees to a prevailing plaintiff in a Brown Act proceeding. Consequently, public agencies require flexibility and the ability to move quickly in dealing with emergency situations.

Local agencies operate most effectively in responding to a variety of emergencies, including a wide range of security threats such as cyber security or similar attacks on government networks or other agency-controlled assets involving public infrastructure and transportation, or agency-owned or controlled services, if they have confidence that courts reviewing their actions will give substantial weight to the legislative body's reasonable determination of emergency. Further, to preserve the legislative body's discretion to make those reasonable determinations, local agencies should have confidence that courts will review the body's determination in light of the evidence before the body at the time of its decision to hold the emergency meeting, and will refrain from "Monday morning quarterbacking" based on facts not known to the body when it made its determination, including a fact the body could not have known then – whether the

perceived emergency could materialize into a tragic event.

2) A Public Agency's Legislative Body is in the Best Position to Determine What Constitutes a Security Threat Under Section 54957(a) and Whether a Closed Session for a Security Threat may be Held at an Emergency Meeting Under Section 54956.5.

As discussed above, Section 54957(a) defines "security threat" broadly, as what constitutes a security threat may evolve over time or may be specific to the local community. As security threats become more sophisticated and particularized, it is critical that the local legislative body—which is equipped with comprehensive, real-time knowledge about the community—use all of the tools at its disposal to proactively address potential and real threats to the local public infrastructure and community, without being restrained by the fear that the judiciary will penalize its decisions made based on limited information during a time of potential or actual crisis.

The confidential setting provided by a closed session under Section 54957(a) is one such tool. Under Section 54957(a), a local legislative body can meet with the Governor, Attorney General, district attorney, agency counsel, sheriff, chief of police, or their respective deputies, security consultants, or security operations managers, on matters posing a threat to the security of public buildings, to the security of essential public services, including water, drinking water, wastewater treatment, natural gas

service, and electric service, or to the public's right of access to public services or facilities, in a confidential setting. A local legislative body will deliberate and weigh the necessity of entering closed session to address a security threat based on the limited, real-time information it has access to as the security threat is pending. The legislative body may ultimately choose to convene in closed session for a variety of reasons. These reasons include the need to speak candidly with experts on the security threat and other individuals with the authority to carry out protective measures in response to the threat, or to avoid unnecessary public panic by quelling threats before they materialize. However, the most important and common reason a legislative body enters closed session to discuss security threats is to prevent persons who might cause harm to the government and community from taking advantage of the community's vulnerability by keeping the threat, or in some cases details about a known threat, confidential.

Whatever the ultimate reason is, the local legislative body decision to go into closed session to address security threats properly rests with the legislative body because it is best equipped to rapidly respond to such threats. As has been discussed, no local agency has the same structure or services as another agency. Even where similar services exist, the implementation of those services will differ. Therefore, a local agency's legislative body has the most comprehensive, real-time information to address these potential and actual threats in a sensitive manner with the appropriate state and local officials.

Moreover, experts among the staff advising the legislative body, and other employees and consultants, including ones who may attend the closed session, often play a role in the decision to hold a closed session for a security threat. Officials who make such decisions do not do so on a whim, and courts should give substantial deference to their judgments in this regard.

If too exacting, judicial scrutiny of a local agency's determination of a security threat warranting a closed session under Section 54957(a) would likely have significant and negative implications on how public agencies address security threats. In some cases, legislative bodies might forego or postpone such closed sessions, and thereby avoid discussing potential threats, or avoid discussing them with the same degree of candor and completeness that would be possible in a closed session. Some security threats could go unaddressed, or not fully addressed, or not timely addressed.

It is the local legislative body's role to make policy decisions in the interest of the public's health, welfare, and safety. This is because a local legislative body, unlike the judiciary, has necessary, real-time information regarding the community's unique characteristics and vulnerabilities to make informed decisions impacting the local agency's jurisdiction. Therefore, judicial review of a public agency's emergency determinations under Government Code sections 54956.5 and 54957 should account for the local agency's role in creating policy and substantially defer to the local legislative body's decision to enter closed session to address security threats, with the

understanding that the local agency does not have the benefit of hindsight when making its decisions.

3. CONCLUSION

The security threat provision is written with the aim of protecting public safety from all manner of security threats, including unanticipated threats and security weaknesses. While its plain text and legislative history require that it be read broadly to achieve this goal, the security provision only compromises the people's right to public participation in the narrowest sense.

For the reasons discussed above the League, and its member cities, CSAC, and its member counties, CSDA and its member districts respectfully ask this Court to uphold the trial court's judgment as related to the legislative intent and application of the Brown Act's security threat provision to allow for closed session meetings.

DATED: April 27, 2018 Respectfully submitted,

WOODRUFF, SPRADLIN & SMART, APC

By: *s/ Kendra L. Carney*
KENDRA L. CARNEY
Attorneys for *Amici Curiae* League of California Cities, California State Association of Counties, and California Special Districts Association

CERTIFICATE OF WORD COUNT

I certify that the attached **APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSSOCIATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT SOUTHERN CALIFORNIA REGIONAL RAIL ASSOCIATION**, including footnotes, uses a 13-point Century Schoolbook font and consists of 7,729 words as counted by the Microsoft Word processing program used to generate the brief.

DATED: April 27, 2018 Respectfully submitted,

WOODRUFF, SPRADLIN & SMART, APC

By: *s/ Kendra L. Carney*
KENDRA L. CARNEY
Attorneys for *Amici Curiae* League of California Cities, California State Association of Counties, and California Special Districts Association

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 and not a party to the within action; I am employed by WOODRUFF, SPRADLIN & SMART in the County of Orange at 555 Anton Boulevard, Suite 1200, Costa Mesa, California 92626.

On April 27, 2018, I served the foregoing document(s) described as **APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT SOUTHERN CALIFORNIA REGIONAL RAIL ASSOCIATION** by placing true copies thereof enclosed in sealed envelope(s), as follows:

☐ **(BY MAIL)** I placed said envelope(s) for collection and mailing, following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and addressed as shown on the attached service list, for deposit in the United States Postal Service. I am readily familiar with the practice of WOODRUFF, SPRADLIN & SMART for collection and processing correspondence for mailing with the United States Postal Service, and said envelope(s) will be deposited with the United States Postal Service on said date in the ordinary course of business.

☒ **(BY ELECTRONIC SERVICE)** by causing the foregoing document(s) to be electronically filed using the Court's Electronic Filing System which constitutes service of the filed document(s) on the individual(s) listed on the attached mailing list.

☒ **(STATE)** I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 27, 2018, at Costa Mesa, California.

s/ Danielle Trulli
Danielle Trulli

LOS ANGELES TIMES AND CALIFORNIANS AWARE, CALIFORNIA AWARE v. SOUTHERN CALIFORNIA REGIONAL RAIL ASSOCIATION

COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE
CASE NO. B280021

LASC CASE NO. BS158628

SERVICE LIST

Kelly A. Aviles, Esq. LAW OFFICES OF KELLY AVILES 1502 Foothill Blvd., Ste. 103-140 La Verne, CA 91750 Telephone: (909) 991-7560 Facsimile: (909) 991-7594 Email: kaviles@opengovlaw.com	Attorneys for Petitioners/Appellants LOS ANGELES TIMES COMMUNICATIONS, LLC AND CALIFORNIANS AWARE
Jeff Glasser, Esq. LOS ANGELES TIMES COMMUNICAITONS LLC 202 West First Street Los Angeles, CA 90012 Telephone: (213) 237-5000 Email: jeff.glasser@latimes.com	Attorneys for Petitioners/Appellants LOS ANGELES TIMES COMMUNICATIONS, LLC AND CALIFORNIANS AWARE
Joseph T. Francke, Esq. CALIFORNIANS AWARE 2218 Homewood Way Carmichael, CA 95608 Telephone: (916) 487-7000 Facsimile: (916) 487-7999 Email: terry@calaware.org	Attorneys for Petitioners/Appellants LOS ANGELES TIMES COMMUNICATIONS, LLC AND CALIFORNIANS AWARE
Adam W. Hofmann, Esq. HANSON BRIDGETT LLP 425 Market Street, 26th Floor San Francisco, CA 94105 Telephone: (415) 995-5819 Facsimile: (415) 995-3483 Email: ahoffmann@hansonbridgett.com	Attorneys for Defendants/Respondents SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY
Honorable Amy D. Hogue Superior Court of California County of Los Angeles 111 North Hill Street Los Angeles, CA 90012	***Via U.S. Mail***