CASE NO.:

COURT OF APPEAL FOR THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

PUBLIC.RESOURCE.ORG, INC.,
***Petitioner*,**
-vs-

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SACRAMENTO,
***Respondent*.**

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW,
Real Party in Interest

From an Order of the Superior Court of Sacramento County
Denying a Petition for Writ of Mandate under the California
Public Records Act, Gov. Code § 6250, seq,
Case No. 34-2021-80003612
The Honorable Steven M. Gevercer
Department 27, Telephone: (916) 874-6697

PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS; MEMORANDUM IN SUPPORT OF PETITION

(EXHIBITS SUBMITTED UNDER SEPARATE COVER)

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CERTIFICATE OF INTERESTED ENTITLES OR PERSONS PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.208

Petitioner Public.Resource.Org is not aware of any other entity or person that has a financial or other interest in the outcome of the proceedings that Petitioner reasonably believes the justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: May 31, 2022 COOLEY LLP

By: */s/ Matthew D. Caplan*

Matthew D. Caplan

Attorneys for Appellant

INTRODUCTION

The Respondent Superior Court erroneously denied the Verified Petition for Writ of Mandate filed by Petitioner, Public.Resource.Org, Inc. ("Public Resource"), which sought to compel compliance by Real Party in Interest, the California Office of Administrative Law ("OAL"), with a California Public Records Act ("CPRA") request that asked for nothing more than a usable electronic copy of the California Code of Regulations ("CCR").

In denying Public Resource's Petition, the Superior Court erred by ignoring the clear mandates of the CPRA, California caselaw, and the California Constitution itself.

First, the Superior Court erred in concluding that OAL was not in possession of the CCR, and so had no obligation to produce an electronic copy in compliance with Public Resource's request. (Petitioner's Exhibits to Petition for Extraordinary Writ ("Exh.") 15, pp. 352–53.) California case law defines possession to mean either actual or constructive possession, and states that an agency is in constructive possession of a record if that agency "has the right to control the records, either directly or through another person." *Consol. Irrigation Dist. v. Super. Ct.*, 205 Cal. App. 4th 697, 710 (2012). Here, the contract between OAL and a third-party publisher unambiguously establishes that OAL maintains complete ownership and authorship over the entirety of the CCR. OAL is in constructive possession of the CCR, even though the document is currently housed on a private server pursuant to the contract.

In denying Public Resource's Petition, the Superior Court misconstrued the nature of Public Resource's request, erroneously concluding that Public Resource sought the entire proprietary database when, in fact, the petition only seeks the *contents* of the database (the CCR) – the public records – in the same common, electronic, machine-readable format at OAL's disposal under the contract. The legislative history, caselaw, and plain text of the statute all confirm that OAL's attempts to hide behind its private publishing contract to avoid producing a usable copy of the CCR are contrary to California law.

Second, the Superior Court erred in concluding that the California Administrative Procedures Act ("APA") implied an exemption for the CCR and OAL's duties under the California Constitution and the CPRA. No exemption applies to the CCR, and the Superior Court erred by creating one without any basis in the statute.

In attempting to "harmonize" the CPRA's express directives with a provision of the California Administrative Procedures Act, Cal. Gov't Code § 11344 (Exh. 14, pp. 319–20), the Superior Court's reasoning conflicts with the express provisions of the California Constitution. The Legislature enacted the CPRA to serve as the primary means for the public to vindicate the people's right of access enshrined in Article I Section 3 of the California Constitution. But the Superior Court reasoned that Section 11344 provides the exclusive mechanism for how the CCR may be made available to the public, and therefore concluded that the CCR was otherwise exempt from disclosure under the

CPRA. That interpretation is directly at odds with the California Constitution's interpretive imperative, Article I Section 3(b)(2), which counsels courts to construe a statute "broadly if it furthers the people's right of access," and "narrowly" if it "limits the right of access." In holding that the APA implied an exemption to the CPRA and the people's right of access, the Superior Court did the exact opposite. This was error.

Further, the Superior Court erred in concluding that Cal. Gov't Code § 11344 should control over the CPRA since the former statute was enacted and amended later in time. (Exh. 14, pp. 319–21.) This inference is flatly inconsistent with the express text of the California Constitution, which mandates that any statute "adopted after the effective date of this subdivision that limits the right of access *shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest*." Art. I § 3(b)(2) (emphasis added). Yet the Superior Court pointed to no such findings made by the Legislature in conjunction with Cal. Gov't Code § 11344, and indeed, none exist. The Superior Court's order is therefore inconsistent with the California Constitution, and cannot stand as a matter of law.

For these reasons, Public Resource respectfully requests relief by way of the instant Petition for Extraordinary Writ of Mandamus to correct the errors committed by the Superior Court in denying Public Resource's Petition.

ISSUES FOR REVIEW

1. **Whether the Superior Court erred in denying the writ of mandate and in so doing found that the California Public Records Act does not require the California Office of Administrative Law to produce usable electronic versions of Titles 1-5, 7-23, and 25-28 of the California Code of Regulations in response to Public.Resource.Org's valid request under the California Public Records Act (Cal. Gov't. Code. Section 6250).**

PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, AND/OR OTHER APPROPRIATE RELIEF

A. JURISDICTION AND TIMELINESS OF PETITION

This Court of Appeal has jurisdiction over the instant matter pursuant to California Government Code Section 6259, which provides that a Superior Court's order denying access to documents under the CPRA is "immediately reviewable by petition to the Court of Appeal for the issuance of an extraordinary writ." *See* Cal. Gov't Code § 6259(c).

This extraordinary writ petition arises out of an order of the Sacramento Superior Court in Case No. 34-2021-80003612, entitled *Public.Resource.Org, Inc. v. California Office of Administrative Law*, and the California Building Standards Commission, denying a petition for a writ of mandate ordering the disclosure of public records under the CPRA, Cal. Gov't Code

§§ 6250, *et seq*.

On March 17, 2021, Public Resource filed a petition for a writ of mandate pursuant to the CPRA against OAL and BSC. (Exhibits to Petition for Writ of Mandate, "Exh." 14, pp. 1-80.)

The Respondent Court issued an order denying Public Resource's Petition on April 11, 2022 as to OAL, refusing to compel the disclosure of the requested records. (Exh. 14, pp. 310-324.)

The Respondent Court's April 11, 2022, order also stayed Public Resource's Petition as to BSC, pending resolution of a related case in federal court concerning in part the same operative question of law. (Exh. 15, pp. 328-329.) See *American Society of Testing and Materials et al. v. Public.Resource.Org* (ASTM) (D.C. Cir. 2018) 896 F. 3d 437.

On May 10, 2022, OAL served Public Resource with the Notice of Entry of Order and Judgment. (Exh. 15, p. 325.)

This Petition, which seeks review of the April 11, 2022, order as to OAL, is timely under California Government Code Section 6259(c).

B. ABSENCE OF OTHER REMEDIES

Petitioner has no plain, speedy, and adequate remedy, other than the relief sought in this Petition. Section 6259 provides for review via petition for extraordinary writ to the appellate court, in lieu of an appeal.

The statutory right to file a petition is in lieu of an appeal, but trial court orders "shall be reviewable on their merits" through the writ process. *See Times Mirror Co. v. Super. Ct.*, 53

Cal. 3d 1325, 1336 (1991).

In cases concerning claims brought under CPRA, such as this one, where "writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters." *Powers v. City of Richmond*, 10 Cal. 4th 85, 113-114 (1995).

C. EVIDENCE & AUTHENTICITY OF EXHIBITS

The exhibits accompanying this Petition, filed concurrently under separate cover in Petitioner's Exhibits to Petition for Extraordinary Writ ("Exh."), are true and correct copies of the original documents they purport to be. All exhibits are incorporated herein by reference as if fully set forth in this Petition.

Because neither party requested oral argument following the tentative ruling of the Superior Court, there was no hearing on the matter and no transcript.

A true and correct copy of the Superior Court's order issued on April 11, 2022 denying the Petition for Writ of Mandate is included as Exhibit 14 of Petitioner's Exhibits to Petition. (Exh. 14, pp. 310-324.)

D. PARTIES AND BENEFICIAL INTEREST OF PETITIONERS

Petitioner Public Resource was the Petitioner in the action before the Superior Court. Public Resource is a 501(c)(3) nonprofit organization, incorporated and based in California, with the mission of improving public access to government records and primary legal materials. Public Resource is the national leader in providing public access to legislative, regulatory, and judicial edicts across a wide range of areas from both federal and state institutions. Public Resource has worked extensively with the Cornell Legal Information Institute to make substantial improvements to the Code of Federal Regulations ("CFR"), including campaigns to make the CFR accessible to the visually impaired and viewable on mobile devices. Public Resource also advised the Obama Administration's efforts to reform the Federal Register to enhance usability, an achievement which earned the Office of the Federal Register an award in 2011 for "Most Innovative Federal Agency." Public Resource is committed to making the regulations of all fifty states available in a common and usable format, including updates, to allow the public to freely view regulatory regimes, and to understand how they change over time.

Respondent Superior Court of California, County of Sacramento, is a duly-qualified superior court exercising its judicial powers in connection with the proceeding below. On April 11, 2022, the Honorable Steven M. Gevercer, presiding in Respondent Court, issued an order denying the Petition for a

Writ of Mandate as to OAL, and stayed the petition as to BSC. (Exh. 14, p. 310.)

Real Party in Interest OAL was one of the two Respondents in the action below, along with BSC. OAL was established in 1980 to ensure that state agency regulations are clear, necessary, legally valid, and available to the public. OAL is responsible for reviewing administrative regulations from over 200 state agencies and transmitting those regulations to the Secretary of State. OAL also oversees the publication and distribution of Titles 1–5, 7–23, and 25–28 of the CCR (all Titles except Title 24, which is managed and published by BSC, and Title 6, which has been revoked).

BSC was the other Respondent in the action below. BSC administers California's building code adoption process and codifies and publishes the California Building Standards Code as Title 24 of the CCR. BSC is not a Real Party in Interest in this action, as the Superior Court stayed the petition as to Title 24, pending resolution of a federal case in the District of Columbia.[1]

E. CHRONOLOGY OF PERTINENT EVENTS

On December 29, 2020, Public Resource sent a CPRA request to OAL, seeking an electronic copy of Titles 1–5, 7–23, and 25–28 of the California Code of Regulations. (Exh. 1, pp. 58.)

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[1] The district court in *Am. Soc'y for Testing & Materials v. Public.Resource.org, Inc.*, No. 13-CV-1215 (TSC), 2022 WL 971735 (D.D.C. Mar. 31, 2022), granted Public Resource's motion for summary judgment and allowing access to copyrighted standards under fair use.

On January 8, 2021, Steven Escobar, Senior Attorney for OAL, responded to Public Resource's request, and invoked the statutory 14-day extension to respond to the request. (*Id.*, pp. 65-66.)

On January 22, 2022, OAL provided a substantive response directing Public Resource to an online CCR resource, hosted by a third-party private publisher, and gave the option for OAL to scan paper copies of the CCR in response to the request. (*Id.*, pp. 64-65.)

On February 3, 2021, Public Resource reiterated that OAL was required to produce electronic copies in the electronic format in which it holds the information or that it uses to create copies. (*Id.*, pp. 63-64.)

On February 17, 2021, Mr. Escobar responded that OAL does not have a structured, machine-readable copy of the CCR. (*Id.*, pp. 62-63.)

On February 19, 2021 and February 24, 2021, Public Resource sent follow-up emails to OAL requesting a copy of the CCR in the Master Database, as specified in the public contract between the publisher and OAL. (*Id.*, pp. 60-62)

On February 26, 2021, Mr. Escobar responded on behalf of OAL, stating "OAL does not have a copy of a CCR Master Database." (*Id.*, p. 60.)

On March 17, 2021, Public Resource filed its Verified Petition for Preemptory Writ of Mandate Ordering Compliance with the California Public Records Act in the Superior Court. (*Id.*, pp. 1-82.)

On March 22, 2022, the Superior Court issued a tentative ruling on Public Resource's petition. (Exh. 11, pp. 277-288.)

On April 11, 2022, the Court entered its Judgment, in relevant part denying Public Resource's petition as to OAL. (Exh. 13, pp. 290-309.)

On May 10, 2022, Public Resource was served the Notice of Entry of Order and Judgment. (Exh. 14, pp. 325-329.)

F. PRAYER FOR RELIEF

1. WHEREFORE, Petitioner Public Resource requests that this Court grant relief as follows:
   a. Issue an extraordinary writ of mandate, prohibition, and/or other appropriate relief directing Respondent Superior Court of California, County of Sacramento to:
   b. Set aside and vacate its April 11, 2022 order denying the Public Resource's Petition as to Real Party in Interest OAL;
   c. Enter an order requiring Real Party in Interest OAL to immediately disclose the public records sought by Petitioner, namely a fully functioning, electronic copy of the CCR;
   d. Award Public Resource's attorneys' fees and costs in this proceeding pursuant to Government Code Section 6259(d); and
   e. Order other such relief as this Court of Appeal may deem just and proper.

Dated:May 31, 2022 COOLEY LLP

By: */s/ Matthew D. Caplan*

Matthew D. Caplan

Attorneys for Appellant

VERIFICATION

I, Matthew Caplan, declare as follows:

I am an attorney with the law firm of Cooley, LLP, attorneys for Petitioner, Public.Resource.Org, Inc. I have reviewed the records and files that are the basis of this Petition for Extraordinary Writ of Mandamus. I make this declaration because I am more familiar with the particular facts, including the state of the record, than is my client. I have read the foregoing Petition and know the facts set forth therein to be true and correct. I declare under penalty of perjury that the foregoing is true and correct. This Verification was executed on May 31, 2022 in Mill Valley, California.

Dated: May 31, 2022 COOLEY LLP

By: */s/ Matthew D. Caplan*

Matthew D. Caplan

Attorneys for Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL ALLEGATIONS AND BACKGROUND

A. The California Code of Regulations

The CCR is the compiled body of regulations for the state of California. Its titles address a broad swath of business, residential, and private life in this state. The CCR contains regulations governing, *inter alia*, vehicles, the California Attorney General's office, earthquakes, port authorities, firearms, plumbing, corrections, environmental protection, business regulation, military and veterans' affairs, toxic substances, and many more aspects of daily life in this state.

California has over 200 state agencies that contribute regulations to the CCR. OAL is responsible for reviewing those proposed regulations, transmitting them to the Secretary of State, and publishing all but one Title for the people of California (Title 24 is published by BSC). Notwithstanding this legal obligation to provide the Code, at present there exists no complete, unified, electronic version of the CCR available for the public to search, copy, print, compile, analyze, and comment upon. Divided portions of the CCR are accessible on private companies' websites for free under a variety of restrictions, but members of the public are charged for full unrestricted access to the CCR.

The CCR is the law of the State of California, which all of its citizens are expected to understand and obey. 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. Nonetheless, OAL does not make the CCR fully available to the public. Instead, it contracts with private companies to publish the CCR on proprietary platforms with significant—and unlawful—constraints on its access and use.

B. The OAL-West Contract

The absence of a public version of the CCR—one that is complete, electronic, and freely available to the public—stems from OAL's contract with a private third-party publisher, Thompson-Reuters ("West"), who publishes all titles of the CCR under its purview (the "OAL-West Contract"). (Exh. 1, pp. 22–56.) The publicly available OAL-West Contract specifies how the CCR shall be stored, updated, and maintained by West. For instance, the OAL-West contract provides that West will maintain "the Official California Code of Regulations (CCR) in an electronic database" called "the Master Database.'" (*Id.*, p. 36). West does not publish a complete version of the CCR in any machine readable format. Rather, West publishes the CCR through various legal resources, and maintains an online version that is segmented and subject to its website's Terms and Conditions. OAL, however, retains all rights to change, amend, and update the CCR. (*Id.*) West must diligently follow OAL's instructions for maintaining and updating the Master Database and the CCR. The OAL-West Contract provides:

- When OAL sends updates to West, West is contractually obliged to include them in the Official CCR on the Master Database. (*Id.*).

- "The text of regulations and all other items in the Master Database shall be subject to inspection, revision, and correction by OAL. The contractor shall take immediate action to make any corrections specified by OAL." (*Id.*)
- West cannot "alter the text of regulations, notices or any other materials furnished by OAL for publication, except as expressly directed or authorized by OAL." (*Id.* at 42.)
- OAL maintains all claims of ownership in the contents of the Master Database. (*Id.*)
- The contract mandates a satisfactory level of accuracy in the Master Database of zero percent (0%) error rate. (*Id.*)

The OAL-West Contract also expressly contemplates the production of the CCR in response to requests under the CPRA. It states that OAL maintains a perpetual license for use of all intellectual property rights 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 Ac*t." (Exh. 6, p. 230.) (emphasis added).

C. Public Resource's CPRA Request to OAL

Public Resource seeks a complete, machine-readable copy of the CCR to allow for the public to view, analyze, understand, and comment upon the laws of California, and to better comprehend how those laws have changed over time. Since no such resource

was publicly available, Public Resource contacted OAL to request a copy of the CCR titles under its purview. On December 29, 2020, Public Resource sent a CPRA request to OAL seeking a copy of "Titles 1-5, 7-23, and 25-28 of the California Code of Regulations" in a "structured, machine-readable digital format, such as XML or PDF." (Exh. 1, p. 58.) In its request, Public Resource cited Government Code Sections 6253(a)(1)-(2), which requires agencies to provide public records in "any electronic format in which [it] holds the information" and any requested format "used by [the agency] to create copies for [its] own use or for provision to other agencies." *Id*.

On January 8, 2021, OAL responded, and invoked the fourteen-day extension of time to respond to Public Resource's request. (Exh. 1, pp. 65-66.) On January 22, 2021, OAL provided its substantive response, denying OAL's request for a machine-readable copy of the CCR, and directing OAL to West's website to view the Titles in question. (*Id*., pp. 64-65.) OAL's response did not cite any statutory exemptions applicable to the CCR, or OAL more generally, that would entitle OAL to decline to furnish such records. OAL's response also stated that OAL would be willing to scan paper copies of the CCR and send those photocopied images to Public Resource. (*Id*.)

On February 3, 2021, Public Resource responded to OAL's letter, identifying two legal deficiencies in OAL's response. (Exh. 1, pp. 69-70) First, Public Resource explained that the existence of an online version published by West is legally irrelevant to OAL's duties under the CPRA. Public Resource stated that OAL,

as an agency, has a statutory duty to respond to a CPRA request, or to cite an exemption. That duty is unaffected by the existence of versions of the records in other places. Second, Public Resource explained that OAL's offer to provide paper copies or scanned PDFs did not comply with the CPRA's clear mandates that an agency produce a copy "in any electronic format in which it holds the information," or in any requested format "used by the agency to create copies for it own use or for provision of other agencies." Cal. Gov't Code § 6253.9(a)(1), (2). Finally, Public Resource explained that the current version of CCR on West's website was incompatible with the requirements of the CPRA as a matter of law, as user access was subject to a litany of "end user restrictions" by West which limited the public's free access to the laws of their own state.

On February 17, 2022, OAL responded, stating that "OAL does not have the requested CCR titles in the electronic format(s) requested, including in a structured, machine readable XML or PDF file." (Exh. 1, pp. 62-63). OAL's representative stated that OAL maintains a repository of out-of-date versions of the CCR on CD-ROMs, but that "the contents of the CD-ROM cannot be copied in whole and transferred to another storage device" and that each (outdated) section would need to be individually extracted and copied from the CD-ROM. (*Id.*)

On February 19, 2022, Public Resource responded, seeking more information about the CD-ROM storage system, and inquiring as to whether OAL could simply provide Public Resource with a copy of the contents of the CCR Master

Database, as described in the OAL-West Contract. (Exh. 1, pp. 60-62). On February 26, 2021, OAL responded, stating that "OAL does not have a copy of a CCR Master Database." (*Id.*, p. 60.) OAL did not, and has not, provided any records pursuant to Public Resource's CPRA request.

Public Resource also sent a CPRA request to BSC on December 29, 2020, seeking Title 24 of the CCR. (Exh. 1, p. 72.) BSC responded on January 7, 2020, and directed Public Resource to the BSC headquarters office where Title 24 is kept, and to various state depository libraries and private companies' websites who host restricted portions of Title 24 but charge a fee for full access. (*Id.*, p74.) BSC also stated that it "does not have the publishing rights to Title 24 and therefore cannot provide free copies to the public." (*Id.*) Public Resource responded to BSC's letter on January 29, 2021, and highlighted the legal deficiencies of BSC's request. (Exh. 1, pp. 76-77.) Public Resource did not hear back, and followed up on February 24, 2021. (*Id.*, pp. 79-80.) On March 2, 2021, BSC replied, stating that it "stands by its original response letter and there will be no additional response." (*Id.*, p. 79.)

D. Proceedings Below

Rebuffed by both agencies, Public Resource sought to enforce both CPRA requests. On March 17, 2021, Public Resource filed a Verified Petition for Peremptory Writ of Mandate Ordering Compliance with the California Public Records Act against both OAL and BSC. (Exh. 1, pp. 1-80) On April 20, 2021, Public Resource filed a Notice of Supplemental Authority based

on the public availability of the most recent contract between West and OAL. (Exh. 3, pp. 83-111.)

On April 23, 2021, OAL filed its Answer to Public Resource's Petition, including citations to two exemptions to disclosure under Government Code Sections 6254(k) and 6255. (Exh. 4, pp. 112–41.) Soon thereafter, two private entities purporting to hold copyrights in the enacted laws of California sought to intervene in the proceeding. International Code Council, Inc. and the National Fire Protection Association, Inc. (collectively, "Intervenors") moved to intervene to "protect" their purported copyright interests in the CCR based on standards that had been incorporated and adopted into the final regulations of Title 24. (Exh. 17, pp. 363-364.) On August 27, 2021, the Superior Court granted their motion to intervene. (*Id*.)

At the merits stage, the Superior Court denied Public Resource's petition and refused to order disclosure of the CCR titles under OAL's purview. (Exh. 13, pp. 290-309.) The Superior Court found that OAL did not "possess" the Official CCR, either actually or constructively, in a usable electronic format responsive to Public Resource's request. (Exh. 15, pp. 352-353.) It also concluded that a provision of the California Administrative Procedures Act ("APA"), Cal. Gov. Code, §§ 11340 *et seq.*, which governs how OAL makes the CCR available over the Internet, controlled over the CPRA's duties for agencies duties to respond to requests for public records. (*Id*., pp. 353-55.) The Superior Court reasoned that because the APA's governance of OAL is more "specific" than the general CPRA mandate, and because the

APA provision in question was passed and amended after the CPRA, that the CCR is not subject to disclosure pursuant to Public Resource's request. (*Id.*, p. 354.) The Superior Court stayed Public Resource's petition as to BSC and Title 24 pending resolution of a copyright infringement case, in federal district court in Washington D.C., which implicates in part the same legal questions. (*Id.*, p. 358.)

For the reasons discussed below, the Superior Court's order as to OAL is factually and legally incorrect.

II. STANDARD OF REVIEW

Whether the CCR titles under OAL's purview are subject to disclosure under the CPRA is a question this Court reviews *de novo*. *See Am. Civil Liberties Union of N. Cal. v. Super. Ct.*, 202 Cal. App. 4th 55, 66 (2011) ("review of a trial court's rulings on questions arising under the PRA . . . is de novo.")

Through Section 6259(a), the Legislature has directed that writ review is "not confined to acts in excess of jurisdiction" but rather "that trial court orders under the Act shall be reviewable on their merits." *Times Mirror Co. v. Super. Ct.*, 53 Cal. 3d 1325, 1336 (1991). In reviewing a trial court's order under the CPRA, an appellate court "conduct[s] an independent review of the trial court's ruling." *Id.*

III. ARGUMENT

The Superior Court erred in denying Public Resource's petition and refusing to order disclosure of the CCR titles under OAL's purview. Both the Constitution and the CPRA stand for

the principle of broad disclosure of agency records to the public. Under the CPRA, any public record in an agency's actual or constructive possession must be disclosed pursuant to a CPRA request, unless an express statutory exemption permits withholding disclosure. The CCR qualifies as a "record" as defined by the CPRA, both due to the nature of the contents of the CCR and because of the OAL's obligation under state law to create and maintain it. Neither OAL nor the Superior Court disputed that the CCR is a public record for purposes of the CPRA. And neither OAL nor the Superior Court identified an express statutory exemption that warranted withholding it from disclosure.

Instead, OAL asserted, and the Superior Court concluded, that OAL is not obligated to disclose the CCR in a usable electronic format. This was error. The Superior Court provided two reasons why OAL has no disclosure obligation, and neither supports that conclusion.

First, the Superior Court concluded that because OAL lacks possession of the CCR, it is not obligated to furnish a copy to Public Resource. It reasoned that under OAL's contract with West, West, and not OAL, maintains physical possession of the CCR. But regardless of whether that is true as a matter of law, the Superior Court had no basis for concluding OAL does not maintain at least constructive possession over the CCR. Under the CPRA, an agency retains constructive possession if it has the right to control the records, either directly, or through another person. OAL acknowledges that under its contract with West,

OAL retains control over the contents of the Official CCR contained in West's Master Database. Nevertheless, it insisted before the Superior Court that its right to control and access the data did not constitute constructive possession, since it does not control the Master Database itself. This assertion is at odds with California case law and is non-responsive to Public Resource's request: Public Resource seeks not the infrastructure of the Master Database itself, but the contents of that database, *i.e.*, the CCR, which OAL furnishes to West under the terms of its contract, and over which OAL has complete control of the contents.

To reach the opposite conclusion, the Superior Court erroneously interpreted OAL's contract with West. For instance, it pointed to the contract terms obligating West to furnish OAL with an electronic XML copy of the CCR upon termination or expiration of the contract. From this, it concluded that OAL had no right to an electronic XML copy unless or until the contract is terminated or expires. But nothing in the contract limits OAL's right to those preconditions, and under California law, courts have enforced production of records under a contract even where the termination right has not yet been enforced.

In addition, the contract expressly reserves for OAL a perpetual license right to reproduce and disclose the CCR pursuant to CPRA requests. And to the extent the contract provides a mechanism for denying Public Resource's request, it is void as against public policy, for the CPRA prohibits agencies from furnishing public records to a private entity if doing so

prevents the agency from providing the records under the CPRA. The Superior Court's interpretation of the contract is therefore unlawful.

Second, the Superior Court erred by concluding the CCR is exempt from disclosure by implication of the California APA. In doing so, it violated the California Constitution in two respects. First, records may be withheld under the CPRA only pursuant to an express exemption, and the APA contains no express exemption. Instead, the Superior Court reasoned that because the APA provides more "specific" instructions concerning how OAL must post portions of the CCR online, those obligations displace any general duty of disclosure under the CPRA. But that interpretation flouts Article I, Section 3(b)(2) of the California Constitution, which contains a "constitutional imperative" to courts that a state statute shall be narrowly construed to the degree it limits the public's right of access. Such a narrow construction is available, since the duties the APA imposes on the OAL in no way conflict with OAL's disclosure obligations under the CPRA.

The Superior Court's interpretation of the APA flouts the California Constitution in a second respect. Section 3(b)(2) of Article I of the California Constitution also instructs that the Legislature may enact a law that limits the right of access only if it adopts findings demonstrating the interest protected by the limitation and the need for protecting that interest. Neither OAL nor the Superior Court pointed to any such findings accompanying the enactment of the APA, nor can they. Given the

absence of such findings, the Superior Court's interpretation of the APA is in violation of that provision of the Constitution. But California courts have repeatedly counseled against any interpretation of a statute that raises constitutional doubt about its validity. The APA thus should not be construed to narrow access to the CCR or serve as a basis for denying OAL's obligation to furnish it under the CPRA, since such a construction raises serious constitutional doubt.

Finally, although not central to the Superior Court's reasoning, OAL has maintained it has no obligation to furnish an electronic copy of the CCR pursuant to the CPRA because a free version of the CCR is available on West's website. As a practical matter, that version is subject to various terms of use and restrictions that OAL and West may change at any time at their discretion. And as a legal matter, whether the CCR is already available to Public Resource is irrelevant to the agency's duty to produce such records in response to a valid CPRA request. The CPRA prohibits denying access to records simply because the agency does not think the purpose for the request is legitimate, and California courts have held that records must be furnished to a requester even if the requester already possesses the records in question.

A. The CPRA Applies to the CCR.

The CPRA fulfills the California Constitution's guarantee of the people's right to access public information and the records of public agencies. Both the Constitution and the CPRA stand for the principle of broad disclosure of agency records to the public.

The CCR qualifies as a "record" as defined by the CPRA, both due to the nature of the contents of the CCR and because of the OAL's obligation under state law to create and maintain it. Neither OAL nor the Superior Court disputed that the CCR is a record for purposes of the CPRA.

1. The CPRA Favors Broad Disclosure of Records.

The California Constitution establishes that "[t]he people have the right of access to information concerning the conduct of the people's business, . . . and the writings of public officials and agencies shall be open to public scrutiny." Art. I, § 3(b)(1). The Legislature enacted the CPRA as a means of enforcing this "fundamental and necessary right." Cal. Gov't Code § 6250. "The CPRA . . . was passed for the explicit purpose of increasing freedom of information by giving the public access to information in possession of public agencies." *CBS, Inc. v. Bloc*k, 42 Cal. 3d 646, 651 (1986) (citations and quotations omitted).

The California Supreme Court has held that, under the CPRA, "all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary." *Williams v. Super. Ct.*, 5 Cal. 4th 337, 346 (1993) (emphasis added). Indeed, the CPRA carries a "presumption in favor of access." *Am. Civil Liberties Union Found. of S. Cal. v. Super. Ct.*, 3 Cal. 5th 1032, 1040 (2017). This is because the California Constitution directs that any applicable statute or authority "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Cal. Const. art. I

§ 3(b)(2); *L.A. Cnty. Bd. Of Supervisors v. Super. Ct.*, 2 Cal. 5th 282, 290–91 (2016). The California Supreme Court has described this rule of construction as "a constitutional imperative." *City of San Jose v. Super. Ct.*, 2 Cal. 5th 608, 617 (2017).

As a result, the general policy of disclosure "can only be accomplished by narrow construction of the statutory exemptions." *Fairley v. Super. Ct.*, 66 Cal. App. 4th 1414, 1419–20 (1998). Agencies can overcome the presumption only by establishing that the requested records fall into one of a limited set of exemptions enumerated by statute. *See Long Beach Police Officers Ass'n v. City of Long Beach*, 59 Cal. 4th 59, 67 (2014) ("The act has certain specific exemptions (Cal. Gov't Code §§ 6254–6254.30), but a public entity claiming an exemption must show that the requested information falls within the exemption."); *Citizens for A Better Env't v. Dep't of Food & Agric.*, 171 Cal. App. 3d 704, 711 (1985) ("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.'" (quoting *State of Cal. v. Super. Ct.*, 43 Cal. App. 3d 778, 783 (1974))); *City of San Jose*, 2 Cal. 5th at 616 ("Every such record must be disclosed unless a statutory exception is shown."). The agency "opposing disclosure bears the burden of proving that an exemption applies." *Cnty. of Santa Clara,* 170 Cal. App. 4th at 1321 ((citing *Bd. of Trs. of Cal. State Univ. v Super. C*t., 132 Cal. App. 4th 889, 896 (2005))).

Unless an exemption applies, an agency must disclose records if (1) the records "qualify as 'public records'" within the

meaning of § 6252(e); and (2) the records are "in the possession of the agency." *Anderson-Barker v. Super. Ct.*, 31 Cal. App. 5th 528, 538 (2019). In the context of the CPRA, "the term 'possession' has been defined to 'mean[] both actual and constructive possession.'" *Id.* (*Bd. of Pilot Comm'rs v. Super Ct.,* 219 Cal. App. 4th 577, 598 (2013)). Before the Superior Court, the parties largely disputed whether OAL has constructive possession over the CCR, since OAL has outsourced aspects of the maintenance of the CCR to West, in accordance with OAL's contract with West.

2. The California Code of Regulations is a Public Record Under the CPRA.

The CCR is a "public record" subject to the CPRA's disclosure requirements. The Real Parties in Interest and the Superior Court below did not contest the CCR's status as a "public record" under the CPRA, and nor could they. As the body of law regulating a wide range of public and private conduct in California, there is no doubt that CCR "relate[s] to the conduct of the public's business." Cal. Gov't Code § 6252(e). Indeed, the CCR is oftentimes the primary—and sometimes the *only*—body of governmental guidance regulating the public's business in a given domain.

The CPRA defines a "public record" broadly, as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov't Code § 6252(e); *see also San Gabriel Tribune v. Super. Ct.*, 143 Cal. App. 3d 762, 774 (1983) ("'[t]his definition is

intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of recordkeeping instrument as it is developed'" (citation omitted)); *Poway Unified School Dist. v. Super. Ct.*, 62 Cal. App. 4th 1496, 1501 (1998) (broad definition of "public records" is purposefully designed to protect the public's need to be informed regarding the actions of government).

The CPRA also requires agencies to provide the requestor with the same file types as are at the agency's disposal. Public records are subject to disclosure 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." Cal. Gov't Code § 6253.9(a)(1)–(2).

Furthermore, California has mandated the creation and maintenance of the CCR by OAL and BSC, which independently qualifies it as a public record. *See* Cal. Gov't Code § 11342.4 ("[OAL] shall adopt, amend, or repeal regulations for the purpose of carrying out the provisions of this chapter."); Cal. Health & Safety Code § 18930(a) ("Any building standard adopted or proposed by state agencies shall be submitted to, and approved or adopted by, the California Building Standards Commission prior to codification."). This is because "[a]ny record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record." *League of Cal. Cities v. Super. Ct.*, 241 Cal. App. 4th 976, 987 (2015).

B. OAL has Possession of the CCR Under California Law.

The CPRA defines "possession" as "mean[ing] both actual and constructive possession." *Bd. of Pilot Comm'rs,* 219 Cal. App. 4th at 598. Specifically, "an agency has constructive possession of records if it has the right to control the records, either directly or through another person." *Consol. Irrigation Dist.*, 205 Cal. App. 4th at 710.

The Superior Court determined that OAL lacks possession over the CCR, given the terms of is contract with West. (Exh. 15, pp. 352-353.) This was error. That finding is contradicted both by California law and by the terms of the contract itself. Nothing in OAL's contract with West suggests it lacks both actual and constructive possession over the CCR. And to the degree the contract might be read in this fashion, it would necessarily flout not only California law, but also the California Constitution, which further suggests why the court erred in its conclusion.

1. OAL's Contract With West Makes Clear OAL Remains In Possession Of The CCR.

Contrary to OAL's contention, nothing about its contract with West dispossesses it of the CCR. The contract conveys OAL's right to control and possess the CCR, which satisfies the CPRA's definition of constructive possession.

OAL admits that it has the right to control the Official CCR through the Master Database. (Exh. 7, p. 254 (OAL "maintains the rights to the data within the Master Database".) Its contract

with West makes this unambiguous. West must "update the Master Database as soon as feasible after OAL provides the contractor with regulations." (Exhs. 1, p. 15; 3, p. 91.) OAL has the right to "inspect[], revis[e] and correct[]" the CCR Master Database and dictate revisions to West. (Exh. 3, p 91.) And the contract states that OAL maintains all rights to the Master Database, notwithstanding the fact that West publishes a copy of it. (Exh. 3, p. 104.) In sum, West has no contractual ability to make any changes to the CCR and must make every change that OAL dictates. This alone establishes constructive possession under the CPRA. *See Cmty. Youth Athletic Ctr. v. City of Nat'l City,* 220 Cal. App. 4th 1385, 1428 (2013) (finding constructive possession and ordering 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").

Before the Superior Court, OAL contended that it only controls the "data" in the Master Database, and not the database itself. (Exh. 7, p. 254.) The Superior Court took this to mean that Public Resource was somehow seeking the digital infrastructure of the database rather than its contents.[2] (Exh. 15, pp. 352-53.) This is not so. Public Resource is requesting a copy of the "data"

[2] To the extent that the respondent court relied on the Declaration of Andrew Martens (Exh. 8, p. 259) to come to this conclusion, that reliance was misplaced, since Mr. Martens misstates Public Resource's request. Public Resource is not seeking access to any "proprietary software" that West uses. Rather, Public Resource is simply requesting a copy of the Official CCR—the record itself—that is stored on the Master Database.

in the Master Database—the CCR—in its already-existing digital format. The CPRA directs that agencies must provide a public record in "any electronic format in which it holds the information" and any requested format "used by the agency to create copies for its own use or for provision to other agencies." Cal. Gov't Code § 6253.9(a)(1)–(2). Here, that includes a usable electronic format. (Exh. 6, p. 216.)

To be clear, Public Resource is not asking OAL to create anything that OAL does not already possess. As OAL has acknowledged, it controls the data in the Master Database. (*Id.* p. 254.) Public Resource is simply asking OAL to export the data from the database in its existing format—a process that is neither complicated nor burdensome. Public Resource is agnostic about the format of the exported data, as it explained in its initial request. (Exh. 1, p. 58.) What matters is that OAL produce a complete, machine-readable electronic copy of the data it controls, as it must do under the CPRA.

Constructive possession of this kind requires production of the record. For example, in *Community Youth Athletic Center v. City of National City*, 220 Cal. App. 4th 1385, 1426, 1428–29 (2013), a city's contractual ownership interest in, and right to possess, a consultant's underlying field survey records were subject to a duty to disclose under the CPRA.

Before the Superior Court, OAL contended that the right to access data does not equal possession or control, but its reliance on *Anderson-Barker*, 31 Cal. App. at 538, for this proposition is misplaced. In *Anderson-Barker*, the court found that the agency

in question lacked constructive possession of disputed records because "the City presented evidence showing that it does not direct what information the OPGs place on the VIIC and Laserfiche databases, and *has no authority to modify the data in any way*." *Id.* at 540 (emphasis added). Here, by contrast, OAL has the express contractual right to direct exactly what information West places in the Master Database, and the exclusive authority to direct West to modify that data in every way. (Exh. 1, pp. 15-16, 30, 42.). The agency's authority to direct and modify the records was dispositive in *Anderson-Barker*, and it is dispositive here. OAL has constructive possession of the CCR in the Master Database because it has exclusive control over the Official CCR stored on the Master Database.

The Superior Court reached the contrary conclusion, reasoning that OAL would have an obligation under the CPRA only if it had actual control of the *infrastructure* containing the records. *See* Ex. 15, pp. 352–53 ("[T]he Master Database exists in the proprietary software of ThomsonReuters/West Publishing . . . which is not a "record" and which OAL does not possess."). According to this theory, OAL would need to own or physically possess West's computers, servers, and access passwords for it to have constructive possession over the CCR. But the Superior Court's standard effectively constitutes *actual* possession, not constructive possession. California law requires agencies to produce records in their constructive possession. *See Consol. Irrigation Dist.*, 205 Cal. App. 4th at 710 (an agency faces a duty to disclose records when it has the ability to control the contents

of those records); *Anderson-Barker*, 31 Cal. App. 5th at 538 ("[A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person." (quoting *City of San Jose*, 2 Cal. 5th at 623.))

The Superior Court also reasoned that under the terms of the contract, OAL may obtain the XML version only if OAL or West terminates the contract, or when it expires. (Exh. 15, p. 353.) The contract need not be read that way, because these are sufficient, not necessary conditions. 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.[3] If anything, the contract anticipates the opposite: it expressly reserves a "perpetual license" for "use" of all editorial enhancements by West, and it defines "use" to include "reproduction or disclosure by OAL . . . as . . . required by law, including but not limited to the Public Records Act." (Exh. 3, p. 105.) The contract permits rather than prohibits such disclosure. The Superior Court therefore erred in concluding that OAL lacked the right to request an XML version of the CCR.

The Superior Court's reasoning was also flawed because California courts have reasoned that, where there is contractual language of ownership, courts enforce production even if the termination right has not been enforced. *See, e.g.*, In *Cmty. Youth*

[3] The OAL-West Contract states that "Upon completion or termination of the contract, the contractor shall provide OAL with a useable electronic database containing the data from the Master Database . . . . in a standard . . . and easily processed or converted format such as XML." (Exh. 3, pp. 91-92.)

Athletic Ctr., 220 Cal. App. 4th at 1428, the court found that, "[b]ased on the contractual language between RSG and the Commission, 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." Given its finding of control, the court ordered production. *Id*. Similarly, in *Consol. Irrigation Dist. v. Superior Ct*., 205 Cal. App. 4th 697, 728 fn. 18 (2012), the contract with the agency's main contractor contained a like provision conveying an obligation for the third-party to turn over records at the termination of the agreement.[4] Although the court was not required to address any issue concerning the primary consultant's files because they were moot due to access granted, it noted that "it cannot be disputed that City holds an ownership interest in those files." *Id*. at 728. OAL cannot hide behind a permissive contractual clause where the contract as a whole clearly establishes ownership and constructive possession.

[4] In that case, the contract provided, in relevant part: "Possession of Materials Prepared Under the Contract. It is agreed that all finished or unfinished documents . . . prepared by the Contractor under this Agreement shall be 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 provided that the Contractor may, at no additional expense to the City, make and retain such copies thereof as desired." *Consol. Irrigation Dist.*, 205 Cal. App. 4th at 728 fn. 18.

2. If OAL Lacks Constructive Possession Over The CCR Due To Its Contract With West, That Contract Is Unlawful and Void For Public Policy.

Alternatively, if OAL is correct that it lacks constructive possession over the CCR due to the terms of its contract with West—as the Superior Court concluded—then OAL's arrangement with West is unlawful, and the contract is void for public policy. OAL cannot rely on the contractual term "upon completion or termination of the contract" to skirt constructive and actual possession in perpetuity so long as it maintains its contract. (Exh. 7, pp. 252-253.) To the extent that this contractual provision cited by OAL and the Superior Court prohibits or disclaims OAL's CPRA obligations, it is void as a matter of public policy and the law. This is because Section 6270 expressly forbids agencies from offloading possession of records to private third parties:

> 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*.

Cal. Gov't Code § 6270(a) (emphasis added). The California Supreme Court has interpreted this provision to mean what it says:

> The statute'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 CPRA because it is no longer in the agency's possession. . . . It simply prohibits agencies from attempting to evade CPRA by transferring public records to an intermediary not bound by the Act's disclosure requirements.

City of San Jose, 2 Cal. 5th at 623–24. OAL has transferred custody of its electronic record to West and is now arguing that because its contractual term has not ended, it cannot recover the record otherwise, or furnish it as mandated under the CPRA.

Such evasion is not only prohibited by Section 6270, but it was expressly admonished during the course of the Legislature's enactment of Section 6270. Below, the Superior Court reasoned that since the Legislature "is aware of OAL's agreement with Thomson Reuters/West," such awareness implies the Legislature's tacit endorsement of the practice. (Exh. 14, pp. 320-321.) Not only is this theory unsupported in case law, but here, the legislature's awareness was neither a sign of acceptance nor approval. Rather, the legislative history of Section 6270 indicates *disapproval* of a predecessor agreement to the current contract between OAL and West.[5] In fact, it appears Section 6270 was passed to forbid this exact type of arrangement. The 1995 Senate Report that OAL and the Superior Court rely on highlights OAL's

[5] "OAL contracts with Barclays, a division of Thomson-Reuters." *See* OAL, "California Code of Regulations (CCR)," oal.ca.gov (May 27, 2022), https://oal.ca.gov/publications/ccr/.

contract as its *only* example of what Section 6270 would *forbid*. The Legislature's analysis cites to OAL's contract, and states 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 this chapter." CA Bill Analysis dated June 12, 1995, Sen. Rules Comm. Rep. on Assem. Bill No. 141 (1995-1996 Reg. Sess.) as amended Jun 12, 1995. The Legislative history therefore squarely contradicts the Superior Court's inference.

C. No Exemption Applies to the CCR.

The Superior Court misapprehended the nature of CPRA exemptions and strayed from the California constitution in concluding that the CCR was exempt from disclosure pursuant to Public Resource's request. This was error for multiple reasons.

1. The Superior Court Did Not Identify an Express Exemption for the CCR, So It Invented One.

If an agency is in possession of public records, it must disclose them pursuant to a valid CPRA request unless the agency can establish that the record is expressly exempt from disclosure. *See* Cal. Gov't Code § 6253(b) (agency must "make the records promptly available to any person" unless "exempt from disclosure by express provisions of law"); *City of San Jose*, 2 Cal. 5th at 616 ("Every such record 'must be disclosed unless a statutory exception is shown.'"); *Williams*, 5 Cal. 4th at 346 ("[A]ll

public records are subject to disclosure unless the Legislature has expressly provided to the contrary."). The CCR contains hundreds of exemptions. *See* Cal. Gov't Code §§ 6254-6254.35; 6255; 6267; 6268 (specifying exemptions). This list is subject to ongoing revision and expansion: the legislature regularly adds exemptions for a variety of agencies, under various statutes, and for numerous categories of documents that the legislature has deemed to fall beyond the purview of the CPRA. Cal. Gov't Code § 6253.4 (listing 37 agencies specifically tasked with developing their own regulations for making records available; OAL not listed (amended in 2018)); § 6253.5 (exempting, *inter alia*, certain official records from district initiatives, referendums, recalls, and parts of the Education Code (amended in 2017)).

Despite the hundreds of exemptions, the Superior Court could not point to a *single* statutory exemption in the CPRA that might exempt the documents requested by Public Resource from public disclosure. Nor did it identify an exemption that applies to documents managed and controlled by OAL generally, or for documents created pursuant to the APA, or that applies to the CCR as a whole. The Superior Court did not even weigh whether, through the CPRA's "catch all" exemption in Section 6255, the "public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

Instead, the Superior Court found an implied exemption without any textual support. The Superior Court concluded the CCR was exempt from disclosure by implication of the California APA, Cal. Gov't Code §§ 11340 *et seq*. *See* Exh. 14, pp. 319-320

(concluding that Section 11344 exclusively governed the public's right to access the CCR because that provision is more "specific" than the "general" CPRA mandate, and because Section 11344 was passed and amended after the CPRA).

That conclusion finds no support in California law. Neither OAL nor the Superior Court has pointed to a single legal precedent justifying the creation of an implied exemption under the CPRA beyond the express exemptions enacted by the Legislature. Given the specificity with which the Legislature has enacted express exemptions under the CPRA, there is no legal basis to look beyond the text of the statutory exemptions and find an unenacted exemption by mere implication. Below, the Superior Court exceeded its authority by finding an exemption the Legislature has not enacted in violation of both the CPRA and the California Constitution.

2. The California Constitution Bars the Superior Court's Construction of the APA.

Below, the Superior Court erred in reasoning that the APA and CPRA must be "harmonize[d]" such that the APA's requirements "governing OAL's duty to make the CCR available" displaced broader obligations under the CPRA. (Exh. 14, pp. 319-320.) Indeed, the Superior Court's attempt to "harmonize" the APA with the CPRA runs afoul of the plain text of the California Constitution in two respects. First, it flouts the Constitution's requirement that statutes conveying the people's right to access, like the CPRA, be construed broadly, and any statutes that could be construed to limit them, such as the APA (as interpreted by

OAL and the Superior Court), be construed narrowly. Second, the Constitution sets out an express procedural requirement the Legislature must follow in order to legislate in a manner that limits the people's right to access; that the Legislature did not follow this procedure when enacting the relevant APA provision means that the APA cannot be construed to limit access.

a. The California Constitution Requires A Broad Construction Of Any Statute To Further The People's Right To Access.

The CPRA protects the people's "fundamental and necessary" right to public access, Cal. Gov't Code § 6250, as enshrined in the California Constitution, Art. I, § 3(b)(1). Emphasizing the fundamental nature of this right, the Constitution provides express guidance to courts interpreting the people's right of public access when that right may conflict with other statutes. Specifically, Section 3(b)(2) provides that "[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Cal. Const. art. I, § 3(b)(2). The California Supreme Court has described this interpretive rule as "a constitutional imperative." *City of San Jose*, 2 Cal. 5th at 617. In the context of interpreting the APA, this interpretive imperative counsels that a court must construe the APA narrowly to the degree that its interpretation may limit the right of access.

Below, the Superior Court did just the opposite. Rather

than treat Section 3(b)'s interpretive rule as "imperative," the Superior Court instead resorted to interpretive axioms that have no basis in either the California Constitution or the Government Code's Code of Construction. *See* Cal. Gov't Code §§ 1-26. The Superior Court instead relied on a canon of construction suggested by OAL in briefing—that the specific statute should control the general. (Exh. 6, p. 219.) To the extent that the APA can be construed in a manner consistent with the people's right of public access—specifically, that construction of the APA may not be read in a fashion that limits the right of access—the Constitution mandates that it must be. Here, the APA's provisions regarding OAL's duties to publish the CCR and sell an official version can easily be construed in a manner consistent with Section 3's mandate to construe statutes to further the people's right of access. 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 CPRA. The Superior Court pointed to no provision in the APA which even remotely suggests otherwise, and indeed, none exist.

b. The Legislature is Required by the Constitution to Follow Specific Procedures To Legislate Limits On The Right To Access Records, Which It Did Not Do When Enacting Section 11344.

The Superior Court's interpretation also flouts the California Constitution in a second respect. Below, it concluded

that Section 11344 controlled because it was both enacted and amended "later in time." (Exh. 14, pp. 319-321.) However apt this interpretive inference may be in some circumstances,[6] it is inapt here, for the California Constitution *provides express guidance* for subsequently passed statutes and their potential effect on the people's constitutional right to public access. In addition to the interpretive imperative discussed above, Section 3(b)(2) also 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(b)(2).

The Superior Court ignored this provision, and interpreted Section 11344 to limit the people's right of public access by shielding the CCR from public disclosure. But neither OAL nor the Superior Court identified any such findings by the Legislature with the enactment of Section 11344. And indeed, it contains no "findings demonstrating the interest protected by the limitation and the need for protecting that interest." Thus, to the

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[6] In its section of the code on "General Presumptions for Statutory Construction," the California Legislature has expressly limited this interpretive presumption only to later statutes enacted in the *same session* as earlier ones. *See* Cal. Gov't Code § 9605(b) ("In the absence of any express provision to the contrary in the statute which is enacted last, it shall be conclusively presumed that the statute which is enacted last is intended to prevail over statutes which are enacted earlier at the *same session*." (emphasis added)). Since the provisions in question were not enacted in the same session, this interpretive presumption gains no authority from the Legislature itself.

degree the APA can be construed to "limit[] the right of access" guaranteed by the Constitution and safeguarded by the CPRA, such a construction raises serious constitutional doubts about the APA.

This is especially so because the California Supreme 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*, 56 Cal. 4th 498, 507 (2013) (emphasis in original). As the California Supreme Court explained in *People v. Gutierrez*:

> When a question of statutory interpretation implicates constitutional issues, we are guided by the precept that [i]f a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable."

58 Cal. 4th 1354, 1373 (2014) (quotations and citations omitted); *see also City & Cnty. of San Francisco v. Regents of Univ. of Cal.*, 7 Cal. 5th 536, 558 (2019) ("[I]f there is a conflict between the

California Constitution and a law adopted by the Legislature, the California Constitution prevails."). The canon of constitutional doubt "has been described as a 'cardinal principle' of statutory interpretation," *Gutierrez*, 58 Cal. 4th at 1373, and it instructs that a court should interpret the APA in a manner consistent with the California Constitution. Below, the Superior Court failed to do so. The APA contains no indication that the statute was ever meant to supplant and override the CPRA and Section 3, and it is possible (easy, even) to construe the APA in a manner that avoids conflict. Again, there is nothing in the text or spirit of the APA which would forbid OAL from complying with its statutory obligations under the CPRA *and* simultaneously continue publishing and selling the CCR under Section 11344. Because such an interpretation is possible, California law requires it.

3. The Free Version of The CCR On West's Website Does Not Satisfy OAL's Obligation Under the CPRA

Below, OAL also opposed its obligation under the CPRA on the basis that the version posted on its website has only "minimal restrictions." (Exh. 8, pp. 250-251.) Notably, a mere month after Public Resource filed its petition against OAL and BSC, in which it explained, inter alia, how West's website was incompatible with the CPRA because it contained end-user restrictions, West undertook a "holistic review of the various public websites" that it manages. (*Id.*, p. 258.) In briefing below, OAL stated that, as a result of this "holistic review," the cookie and copyright policies

were removed from the CCR site. (*Id*., p. 250.) But it contended that "even had these minimal restrictions not been removed, Petitioner would have been able to access the records as required under the PRA." (*Id*. ("OAL Satisfied the Requirements of the PRA by Making the CCR Available Electronically").) As a matter of law, this argument is wrong, for three reasons.

First, OAL has pointed to nothing in the CPRA, nor any California jurisprudence, which suggests an agency is exempt from disclosing public records simply because the agency can point to a third-party private website where the records exist in some form, and regardless of whether that form complies with the agency's disclosure obligations under the CPRA. And indeed, it cannot, as no such authority exists. Under the CPRA, an agency must produce a requested public record unless it can justify nondisclosure under an express exemption. *See Williams*, 5 Cal. 4th at 346 ("all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary." (emphasis added)). The existence of West's website, and whether it contains public records in whole or in part, has no relevance to OAL's legal duty to disclose public records in compliance with the CPRA. Indeed, the OAL-West Contract expressly contemplates that OAL will need to comply with CPRA requests notwithstanding West's agreement to publish a version of the CCR on its website. (Exh. 6, p. 230.)

Second, West's remedial "fix" to its website provides cold comfort for the public's constitutional right to public access. This is because nothing forbids West from reinstating its copyright

and cookie policies on the CCR website and again subjecting the public to private terms of use to access the laws of California. OAL takes the position that there was nothing wrong with those end-user restrictions in the first place, (Exh. 6, p. 250), and nothing would prevent OAL and West from enforcing those terms again. This is a result that California law should not countenance. *Saltonstall v. City of Sacramento*, 231 Cal. App. 4th 837, 849 (2014) (courts "should not avoid the resolution of important and well litigated controversies arising from situations which are capable of repetition, yet evading review" (internal citations omitted)). By OAL's logic, as long as the terms of use to access a version of a public record on a private entity's website have—in that agency's view—"minimal impact" on the user experience, there is no legal limitation on the kinds of terms the agency or private entity can set. (Exh. 6, p. 250.) Such an assertion could not more clearly flout the right of unrestricted public access guaranteed by both the California Constitution and the CPRA.

Finally, and most importantly, OAL's argument is undermined by a core tenant of the CPRA. Under the CPRA, the requestor's access to—*or even possession of*—a public record is irrelevant to the agency's duty to produce the same record in response to a valid CPRA request. *See* Cal Gov't Code § 6257.5 (disallowing limitations on public access to a record "based upon the purpose for which the record is being requested"). OAL cannot decline its legal duty to disclose records to the public simply because it believes the requester's reasons for the request

are superfluous. Thus, *even if* West's website somehow provided a machine-readable XML copy of the CCR (which it surely does not), that would in no way relieves OAL of its duty to comply with Public Resource's CPRA request and provide the same record. California courts have found similarly. In *Caldecott v. Superior Court*, 243 Cal. App. 4th 212, 216 (2015), the Superior Court had denied a school district director's public records request because "he already possessed the documents." The Superior Court reasoned that, because he already had the documents, his request was "abstract and unnecessary." *Id.* at 219. The Court of Appeal reversed, explaining that "this completely misses the point," concluding that petitioner's "possession of copies is not a basis to withhold the Documents." *Id.* at 220 (citing § 6257.5).

OAL's argument that West's CCR website somehow satisfies the agency's obligations under the CPRA is legally meritless.

CONCLUSION

It is uncontested that the CCR is a public record under the CPRA. OAL has legal possession over a usable electronic version of the CCR that Public Resource seeks, and California law therefore requires OAL to produce the CCR pursuant to Public Resource's CPRA request unless an express exemption applies. The Respondent Sacramento Superior Court did not find that an exemption applies and strayed from the clear mandates of the CPRA and the California Constitution in denying Public Resource's Petition. For all the foregoing reasons, Petitioner

respectfully requests that this Court issue an extraordinary writ of mandate directing Respondent Sacramento Superior Court to set aside and vacate its April 11, 2022, order denying Public Resource's petition and enter an order requiring OAL to disclose the CCR Titles under its purview.

Dated: May 31, 2022 COOLEY LLP

By: /s/ *Matthew D. Caplan*

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8204(c) of the California Rules of Court, I certify that the text of this brief consists of 11,282 words according to the word count feature of the computer program used to prepare this brief.

Dated: May 31, 2022

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