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August 15, 2023

Chief Justice Patricia Guerrero and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797
Via TrueFiling

RE: *Housley v. Los Angeles Times Communications (County of Ventura)*
Supreme Court of the State of California, Supreme Court California S.F., *Case No. S281005*

Senator Henry Stern's Letter in Support of Appellants' Petition for Review (Cal. Rules of Court, rule 8.500(g))

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

I submit this letter pursuant to Rule 8.500(g) in support of the petition for review in this matter filed on July 18, 2023 by Plaintiff/Appellants—families who lost their loved ones in the Borderline mass shooting(collectively, "the Borderline Families"). I urge this Court to grant review of the Court of Appeal's opinion given the importance of the issues raised in this case.

I. IDENTITY AND INTEREST OF SEN. HENRY STERN

I am a California Senate Senator. Since being elected in 2016, I have represented the nearly one million residents of Senate District 27 that includes parts of Ventura and Los Angeles Counties. I earned my law degree from University of California, Berkeley School of Law.

On the night of November 7, 2018, a murderer killed twelve innocent people at the Borderline Bar and Grill. The atrocity occurred in District 27, in the City of Thousand Oaks. At the time, I represented District 27 and the Thousand Oaks community in the State Senate. Over the past five years, I have met with the families of the Borderline victims numerous times, collaborated with them on stronger gun control regulations, and have followed their efforts to

protect their loved ones' privacy. I have witnessed first-hand the repeated trauma these families have been forced to experience.

I have a strong interest in protecting the rights and safety of my constituents. The Borderline shooting was the deadliest mass shootings that has ever occurred in District 27. As with any mass shooting, the County acquires personal and intimate details about the last moments of the victims' lives that are included in the autopsy reports. The Borderline Families assert that the unconstrained public dissemination of their loved ones' autopsy reports would violate their privacy rights. While time has passed since the Borderline mass shooting, the hurt has not gone away for these families. These families deserve to be heard on the merits of their assertion of privacy rights—to protect their own rights as well as those of other families who may face similar tragedy in the future. For far too many families (377 mass shootings since the start of 2023 alone, according to the Gun Violence Archives database), privacy and safety become central issues after the shock and grief. This is also a safety issue for my community because it is well-documented that the release of gruesome details of a mass shooting can have a contagion effect.

II. REVIEW IS NECESSARY TO ADDRESS AN IMPORTANT QUESTION OF LAW UNDER THE CALIFORNIA CONSTITUTION

This matter before the Supreme Court provides an opportunity to provide guidance for local governments and Californians as set forth in the California Constitution. The California Constitution contains an express right to privacy, enshrined by voters through Proposition 11 in 1972. (See Calif. Const., Art. I, § 1.) The state constitutional right is "broader and more protective of privacy than the federal constitutional right of privacy interpreted by the federal courts." (*Amer. Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 325-26). Privacy rights under the California Constitution may include informational and autonomy privacy, which includes medical information. (*Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal. 4th 1, 35-36).

The United States Supreme Court has clearly stated that privacy interests in similar instances to the Borderline massacre outweigh the desire for public disclosure. In a 2004 U.S. Supreme Court decision, the justices unanimously held that the victim's family interest in privacy outweighed the public interest in seeing pictures from an unfortunate death scene. (*National Archives and Records Administration v. Favish* (2004) 541 U.S. 157). The Supreme Court validated the rights of victims by stating that it would be proper "to withhold not just graphic excerpts or images from disclosure, but entire autopsy reports when doing so would

impinge on the privacy rights of surviving family members." (*Id.,* citing *Bowen v. U.S. Food & Drug Admin* (9th Cir. 1991) 925 F.2d 1225).

Since federal courts have recognized privacy rights that encompass the autopsy reports at issue here, and both the U.S. and California Supreme Courts believe that the breadth of California's right to privacy goes beyond federal rights to privacy, it is reasonable for the privacy rights asserted by the Plaintiffs-Appellants to be protected under the California Constitution.

III. REVIEW IS NECESSARY TO ADDRESS AN IMPORTANT QUESTION OF LAW UNDER THE CALIFORNIA PUBLIC RECORDS ACT

The Plaintiff-Appellants seek review of the Court of Appeal decision to release their relatives' autopsy reports pursuant to the California Public Records Act (CPRA) (Gov. Code, § 7921.00 et seq.). As noted in the Court of Appeal's decision, the CPRA furthers the constitutional aims of open governance and transparency. (Cal. Const., art. I, § 3(b)(1)). However, open governance and transparency must serve a public benefit of oversight and scrutiny. Being "mindful of the right of individuals to privacy" is intrinsic to the CPRA. (Gov. Code, § 7921.00).

There are numerous exemptions in the CPRA that protect individual privacy rights. This includes Section 7927.700 (formerly § 6254(c)) of the Government Code, which exempts files for which disclosure would amount to "an unwarranted invasion of privacy." It also includes a "catch-all exemption" that allows a public agency to withhold a record if it can demonstrate that "on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." (Gov. Code, § 7922.000.) Both exemptions allow courts to balance the factors, on a case-by-case basis, in favor of disclosure or withholding records. (*see also* Gov. Code § 7921.500.) The Borderline Families invoked both exemptions in the lower courts. It is important for the California Supreme Court to provide guidance to California local governments forced to grapple with the difficult balancing factors and delineate the importance of victim privacy within those balancing factors.

The Borderline Families' petition for review expressly mentions the privacy exemption in Cal. Gov't Code, § 7927.700 as an example of an applicable privacy exemption. In the submitted briefing, the Families also raised the "catch-all" exemption. While the County did not believe it could utilize the exemption in preventing the disclosure of the documents, there is important context for understanding how the "catch-all" exemption in California has been used to prevent unintended consequences, such as the chilling of citizen participation or academic research, which the Court can clarify by granting review. (See *Humane Soc'y of U.S. v. Superior Court of Yolo Cnty.* (2013)214 Cal.App.4th 1233, 1255[concluding that public interest in

nondisclosure due to the potential to impair the academic research process outweighed the public interest in disclosure]; *City of San Jose v. Superior Court, Santa Clara* (1999) 74 Cal.App.4th 1008, 1022[court held that public disclosure "would have a chilling effect on future complaints with minimal benefit to the public" for those who complained about municipal airport noise]). Here, the concern of exposing victims to additional trauma and unwarranted media scrutiny outweighs the limited information of full autopsy reports. Given that there is no active criminal case regarding the Borderline mass murder, there is very limited public interest in disclosure.

Furthermore, as the Borderline Families point out, the result would likely be different if this case turned on a public record dispute under federal law. (See Petition for Review at 14-20.) This case, thus, raises an important question of whether California should align with precedent of federal courts as well as certain state courts. (See *id*. at 16 & n.11 (collecting federal precedent); *Reid v. Pierce County* (Wash. 1998) 961 P.2d 333, 342 ["[T]he immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent."]; *Perry v. Bullock* (S.C. 2014) 761 S.E.2d 251, 253 [finding that autopsy reports "fit neatly" within the general understanding of medical records and thus are exempt from disclosure under the state's public records act]; *Lawson v. Meconi* (Del. 2006) 897 A.2d 740, 747 [recognizing personal privacy protections for decedent's family and prohibiting release of autopsy report]; *Galvin v. Freedom of Info. Comm'n* (1986) 201 Conn. 448, 461 [preventing disclosure of autopsy reports because they "might cause embarrassment and unwanted public attention to the relatives of the deceased"]; *Globe Newspaper Co. v. Chief Med. Examiner* (Mass. 1989) 533 N.E.2d 1356 [autopsy reports exempt from disclosure]).

Here, I am not aware of any evidence or information that would provide the public with any substantial benefit from disclosure. There must be a public benefit in order to disseminate this troubling information to the general public and media. In this case, the murderer who perpetrated the Borderline mass shooting is deceased. He poses no future threat. There is no dispute that all of the civilian victims were killed that evening by the perpetrator/murderer. There is no public benefit from releasing the autopsy report of the victims. The Supreme Court of California has consistently been a leader in our country in protecting privacy rights, and this case presents an opportunity for the Court to address privacy rights of surviving family members of a mass shooting. The Court should hear this case and clarify how victims' right to privacy is balanced with public interest in information. The Court should consider the merits of the Families' arguments based on full briefing and argument.

IV. CONCLUSION

The disclosure of autopsy records would constitute a painful, unwarranted invasion of privacy. I support the protection of privacy for families when there is no plausible public interest

to disclose information. I respectfully request that the Court grant review in this decision and address critical issues around the right to privacy under the California Constitution, the Public Records Act, and other existing laws.

RESPECTFULLY SUBMITTED,

Senator Henry Stern

cc: See attached service list

DECLARATION OF ELECTRONIC SERVICE

Case Name: **HOUSLEY v. LOS ANGELES TIMES COMMUNICATIONS (COUNTY OF VENTURA)**
Case No.: **S281005**

I am over the age of eighteen years and not a party to the within action. My business address is 1021 O Street, Suite 7710, Sacramento, CA, 95814.

On August 15, 2023, I electronically served the attached Amici Curiae Letter in Support of Petition for Writ of Mandate by transmitting a true copy via this Court's ***TrueFiling*** system, addressed as follow:

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I declare under penalty of perjury under the laws of the State of California the foregoing proof of service is true and correct. This declaration was executed on August 15, 2023.

Senator Henry Stern