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| AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, Plaintiff-Appellant, v. COUNTY PROSECUTORS ASSOCIATION OF NEW JERSEY, Defendant-Respondent. | Supreme Court of New Jersey, Docket No. 087789 <u>Civil Action</u> On Petition for Certification from a Final Judgment of the Superior Court of New Jersey, Appellate Division, Docket No. A-2572-20 Sat Below: Hon. Thomas W. Sumners, Jr., P.J.A.D. Hon. Richard J. Geiger, J.A.D. Hon. Ronald Susswein, J.A.D. |
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**BRIEF OF AMICI CURIAE LIBERTARIANS FOR TRANSPARENT
GOVERNMENT AND THE ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS OF NEW JERSEY**

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PRELIMINARY STATEMENT

This amici curiae brief is submitted on behalf of Libertarians for Transparent Government (LFTG), which participated below, and the Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ), which seeks leave to participate. The brief is intended to supplement the brief submitted by LFTG in the Appellate Division and better explain how CPANJ is a public agency that should comply with the Open Public Records Act (OPRA). In the alternative, however, LFTG maintains that CPANJ's records are accessible directly from any of the County Prosecutors because they make and receive them in the course of their official business. Finally, Amici ask the Court to adopt procedures to ensure in future cases that plaintiffs are entitled to discovery to ascertain whether an entity is subject to OPRA.

STATEMENT OF INTEREST OF PROPOSED AMICI CURIAE

A. About LFTG

LFTG is a non-profit organization devoted to transparency and openness in government. LFTG's founder is John Paff, a longtime transparency advocate who has litigated volumes of OPRA cases, many of which are published. See, e.g., Libertarians for Transparent Gov't v. Cumberland Cty., 245 N.J. 38 (2021); Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018). LFTG was granted leave to participate as amicus curiae in

the appeal below by the Appellate Division and thus may participate as amicus curiae in the Supreme Court as of right pursuant to Rule 1:13-9(d)(4)

B. About ACDL-NJ

The Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a non-profit corporation organized under the laws of New Jersey that serves as the primary organized voice for the criminal defense bar in New Jersey. Among other purposes, ACDL-NJ seeks to "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good." See ACDL-NJ By-Laws, Article II(a). Founded in 1985, ACDL-NJ has over 500 members across New Jersey.

ACDL-NJ has participated as amicus curiae in cases involving access to law enforcement records, recognizing that transparency benefits criminal defense attorneys and their clients. See, e.g., Rivera v. Union County Prosecutor's Office, 250 N.J. 124 (2022); Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021), certif. granted, 251 N.J. 465 (2022); In re Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6, 246 N.J. 462 (2021); North Jersey Media Group Inc. v. Twp. of

Lyndhurst, 229 N.J. 541 (2017). ACDL-NJ seeks leave to join LFTG’s brief and weigh in on this important issue before the Court.

STATEMENT OF FACTS¹

Amici adopt the statement of facts and procedural history as set forth by the American Civil Liberties Union of New Jersey (ACLU-NJ) in its Appellate Division brief and Petition for Certification. However, it writes separately to highlight CPANJ’s expansive use of public resources over the years. As detailed below, the County Prosecutors use attorneys from their offices to represent CPANJ in court—including in this case; use the personnel and technological resources of their office to do CPANJ business; attend meetings on CPANJ’s behalf during business hours; and fund CPANJ through county budgets and asset forfeiture accounts.

A. Government Attorneys Regularly Represent CPANJ in Court

CPANJ utilizes government attorneys from the County Prosecutor offices to do its business. In this case, the Mercer County Prosecutor’s Office (MCPO)² served as attorney of record and Assistant Mercer County Prosecutor Joseph

¹ Aa = Amici’s appendix

² A response to LFTG’s OPRA requests revealed CPANJ’s \$50 filing fee for its Motion to Dismiss ACLU-NJ’s complaint was listed upon MCPO’s October 2020 Judiciary Account Charge System (JACS) invoice. Thus it appears that MCPO also paid CPANJ’s filing fee. (Aa5).

Paravecchia briefed and argued the case in the trial court. MCPO and Paravecchia continued that representation in the Appellate Division until just before oral argument, when CPANJ evidently realized such representation significantly undermined its legal cause. In any event, CPANJ's use of government attorneys is expansive, as it has used Assistant Prosecutors and other government attorneys to represent it as amicus curiae before our appellate courts in more than thirty published matters, primarily over the past six years but dating back to 1986.³

³ See State v. Mackroy-Davis, 251 N.J. 217 (2022) (John McNamara, Jr., Morris County Chief Assistant Prosecutor); State v. Sims, 250 N.J. 189 (2022) (same); State v. Dangcil, 248 N.J. 114 (2021) (Linda A. Shashoua, Special Deputy Attorney General/Acting Assistant Camden County Prosecutor); State v. Chavies, 247 N.J. 245 (2021) (Frank J. Ducoat, Special Deputy Attorney General/Acting Essex County Assistant Prosecutor); State v. Szemple, 247 N.J. 82 (2021) (Paul H. Heinzl, Somerset County Assistant Prosecutor); Matter of Request to Release Certain Pretrial Detainees, 245 N.J. 218 (2021) (Anthony J. Robinson, First Assistant Warren County Prosecutor); State v. Desir, 245 N.J. 179 (2021) (Patrick F. Galdieri, II, Assistant Middlesex County Prosecutor); State v. Andrews, 243 N.J. 447 (2020) (Gregory R. Mueller, First Assistant Sussex County Prosecutor); Gramiccioni v. Dep't of Law & Pub. Safety, 243 N.J. 293 (2020) (Stephen C. Sayer, Cumberland County Assistant Prosecutor); State v. McCray, 243 N.J. 196 (2020) (John McNamara, Jr., Chief Assistant Morris County Prosecutor); State v. J.V., 242 N.J. 432 (2020) (same); Matter of Request to Modify Prison Sentences, 242 N.J. 357 (2020) (Joseph Paravecchia, Assistant Mercer County Prosecutor); Paff v. Ocean Cnty. Prosecutor's Office, 235 N.J. 1 (2018) (Ian C. Kennedy, Assistant Prosecutor and Annmarie Cozzi, Senior Assistant Prosecutor); State v. Gathers, 234 N.J. 208 (2018) (Joseph Paravecchia and Laura Sunyak, Assistant Mercer County Prosecutors); State v. J.L.G., 234 N.J. 265 (2018) (Laura Sunyak and Joseph Paravecchia, Assistant Mercer County Prosecutors); State v. S.N., 231 N.J. 497 (2018) (Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor Director); State v. Dickerson, 232 N.J. 2 (2018) (Jeffrey L.

B. The County Prosecutors Use the Resources of Their Offices to Conduct CPANJ's Business and Attend CPANJ Meetings During Regular Business Hours

The County Prosecutors conduct CPANJ business during their working hours and with the full resources of their government offices. For example, each month, a County Prosecutor attends a meeting of the Police Training Commission on CPANJ's behalf. The meetings take place at 11 a.m. on weekdays, during business hours. See Meeting Schedule, Police Training

Weinstein, Assistant Prosecutor); State v. Mercedes, 233 N.J. 152 (2018) (John McNamara, Jr., Supervising Assistant Prosecutor); State v. Robinson, 229 N.J. 44 (2017) (Paul H. Heinzl, Somerset County Assistant Prosecutor); State v. Ingram, 230 N.J. 190 (2017) (John K. McNamara, Jr., Morris County Supervising Assistant Prosecutor); Paff v. Ocean Cnty. Prosecutor's Office, 446 N.J. Super. 163 (App. Div. 2016) (Annmarie Cozzi, Bergen County Senior Assistant Prosecutor); State v. Pena-Flores, 198 N.J. 6 (2009) (Joseph P. Connor, Jr., Deputy First Assistant Morris County Prosecutor); State v. Fajardo-Santos, 199 N.J. 520 (2009) (Catherine A. Foddai, Senior Assistant Bergen County Prosecutor and John J. Scaliti, Senior Assistant Bergen County Prosecutor); In re Taylor, 196 N.J. 162 (2008) (John J. Scaliti, Assistant Bergen County Prosecutor and Catherine A. Foddai, Assistant Bergen County Prosecutor); State v. Williams, 190 N.J. 114 (2007) (Catherine A. Foddai, Assistant Bergen County Prosecutor); In re Grand Jury Appearance Request by Loigman, 183 N.J. 133, 135 (2005) (Mary R. Juliano, Assistant Monmouth County Prosecutor, on the brief); State v. Michaels, 136 N.J. 299, 302 (1994) (Simon Louis Rosenbach, Asst. Middlesex County Prosecutor); State v. Muhammad, 145 N.J. 23, 30 (1996) (Boris Moczula, First Assistant Passaic County Prosecutor); State ex rel. Cnty. of Cumberland v. One 1990 Ford Thunderbird, 371 N.J. Super. 228, 230 (App. Div. 2004) (Dolores M. Blackburn, Sussex County Prosecutor and Mary R. Juliano, Assistant Monmouth County Prosecutor—attorneys); State v. Olivio, 123 N.J. 550, 552 (1991) (Steven J. Kaflowitz, Sp. Deputy Atty. Gen. and Acting Asst. Prosecutor); Loigman v. Kimmelman, 102 N.J. 98, 100–01 (1986) (Gary H. Schlyen, Sr. Asst. Prosecutor).

Commission, <https://www.njoag.gov/about/divisions-and-offices/division-of-criminal-justice-home/police-training-commission/meeting-schedule> (last visited June 9, 2023). Hudson County Prosecutor Ester Suarez testified at the Judicial Conference on Jury Selection on behalf of CPANJ, which took place during business hours in November 2021. See Judicial Conference on Jury Selection, New Jersey Courts, <https://www.njcourts.gov/courts/supreme/judicial-conference-jury-selection> (last visited June 9, 2023). Given CPANJ's service on multiple committees, including the Joint Committee on Criminal Justice, it is likely that County Prosecutors regularly attend other meetings on CPANJ's behalf during daytime business hours as part of their official business.

The County Prosecutors also utilize the resources of their offices to conduct CPANJ business, such as their government-issued email accounts and their secretaries and other staff to schedule meetings and distribute agendas. It appears that CPANJ has also utilized government-owned video conferencing platforms for its remote meetings. (Aa4-Aa5). Publicly available materials online show that each of the County Prosecutors promote CPANJ scholarships on their Office's social media or websites, and applicants were told to submit their materials directly to the official address of a Prosecutor's Office. See, e.g.,

<https://www.hudsoncountyprosecutorsoffice.nj.org/wp-content/uploads/2022/07/stamler.pdf>. See also Aa5.

Each year, CPANJ holds an Annual College, which generally takes place at the Borgata in Atlantic City and is attended by hundreds of prosecutors and assistant prosecutors, as well as the Attorney General and state law enforcement officials. See 2018 Prosecutors' College Convenes, Morris County Prosecutor's Office, Nov. 20, 2018, <https://www.morriscountynj.gov/Departments/Prosecutor/Prosecutor-Press-Releases/2018-Prosecutors-College-Convenes>; 2022 Annual College Website, <https://www.cpanj2022.opspolice.com/> (displaying the official seal of the Cape May County Prosecutor's Office); 2017 Annual College Website, <https://appadvice.com/app/cpanj-2017-annual-college/1293201229> (noting the college is "hosted by the Morris County Prosecutor's Office"). According to responses to OPRA requests served upon the county governments, CPANJ apparently utilizes county administrative employees as staff at the College. (Aa8-Aa9). For example, records produced by Mercer County showed that the County paid nearly \$4,000 to CPANJ to cover registration, food, and lodging of the following Mercer County employees to attend the 2022 CPANJ Annual College as "Event Staff": Wendy Santos (Legal Secretary), Astrid Brunbach (Administrative Assistant), Maribel Cartagena (Unknown Title), Karen Christie

(Data Entry), Jaqueline Estrada (Unknown Title), Dawn Fennimore (Title Unknown), Maria Ristaino (Clerk), Michelle Tronzinger (Title Unknown). (Aa8-Aa9).

C. CPANJ Receives Substantial Public Funds

CPANJ receives hundreds of thousands of dollars in public funds each year. Indeed, most of its income seems to come from taxpayer funds. According to The State of New Jersey Transparency Center/ YourMoney.NJ.Gov, the Department of Law and Public Safety paid CPANJ a total of \$55,415 in 2021 and 2022 for conferences and travel. See Expenditures, State of New Jersey Transparency Center/YourMoney.NJ.Gov, <https://data.nj.gov/Government-Finance/YourMoney-Agency-Expenditures/apet-rp2i> (last visited June 8, 2023).

According to responses to OPRA requests served upon the counties, CPANJ has received at least \$2,683,000 in funding from county governments since 2015. (Aa8). In 2022 alone, CPANJ received at least \$474,800 from county governments. (Aa8). It is concerning that at least some of these funds are coming from Asset Forfeiture accounts, meaning that assets seized directly from defendants via a mechanism that is widely criticized for disproportionately impacting low-income people and people of color are being used as a funding mechanism for CPANJ. (Aa9). The full scope of Asset

Forfeiture funds is unknown.

LEGAL ARGUMENT

I. CONSISTENT WITH THE LEGISLATURE’S INSTRUCTION TO CONSTRUE OPRA IN FAVOR OF ACCESS AND WITH THE PUBLIC POLICIES UNDERLYING OPRA, THE COURT SHOULD FIND THAT CPANJ IS A “PUBLIC AGENCY” THAT MUST COMPLY WITH OPRA

Under OPRA’s predecessor statute, the Right to Know Law (RTKL), the public had a right to access only those limited records that were required by law to be made, maintained, or kept on file by

any board, body, agency, department, commission or official of the State or of any political subdivision thereof or by any public board, body, commission, or authority created pursuant to law by the State or any of its political subdivisions, or by any official acting for or on behalf thereof

[N.J.S.A. 47:1A-2.]

When the Legislature enacted OPRA, it broadened the definition of “government record” so that most records are accessible except for limited exemptions, which are to be construed in favor of access. N.J.S.A. 47:1A-1. It also substantially expanded the types of entities that must comply with OPRA, to ensure that government officials do not try to circumvent transparency by forming entities that are technically private on paper yet controlled by public officials and funded with taxpayer monies.

OPRA defines a “public agency” or “agency” as:

[A]ny of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

[N.J.S.A. 47:1A-1.1 (emphasis added).]

Thus, OPRA applies not just to traditional government agencies as the RTKL did, but also to instrumentalities of the government. There is no requirement that such instrumentalities be “created pursuant to law.” N.J.S.A. 47:1A-2.

In determining whether CPANJ is a “public agency,” the Appellate Division first sought to determine how a County Prosecutor fits within the statutory definition. It concluded that a County Prosecutor is either an instrumentality of the Executive Branch or an “office.” Thus, even if CPANJ is an instrumentality of the County Prosecutors as ACLU-NJ argued, the Appellate Division held that CPANJ is not a “public agency” because N.J.S.A. 47:1A-1.1 does not include “instrumentalities of instrumentalities” or “instrumentalities of

offices.” American Civil Liberties Union of New Jersey v. County Prosecutors Association of New Jersey, 474 N.J. Super. 243, 264 (App. Div. 2022).

Amici believes that the Appellate Division erred by applying a hyper technical definition of “public agency” and ignoring key facts that are relevant to the issue, such as CPANJ’s expansive use of public resources to conduct its business. As noted above, there is little distinction between a County Prosecutor’s Office and CPANJ—at times, even the official seal of a County Prosecutor’s Office has been affixed to CPANJ materials. And the County Prosecutors routinely use their staff—both legal and administrative—to conduct CPANJ’s business. This makes CPANJ a very different organization than an ordinary nonprofit that is truly private, not controlled by public officials, not funded with taxpayer money, and not subject to OPRA.

In addition to the arguments made in LFTG’s prior brief, there are at least two viable paths to finding CPANJ to be a public agency that is subject to OPRA. First, the Court should consider the unique, hybrid role of the County Prosecutors and find CPANJ to be a public agency to avoid an absurd result that would allow them to evade OPRA while using the full resources of their offices to conduct CPANJ’s business. There is little distinction between the County Prosecutors and CPANJ. Second, the Court could find that CPANJ is an instrumentality of the Governor and the Attorney General. Under either

approach, the Court should be mindful that OPRA is to be construed liberally in favor of public access. N.J.S.A. 47:1A-1.

A. Given the Unique, Hybrid Role of County Prosecutors, the Court Should Find CPANJ to be a Public Agency to Avoid Absurd Results

Amici adopt Point I(A) of ACLU-NJ’s Petition for Certification brief, which discusses the unique, hybrid role of County Prosecutors as both constitutional officers and state actors. The Appellate Division applied a hyper technical definition of “public agency” when the statute is supposed to be construed in favor of access.⁴ N.J.S.A. 47:1A-1. As evidenced by prior decisions of this Court, the definition of “public agency” is flexible to avoid absurd results and to serve OPRA’s core purpose of transparency in government. See Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535

⁴ The Appellate Division’s decision is also surprisingly silent about CPANJ’s expansive use of public resources to conduct its business. For example, the court never acknowledges that CPANJ uses Assistant Prosecutors to represent it in court, including in this case. The receipt of public funds and use of public resources is an important part of the analysis and should have been considered by the Appellate Division. See Fair Share Housing Ctr., Inc. v. N.J. State League of Muns., 207 N.J. 489, 495 (2011) (“Sixteen percent of the League’s budget is comprised of taxpayer public funds in the form of membership fees from each municipality. More than one-half of the League’s annual income is raised at a yearly convention.”); Wronko v. N.J. Soc’y for the Prevention of Cruelty to Animals, 453 N.J. Super. 73, 81 (2018) (rejecting agency’s argument that it did not receive public funds because it did not have a “line item” in the budget because the organization received portions of fines issued for animal cruelty).

(2005) (stating that courts should not “elevate form over substance to reach a result that subverts the broad reading of OPRA as intended by the Legislature”).

The definition’s flexibility is demonstrated by the Court’s decision in Sussex Commons Assocs. LLC v. Rutgers, 210 N.J. 531 (2012). There, as Justice Albin noted in his concurrence, a legal clinic at Rutgers University School of Law fell within the plain language of N.J.S.A. 47:1A-1.1’s definition of “public agency.” Sussex Commons, 210 N.J. at 547-48 (Albin, J., dissenting). However, the Court nonetheless found that the Legislature could not have intended for OPRA to apply to teaching clinics that function like private law firms. Id. at 544. The Court concluded that it would not “further the purposes of OPRA to allow public access to documents related to clinic cases” and thus it found that legal clinics at public law schools are categorically not subject to OPRA. Id. at 547. Thus, even where an entity would technically fall within the definition of “public agency,” this Court refused to apply the statute in a manner that would lead to an absurd result and not serve OPRA’s core purpose.

The inverse is also true. Where an entity might not fall within a rigid and hyper technical reading of N.J.S.A. 47:1A-1.1, the Court should nonetheless find the entity is a public agency if it would serve OPRA’s core purposes and if a holding to the contrary would be absurd. Here, finding CPANJ to be a public agency would serve OPRA’s core purposes of government transparency and

guarding against waste and corruption, among other things. CPANJ’s budget consists primarily of taxpayer funds, paid in the form of membership dues and conference registration fees, and the public deserves to see how those funds are spent. See Paff v. New Jersey State Firemen's Ass'n, 431 N.J. Super. 278, 291 (App. Div. 2013) (noting the management of public funds “is an issue of public interest that OPRA was intended to address”); Livecchia v. Borough of Mount Arlington, 421 N.J. Super. 24, 38 (App. Div. 2011) (“Rooting out the possible misuse of the public fisc and abuse of the taxpayer's trust is the bedrock upon which OPRA rests.”). If the Annual College were hosted by the County Prosecutors themselves through their offices,⁵ presumably they would need to comply with public bidding requirements and ensure that all contracts were competitive. But because the Annual College is technically hosted by CPANJ, no public bidding laws apply. The public deserves to see which vendors are receiving CPANJ’s contracts and whether taxpayer funds could have been spent more wisely.

There is also a danger in allowing members of the public to make contributions to CPANJ without any oversight, perhaps to try to sway a particular County Prosecutor about an investigation or a charging decision. See,

⁵ As noted in the Statement of Facts, the 2022 Annual College Website contains the official seal of the Cape May County Prosecutor’s Office, and the 2017 Annual College Website notes the conference is “hosted by the Morris County Prosecutor’s Office.” Thus, it appears the College is really hosted by the County Prosecutors even done in CPANJ’s name.

e.g., Sussex Commons, 210 N.J. at 542 (noting OPRA was enacted to guard against wasteful spending, corruption, and misconduct). Although Amici of course are not accusing anyone of engaging in such corruption, OPRA exists to ensure that it never occurs. Transparency is a safeguard.

There is little distinction between the County Prosecutors and CPANJ—they are essentially one and the same. Considering the two distinct “elevate[s] form over substance.” Lafayette Yard, 183 N.J. at 535. It also leads to absurd results. The Legislature expanded the definition of “public agency” in OPRA to ensure government officials do not create nonprofit organizations and other instrumentalities to evade transparency. It could not have intended that instrumentalities of the State, instrumentalities of the Legislature, and instrumentalities of political subdivisions are subject to OPRA, but not the instrumentalities of constitutional officers. That would be a glaring oversight.

Because CPANJ is comprised of New Jersey’s twenty-one County Prosecutors, its governing board consists of the County Prosecutors, its budget is largely financed through public funds, its employees are members of PERS, and its mission is to advocate for policies that benefit the County Prosecutors and the State, it is a public agency. See Fair Share Housing, 207 N.J. at 492–93 (finding the League of Municipalities subject to OPRA for those same reasons).

B. CPANJ is an Instrumentality of the Governor and Attorney General

CPANJ is a public agency pursuant to Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519 (2005). There, the Court found that a private, nonprofit development corporation established to assist the City of Trenton redevelop a piece of property was a “public agency” subject to OPRA because it was an “instrumentality” of the City. The nonprofit argued that it was not “created” by the City, but instead was created by “public-spirited citizens of the city” who incorporated it. The Court nonetheless found it to be an instrumentality of the City because it worked to benefit the City and the “Mayor and City Council have absolute control over the membership of the Board” by appointing its members. Id. at 535.

The same is true here. Although the County Prosecutors themselves technically created CPANJ,⁶ the Governor and the Attorney General effectively control the full membership of CPANJ’s Board. CPANJ’s Board is comprised solely of County Prosecutors, each of whom are appointed by the Governor for a five-year term. N.J. Const., Art. VII, § II, ¶ 1. The Governor may also remove a County Prosecutor for cause prior to the expiration of the five-year term.

⁶ The record below is sparse, and many facts are assumed (or based on uncertified statements of counsel during arguments) because CPANJ was purposefully opaque in its defense. More information about how CPANJ was formed, what its bylaws state

N.J.S.A. 52:17B-110. Similarly, the Attorney General supervises every law enforcement officer in the state, including the County Prosecutors. N.J.S.A. 52:17B-103. The Attorney General may supersede a County Prosecutor and, after having done so, will determine which powers and duties the County Prosecutor shall retain. N.J.S.A. 52:17B-106. Thus, both the Governor and the Attorney General control the membership of CPANJ's Board.

Moreover, because of his supervisory powers over the County Prosecutors, the Attorney General also has control over CPANJ. If, for example, the Attorney General did not want CPANJ to use Assistant Prosecutors when it appears as amicus curiae before this Court or did not want the County Prosecutors to tend to CPANJ business during business hours, the Attorney General could prohibit it by ordering the County Prosecutors to cease those practices. They would have no option but to comply.

CPANJ is not just controlled by the Governor and the Attorney General, but it also works as an instrumentality of the Attorney General and the State's law enforcement function. Per its mission, CPANJ works to ensure "the orderly administration of criminal justice within the State and the fair and effective enforcement of the constitution and laws of the state through the cooperation of all law enforcement agencies." CPANJ, 474 N.J. Super. at 252. As the Appellate Division recognized, CPANJ assists the Attorney General by participating as

“stakeholders in the drafting of directives and guidelines to be issued by the Attorney General, which are binding on the prosecutors.” Id. at 267. Its meetings serve as “a convenient forum for the Attorney General to meet with the county prosecutors.” Ibid. In the past, the Attorney General and CPANJ have issued joint policies and guidelines for prosecutors to follow. See, e.g., State v. Jackson, 128 N.J. 136, 136 (1992) (discussing the Guidelines for the Designation of Homicide Cases for Capital Prosecutions adopted by the Attorney General and CPANJ); State v. Perry, 124 N.J. 128, 186 (1991) (discussing the Guidelines for the Designation for Capital Prosecutions adopted by the Attorney General and CPANJ); State v. Vinegra, 73 N.J. 484, 517 (1977) (discussing the Grand Jury Manual for Prosecutors; Criminal Justice Standards, adopted by the Attorney General and CPANJ). See also Pa99 (Joint Policy Statement by the Attorney General and CPANJ regarding Prosecutor Review of Search Warrant Applications).

Moreover, each year, hundreds of law enforcement employees—County Prosecutors, the Attorney General, Assistant Prosecutors, Deputy Attorneys General, and others—attend the Annual CPANJ College where they receive uniform training on law enforcement topics, which greatly benefits the State and improves its law enforcement functions. Additionally, CPANJ frequently participates as amicus curiae before this Court, giving a uniform perspective of

the County Prosecutors, which benefits the administration of justice in the State. These arguments are made by government attorneys, and CPANJ is serving as an instrumentality of the State when it makes them.

Thus, if for some reason the Court deems the County Prosecutors to be instrumentalities or offices, the Court should nonetheless deem CPANJ to be an instrumentality of the State because it is controlled by the Governor and the Attorney General and performs functions to benefit the State.

C. If the Court Finds that CPANJ is Not a Public Agency, Then There are Serious Legal Implications

As noted above, the County Prosecutors utilize county employees to staff CPANJ's Annual College; ask county governments to pay their membership dues; ask county governments to pay the conference registration fees of the hundreds of staff from their offices to attend CPANJ's Annual College; utilize Assistant Prosecutors to represent CPANJ in court; utilize their administrative staff to schedule CPANJ meetings; advertise CPANJ's programming and scholarships on their official government websites and social media; and utilize the technology from their offices to conduct CPANJ business, which they routinely do during business hours. The Court should find that CPANJ is subject to OPRA. Any contrary holding means that the County Prosecutors might be violating the New Jersey Constitution or state ethics or criminal laws when it uses taxpayer money to fund private scholarships and when it uses government

attorneys and other resources to conduct its business. See N.J. Const. art. VIII, 3, ¶2; ¶3 (prohibiting government from using government resources in aid of any individual, association or corporation); N.J.A.C. 4A:2–2.3 (prohibiting an employee from “misuse of public property”; N.J.S.A. 2C:27-12 (making it a crime to use public resources for an unauthorized purpose). CPANJ existed long before the Legislature enacted OPRA and it has always utilized government resources to do its business. See, e.g., Michaels, 136 N.J. 299 (CPANJ using Assistant Prosecutor to represent it in court); Muhammad, 145 N.J. 23 (same); State ex rel. Cnty. of Cumberland, 371 N.J. Super. 228 (same); Olivio, 123 N.J. 550 (same); Loigman, 102 N.J. 98 (same). The Legislature could not have intended to permit CPANJ to violate the Constitution or other laws or to so blatantly evade transparency—it instead intended that CPANJ is a public agency.

D. If the Court Finds That CPANJ is Not a Public Agency, Then Certain Privileges Cannot Apply

OPRA excludes “inter-agency or intra-agency advisory, consultative, or deliberative material” from the definition of government record. N.J.S.A. 47:1A-1.1. This Court has said the purpose of that deliberative process privilege is to promote the government’s “full and frank discussion of ideas when developing new policies, or in examining existing policies and procedures[.]” Educ. Law Ctr. v. New Jersey Dep't of Educ., 198 N.J. 274, 295 (2009).

For the privilege to apply, however, the communications must be *inter-* or *intra-*agency. N.J.S.A. 47:1A-1.1. Communications with third parties are not subject to the privilege. If the Court finds that CPANJ is not a public agency, then the communications and policy discussions it has with other government officials, such as the Attorney General, will not be subject to any privilege. The Legislature could not have intended such a result, given the long history of the County Prosecutors—via CPANJ—and the Attorney General collaborating policy issues. Thus, the Court should find CPANJ to be a public agency.

II. IN THE ALTERNATIVE, SHOULD THE COURT FIND THAT CPANJ IS NOT A PUBLIC AGENCY, EVERY RECORD THAT ANY COUNTY PROSECUTOR OBTAINS FROM CPANJ IS SUBJECT TO OPRA THROUGH THE COUNTY PROSECUTORS' OFFICES

If the Court finds that CPANJ itself is not a public agency, then, consistent with Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285 (2017), the Court should still find that CPANJ's records are accessible via the County Prosecutors' Offices because they constitute "government records." OPRA defines "government records" as

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, **that has been made, maintained or kept on file in the course of his or its official business by any officer**, commission, agency or authority of the State or of any political

subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1 (emphasis added).]

The Court has said this definition is “broad,” Paff v. Galloway Twp., 229 N.J. 340, 352 n. 5 (2017), and like all provisions of OPRA the definition must be construed in favor of access. N.J.S.A. 47:1A-1. When the County Prosecutors tend to CPANJ’s business or attend meetings on CPANJ’s behalf, they are doing so in their official capacities as County Prosecutors. As the Appellate Division noted, “CPANJ’s monthly meetings are a convenient forum for the Attorney General to meet with the county prosecutors. Such meetings could be convened, of course, without the existence of CPANJ.” CPANJ, 474 N.J. Super. at 267. The County Prosecutors should not be permitted to escape OPRA by simply labeling their meetings and communications with the Attorney General as occurring on behalf of CPANJ, when there is no functional difference between a meeting with the County Prosecutors and a meeting with CPANJ.

Whenever a County Prosecutor makes, maintained, or receives a document on behalf of CPANJ, that document satisfies the definition of “government record” and is subject to OPRA. Therefore, because a County

Prosecutor has undoubtedly received CPANJ's funding records, meeting agendas, and other documents that ACLU-NJ seeks, they are accessible records. Thus, even if the Court finds that CPANJ itself is not subject to OPRA, the public should still be able to access these records directly from the County Prosecutors' Offices. This, of course, makes access much more difficult in that it will require multiple requests to try to ascertain which County Prosecutors maintain which records, but such a holding would at least prohibit the County Prosecutors from circumventing OPRA altogether.

III. WHERE A REQUESTOR PLEADS A PRIMA FACIE CASE THAT AN ENTITY IS SUBJECT TO OPRA, COURTS SHOULD GRANT DISCOVERY AND THE BURDEN OF PROOF SHOULD BE UPON THE ENTITY

There is enough in the public record to establish that CPANJ meets the definition of public record, so a remand for discovery is not necessary in this case. The Court should find that CPANJ is a "public agency" and compel it to comply with ACLU-NJ's OPRA request. But it is worth noting that the trial court dismissed ACLU-NJ's lawsuit based on a flimsy record and without granting ACLU-NJ the right to any discovery. CPANJ ensured such by filing a motion to dismiss and arguing that ACLU-NJ had not proven that it was subject

to OPRA, even though CPANJ alone has access to the facts that would be relevant to the court's analysis.

Although OPRA proceedings are generally summary actions pursuant to N.J.S.A. 47:1A-6 and Rule 4:67-1, discovery is important in matters like this where one party exclusively holds all the information relevant to the legal question at stake. In this case, CPANJ alone knows important details about its meetings, how the county prosecutors make decisions for CPANJ, the full scope of public resources CPANJ is using, the relationship it has with other officials such as the Attorney General, and what its bylaws state, yet it disclosed none of that information to the court during the summary proceeding and instead moved to dismiss based on ACLU-NJ's alleged "failure to state a claim." CPANJ should have had the burden of proving that it was not subject to OPRA but it was intentionally opaque.

The Court should make it clear that in the future, where a plaintiff establishes a colorable claim that a non-profit organization satisfies the definition of "public agency," then courts should grant discovery to the plaintiff to develop a record and get to the truth of the matter. The Court should also make it clear that the burden rests upon the entity, not the requestor. See N.J.S.A. 47:1A-6. These entities cannot use their informational advantage to defeat a lawsuit and evade compliance with OPRA.

CONCLUSION

As argued above, the Court should find that CPANJ is subject to OPRA.

Respectfully Submitted,

/s/ CJ Griffin

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AMERICAN CIVIL LIBERTIES
UNION OF NEW JERSEY,

Plaintiff-Appellant,

v.

COUNTY PROSECUTORS
ASSOCIATION OF NEW JERSEY,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION,
DOCKET NO. A-2572-20

Civil Action

On Appeal from a Final Order of
the Superior Court of New Jersey,
Law Division, Essex County,
Docket No. ESX-L-8169-19

Sat Below:
Hon. Bridget A. Stecher, J.S.C.

**CERTIFICATION OF
JOHN PAFF**

I, John Paff, hereby certify the following:

1. I am the Executive Director of Libertarians For
Transparent Government, an NJ Nonprofit Organization (LFTG).

2. I make this certification in support of the LFTG's motion
for leave to file a brief and to participate in oral argument in
the above-captioned matter in an amicus curiae capacity. I have
personal knowledge of the facts set forth herein.

3. I have litigated scores of Open Public Records Act (OPRA)
cases in order to advance transparency and open government in this

state for many years. Many of the cases I have litigated in my own name have resulted in published opinions that have greatly advanced transparency in this state. See, e.g., Paff v. Ocean Cty. Prosecutor's Office, 235 N.J. 1 (2018) (access to dash cam videos); Paff v. Twp. of Galloway, 229 N.J. 340 (2017) (access to electronically stored information); Asbury Park Press v. Cty. of Monmouth, 201 N.J. 5, 6 (2010) (access to settlement agreements); Scheeler v. Office of the Gov., 448 N.J. Super. 333 (App. Div. 2017) (third party's OPRA requests are subject to OPRA).

4. Notably, I have litigated a case regarding OPRA's definition of "public agency" and the court found that the New Jersey State Firemen's Association was subject to OPRA. See Paff v. New Jersey State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013)

5. In 2015, LFTG was formed, which is a non-profit organization dedicated to promoting transparency and open government in this state. I am its Executive Director and file OPRA requests and litigation on its behalf. This has permitted me to litigate in an organizational name, which can be carried on by future generations of LFTG leaders as time passes. Thus far, LFTG has litigated the following published cases: Libertarians for Transparent Gov't v. Cumberland Cty., 245 N.J. 38, cert. granted, 245 N.J. 38 (2021); Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018).

6. The Supreme Court has recognized LFTG's special expertise in transparency-related matters and granted LFTG's motions to appear as amicus curiae in the following cases: Bozzi v. City of Jersey City, 248 N.J. 274 (2021); In re Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. 462 (2021); L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019); Kean Federation of Teachers v. Morel, 233 N.J. 566 (2018); Brennan v. Bergen County Prosecutor's Office, 223 N.J. 330 (2018).

7. This court has also granted LFTG's motions to appear as amicus curiae in two OPRA cases. See Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021); In re Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, 465 N.J. Super. 111 (2020).

8. The special interest and expertise of LFTG in this area of law is substantial, as outlined above. I respectfully submit that the participation of LFTG in this matter will assist the Court in the resolution of the significant issues of public importance presented by this appeal.

9. In addition to LFTG's expertise in OPRA matters in general, LFTG is also familiar with the County Prosecutor's Association of New Jersey (CPANJ) because I have requested public records relating to CPANJ. LFTG is concerned that public records reveal that although CPANJ is a separate non-profit entity on paper, it is nonetheless using and receiving substantial

government resources without having to comply with the State's transparency laws.

10. For example, I am aware that in this case, the Mercer County Prosecutors Office (MCPO) is serving as counsel of record and Assistant Mercer County Prosecutor Joseph Paravecchia has drafted the briefs and made court appearances during weekday, daytime hours. It is alarming that a public agency is providing free legal services to a non-profit organization. I was further alarmed when a response to an OPRA request revealed CPANJ's \$50 filing fee for its Motion to Dismiss ACLU-NJ's complaint listed upon MCPO's October 2020 Judiciary Account Charge System (JACS) invoice.

11. I also filed OPRA requests with all twenty-one counties to ascertain how much each county had paid to CPANJ for membership dues and conference fees. Responses to those requests revealed that since 2015, New Jersey county governments made payments to CPANJ in excess of \$1.7 million.

12. Another OPRA request for the Burlington County Prosecutors Office's (BCPO) First Quarter 2021 Forfeiture Report revealed that BCPO spent \$2,017 of funds it had seized from defendants to pay CPANJ membership dues.

13. Other records requests reveals that each of the county prosecutor's is utilizing their government-issued email accounts to conduct CPANJ business and that their secretaries or other staff

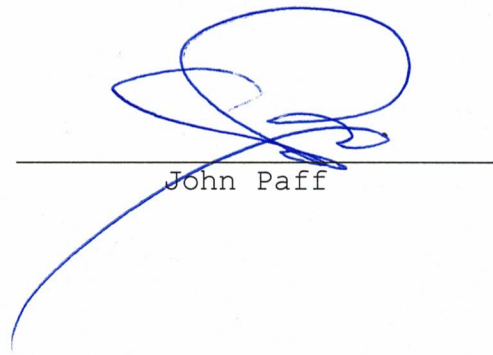
members are assisting them with CPANJ business, such as scheduling CPANJ meetings and distributing CPANJ agendas. It appears that this past year during COVID-19, CPANJ has also utilized government-owned video conferencing platforms for remote meetings.

14. I filed a public records request for Mercer County Prosecutor's Judiciary Account Charge System (JACS) invoices and discovered CPANJ's \$50 filing fee on October 7, 2020 for its Motion to Dismiss ACLU-NJ's complaint in this matter.

15. Online materials shows that each of the County Prosecutors promote CPANJ scholarships on their Office's social media or websites and applicants were told to submit their materials directly to the official address of the Cape May County Prosecutor's Office. See <https://bcpo.net/cpanj-scholarships>.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: November 12, 2021



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AMERICAN CIVIL LIBERTIES
UNION OF NEW JERSEY,

Plaintiff-Appellant,

v.

COUNTY PROSECUTORS
ASSOCIATION OF NEW
JERSEY,

Defendant-Respondent.

Supreme Court of New Jersey,
Docket No. 087789

Civil Action

On Petition for Certification from a Final
Judgment of the Superior Court of New
Jersey, Appellate Division,
Docket No. A-2572-20

Sat Below:

Hon. Thomas W. Sumners, Jr., P.J.A.D.
Hon. Richard J. Geiger, J.A.D.
Hon. Ronald Susswein, J.A.D.

**CERTIFICATION OF
JOHN PAFF**

I, John Paff, hereby certify the following:

1. I am the Executive Director of Libertarians for Transparent
Government, an NJ Nonprofit Organization (LFTG).

2. I make this certification in support of the LFTG's amicus curiae brief I have personal knowledge of the facts set forth herein.

3. This certification updates my November 12, 2021 certification, in which I described my findings via public records requests to county governments regarding payments to the County Prosecutor's Association of New Jersey (CPANJ). My prior request sought all payments to CPANJ from January 1, 2015 to May 2021. I have now updated those requests to obtain payment information from May 2021 to March 27, 2023, when the requests were filed.

4. Per the responses, some of which appear to be incomplete, county governments paid CPANJ at least \$255,620 in 2021 and \$474,800 in 2022. Some counties, such as Hudson, paid CPANJ more than \$60,000 in 2022 alone.

5. CPANJ has received at least \$132,000 in 2023, but some counties had not yet paid dues at the time of the request and the 2023 CPANJ Annual College does not occur until the late fall.

6. In total, CPANJ has collected at least \$2,683,000 in funds from county governments since 2015. Some counties produced incomplete results for certain years and some counties did not report what they spent on the annual college registrations, thus the total is likely significantly higher.

7. The payment records also produced further evidence that the County Prosecutors use other public employees to conduct CPANJ's business. For example,

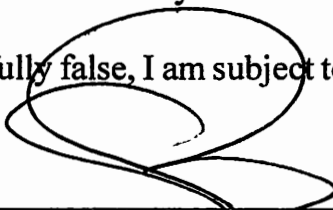
the payment records produced by Mercer County showed that the County paid nearly \$4000 to CPANJ to cover registration, food, and lodging to cover the following Mercer County employees to work the 2022 CPANJ Annual College as “Event Staff”: Wendy Santos (Legal Secretary), Astrid Brunbach (Administrative Assistant), Maribel Cartagena (Unknown Title), Karen Christie (Data Entry), Jaqueline Estrada (Unknown Title), Dawn Fennimore (Title Unknown), Maria Ristaino (Clerk), Michelle Tronzinger (Title Unknown). I looked the titles up, but the names were all listed on the payment vouchers as “registration for event staff.”

8. In my previous certification, I detailed that the Burlington County First Quarter 2021 Forfeiture Report revealed that BCPO spent \$2,017 of funds it had seized from defendants to pay CPANJ membership dues.

9. My new request revealed at least one other County Prosecutor is using Forfeiture Funds to pay CPANJ. Per Morris County’s vendor transaction detail report, Morris County paid CPANJ \$30,330 from the Forfeiture Funds account for the 2022 CPANJ Annual College registration fees. Most other reports did not indicate the name of the account from which CPANJ was paid.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: June 9, 2023



John Paff