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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

PUBLIC.RESOURCE.ORG, INC., a nonprofit
California corporation,

Plaintiff,

v.

OREGON DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES,

Defendant.

Case No. 24CV30573

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS**

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4 <https://shop.iccsafe.org/catalogsearch/result/?cat=&q=Oregon+Fire+Code> 5

5 <https://www.iapmo.org/terms-of-use/#:~:text=IAPMO%20reserves%20the%20right%2C%20in,at%20any%20time%2C%20without%20notice> 7

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1 Plaintiff Public.Resource.Org, Inc. (“PRO”) submits its response in opposition to
2 Defendant Oregon Department of Consumer and Business Services’ Motion to Dismiss as follows:

3 **I. INTRODUCTION**

4 The Oregon Specialty Codes (the “Codes”) addressed in the Complaint are a body of law
5 that regulates the private conduct of Oregonians engaged in construction and maintenance
6 activities within the state. The Codes are composed of amendments and standards, codified and
7 adopted by the Oregon Department of Consumer and Business Services, which refers to itself as
8 the “Building Codes Division” (“BCD”) in the marketplace and online.

9 PRO seeks to reproduce the codes—to make them publicly available, at no charge, for
10 translation, accessibility, public comment, comparison, and academic scholarship. As enactments
11 of Oregon’s government, the Codes are imbued with the force of law, and carry stiff penalties for
12 violations. However, unlike other bodies of law, PRO is not free to reproduce the Codes in any
13 way. BCD prevents PRO, or anyone in the public, from being able to freely “speak” the Codes
14 through a pernicious and unlawful arrangement with private companies from whom the state
15 purchases model standards that are incorporated by reference. To have access to the Codes,
16 including the standards, PRO must pay a private party a fee. And even if PRO does pay for copies
17 of the Codes, PRO cannot reproduce them or “speak” them as it wishes. PRO therefore asserts
18 two claims for declaratory relief.

19 First, PRO seeks a declaration that the Codes—after their codification and adoption by the
20 Oregon government—are the law, and carry the force of law, where appropriate. Black letter law
21 holds that no one can own the law, and no one can prohibit another person from speaking,
22 reproducing, distributing, and commenting upon the law as they see fit. Such a freedom lies at the
23 very core of a representative republic, and Article I § 8 contains no historical analog for speech
24 restrictions when the government enters into a contract with a private company who is authorized
25 to forbid the public from speaking or reproducing the laws. Yet, that is precisely what the
26 Complaint alleges, and precisely what PRO will establish in this case. On this basis, PRO has
27 stated a claim for declaratory relief, and the Motion should be summarily denied.

1 employment and public accommodation under ORS 659A.145 *et seq.*); OAR 918-001-0036 (civil
2 penalties for violation of the Building Codes).

3 Some OAR provisions provide guidance and requirements for public bodies, while others
4 dictate the terms, standards, and penalties for private individuals who wish to engage in certain
5 lawful activities subject to the state’s regulation. Structural, fire, and plumbing codes fall in the
6 latter category. The “Building Codes Division,” an Oregon business regulatory and consumer
7 protection agency, adopts and publishes the rules, standards, and penalties for Oregonians relating
8 to building construction and modification. OAR 918-008-0000 (“Purpose and Scope”). “The
9 Department of Consumer and Business Services, Building Codes Division, adopts model building
10 codes, standards and other publications by reference, as necessary, through administrative rule *to*
11 *create the state building code.*” *Id.* sub. (1) (emphasis added).

12 As PRO alleges in the Complaint, BCD buys certain model codes from private companies,
13 such as the International Code Consortium (“ICC”), the National Fire Protection Agency,
14 (“NFPA”) and the International Association of Plumbing and Mechanical Officials (“IAPMO”),
15 (collectively the “Private Standards Companies”) for incorporation into the state building code.
16 (Compl., ¶ 10.) As part of that arrangement, BCD contracts with the Private Standards Companies
17 to publish the official Oregon codes, including the standards that have been incorporated therein.

18 **B. The Contracts Between BCD and The Private Standards Companies.**

19 PRO received copies of the contracts between BCD and the Private Standards Companies
20 pursuant to a Public Records Law request. (Compl., Ex. 1.) Under the contracts, the Private
21 Standards Companies are tasked with compiling the Oregon “specialty codes,” which are the
22 codified official laws governing each subject, comprised of the state of Oregon amendments *and*
23 the uniform standards Oregon purchases from the Private Standards Companies.¹ Consider the
24

25 ¹ The contractual relationship is considerably more complex. The Private Standards Companies
26 provide the standards, which are incorporated into the Codes, and then distribute and sell the Codes
27 to the public and the government (*See* Compl., Ex 1).

1 following illustrative excerpts from the government’s contracts with the Private Standards
2 Companies:

- 3 • “Produce and provide the 2021 Oregon Plumbing Specialty Code (OPSC) consisting
4 of the 2021 Uniform Plumbing Code and the State of Oregon amendments as produced
5 by the Oregon Plumbing Board. All contents aforementioned shall be known as the
6 2021 Oregon Plumbing Specialty Code (OPSC).” (Compl., Ex. 1 at 1) (BCD contract
7 with IAPMO)
- 8 • “The Agency is adopting the following building codes and construction standards
9 (collectively, the “Oregon Codes”), which are based on and include the 2012
10 International Codes and material developed by Agency or otherwise by the State of
11 Oregon (the “Oregon Amendments”):
 - 12 (a) 2014 Oregon Structural Specialty Code (OSSC), which is based on the 2012
13 International Building Code and the energy efficiency requirements commonly
14 referred to as the “2014 Oregon Energy Efficiency Specialty Code (OEESC)”
15 which is based on the 2010 Oregon Energy Efficiency Specialty Code and
16 originally based on the 2009 International Energy Conservation Code;
 - 17 (b) 2014 Oregon Mechanical Specialty Code (OMSC) which is based on the 2012
18 International Mechanical Code and International Fuel Gas Code;
 - 19 (c) 2015 Oregon Residential Specialty Code (ORSC) which is based on the 2011
20 Oregon Residential Specialty Code and originally based on the 2009 International
21 Residential Code;
 - 22 (d) 2014 Oregon Fire Code (OFC) which is based on the 2012 International Fire Code.
23 (Compl., Ex. 1 at 8) (BCD contract with ICC)
- 24 • WHEREAS, BCD desires to publish an edition of the OESC containing those portions
25 of NFPA 70®, National Electrical Code®, (NEC or NEC®) 2017 that have been
26 approved and codified by BCD, those portions of the NEC® that have been modified
27 by BCD, and the Oregon amendments thereto, (hereinafter referred to as the
OESC/NEC) and to publish supplements to the OESC/NEC from time to time. (Compl.,
Ex. 1 at 21) (BCD contract with NFPA)

21 In essence, the contracts authorize the Private Standards Companies to compile the codified
22 final versions of the specialty codes (the “Codes”) for publishing and distribution. The contracts
23 also empower the Private Standards Companies to sell the codes to the public for a hefty price.
24 For example, access to a copy of the 2021 Oregon Plumbing Specialty Code (OPSC), a “Hardcopy
25 3 ring binder,” costs IAPMO Members \$120, while non-members pay \$150. (Compl., Ex. 1 at 2.)
26 For an e-book version, IAPMO Members pay \$112, while non-members pay \$140. (*Id.*) For the
27

1 Oregon Structural Specialty Code, the Oregon Mechanical Specialty Code, the Oregon Residential
2 Specialty Code (ORSC) and the Oregon Fire Code (OFC), ICC provides PDF versions for purchase
3 on its website, pursuant to the contract. (Compl., Ex. 1 at 1, 8.)² So too for NFPA’s distribution
4 of the Oregon Electrical Specialty Code (OESC). BCD’s contract with NFPA (whose licensee is
5 BNi) provides that “BNi shall make the OESC/NEC available for sale to the State of Oregon, local
6 governmental agencies, and the general public on or before January 15, 2018.” (Compl., Ex. 1 at
7 1, 23.)³ For anyone, including PRO, who wishes to search, copy, paste, annotate, or process the
8 Codes for accessibility, purchasing a copy is their *only* legal option.

9 **C. The “Free” Versions of the Codes Are Anything But.**

10 Contrary to BCD’s representation, the “official versions of Oregon’s building codes” are
11 not “freely available for the public to download from the Secretary of State’s website.” (Mot.
12 at 3.) This is because the “official versions” of the Codes—the entire versions—are not available
13 for download without paying a fee to a third party private business, namely the Private Standards
14 Companies. Chapter 918 of the Oregon Administrative Rules, which the Motion alludes to
15 captures the amendments, but does not include the actual standards. (*Id.*) As explained above, the
16 Codes are comprised of a combination of *both* the amendments and the standards, codified by the

18
19 ² See <https://shop.iccsafe.org/catalogsearch/result/?cat=&q=Oregon+Fire+Code> (Oregon Fire
20 Code versions for sale, with prices ranging from \$2.30 for 2016 version, to \$88.00 for 2014
21 version) (last visited October 17, 2024);
22 <https://shop.iccsafe.org/catalogsearch/result/?cat=&q=+Oregon+Residential+Specialty+Code>
23 (Oregon Residential Specialty Code versions for sale, with prices ranging from \$4.25 for 2017
24 version, to \$67.00 for 2014 version) (last visited October 17, 2024);
25 <https://shop.iccsafe.org/catalogsearch/result/?cat=&q=+Oregon+Mechanical+Specialty+Code>
26 (Oregon Mechanical Specialty Code versions for sale, with prices ranging from \$7.90 for 2019
27 version to \$90 for 2014 version) (last visited October 17, 2024);
<https://shop.iccsafe.org/catalogsearch/result/?cat=&q=+Oregon+Structural+Specialty+Code>
(Oregon Structural Specialty Code versions for sale, with prices ranging from \$9.70 for 2019
version to \$114 for 2014 version) (last visited October 17, 2024).

³ <https://www.nfpa.org/product/nfpa-70-or/p0070acor> (Oregon Electrical Specialty Code for sale
on NFPA website for \$198) (last visited October 24, 2024).

1 respective governmental bodies for enforcement against Oregon’s citizenry. To be sure, for
2 builders, electricians, plumbers, inspectors, and private citizens, the adopted standards themselves
3 are the most important component of the Codes. The standards delineate what is permitted, and
4 what is not—including penalties, fines, and fees for noncompliance.⁴

5 Each contract permits or requires the Private Standards Companies to offer a highly-
6 restricted version of the Codes. (Compl., Ex. 1 at 2, 9, 23.) But this feature is no saving grace.
7 The contracts refer to this feature as “read only,” and that moniker is no exaggeration. The Private
8 Standards Companies lock down the Codes, so that they are available in just “read only” versions.
9 These technological safeguards prevent the public, and PRO, from searching, copying,
10 commenting upon, printing, comparing, or distributing Oregon’s official and binding laws *in any*
11 *way*. If, for example, someone wants to find Oregon’s requirements regarding the fire exits in a
12 building, they cannot simply search the free version of the Oregon Fire Code for “fire exit” and
13 find the relevant provisions. Instead, they will need to undertake the tedious task of paging through
14 each section of a private company’s website to find out what Oregon law requires. And should
15 they wish to print that provision, or send it to a friend, colleague, or co-worker, they cannot do so
16 because of the technological restrictions, and the Terms of Use governing the private websites.

17 For example, ICC’s Terms of Use page expressly prohibits: “derivative use of any Service
18 or E-Content; ***downloading, copying, distribution, or display*** of E-Content (or a portion thereof)
19 or account information to, by, or for the benefit of any third party (for example, a user other than
20 You or any Additional Authorized User); or use of data mining, robots, or similar data gathering
21 and extraction tools with any Service or E-Content.”⁵ The user must agree that “***no portion of the***
22 ***Services may be reprinted, republished, modified, publicly displayed, publicly performed, or***
23 ***distributed in any form without Our express written permission.*** You may not, and ***the Terms of***

24 _____

25 ⁴ <https://www.oregon.gov/bcd/enforcement/Documents/penalty-matrix.pdf> (civil penalties
26 enforcement matrix on BCD’s website. Last visited October 23, 2024).

27 ⁵ <https://www.iccsafe.org/about/terms-of-use/> (ICC terms of use) (last visited October 17, 2024).

1 *Use do not give You permission to, reproduce, reverse engineer, decompile, disassemble, attempt*
2 *to derive the source code of, modify, adapt, amend, translate, transmit, sell (or participate in any*
3 *sale), distribute, license, or create derivative works* with respect to the Services.”⁶ NFPA and
4 IAPMO have similar provisions in their Terms of Use.⁷

5 For clarity, Footnote 2 of the Motion misunderstands not only the current status of
6 Oregon’s laws, but also the purpose and basis of this lawsuit. (Mot. at 2, n.2.) The Complaint’s
7 reference to “integrated digital codes” refers to a digital copy of the Codes, which PRO requested
8 from BCD via the Public Records Law, ORS 192.314. That effort is described more fully below.
9 But more to the point, the Motion’s assertion that “free ‘read-only’ access to those versions” of
10 the Codes are “available through BCD’s website” is at best, misleading, and at worst, patently
11 false. The versions “available through BCD’s website” are the same private, highly-restricted,
12 “read-only” resources discussed above. In fact, BCD’s website contains *links directly to the*
13 *Private Standards Companies’ websites*, where users are subject to Terms of Use, and outright
14 forbidden from doing *anything* with Oregon’s laws except reading them in a highly restricted
15 manner. A user, such as PRO, cannot take them and “speak them” elsewhere. Unlike the other
16 edicts issued by governments for enforcement purposes, PRO cannot take the Codes and make
17 them accessible for the visually impaired, nor can PRO reproduce them for comparison with other
18 states to aid in industrial commentary or academic scholarship. To even have the ability to search,
19 copy, and print the Codes, PRO must pay a fee. The Private Standards Companies’ therefore
20 overwhelmingly limit anyone’s lawful ability to use the contents of Oregon’s laws in any
21 productive way. PRO, and the public at large, cannot freely speak the laws that govern them.

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23 ⁶ *Id.* (emphasis added).

24 ⁷See <https://www.iapmo.org/terms-of-use/#:~:text=IAPMO%20reserves%20the%20right%2C%20in,at%20any%20time%2C%20with%20notice.> (IAPMO terms of use) (last visited October 17, 2024);
25 <https://www.nfpa.org/customer-support/products-terms-of-use> (NFPA terms of use) (last visited
26 October 17, 2024).
27

1 **D. BCD’s Involvement and PRO’s Request Pursuant to the PRL.**

2 BCD’s actions are squarely responsible for this unconstitutional arrangement. As detailed
3 in the Complaint, BCD has entered into contracts with private parties for the provision of model
4 language into Oregon law, and for the distribution of Oregon laws. (Compl., Ex. 1.) To be clear,
5 some purposes of the contracts are pedestrian and common practice for a government agency—
6 namely, purchasing an input for a government process or service (such as model codes), and
7 contracting with a private party for the distribution of the final product. But here, BCD has gone
8 multiple steps further.

9 *First*, BCD’s contracts with the Private Standards Companies ensure—guarantee even—
10 that BCD will not possess a digital, machine-readable copy of the Codes which would be available
11 pursuant to a request under Oregon’s Public Records law. As the Motion states, PRO filed requests
12 to BCD for the integrated digital copies of the Codes. (Mot. at 3.) Oregon Department of Justice,
13 on behalf of BCD, responded and stated that BCD “does not possess any integrated digital copies.”
14 *Id.*; (Compl., Exs. 2, 3.) The contracts explain precisely *why* BCD, the agency responsible for
15 maintenance and publication of the Codes, does not have a single digital copy that the public could
16 request:

- 17 • The NFPA contract commands that: “BNI shall provide no copies of the OESC/NEC
18 to employees of the BCD, except incidental copies necessary for review for compliance
19 with this agreement.” (Compl., Ex. 1 at 23.)
- 20 • The IAPMO contract commands that IAPMO shall: “Provide the exact number of
21 copies as requested by the Oregon Building Codes division. 15 hardcopy books to be
22 purchased from IAPMO at a discounted price.” (Compl., Ex. 1 at 2). The IAPMO
23 contract also commands that IAPMO shall provide an electronic version “to the State
24 of Oregon, Oregon Building Codes Division, at no charge to the state and as a read[]
25 only document.” (*Id.*)
- 26 • The ICC contract commands that IAPMO shall “deliver two complimentary [Printed]
27 copies of the published Oregon Codes to Agency. (Compl., Ex 1 at 8.)

28 Through these contractual provisions, BCD has abdicated possession of an integrated copy
29 of the body of laws it is tasked with managing. Accordingly, BCD denied possession in response
30

1 to PRO’s request under the Public Records Law. (Compl., Exs. 2, 3.) In this regard, the contracts
2 have gone too far.

3 *Second*, BCD’s contracts with the Private Standards Companies mistreat the Codes despite
4 their status as enforceable Oregon laws. Even *after* they have been adopted and codified by the
5 State of Oregon, BCD’s contracts recognize the Codes as the intellectual property of *private*
6 *parties*, rather than the public property (and right) of all Oregonians. In each contract, BCD grants
7 licenses to the Private Standards Companies to charge for access to the Codes. (Compl., Ex. 1 at
8 2, 11, 22-23.) This arrangement by BCD provides the imprimatur to the Private Standards
9 Companies, and to the public, that the Codes are something other than the law. In this regard as
10 well, BCD’s contracts violate the Oregon constitution.

11 **III. LEGAL STANDARD**

12 On a motion to dismiss for failure to state a claim under ORCP 21 A(1)(h), the Court
13 assumes the truth of all allegations in plaintiff’s pleadings and “view all reasonable inferences in
14 the light most favorable to the plaintiff.” *Sunshine Farm, LLC v. Glaser*, 331 Or App 429, 431
15 (2024) (quoting *Munson v. Valley Energy Investment Fund*, 264 Or App 679, 703 (2014)).
16 Pursuant to this liberal standard, all reasonable inferences must be drawn in the nonmovant’s
17 favor. *See Wathers v. Gossett*, 148 Or App 548, 550 (1997) (*citing Hansen v. Anderson*, 113 Or
18 App 216, 218 (1992)).

19 Oregon pleadings require “A plain and concise statement of the ultimate facts constituting
20 a claim for relief without unnecessary repetition” only. ORCP 18 A. An ultimate fact is one from
21 which a legal conclusion may be drawn and serves to give defendants notice of the nature of the
22 claims against them. *See Fearing v. Bucher*, 328 Or 367, 374 (1999).

23 **IV. ARGUMENT**

24 **A. Plaintiff’s Claims for Declaratory Relief Are Not Subject to Dismissal.**

25 Under the Declaratory Judgment Act (“DJA”), “[a]ny person * * * whose rights, status or
26 other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract
27 or franchise may have determined any question of construction or validity arising under any such

1 instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a
2 declaration of rights, status or other legal relations thereunder.” ORS 28.020. The purpose of the
3 DJA “is to settle and to afford relief from uncertainty and insecurity with respect to rights, status
4 and other legal relations, and is to be liberally construed and administered.” ORS 28.120. Here,
5 PRO seeks declaratory relief under the DJA because the contracts between BCD and the Private
6 Standards Companies violate PRO’s constitutional rights and violate Oregon public policy.

7 BCD’s attempt to dismiss PRO’s complaint in its entirety for failure to state a claim under
8 ORCP 21 A(1)(h) should be denied on this independent basis, because both claims seek declaratory
9 relief. Oregon courts have emphasized that “the law is clear that a declaratory judgment action
10 cannot be dismissed for failure to state a claim under [ORCP 21 A(1)(h)].” *East Side Plating, Inc.*
11 *v. City of Portland*, 316 Or App 111, 112 (2021) (citing *Erwin v. Oregon State Bar*, 149 Or App
12 99, 106 (1997); *see also Waters v. Klippel Water, Inc.*, 304 Or App 251, 261 (2020). Rather than
13 seeking a dismissal in a declaratory judgment action, “[t]he proper procedure is for the defendant
14 to answer and for the parties then to submit the matter to the court for a declaration as to the merits
15 of the claim.” *Doe v. Medford School Dist.* 549C, 232 Or App 38, 46 (2009). The *only* occasion
16 in which a declaratory judgment action may be dismissed by motion is when there is a lack of
17 justiciable controversy articulated in the complaint. *Petix v. Gillingham*, 325 Or App 157, 165
18 (2023), (citing *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982)).

19 Justiciability is an imprecise standard but entails several definite considerations. *Hale v.*
20 *State*, 259 Or App 379, 384 (2013). A controversy is justiciable if “involves an actual and
21 substantial controversy between parties having adverse legal interests” and “such controversy must
22 involve present facts as opposed to a dispute which is based on future events of a hypothetical
23 issue.” *Weber v. Oakridge Sch. Dist.* 76, 184 Or App 415, 424 (2002) (internal citation
24 omitted); *see also Petrix*, 325 Or App at 165 (emphasizing that a dismissal of a prior claim was
25 proper because the controversy was alleged in hypothetical terms rather than present). In sum, the
26 case law in Oregon has made clear that there are two irreducible requirements for justiciability:

27

1 the dispute must involve present facts, and the dispute must be one in which the prevailing plaintiff
2 can receive meaningful relief from the losing defendant. *Hale*, 259 Or App at 384.

3 The Complaint here alleges present facts, not future or hypothetical issues. (*See* Complaint
4 generally). And PRO and BCD’s legal interests are adverse—PRO alleges that BCD’s activities,
5 and contracts, violate its constitutional rights on an ongoing basis, and BCD disagrees. Dismissal
6 is therefore improper as a matter of law. *See Webb v. Clatsop Cnty. Sch. Dist. No. 3*, 188 Or 324,
7 332 (1950) (holding that “[a] justiciable controversy having been stated, the test of the sufficiency
8 of the complaint was not whether or not it showed plaintiffs were entitled to a declaratory judgment
9 in accordance with their theory, but whether or not they were entitled to any declaration at all, even
10 if they were mistaken in their theory.”); *see also Prairie v. Dep’t of Aviation*, 331 Or App 438, 442
11 (2024) (so long as the court’s decision will have a practical effect on the rights of the parties, the
12 case remains justiciable assuming there are also adverse interests between parties.).

13 **B. PRO Has Adequately Alleged That Article I § 8 of the Oregon Constitution Provides**
14 **a Legal Right of Action for PRO’s Request for a Declaratory Judgment**

15 BCD also argues that PRO’s Complaint cannot state a claim under ORCP 21 A(1)(h)
16 because PRO purportedly failed to “identify any source of law that creates a right of action for it
17 to seek declaratory relief directly under the Oregon constitution.” This argument misapplies the
18 law and overlooks the nature of PRO’s Complaint.

19 Citing to *Hunter v. City of Eugene*, BSD claims that PRO cannot seek relief directly under
20 Article I, § 8. 309 Or 298, 304 (1990). But *Hunter* only held that plaintiffs cannot “bring an action
21 for damages against” a “municipality or its employees directly under the constitution[.]” *Id.* In
22 fact, *Hunter* clarified that Plaintiffs can still pursue claims for violations of the Oregon constitution
23 pursuant to “existing common-law, equitable, and *statutory remedies.*” *Id.* (emphasis added).

24 The Oregon Supreme Court’s decision in *Barcik v. Kubiaczyk*, is instructive. 321 Or 174
25 (1995). In *Barcik*, the Court explained that plaintiffs cannot use Article I, § 8 of the Oregon
26 Constitution to assert a claim for nominal damages. *Id.* at 192. It also held that the DJA, standing
27 alone, does not provide for awards of nominal damages. *Id.* **Critically**, however, the *Barcik* Court

1 held that a plaintiff seeking a “declaration that defendants acted unconstitutionally” because of the
2 “deprivation of his Article I, section 8, rights” presented a justiciable and valid claim under the
3 DJA. *Id.*

4 Here, PRO’s declaratory relief claim fits squarely within what *Barcik* authorizes. As
5 explained above, the DJA authorizes PRO to seek a declaration of “rights, status, and other legal
6 relations, whether or not further relief is or could be claimed.” ORS 28.010. And PRO’s
7 Complaint begins and ends by making clear that it is seeking declaratory relief from the Court
8 under the DJA. For instance, the initial paragraph of the Complaint clarifies that PRO is bringing
9 a “declaratory relief action.” PRO’s prayer for relief section confirms this fact because PRO seeks
10 declarations from the Court in each of the first five separate forms of requested relief. Consistent
11 with *Barcik*, PRO is entitled to consideration of its declaratory relief claim for violation of Article
12 I, § 8 on the merits.

13 Article I § 8 also authorizes the relief PRO seeks in this case. On this point, the Motion’s
14 arguments are misplaced. BCD asserts that the Complaint is “not directed toward an enactment
15 subject to challenge under Article I, section 8.” (Mot. at 6.) The Motion then proceeds to quote
16 from the Oregon Court of Appeals’ decision in *State v. Babson*, 249 Or App 278, 285-86 (2012),
17 and asserts that PRO’s challenge “fails to implicate any of the three categories described in the
18 court’s opinion.” (Mot. at 6.) As the Complaint makes clear, this is simply false. The Complaint
19 describes government conduct—*i.e.* public-to-private contracts that, when enforced, restrict the
20 right of PRO to freely speak the Codes. Such a theory of relief falls squarely within the third
21 category from *Babson*—“enactments that regulate or prohibit conduct without referring to
22 expression at all... but may, when enforced, interfere with a person’s expression.” *Id.* The Motion
23 asserts, in conclusory fashion, that PRO’s contention that “the contracts interfere with its ability
24 to speak freely lacks merit” because the codes are “available in physical form” at BCD’s offices.
25 (Mot. at 7.) As explained above, BCD is mistaken. PRO can *read* the Codes, *but it cannot speak*
26 *them*. PRO cannot print them, distribute them, discuss them in a public forum, translate them,
27 make them accessible, solicit comments from the public on them, or even attach them to a letter to

1 local stakeholders and politicians. In short, PRO (and the public) cannot *speak* the Codes.
2 Enforcement of the contracts has given a private party the right to prevent the public, and PRO,
3 from exercising its rights under Article I § 8 to “speak, write, or print freely on any subject
4 whatever.”

5 **C. PRO Has Adequately Alleged That the Codes Are Laws.**

6 PRO has a right to speak the Codes, in their entirety, under Article I § 8 of the Oregon
7 Constitution. Free and available access to a government’s laws sits at the core of this state’s, and
8 this country’s, rights to free speech. Accordingly, the ability to speak, print, and discuss the Codes,
9 and to criticize elected leaders, is a fundamental pre-requisite for representative government in
10 Oregon. In 2019, the U.S. Supreme Court held, in a case concerning PRO’s reproduction of
11 Georgia’s annotated codes, that the “government edicts doctrine” controlled, and mandated that
12 states and private companies could not exert control over state laws and their annotations under
13 the guise of copyright. The government edicts doctrine holds that works authored by the
14 government, like the Codes, are not subject to copyright protection. “That of course includes final
15 legislation, but it also includes explanatory and procedural materials legislators create in the
16 discharge of their legislative duties.” *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255, 266
17 (2020). “The animating principle behind this rule is that no one can own the law. Every citizen is
18 presumed to know the law, and it needs no argument to show . . . that all should have free access
19 to its contents.” *Id.* at 265 (citations and quotations omitted) (ellipses in original).

20 The Codes, as adopted and codified edicts of Oregon’s state government, and exercises of
21 its sovereign right to regulate the conduct of Oregon residents and businesses, are laws. Webster’s
22 Ninth New Collegiate Dictionary defines a “law” as “LAW, RULE, REGULATION, PRECEPT,
23 STATUTE, ORDINANCE, CANON mean a principle governing action or procedure. LAW
24 implies imposition by a sovereign authority and the obligation of obedience on the part of all
25 subject to that authority; RULE applies to more restricted or specific situations; REGULATION
26 implies prescription by authority in order to control an organization or system; PRECEPT
27 commonly suggests something advisory and not obligatory communicated typically through

1 teaching; STATUTE implies a law enacted by a legislative body; ORDINANCE applies to an
2 order governing some detail of procedure or conduct enforced by a limited authority such as a
3 municipality; CANON suggests in nonreligious use a principle or rule of behavior or procedure
4 commonly accepted as a valid guide.” *Webster’s Ninth New Collegiate Dictionary* 678 (1988).
5 The Oregon Revised Statutes provide a similar definition for the purposes of ORS 15.300 to
6 15.380. “‘Law’ means any rule of general legal applicability adopted by a state, whether that rule
7 is domestic or foreign and whether derived from international law, a constitution, statute, other
8 publicly adopted measure or published judicial precedent. Except for references to the law of
9 Oregon, “law” does not include rules governing choice of law.” ORS 15.300(1).

10 The Codes, with granular detail, mandate conduct that must be obeyed, and violators are
11 subject to legal consequences and sanction. For example, the Oregon Fire Code imposes steep
12 penalties for violations of its standards. *See*, 2019 Oregon Fire Code 110.4.1 (“Violation
13 penalties”); ORS 479.990, 476.990, 480.990 (“Penalties” for fire code violations). BCD even has
14 its own “penalty matrix” on the enforcement page of its website that “identifies penalties that may
15 be assessed to businesses and individuals found to be in violation of building *code statutes, rules,*
16 *and specialty codes.*” (emphasis added).⁸ The Codes are, without a doubt, the law within their
17 respective domains. Accordingly, PRO seeks a declaration at the Codes are laws.

18 The constitutional harm from BCD’s arrangement with the Private Standards Companies
19 is self-evident. First, BCD’s contracts deprive the public’s liberty to freely discuss and compare
20 the Codes. Because of the technological and legal restrictions on use of the Codes, the public must
21 pay a fee to know the laws that govern their behavior, and even then, the public cannot freely speak
22 the contents of the Codes. And as if that wasn’t enough, the Private Standards Companies
23 zealously defend their supposed rights to control government codes that are incorporated by
24

25

26

27

⁸ <https://www.oregon.gov/bcd/enforcement/pages/index.aspx> (last visited October 18, 2024).

1 reference, and file lawsuits against individuals or groups suspected of reproducing incorporated
2 standards without their permission.

3 The significant risk this arrangement creates in chilling citizens’ free speech rights is far
4 from abstract or speculative. PRO itself has been sued for copyright infringement by various
5 private standards organizations, for simply publicizing the law. After a long, costly, and arduous
6 litigation campaign, and two separate appeals to the U.S. Court of Appeals for the District of
7 Columbia, PRO prevailed in establishing that its reprinting of federal regulations and their
8 incorporated standards constituted “fair use” under the Copyright Act. *Am. Soc’y for Testing &*
9 *Materials v. Public.Resource.Org, Inc.*, 82 F.4th 1262 (D.C. Cir. 2023) (affirming district court’s
10 finding of fair use for those standards incorporated by reference into federal regulations). The
11 Court held that “where the consequence of the incorporation by reference is virtually
12 indistinguishable from a situation in which the standard has been expressly copied into law, this
13 factor weighs heavily in favor of fair use.” *Id.* at 1268. Although PRO ultimately prevailed, and
14 was not held liable for copyright infringement for reproducing standards incorporated into law, the
15 litigation was costly and high stakes, and the risk of another lawsuit is sufficiently chilling in
16 Oregon where the question has not yet been posed. Here, as in *ASTM*, “the most important question
17 is what material counts as ‘law.’ And all material that has been validly incorporated by reference
18 carries the force of law and is treated as having been published in the [regulations registers]...”
19 *Id.* at 1269. PRO’s first request for relief therefore seeks a declaration that the Codes are, in fact,
20 the law in this state. And even if portions of the Codes do not necessarily carry the force of law,
21 they are still government edicts. “Rather than attempting to catalog the materials that constitute
22 ‘the law,’ the doctrine bars the officials responsible for creating the law from being considered the
23 ‘author[s]’ of ‘whatever work they perform in their capacity’ as lawmakers.” *Georgia*, 590 U.S.
24 at 266 (citations omitted). “Because these officials are generally empowered to make and interpret
25 law, their ‘whole work’ is deemed part of the ‘authentic exposition and interpretation of the law’
26 and must be ‘free for publication to all.’” *Id.* (citations omitted). So too here.

27

1 The Motion has not provided any meaningful reason why that decision is not fit for
2 resolution by this Court. Accordingly, the Motion should be denied as to Claim I.

3 **D. PRO Has Adequately Alleged That BCD’s Contracts With Private Standards**
4 **Companies Are Void Ab Initio.**

5 PRO seeks a declaration that the contracts between the Private Standards Companies and
6 BCD are void for public policy. This is so for two reasons. First, the contracts violate the Oregon
7 constitution, Article I § 8. Second, the contracts violate the Oregon Public Records Law, ORS
8 192.314, *et seq.* The Motion fails to provide a rationale, as a matter of law, as to why either of
9 these substantive grounds are insufficient under Oregon law.

10 The contracts between the Private Standards Companies and BCD violate Article I § 8 on
11 the basis that, when enforced, the contracts provide a third-party—the Private Standards
12 Companies—with the exclusive authority to speak the contents of the Codes. Specifically, the
13 contracts effectuate a content based restriction on speech. PRO is not permitted, as a consequence
14 of the contracts terms, to speak the substantial portions of Oregon law that are contained within
15 the Codes. In other words, a private company is given permission to decide who, when, and why
16 a person is authorized to speak the Codes, even though everyone can technically *see* the Codes.
17 This type of content-based restriction is unconstitutional. *See Bates v. Or. Health Auth.*, 335 Or
18 App 464, 475 (2024) (holding that a statute restricting the packaging of inhalant delivery systems,
19 was an unconstitutional restriction of speech under Article I §8); *see also Zackheim v. Forbes*, 134
20 Or App 548, 553 (1995) (A content-based restriction on speech “might * * * survive an Article I,
21 section 8, challenge, if it is ‘wholly confined within some historical exception that was well
22 established when the first American guarantees of freedom of expression were adopted and that
23 the guarantees then or in 1859 demonstrably were not intended to reach.’”) (ellipses in original).
24 Because the contracts violate the Oregon constitution and there are no historical exceptions that
25 are well established, they are void ab initio.

26 Separately, the contracts also violate Oregon’s Public Records Law. The Oregon
27 Legislature has declared that it is “the policy of this state to guarantee to its citizens the right to

1 know about the activities of their government, to benefit from the information developed by state
2 agencies at public expense and to enjoy equal access to the information services of state agencies.”
3 ORS 192.235. Here, PRO seeks a declaration that the contracts between the Private Standards
4 Companies and BCD, which are “developed by state agencies at public expense,” violate this
5 directive by impermissibly dispossessing BCD of any copies of the Codes that could be subject to
6 a request by the public. As explained above, the contracts expressly state that the Private Standards
7 Companies will *not* provide any electronic versions that are capable of copying, printing, or
8 disseminating. This, PRO contends, is inconsistent with the spirit, purpose, and manifest directives
9 of the Public Records Law and the Oregon Legislative Assembly.

10 PRO contends that a state agency cannot, under Oregon law, simply abdicate its duties
11 under the Public Records Law by offloading possession of vital public records—via contract—to
12 a third party who is not bound by the law. (Compl., Prayer for Relief No. 5.) Such an arrangement
13 is even more concerning here, where the public records at issue are the Codes, which have binding
14 effect upon public and private conduct within the state of Oregon. The Motion misses this point
15 entirely, citing three cases for the proposition that Article I § 8 of Oregon’s constitution does not
16 create an affirmative right to access government records. (Mot. at 5-6.) The Motion’s argument
17 is not responsive for two reasons. First, the Motion ignores the Public Records Law, which *does*
18 create an affirmative right to access public records. ORS 192.314 (“Every person has a right to
19 inspect any public record of a public body in this state, except as otherwise expressly provided by
20 ORS 192.338, 192.345 and 192.355.”) And second, the Codes are not “government records,” as
21 the Oregon Court of Appeals addressed in *Oregon Newspaper Publishers Ass’n v. Dep’t of Corrs.*,
22 156 Or App 30, 37 (1998) (Mot. at 5.) The Codes are laws, and without question qualify as public
23 records under Oregon law. (Compl. ¶ 24.) As the Complaint notes, BCD *did not even dispute the*
24 *Codes’ “public records” status* in response to PRO’s public records request, and *did not invoke*
25 *any exemption* to disclosure under Oregon law. (Compl. ¶ 25, Compl., Exs. 2, 3.) Instead, BCD
26 denied PRO’s request on the basis that BCD does not possess the records in question. (Compl.
27 ¶¶ 12, 13.)

1 BCD’s contracts, which are attached to the Complaint, have therefore circumvented the
2 public’s “right to inspect any public record of a public body in this state[.]” ORS 192.314. This,
3 PRO contends, is unlawful, and renders the contracts void ab initio on public policy grounds.

4 The Motion, for its part, does not even address this fundamental basis of relief. BCD opts
5 instead to argue that PRO lacks standing to challenge a contract between the government and a
6 third party, regardless of whether or not PRO’s constitutional rights are being violated. (Mot. at 7.)
7 The Motion argues that, because PRO is not a party to the contracts, it cannot challenge them, and
8 cites a string of cases holding that non-parties cannot sue to enforce the terms of a contract. (*See*
9 Mot. at 7.) But unlike those cases, PRO is *not* seeking to enforce the terms of the contracts, or sue
10 for breach, or to compel any remedy contemplated in the contracts. To the contrary, PRO seeks a
11 declaration that the contracts are void ab initio—unenforceable because BCD’s conduct in
12 executing them violates the Oregon constitution and Oregon’s Public Records Law. The
13 authorities cited by the Motion miss the mark.

14 Nevertheless, PRO has standing to seek declaratory relief, and nothing in the Motion
15 counsels to the contrary. Whether a plaintiff has standing “largely depends on the statute under
16 which the plaintiff seeks relief.” *MT & M Gaming, Inc. v. City of Portland*, 360 Or 544, 553, 383
17 P3d 800 (2016). Here, PRO seeks relief pursuant to the Declaratory Judgments Act, which
18 articulates a clear basis for standing:

19 Any person * * * whose rights, status or other legal relations are
20 *affected by a* constitution, statute, municipal charter, ordinance,
21 *contract* or franchise *may have determined any question of*
22 *construction or validity* arising under any such instrument,
constitution, statute, municipal charter, ordinance, contract or
franchise and obtain a declaration of rights, status or other legal
relations thereunder.

23 ORS 28.020 (emphasis added). Pursuant to this statutory authorization, the Complaint challenges
24 the *contract* between BCD and the Private Standards Companies on the basis that it is *invalid*,
25 void ab initio, for violating PRO’s rights under the Oregon constitution and Oregon’s Public
26 Records Law. PRO has clearly demonstrated standing under the Declaratory Judgments Act.

1 The other authorities cited in the Motion are either inapposite, or overwhelmingly helpful
2 to PRO’s position. *Kellas v. Dept of Corr.*, 341 Or 471 (2006) concerned a plaintiff challenging
3 the lawfulness of administrative rules upon which the Oregon Department of Corrections relied in
4 making a determination of sentencing length. The Court of Appeals held that the plaintiff had no
5 standing to challenge the rules, and the Oregon Supreme Court reversed, reasoning from
6 ORS 183.400(1)’s text that “[t]he validity of *any rule* may be determined upon a petition *by any*
7 *person* to the Court of Appeals[.]” The Court held that: “[t]he legislature intends by the statute to
8 authorize any person to invoke the judicial power of the court to test the validity of every
9 administrative rule under existing statutory and constitutional law***.” *Kellas* addressed a
10 plaintiff’s standing to sue to challenge the validity of an administrative rule. Contrary to the
11 Motion’s argument, *Kellas* does not render it “impossible for the Court to determine whether
12 Plaintiff even has standing to bring this case.” (Mot. at 4.) Since PRO is not challenging the
13 constitutional propriety of the Codes themselves, but rather the actions of BCD in contracting with
14 private parties to keep them from the public via a request for declaratory judgment, *Kellas* is
15 plainly irrelevant.

16 The Motion also cites to *Oregon Newspaper Publishers Ass’n v. Dep’t of Corrs.*, 156 Or
17 App 30, 37 (1998) (Mot. at 5.) That decision was overruled by the Oregon Supreme Court, *Or.*
18 *Newspaper Publr. Ass’n v. Dep’t of Corr.*, 329 Or 115, 988 P.2d 359 (1999), which held that
19 various conditions and restrictions placed upon people who witnessed executions of death
20 sentences conducted by the Department of Corrections were unconstitutional for violating the
21 witnesses’ free expression rights. The Department of Corrections, a state agency, could not
22 “condition” a witness’s attendance on an agreement “that they will waive their rights to free
23 expression respecting certain things that they might see and that they will be subject to injunction
24 and may be required to respond in damages if they violate that agreement.” *Id* at 122. In essence,
25 this is *precisely* what the contracts between BCD and the Private Standards Companies effectuate.
26 PRO can read, or “witness,” the Codes, but PRO cannot communicate what it saw to anyone, for
27 any purpose. BCD’s contracts effectively condition the ability to “see” the Codes on the public’s

1 agreement—via private contract—not to do anything further with them. And likewise, PRO and
2 the public cannot speak the Codes publicly without fear of reprisal via injunction, damages, or
3 both, from the Private Standards Companies. As explained above, that fear is far from speculative.

4 BCD also cites *Blessing v. Ocean Accident & Guarantee Corp.*, 152 Or 632, 641 (1936) to
5 support their contention that a third party cannot void a contract as against public policy, but
6 provides a misleading parenthetical explanation of that case. In *Blessing*, the Court did not “deny
7 plaintiff’s claim that contract was void as against public policy because her deceased husband was
8 not a party to the contract and, upon his death, it vested no right in her...” (Mot. at 8.) These are
9 two separate holdings; the Court did not conclude the first *because of* the second. In *Blessing*,
10 plaintiff widow sued an insurance company for the proceeds of an insurance policy that was taken
11 out by her deceased son’s employer. *Blessing*, 152 Or at 633. The Court held that the policy terms
12 directed payment to the company, and not to the workman or his estate. Plaintiff argued that the
13 insurance rider, which allowed the company to contract for direct payment of insurance proceeds
14 to the company, and *not* to the workman or his estate, was void for public policy. The Court
15 disagreed as a matter of contract law—not standing law—holding that the provision was “a valid
16 agreement and one upon which the assured has a right to rely.” *Id.* at 639. Accordingly, *Blessing*
17 does not support the proposition that PRO lacks standing to challenge the constitutional propriety
18 of BCD’s actions in contracting with private parties to violate the constitution and the Public
19 Records Law. Furthermore, the plaintiff was not seeking a declaratory judgment, as PRO does
20 here. The DJA governs the standing question in this case, and as explained above, PRO has
21 satisfied its requirements.

1 **V. CONCLUSION**

2 For these reasons, PRO respectfully asks the Court to deny the Motion.

3
4 DATED: October 25, 2024

5 LANE POWELL PC

6
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1 **CERTIFICATE OF SERVICE**

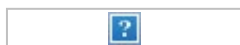
2 I, Ryan O’Hollaren, hereby certify that on this 25th day of October, 2024, I caused a copy
3 of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO**
4 **DISMISS** to be served via U.S. Mail and electronic mail, on the following:

5 Shaunee Morgan, Assistant Attorney General
6 Sara Van Loh, Assistant Attorney General
7 Ellen F. Rosenblum, Attorney General
8 Department of Justice
9 100 SW Market Street
10 Portland, OR 97201
11 E-mails: shaunee.morgan@doj.oregon.gov
12 sara.vanloh@doj.oregon.gov

13 s/ Ryan O’Hollaren
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From: no-reply@efilingmail.tylertech.cloud
To: [Docketing](#)
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Case Number: 24CV30573
Case Style: Public.Resource.Org,
Inc.vsOregon Department of Consumer
and Business Services

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Accepted Comments	
Filing Type	Opposition - OS
Filing Description	
Activity Requested	EFile
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