IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PUBLIC.RESOURCE.ORG, INC.,

Appellant,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent.

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW,

Real Party in Interest.

AFTER SUMMARY DENIAL OF WRIT OF MANDATE BY THE
COURT OF APPEAL,
THIRD APPELLATE DISTRICT, DIVISION TWO
CASE NO. C096317

FROM AN ORDER OF THE SUPERIOR COURT OF SACRAMENTO
COUNTY,
CASE NO. 34-2021-80003612-CU-WM-GDS
THE HONORABLE STEVEN M. GEVERCER
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PETITION FOR REVIEW

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ISSUES PRESENTED

1. As the state agency responsible for reviewing and publishing virtually all state regulations, has the Office of Administrative Law ceded possession of the California Code of Regulations for purposes of its disclosure obligations under the Public Records Act as a result of its contract with West to store, maintain, and publish the Code?

2. Does the Office of Administrative Law's duty to publish the Code online pursuant to the Administrative Procedure Act constitute either an implied exemption from the agency's disclosure obligations under the Public Records Act or a supersession of the Public Records Act altogether?

WHY REVIEW SHOULD BE GRANTED

Petitioner Public.Resource.Org, Inc. ("Public Resource") is a 501(c)(3) non-profit dedicated to making public domain materials digitally accessible to the American public, and is based in Sebastopol, California. As part of its effort to make public domain materials digitally accessible, Public Resource sought a machine-readable electronic copy of Titles 1–5, 7–23, and 25–28 of the California Code of Regulations ("CCR") from the California Office of Administrative Law ("OAL"). OAL maintains those titles of the CCR, which contains regulations governing most aspects of business, residential, and private life in the state. Public Resource made a request pursuant to the Public Records Act ("PRA"), which codifies the California Constitution's command that "writings of public officials and agencies shall be

open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).)

The Legislature enacted the PRA to codify the "fundamental and necessary right of every person in this state" to "access [] information concerning the conduct of the people's business" (Gov. Code, § 6250[1]; Cal. Const., art. I, § 3, subd. (b)(1))—*i.e.*, to "giv[e] members of the public access to records in the possession of state and local agencies. [Citation.]" (*Nat. Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al.* (2020) 9 Cal.5th 488, 492 (*National Lawyers Guild*).) "[A]ll public records are subject to disclosure unless the Legislature has expressly provided to the contrary" (*Williams v. Super. Ct.* (1993) 5 Cal.4th 337, 346 (*Williams*) (emphasis added); *Am. Civil Liberties Union Foundation of S. Cal. v. Super. Ct.* (2017) 3 Cal.5th 1032, 1040 (*ACLU Foundation of Southern California*)), because the PRA carries a "presumption in favor of access" (*ACLU Foundation of Southern California*, at p. 1040).

Notwithstanding the clear text and purpose of the PRA, and the absence of any PRA exemption, OAL declined to produce the CCR pursuant to Public Resource's PRA request. When Public Resource filed a Peremptory Writ of Mandate, the Superior Court shielded OAL from fulfilling its disclosure obligation, finding: (1) OAL ceded possession of the CCR through its contract with a private entity; and (2) the APA overrides OAL's disclosure obligations under the PRA. Public Resource filed a Petition for Extraordinary Writ of Mandamus to correct

[1] All undesignated statutory references are to the Government Code.

this error, which the Third District summarily denied, effectively adopting the Superior Court's erroneous reasoning.

The Superior Court's order and the Third District's summary denial (1) fundamentally misunderstand the PRA and APA; (2) squarely conflict with this Court in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 623–624 (*City of San Jose*), the Fourth District in *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385 (*Community Youth Athletic Center*), and the Fifth District in *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697 (*Consolidated Irrigation District*); (3) flout provisions of the Constitution and are at odds with this Court's maxims of statutory interpretation; and (4) jeopardize the public's right to access the very regulatory framework that governs their day-to-day lives. Accordingly, this Court's review and transfer to the Third District are "necessary to secure uniformity of decision" and to "settle [two] important question[s] of law." (Rule 8.500(b)(1) & (b)(4).)

Prior to the Third District's summary denial here, no Court of Appeal had previously found that an agency's contract with a private party could remove a public record from an agency's legal possession—particularly where, as here, the agency is statutorily obligated to review and promulgate those very records. Nor had any Court of Appeal ever held that the APA impliedly exempts an agency from its independent obligation to produce public records otherwise disclosable under the PRA. Finally, no Court of Appeal had previously found that provisions of the APA supersede the

PRA despite the absence of a clear statement of legislative intent to do so—as required by the California Constitution. (Cal. Const., art. I, § 3, subd. (b)(1).) Interpreting section 11344 to supersede the PRA also flouts this Court's instruction to interpret section 11344 and the PRA in furtherance of the Legislature's purpose, as the fundamental purpose of both statutes is to facilitate disclosure of public records like the CCR.

Given the Superior Court's disregard for this Court's holding in *City of San Jose*, the split in authority among the Courts of Appeal given the Third District's summary denial, and the issues of paramount importance raised by this Petition, this Court should grant review and transfer this matter back to the Third District with instructions to issue an alternative writ consistent with *City of San Jose*, *Community Youth Athletic Center*, and *Consolidated Irrigation District* or, in the alternative, to show cause as to why the requested relief should not be granted.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Statement of Facts.

The CCR is the law of the State of California, which its citizens are expected to understand and obey, under penalty of law. Its titles govern most aspects of business, residential, and private life. Over 200 California state agencies contribute regulations to the CCR. OAL oversees the compilation and maintenance of the CCR. California law provides that OAL is responsible for reviewing proposed regulations, transmitting them to the Secretary of State, and publishing for the people of

California all but one Title of the CCR (Title 24 is published by the California Building Standards Commission, "BSC").

Impacting the daily lives of all Californians, the CCR is the paradigmatic example of a public record that the government is required by law to make fully available to anyone who wishes to access and use it. Crucially, however, OAL does not make the CCR fully available to the public in a manner that satisfies its obligations pursuant to the PRA's express mandate favoring public access. Instead, it contracts with private companies to publish the CCR on proprietary platforms with significant constraints on its access and use, limiting access in violation of California law.

Specifically, OAL has contracted with a private third-party publisher, Thompson-Reuters ("West") to provide an online copy of the CCR and to sell licenses to the public. OAL receives $350,000 annually, and an 8.1 percent royalty on West's net revenues from sales and licensing in exchange for West's exclusive right to compile, store, and license for sale copies of the CCR. Under the agreement, West publishes all titles of the CCR under its purview (the "OAL-West Contract"). (COA Exh. 1, at pp. 00022–56.)[2] The publicly available OAL-West Contract specifies how the CCR shall be stored, updated, and maintained by West, providing that West will maintain "the Official California Code of Regulations (CCR) in an electronic database" called "the Master Database." (*Id.* at p. 00036). OAL retains all

[2] Exhibits to Public Resource's petition for writ of mandate in the Court of Appeals are referenced herein as "COA."

rights to change, amend, and update the CCR. (*Ibid*.) West must diligently follow OAL's instructions for maintaining and updating the Master Database and the CCR. (*Id.* at p. 00091) The OAL-West Contract also expressly contemplates production of the electronic CCR in response to requests, like Public Resource's, under the PRA. (*Id*. at p. 00105) Under the contract, OAL owns all rights and retains a perpetual license for use of all intellectual property in all editorial enhancements of the CCR created by West, and that "'use' shall include reproduction or disclosure by OAL or the state for informational purposes or as otherwise required by law, *including but not limited to the Public Records Act*." (*Ibid*. (emphasis added).)

Pursuant to the PRA, Public Resource seeks a complete, machine-readable copy of the CCR to allow the public to view, analyze, understand, and comment upon the laws of California, and to better comprehend how those laws have changed over time. West does not publish a complete version of the CCR in any machine-readable format freely available to the public. OAL contends that it is not obligated to furnish a copy under the PRA because it lacks actual or constructive possession of the CCR given its contract with West. Further, OAL also contends that its obligations under the California Administrative Procedure Act ("APA") to maintain and furnish the CCR exempt it from compliance obligations under the PRA.

The PRA

The Legislature enacted the PRA to enforce the public's "fundamental and necessary right" of access. (§ 6250 *et seq*.) The

PRA operates in tandem with the California Constitution's command that "writings of public officials and agencies shall be open to public scrutiny." (Cal. Const. art. I, § 3, subd. (b)(1).) The California Constitution directs that any "statute, court rule, or other authority . . . shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. [Citation.]" (*ACLU Foundation of Southern California*, *supra*, 3 Cal.5th at p. 1039; see also *Sierra Club v. Super. Ct.* (2013) 57 Cal.4th 157, 166.) As this Court stated in *ACLU Foundation of Southern California*, "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state . . . . [and under the PRA] all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary. [Citations.]" (*ACLU Foundation of Southern California*, *supra*, 3 Cal.5th at p. 1038 (emphasis added).)

The PRA carries a "presumption in favor of access." (*Id.* at p. 1040.) As such, agencies must "make the records promptly available to any person" unless "exempt from disclosure by *express* provisions of law" (§ 6253, subd. (b) (emphasis added).), and they must disclose the record in "any electronic format in which [the agency] holds the information" and any format "used by the agency to create copies for its own use or for provision to other agencies" (§§ 6253.9, subds. (a)(1)–(2)).

The APA

In addition to its compliance obligations under the PRA, OAL is also directed, under sections 11340 and 11344 to manage

and promulgate the CCR. Section 11340, subdivision (b) provides that "[i]t is the intent of the Legislature that the California Code of Regulations made available on the Internet by the office pursuant to section 11344 include complete authority and reference citations and history notes." Pursuant to section 11344, OAL "shall" "[p]rovide for the official compilation, printing, and publication of adoption, amendment, or repeal of regulations, which shall be known as the [CCR]. On and after July 1, 1998, [OAL] shall make available on the Internet, free of charge, the full text of the [CCR], and may contract with another state agency or a private entity in order to provide this service." (§ 11344, subd. (a).) Neither section, nor any other part of the APA, make direct textual reference to the provisions of the PRA applicable to this petition.

B. Procedural History.

In December 2020, Public Resource sent a PRA request to OAL, seeking a machine-readable electronic copy of Titles 1–5, 7–23, and 25–28 of the CCR. [3] (COA Exh. 1, at p. 00058.) Public Resource explained that it sought a copy of the CCR which was stored on the CCR Master Database, a storage location for the

[3] There is no Title 6 of the CCR, and Title 24 is maintained by BSC. Public Resource also sent a similar request to BSC, seeking a machine-readable electronic copy of Title 24 of the CCR. BSC was a part of the proceedings in the Superior Court, but because the court stayed the action concerning BSC pending resolution of a related case in federal court, that issue is not part of this Petition. When Public Resource refers to the "CCR" here, it is referring to the Titles maintained by OAL (Titles 1–5, 7–23, and 25–28), since the proceedings are currently stayed as to Title 24.

CCR specified in the OAL-West Contract. (COA Exh. 1, at pp. 00029-55.) OAL refused to produce anything in response to Public Resource's request, with OAL taking the position that "OAL does not have a copy of the CCR Master Database." (COA Exh. 1, at p. 00060.)

On March 17, 2021, Public Resource filed in the Sacramento County Superior Court a Verified Petition for Peremptory Writ of Mandate Ordering Compliance with the PRA against Real Party in Interest OAL and BSC. (COA Exhs. 1, 2, at pp. 00001-82.) In its petition, Public Resource explained that: (1) the CCR is quintessentially a "public record" under the PRA, as it clearly "relate[s] to the conduct of the public's business" under section 6252(e); (2) OAL is in constructive possession of the CCR under California law because it exclusively controls the contents of the CCR Master Database; and (3) no express exemption under law exempts OAL from its obligations to furnish records in its possession under the PRA. (*Ibid.*)

On April 11, 2022, the Superior Court entered judgment, in relevant part denying Public Resource's petition as to OAL, and Public Resource was served with judgment on May 10, 2022. (COA Exh. 13, at pp. 00290-309.) The Superior Court reasoned that OAL, the state agency statutorily tasked with managing and distributing the CCR, lacks actual possession of a usable electronic copy of the CCR and therefore cannot produce it. In reaching this conclusion, the Superior Court observed that OAL's contract with West only expressly obligates West to furnish OAL with a machine-readable copy of the CCR at the termination of

its contract with West, a right which OAL has never exercised. (COA Exh. 14, p. 00318.) It also concluded that OAL does not "constructively possess[]" the CCR in the Master Database under its contract with West. (*Id.* at p. 00319.)

Furthermore, the Superior Court concluded that even if OAL had actual or constructive possession of a usable electronic copy of the CCR, OAL has no duty to produce it under the PRA because the APA requires OAL to make the CCR available on the Internet. (COA Exh. 14, at p. 00319 [citing §§ 11344, subds. (a)–(c)].) The Superior Court found a conflict between the PRA and the APA, and on this basis concluded that since the APA is "a specific statutory provision" that "prevails over a general statute," the APA effectively supersedes OAL's obligations under the PRA. (*Id.* at pp. 00319-320.) The Superior Court also reasoned that because section 11344 of the APA was passed and amended more recently than section 6253.9 of the PRA, "the Legislature was aware of the PRA and Section 6253.9." (*Id.* at p. 00320.) In so doing, the Superior Court implied an exemption into the PRA for public records whose *publication* is addressed by another statutory scheme, even in the absence of any indication by the Legislature to supersede the agency's separate *disclosure* obligations under the PRA. Notably, the Superior Court did not base its decision on the adequacy of OAL's claim that it had fulfilled its PRA obligations since the CCR was already available on West's private, subscriber-only website.[4]

[4] Nor could it. The requestor's access to—or even prior *possession of*—a public record is irrelevant to the agency's duty to produce

On May 31, 2022, Public Resource timely petitioned the Third District Court of Appeal for an Extraordinary Writ of Mandamus, seeking an order directing the Superior Court to set aside and vacate its April 11, 2022 order, and enter a new order requiring OAL to disclose the CCR Titles under its purview. On July 8, 2022, the Third District summarily denied Public Resource's writ petition. (Exhibit A.) The Third District declined to offer any reasoning notwithstanding the conflict in authority and the two important issues of law squarely presented here: (1) whether OAL has actual or constructive custody of the CCR public records it collects and publishes; and (2) whether the APA exempts OAL from its separate disclosure obligations under the PRA. To the extent the Superior Court's opinion rests on these legal determinations, it is subject to this Court's independent review. *Times Mirror Co. v. Super. Ct.* (1991) 53 Cal.3d 1325, 1336.

ARGUMENT

OAL is obligated to produce the electronic version of the CCR as requested by Public Resource. It is undisputed that the CCR is a public record, and the PRA "establishes a right of public access to government records. . . In enacting the [PRA] in 1968,

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the same record in response to a valid PRA request. See § 6257.5 (disallowing limitations on public access to a record "based upon the purpose for which the record is being requested"); see also *Caldecott v. Super. Ct.* (2015) 243 Cal.App.4th 212, 216, 219–220 (reversing denial of public records request on the basis that "he already possessed the documents" because petitioner's "possession of copies is not a basis to withhold the Documents" (citing § 6257.5)).

the Legislature declared this right of access to be 'a fundamental and necessary right of every person in this state' [citation]—a declaration ratified by voters who amended the California Constitution in 2004 to secure a 'right of access to information concerning the conduct of the people's business.' [Citations]." (*National Lawyers Guild*, *supra*, 9 Cal.5th at p. 492.) It is therefore apparent that "[a]llowing government agencies [like OAL] to" avoid their public disclosure obligations by contracting with a private entity and denying constructive custody "would hinder that purpose." (*Id.* at p. 510 (Cuéllar, J., concurring).) Nor can OAL evade this obligation by disclaiming both actual and constructive possession over the CCR pursuant to its contract with West. In *City of San Jose v. Superior Court*, this Court noted that the "clear purpose [of section 6270] is to prevent an agency from evading its disclosure duty by transferring custody of a record to a private holder and then arguing the record falls outside [the] PRA because it is no longer in the agency's possession. . . . It simply prohibits agencies from attempting to evade [the] PRA by transferring public records to an intermediary not bound by the Act's disclosure requirements." (*City of San Jose*, *supra*, 2 Cal.5th at pp. 623–624.) Yet, that is exactly what the Superior Court approved, and the Third District below summarily affirmed.

Nor do the OAL's publication obligations under the APA somehow supersede the PRA's disclosure requirement. "[A]ll public records are subject to disclosure unless the Legislature has expressly provided to the contrary.' [Citations.]" *ACLU*

Foundation of Southern California, *supra*, 3 Cal.5th at p. 1038. When the Legislature intends to exempt a record from disclosure under the PRA, it does so "expressly"—*i.e.*, by writing the exemption into the PRA's statutory framework. Despite the absence of any textual indicia or legislative intent to override the public's "fundamental and necessary right" guaranteed by the California Constitution and the PRA, the Superior Court effectively found, and the Third District summarily affirmed, that the APA creates an implied exemption to the OAL's disclosure obligations under the PRA by superseding the PRA altogether.

As the following sections demonstrate, the Superior Court's holding and the Third District's summary denial run counter to the text of the PRA and squarely conflict with this Court and multiple Courts of Appeal. Given the Superior Court's disregard for this Court's holding in *City of San Jose*, the split in authority among the Courts of Appeal given the Third District's summary denial, and the issues of paramount importance raised by this Petition, this Court should grant review and transfer this matter back to the Third District with instructions to issue an alternative writ consistent with *City of San Jose*, *Community Youth Athletic Center*, and *Consolidated Irrigation District* or, in the alternative, to show cause as to why the requested relief should not be granted.

I. A Grant-And-Transfer Is Necessary to Clarify that a Government Agency Like OAL Cannot Disclaim Constructive or Actual Possession of Public Records under the PRA by Contracting with a Private Entity.

To the extent that the Third District's summary denial relied on the Superior Court's conclusion that OAL does not have actual or constructive possession of the CCR, this Court's review and transfer is necessary for the Third District to issue an alternative writ or to require the Third District to provide a reasoned opinion as to how the CCR is not within OAL's actual or constructive possession for purposes of the PRA.

A written opinion by the Court of Appeal is especially warranted because the Superior Court's holding below failed to comply to binding precedent in *City of San Jose*, *supra*, 2 Cal.5th at pp. 623–624, *Community Youth Athletic Center*, *supra*, 220 Cal.App.4th at p. 1385, and *Consolidated Irrigation District, supra*, 205 Cal.App.4th at p. 697. And by summarily denying Public Resource's writ petition, the Third District implicitly endorsed the Superior Court's grave error, thereby creating a conflict with this Court and two other Courts of Appeal.

To facilitate the public's right to access under the PRA, the Legislature set forth a two-step process for requesting and furnishing public records. First, "upon a request for a copy of records," each agency shall "determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency." (§ 6253, subd. (c).) Then, once "the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when

the records will be made available." (*Ibid.*) It is undisputed that the CCR is a "public record" within the meaning of the PRA.

According to the Superior Court, OAL lacks both actual *and* constructive possession of the CCR because of its contract with West. (COA Exh. 15, pp. 00352-353.) Under that flawed reasoning, *any* California agency could evade its disclosure obligations under the PRA by simply contracting with a private party for the storage and maintenance of public records. Such reasoning would eviscerate the public's "fundamental and necessary right" of public access guaranteed by the California Constitution and the Legislature when enacting the PRA. Nothing in the text or purpose of the PRA permits such a glaring contract loophole to eliminate the public's right to access public records. Indeed, if the Superior Court's reasoning stands, and OAL's contract with West were to leave OAL without constructive possession of the CCR, as the Superior Court found, then the contract must be unlawful and void as against public policy.

A. OAL's Contract with West Makes Clear OAL Retains Constructive Possession of the CCR.

The Superior Court erroneously concluded that OAL lacks possession over the CCR given its contract with West. (COA Exh. 15, at pp. 00352-353.) Contrary to the Superior Court's decision, under California law OAL remains in constructive possession of the CCR—as OAL's contract with West itself makes clear that OAL retains control over the CCR. The PRA defines "possession" as "mean[ing] both actual and constructive possession." (*Bd. of Pilot Comrs. v. Super. Ct.* (2013) 218 Cal.App.4th 577, 598.)

Under the PRA, "an agency has constructive possession of records if it has the right to control the records, either directly or through another person." (*Consolidated Irrigation District*, *supra*, 205 Cal.App.4th at p. 710.)

Under the contract, West must "update the Master Database as soon as feasible after OAL provides the contractor with regulations." (COA Exh. 1, at p. 00015; Exh. 3, at p. 00091.) OAL has the right to "inspect[], revis[e] and correct[]" the CCR Master Database and dictate revisions to West. (COA Exh. 3, at p. 00091.) And OAL maintains all rights to the contents of the Master Database, notwithstanding the fact that West publishes a copy of it. (*Id*. at p. 00104.) Indeed, according to OAL, it "maintains the rights to the data within the Master Database," *i.e.*, the CCR. (COA Exh. 7, at p. 00269.) In sum, West has *no* ability to make *any* changes to the CCR and must make *every* change that OAL dictates. This alone establishes OAL's constructive possession under the PRA. (*Anderson-Barker v. Super. Ct* (2019) 31 Cal.App.5th 528, 538 (*Anderson-Barker*) ["[A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person. [Citation.]"].) Nor does it matter whether OAL has previously sought a copy of the CCR from the Master Database under the contract. (*Community Youth Athletic Center, supra*, 220 Cal.App.4th at p. 1428 [finding constructive possession and ordering PRA disclosure where, under the contract, "the City had an ownership interest in the … [] material and it had the right to

possess and control it, even though it did not enforce its contractual right"].)

OAL has contended, and the Superior Court held, that OAL lacks constructive possession of the CCR because it only controls the CCR "data" in the Master Database, and not the database itself, arguing that this right to access data did not amount even to constructive possession. (COA Exh. 15, at pp. 00352-353.) This view is erroneous and contrary to law.

Below, OAL mischaracterized Public Resource's request as seeking the "digital infrastructure" of the database rather than its contents. (COA Exh. 15, at pp. 00352-353.) Not so. Public Resource seeks a copy of the "data" *in* the Master Database—*i.e.*, the public record constituting the CCR—in its already-existing digital format, which OAL has acknowledged it exclusively controls. (COA Exh. 7, at p. 00254.) Constructive possession of this kind requires production of the record. (See *Consolidated Irrigation Dist*rict, *supra*, 205 Cal.App.4th at p. 710 [an agency must disclose records when it has the ability to control the contents of those records]; *Anderson-Barker*, *supra*, 31 Cal.App.5th at p. 538 [same]; *Community Youth Athletic Center*, *supra*, 220 Cal.App.4th at pp. 1426, 1428–1429 [same].) Public Resource is not asking OAL to create anything that OAL does not already possess. OAL has constructive possession of the Official CCR as it exists in the Master Database because it has exclusive control over the Official CCR as stored on the Master Database. Pursuant to section 6253.9, subdivision (a)(2), Public Resource is simply asking OAL to export the CCR data it controls in its

existing XML format—a process that is neither complicated nor burdensome, as evidenced by the fact that it is provided for in the contract. (COA Exh. 1, at p. 00058.)

B. Under California Law, OAL Need Not Terminate the Contract with West to Maintain Actual Possession of the CCR.

To defeat Public Resource's request, the Superior Court reasoned that under the terms of the contract, OAL may regain actual possession of an XML version of the CCR only upon termination or expiration of its contract with West. (COA Exh. 15, at p. 00353.) Such an interpretation of the contract is both unreasonable on its face and flatly violates California law. It is unreasonable to read the contract in a manner that denies OAL the unconditional right to possess its own CCR data. Rather, the more natural reading of the contract is that termination or expiration are sufficient, not necessary conditions, to obtain a copy. Nothing in the contract's language indicates that OAL may *only* request an XML version of the CCR upon expiration or termination of the agreement. To the contrary, the contract anticipates requests like Public Resource's, expressly reserving a "perpetual license" for "use" of all editorial enhancements made by West and defining "use" to include "reproduction or disclosure by OAL . . . as . . . required by law, *including but not limited to the Public Records Act*." (COA Exh. 3, at p. 00105 (emphasis added).) The contract therefore contemplates and permits, rather than prohibits, disclosure of the XML version of the CCR pursuant to a PRA request. In other words, the Superior Court's

reasoning contradicts the unambiguous terms of OAL's contract with West.

Not only is the Superior Court's finding unreasonable on its face, but it also disregards Court of Appeal precedent to which it is bound. Both the Fourth and Fifth Districts have held that where there is contractual language of control and *ownership of the records*, courts enforce production even if the termination right has not been enforced. And to the extent that the Third District's summary denial disagrees with the decisions of its sister Courts of Appeal, a written decision is necessary to justify the basis for its denial.

Community Youth Athletic Center is instructive. There, the City had contracted with a consulting firm that created field survey materials for a development project. (*Community Youth Athletic Center*, *supra*, 220 Cal.App.4th at p. 1428.) Based on the contract, the Court of Appeal for the Fourth District held that "the City had an ownership interest in the field survey material and it had the right to possess and control it, even though it did not enforce its contractual right" to possess it at the time of the PRA record request. (*Id.*) Consequently, the Fourth District held the City violated the PRA when it did not seek out and produce the field survey materials in response to the PRA request. (*Id.* at p. 1428.) Here, as in *Community Youth Athletic Center*, nothing in OAL's contract with West expressly forbids OAL from seeking out records it has the right to possess and control.

The Fifth District reached a similar conclusion in *Consolidated Irrigation District*. There, the agency's contract

with the main consultant contained a provision stating that documents retained by the consultant to prepare for an impact study were the "property of the City and upon completion of the Services to be performed or upon termination of this Agreement for any reason, the original and any copies thereof will be turned over to the City . . ." (*Consolidated Irrigation District*, *supra*, 205 Cal.App.4th at p. 728, fn. 18.) The Fifth District held that the agency's reservation of an "ownership interest" in the records meant that they were properly subject to disclosure under the PRA.[5] (*Ibid.*) As the Fourth District noted in *Community Youth Athletic Center*, *Consolidated Irrigation District* "indicates that the contractual relationship of a public agency and its private consultant is important in determining the agency's duty of disclosure." (*Community. Youth Athletic Center, supra*, 220 Cal.App.4th at p. 1427.)

Here, that contractual relationship is clear. OAL's contract with West unambiguously establishes OAL's ownership interest in the CCR, as well as OAL's universal and exclusive right to control and author every word of the CCR stored on the Master Database. Thus, although the usable electronic version of the CCR exists on West's servers in the Master Database, OAL maintains constructive possession and must produce a copy under the PRA.

[5] The Fifth District declined to order the requested records produced only because they already "ha[d] been made available" pursuant to a prior court order in the litigation. (*Ibid.*)

C. If OAL Lacks Both Actual and Constructive Possession Over The CCR Because of Its Contract With West, the Contract Is Unlawful and Void.

Review is further warranted because the Superior Court's interpretation of OAL's contract with West directly contravenes section 6270, subdivision (a), and undermines the California Constitution and the PRA's core purpose of broadening access to public records. OAL claims that since it has transferred custody of its electronic record to West, it lacks constructive possession over the CCR, and it contends it cannot recover actual possession of the CCR to furnish it under the PRA because the contract has not yet expired or been terminated.

The Superior Court's wholesale adoption of this argument sanctions the exact type of evasion contemplated and squarely prohibited by the Legislature in section 6270 and this Court in *City of San Jose*. In *City of San Jose*, this Court made clear that the PRA's "clear purpose is to prevent an agency from evading its disclosure duty by transferring custody of a record to a private holder and then arguing the record falls outside PRA because it is no longer in the agency's possession. . . ." (*City of San Jose*, *supra*, 2 Cal.5th at pp. 623–624.) Indeed, the PRA "prohibits agencies from attempting to evade [the]PRA by transferring public records to an intermediary not bound by the Act's disclosure requirements." (*Ibid.*) Yet, the Superior Court found, and the Third District summarily affirmed, the exact opposite: an agency like OAL may easily evade its constitutional and statutory obligation to provide public records by contracting with

a private party (*i.e.*, West) to retain and manage those same records and thus cede actual and constructive possession of public records.

To the extent OAL's contract with West disclaims OAL's PRA obligations, it is void as a matter of public policy and the law. Neither the Superior Court nor OAL can rely on the contractual term "upon completion or termination of the contract" to skirt the OAL's obligations under the PRA by disclaiming either constructive or actual possession for the duration of its contract with West. (COA Exh, 7, at pp. 00252–253.) In fact, the Legislature adopted section 6270 to expressly forbid agencies like OAL from doing precisely that:

> Notwithstanding any other provision of law, no state or local agency shall sell, exchange, furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a private entity in a manner that prevents a state or local agency from providing the record directly pursuant to this chapter.

(§ 6270, subd. (a).)

OAL's evasion is not only prohibited by law, but OAL was expressly admonished during the Legislature's enactment of section 6270. The legislative purpose behind section 6270 could not be clearer, for the 1995 Senate Report points to OAL's

contract with West[6] as *the* example of what Section 6270 would *forbid*. The Legislature's analysis references a legacy version of OAL's contract with West in stating that section 6270 is intended to "prohibit[] state and local agencies from providing public records to private entities in a way that would prevent the agency from providing the record directly to the public, pursuant to [the PRA]." (Sen. Rules Com., com. on Assem. Bill 141 Assem. Bill Analysis (1995-1996 Reg. Sess.) June 12, 1995, pp. 1-2.)

Despite the legislative history's clear demonstration of the Legislature's intent in enacting section 6270, the Superior Court reasoned that since the Legislature was "aware of OAL's agreement with Thomson Reuters/West," such awareness implied the Legislature's tacit endorsement of the practice. (COA Exh. 14, at pp. 00320-321.) This "awareness" theory gets it backward; the legislative history makes clear section 6270 was passed to forbid *this exact type of arrangement*.

The Superior Court's decision approves the very arrangement the Legislature sought to undo. OAL's contract with West cannot be interpreted such that OAL lacks possession of the of the CCR data in the Master Database. Accordingly, this Court should review and transfer the matter back to the Third District to address this dramatic departure from settled law on constructive possession under the PRA.

[6] "OAL contracts with Barclays, a division of Thomson-Reuters." (See California Code of Regulations (CCR), Office of Administrative Law (May 27, 2022), https://oal.ca.gov/publications/ccr/ [as of July 18, 2022].)

II. A Grant-and-Transfer Is Necessary to Confirm that the APA Does Not Establish Any Exemption to the PRA, Nor Does It Supersede the PRA Altogether.

This Court's review and transfer for a written opinion by the Third District is also warranted to determine whether the APA either (a) provides an implied exemption for OAL under the PRA—notwithstanding the absence of any indication of this intent by the Legislature, *and* the established precept that exemptions under the PRA must be "express"—or (b) supersedes the PRA altogether, notwithstanding the California Constitution's instruction to read any statute "narrowly" to the degree it limits the public's right of access.

The Superior Court erroneously and atextually took this provision to set forth OAL's *exclusive* disclosure obligations with respect to the CCR. In doing so, it effectively derived an implied exemption from the APA, finding that it superseded OAL's obligations under the PRA because the APA provision was the "more specific" and "later enacted" provision. Nothing in the text of the APA supports any legislative intent to override any PRA provision, and a closer examination of the APA's text and purpose actually supports Public Resource's requested disclosure here. Moreover, the Superior Court's flawed holding contradicts the express text of the PRA, the California Constitution, and fundamental principles of the statutory interpretation.

A. Exemptions to the PRA Must Be "Express," and No Such Exemption Appears in the APA.

First, this Court's review and transfer for an alternative writ or a written opinion by the Third District is warranted to

determine whether the Superior Court's conclusion—that the APA effectively contains an implied exemption to the PRA—is sound. It is not.

The PRA mandates that an agency must disclose public records unless an *express* exemption applies. (§ 6253, subd. (b) [agency must "make the records promptly available to any person" unless "exempt from disclosure by *express* provisions of law" (emphasis added)]; see also *id.*, subd. (a) [agency must identify exemption "under express provisions of this chapter"]; *City of San Jose*, *supra*, 2 Cal.5th at p. 616.) "All public records are subject to disclosure [under the PRA] unless the Legislature has expressly provided to the contrary." (*Williams*, supra, 5 Cal.4th at p. 346 [emphasis added]; see also Long Beach Police Officers Assn. v. City of Long Beach (2014) 59 Cal.4th 59, 67 ["The act has certain specific exemptions [§§ 6254–6254.30], but a public entity claiming an exemption must show that the requested information falls within the exemption[.]"].) Despite the Third District's summary denial below, the Courts of Appeal have repeatedly explained that agencies must justify withholding by pointing to an *express,* specific exemption enumerated in the PRA, including the First District (*Newark Unified School Dist. v. Super. Ct.* (2015) 245 Cal.App.4th 887, 897); the Second District (*Fairley v. Super. Ct.* (1998) 66 Cal.App.4th 1414, 1419-1420 ["Grounds to deny disclosure of information 'must be found, if at all, among the specific exceptions to the general policy that are enumerated in the Act.'" [Citations.]]; the Third District (*Citizens for A Better Environment v. Dept. of Food & Agriculture* (1985)

171 Cal.App.3d 704, 711); the Fourth District (*Bd. of Trustees of Cal. State Univ. v. Super. Ct.* (2005) 132 Cal.App.4th 889, 896); the Fifth District (*Galbiso v. Orosi Pub. Utility Dist.* (2008) 167 Cal.App.4th 1063, 1083); and the Sixth District (*County of Santa Clara v. Super. Ct.* (2009) 170 Cal.App.4th 1301, 1320; *Copley Press, Inc. v. Super. Ct.* (2006) 39 Cal.4th 1272, 1282).

Notably, the Superior Court did not point to a single express exemption that applies to the CCR. Nor did it identify any exemption that applies to documents managed and controlled by OAL generally, or an exemption for documents created pursuant to the APA. Nor could it. No PRA exception appears in the APA because the Legislature evinced no intent to create one, express or otherwise. To the contrary, when enacting the APA, the Legislature provided the authority for OAL to create and publish the CCR—a legislative project entirely separate and distinct from the PRA. (See § 11340, *et seq*.)

When the Legislature intends to adopt an exemption to the PRA, as it done on numerous occasions, it makes its intent clear by inserting "express" exemption language into the PRA. Given the express exemption requirement, it is unsurprising that the Legislature has adopted hundreds of express exemptions to the PRA's disclosure obligations. (See, e.g., §§ 6254-6254.35; 6255; 6267; 6268 [specifying exemptions].) In fact, in 2012, the same year the Legislature amended that same section, it amended two separate exemptions to the PRA (§§ 6254.14; 6267), but tellingly evinced no intent to exempt OAL, the APA, or the CCR. Accordingly, a grant-and-transfer by this Court is necessary to

confirm that, pursuant to the clear text of the PRA, the absence of any legislative intent to establish an exemption, as well as widespread controlling caselaw, no such exemption exists.

B. The Superior Court Flouted Both the Constitution's Direction To Construe Statutes Narrowly To Avoid Limits on the People's Right of Access as well as Settled Principles of Statutory Interpretation.

A grant-and-transfer is also necessary to explain why the APA can be interpreted to supersede the PRA, despite the California Constitution's instruction that statutes must be read narrowly when they function to limit the people's right of access. In seeking to "harmonize" the text of the APA with the PRA, the Superior Court unnecessarily read the two statutory provisions as in conflict, in violation of both the Constitution and longstanding principles of statutory interpretation.

By their plain text, nothing about the relevant provisions of the APA and the PRA suggest they are in conflict. Section 11344 of the APA provides statutory guidance "governing OAL's duty to make the CCR available." (COA Exh. 14, at pp. 00319-320.) Subdivision (b) provides that "[i]t is the intent of the Legislature that the California Code of Regulations made available on the Internet by the office pursuant to section 11344 include complete authority and reference citations and history notes." Pursuant to section 11344, OAL "shall" "[p]rovide for the official compilation, printing, and publication of adoption, amendment, or repeal of regulations, which shall be known as the [CCR]. On and after July 1, 1998, [OAL] shall make available on the Internet, free of charge, the full text of the [CCR], and may contract with another

state agency or a private entity in order to provide this service." (§ 11344, subd. (a).)[7]

The PRA, by comparison, mandates that agencies disclose public records "in *any* electronic format in which it holds the information," or in any requested format "*used by the* agency to create copies for its own use or for provision of other agencies." (§ 6253.9, subds. (a)(1) & (2) (emphasis added).)

The Superior Court ignored the Constitution and departed from basic principles of statutory interpretation to find these provisions in conflict. And the Superior Court neglected the Constitution's clear instruction that any "statute, court rule, or other authority"—including the APA—"shall be broadly construed if it furthers the people's right of access, and *narrowly construed if it limits the right of access*." (Cal. Const., art. I, § 3, subd. (b)(2) [emphasis added]; *City of San Jose*, *supra*, 2 Cal.5th at p. 617 [characterizing this interpretive rule as "a

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[7] Several other California statutes contain similar language directing an agency to distribute public records in a specific way. (See, e.g., § 8587.7, subd. (c) [The Office of Emergency Services "shall make the pamphlet and the current edition of the office's school emergency response publication available by electronic means, including, but not limited to, the Internet."]; § 11425.60, subd. (c) ["The index [of California's significant legal and policy determinations] shall be made available to the public by subscription"]; § 11011.1, subd. (b)(2)(C) ["The [D]epartment [of General Services] . . . shall maintain a list of surplus state real property in a conspicuous place on its Internet Web site"]; § 8334, subd. (a)(2) ["Each state agency shall provide a link to the California State Library's funding opportunities internet Web portal on the state agency's internet website."].) Should the Superior Court's decision be allowed to stand, these public records would presumedly be impliedly exempt from the PRA.

constitutional imperative"].)

Below, the Superior Court did just the opposite. Rather than treat section 3(b)'s constitutional interpretive rule as "imperative," the Superior Court ignored it entirely, resorting to an interpretive axiom suggested by OAL in briefing—that the specific should control the general—that has no basis in either the California Constitution or the Government Code's Code of Construction. (See §§ 1–26; COA Exh. 6, at p. 00219.) Rather, the Constitution makes clear that to the extent the APA *can* be construed in a manner consistent with the people's right of public access, courts *must* construe it in that manner. Here, the APA's provisions regarding OAL's duties to publish the CCR and sell an official version can *easily* be construed in such a manner. To be sure, OAL can continue to publish and sell the CCR pursuant to section 11344 while also providing Public Resource with a usable electronic copy under the PRA. The Superior Court pointed to no provision in the APA which even remotely suggests otherwise, and indeed, none exist.

The Superior Court's interpretation is also at odds with other maxims of statutory interpretation. This Court has repeatedly advised that a court's "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute. [Citation.]" (*Smith v. Super Ct.* (2006) 39 Cal.4th 77, 83 (*Smith*).) Nothing in either the text or legislative history of section 11344 evinces the Legislature's intent to narrow the people's right of access. Indeed, if anything, the express "intent of the Legislature that the California Code of Regulations made

available on the Internet" suggests the APA can and should be read in harmony with the PRA as affirmatively *enhancing* OAL's obligation to disclose the CCR to the public, rather than limiting it. (See *Presbyterian Camp & Conf. Centers, Inc. v. Super. Ct.* (2021) 12 Cal.5th 493, 512 ["Statutes should be interpreted to be 'consistent with legislative purpose and not evasive thereof.' [Citations.]"].)

Moreover, this Court has repeatedly emphasized that lower courts shall interpret statutes so as to further rather than stymie their general purpose. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1233 [Courts shall adopt the "construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. [Citation.]"].) The Superior Court's interpretation did just the opposite—undermining rather than furthering *both* the APA and the PRA's clear purpose of ensuring OAL makes public records like the CCR freely available to the public. Indeed, in interpreting the APA as to supersede the PRA, the Superior Court also ignored this Court's maxims that courts should "avoid a construction that would lead to absurd consequences [citation]" (*Smith*, *supra*, 39 Cal.4th at p. 83), or "give rise to incongruous results" (*Cal. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 300). It simply defies logic that the Legislature intended section 11344—which places affirmative disclosure obligations on OAL with respect to the CCR—to narrow the public's right of access to the CCR under the PRA.

The Superior Court's interpretation also flouts the California Constitution in a second important respect. Article I, section 3(b)(2) instructs that, where the Legislature intends to enact legislation that "limits the right of access," the Legislature "shall . . . adopt[it] with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (Cal. Const., art. I, § 3, subd. (b)(2).) Under the California Constitution, therefore, the Superior Court must point to legislative findings in the APA demonstrating the public interest in that limitation. But neither OAL nor the Superior Court identified any such findings by the Legislature with the enactment of any APA provision—much less section 11344—because the Legislature did not intend to create any such exemption to the PRA.

Moreover, even if section 11344 may reasonably be read to limit the right of access despite the lack of requisite legislative findings required under Article I, section 3(b)(2), then this raises serious doubts about its constitutionality. This Court has adopted the canon of constitutional doubt, repeatedly recognizing that, where one proposed construction of a statute "raises serious constitutional questions, [a court] should endeavor to construe the statute in a manner which avoids any doubt concerning its validity." (*People v. Leiva*, (2013) 56 Cal.4th 498, 506-07; *People v Gutierrez* (2013) 58 Cal.4th 1354, 1373 [describing this canon "as a 'cardinal principle' of statutory interpretation"].) Below, the Superior Court failed to do so. The APA contains no findings indicating the Legislature intended to limit the people's right of

access to the CCR. And if section 11344 is read to do so, it cannot satisfy section 3(b)(2)'s constitutional mandate. Because it is not only possible, but easy, to construe the APA in a manner that avoids such a conflict, a grant and transfer is necessary to clarify whether the Superior Court's reasoning raises serious constitutional concerns.

REQUEST FOR RELIEF

For the foregoing reasons, this Court should grant review and transfer this matter to the Court of Appeal, Third Appellate District with orders to refile the petition for writ of mandate and to issue an alternative writ directing the Superior Court to issue an order directing the Office of Administrative Law to furnish the CCR to Public Resource pursuant to its PRA request, or to show cause why the requested relief should not be granted.

Dated: July 18, 2022

Respectfully submitted,

COOLEY LLP

/s/ Matthew D. Caplan

By: Matthew D. Caplan

Attorneys for Petitioner

CERTIFICATE OF WORD COUNT

In compliance with California Rules of Court, rule 8.504, I, Matthew D. Caplan, certify that the foregoing Petition for Review uses proportionally spaced typeface of 13 points or more, and contains 8,153 words (including footnotes and excluding cover information, tables, signature blocks, and this certificate), as counted by Microsoft Word word-processing software.

Dated: July 18, 2022

/s/ Matthew D. Caplan

Matthew D. Caplan

EXHIBIT A

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

PUBLIC.RESOURCE.ORG, INC.,
Petitioner,
v.
THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent;
OFFICE OF ADMINISTRATIVE LAW,
Real Party in Interest.

C096317
Sacramento County
No. 34202180003612

BY THE COURT:

The petition for writ of mandmus is denied.

ROBIE, Acting P.J.

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cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Public.Resource.Org, Inc., v. The Superior Court of Sacramento County
C096317
Sacramento County Super. Ct. No. 34202180003612

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley LLP, 3 Embarcadero Center, 20th Floor, San Francisco, California 94111-4004. On July 18, 2022, I served the documents described below in the manner described below:

- **PETITION FOR REVIEW**

☒ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized vendor, First Legal Court & Process for hand delivery on this date.

☒ (BY ELECTRONIC MAIL) I am personally and readily familiar with the business practice of Cooley LLP for the preparation and processing of documents in portable document format (PDF) for e-mailing, and I caused said documents to be prepared in PDF and then served by electronic mail via the TrueFiling platform to the parties listed below.

on the following part(ies) in this action:

Clerk of the Superior Court Superior Court of California County of Sacramento 720 9th Street Sacramento, CA 95814 Tel: 916-874-6697 ***Respondent Superior Court of the State of California, County of Sacramento*** *Served via messenger only.*	Rob Bonta Attorney General of California Michelle M. Mitchell Supervising Deputy Attorney General Keith L. Wurster Deputy Attorney General Email: keith.wurster@doj.ca.gov Laura A. Randles-Little Deputy Attorney General Email: laura.randleslittle@doj.ca.gov 1300 I Street, Suite 125 P.O. Box 944255 Sacramento, CA 94244-2550 Tel: 916-210-6504 ***Attorneys for Real Party in Interest California Office of Administrative Law***

Executed on July 18, 2022, at Oakland, California.

Adriana R. Vera