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

Hon. Natasha Zimmerman

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

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Plaintiff Public.Resource.Org, Inc. ("Public Resource") submits its opposition to Defendant Oregon Department of Consumer and Business Services' Motion to Dismiss Amended Complaint ("Motion") as follows:

## I. INTRODUCTION

The Oregon Electrical, Plumbing, Structural, Mechanical, Residential, and Fire Specialty Codes (collectively, the "Codes") are the regulations governing private and public conduct within the state of Oregon. They are adopted by the state, and they are enforced against an innumerable number of people, businesses, and institutions. They carry the force of law, and without question, everyone in this state is expected to know their contents. But despite that fundamental expectation, the Codes are kept under lock and key – the current arrangement between the state of Oregon and private businesses outright forbids anyone, including Plaintiff in this case, from speaking the Codes and distributing them. The private companies profit from selling usable versions of the Codes to businesses and to the public. The "free" versions, in hard copy and online, are subject to technological and legal constraints to ensure – guarantee even – that no one, including Public Resource, can reproduce and distribute the Codes under any circumstances, or else risk legal action.

This is a clever arrangement, but Public Resource's First Amended Complaint posits that it violates Article I § 8 of the Oregon constitution, and the Oregon Public Records Law. Public Resource wishes to copy and post the Codes online, for free, for anyone to read and discuss, but it cannot do so under the current paradigm. In response to Public Resource's Public Records Law ("PRL") request, Defendant Building Codes Division ("BCD"), the state agency statutorily responsible for managing the Codes, said they do not possess a digitally integrated version of the Codes. They only have hard copies – for public inspection only. To get a digital copy of the Codes, Public Resource was directed to private websites, with private Terms of Use, and subject to both legal and technological restrictions that prohibit Public Resource from doing what it wants to do – print and post the Codes. Notably, this arrangement means that BCD never has to admit that the Codes are public records. BCD need only say that it does not possess the Codes, and then insist



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that its job is done. This "closed loop" functions very well, deftly prohibiting anyone from ever "speaking" the Codes in any way, at any time, and for any purpose, and thereby ensuring that people who need usable copies of the Codes have to pay a fee to a private company (and even then, they cannot print or distribute the Codes themselves). Without any window through which to receive a non-rival copy of the Codes that can be publicly spoken, Public Resource is left with no choice but to file suit to break the closed loop between the state and private enterprise, to seek clarity on the nature of the Codes, and to resolve the legality of BCD's arrangement with private companies for their stewardship of the Codes.

As laws, the Codes are not chattel; they are government edicts that "no one can own." Public Resource seeks a declaration to that effect. It also seeks fulfillment of its Public Records Law request to BCD. Finally, and as an alternative, Public Resource recognizes the closed loop that BCD has created, and seeks a declaration that it is unlawful. Specifically, if BCD lacks possession of a digital integrated copy of the Codes, and cannot fulfill Public Resource's request for that reason, then the contract terms that dispossess BCD of the Codes are void and unenforceable. Public Resource posits that, under Oregon law, BCD cannot simply offshore possession of public records to a private entity who gets to dictate the terms of their usage.

The Motion does not challenge the merits of Public Resource's free speech claim. Rather, the Motion seeks dismissal on the basis that (1) this Court lacks jurisdiction, (2) Public Resource has not alleged a justiciable controversy, (3) Public Resource lacks standing, and (4) failure to state a claim. For the reasons explained more fully below, the Motion should be denied.

## II. FACTUAL BACKGROUND

### A. The Oregon Specialty Codes.

The Codes are part of the body of administrative laws called the Oregon Administrative Rules, or "OAR," which govern various industries, public and private activities, utilities, and institutions within the state. The OAR is vast. For some OAR provisions, the state of Oregon (through various state agencies) drafts and enacts its own laws, procedures, requirements, standards, enforcement mechanisms, and penalties. *See, e.g.* OAR 845-005-0312 (OLCC



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requirements for liquor license applications); OAR 839-003-0020 (procedures for a litigant filing a civil action relating to employment and public accommodation under ORS 659A.145 et seq.); OAR 918-001-0036 (civil penalties for violation of the Building Codes). For other OAR provisions, the state draws from "model codes" created by private companies, and then makes amendments, adjustments, and changes to the language before formally adopting the final version for enforcement. The Codes fall into this latter category.

BCD is an Oregon business regulatory and consumer protection agency that adopts and publishes the rules, standards, and penalties for Oregonians relating to building construction and modification. (FAC ¶ 3); OAR 918-008-0000 ("Purpose and Scope") ("The Department of Consumer and Business Services, Building Codes Division, adopts model building codes, standards and other publications by reference, as necessary, through administrative rule to create the state building code."); *id*. at (1).

As alleged in the FAC, BCD buys model codes from International Code Consortium ("ICC"), the National Fire Protection Agency, ("NFPA") and the International Association of Plumbing and Mechanical Officials ("IAPMO"), (collectively the "Private Standards Companies") for incorporation into the state building code. (FAC ¶ 11.) The final Codes reflect incorporation of parts of the model codes, as well as all changes and additions that have been approved by the respective agencies. *See e.g.* OAR 837-040-00010(2) ("[T]he 2022 Oregon Fire Code which is the 2021 edition of the International Fire Code, as published by the International Code Council, and as amended by the Department of the State Fire Marshal, is adopted."); (FAC ¶ 11).

Once finalized and adopted, the Codes carry immense importance. In granular detail, the Codes mandate conduct that must be obeyed, and violators are subject to legal consequences and sanction. For example, the Oregon Fire Code imposes steep penalties for violations. *See*, 2019 Oregon Fire Code 110.4.1 ("Violation penalties"); ORS 479.990, 476.990, 480.990 ("Penalties" for fire code violations). BCD even has its own "penalty matrix" on the enforcement page of its



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website that "identifies penalties that may be assessed to businesses and individuals found to be in violation of building code statutes, rules, and specialty codes."[1] (FAC ¶ 9.)

**B. BCD Circumvents the PRL Through Contracts with the Private Standards Companies.**

As part of BCD's arrangement with the Private Standards Companies, BCD contracts with the Private Standards Companies to publish the official Codes. (FAC ¶ 11.) Those contracts are attached to the FAC as Exhibit 1. (FAC, Ex. 1, pp. 1-32.) Pursuant to the contracts, the Private Standards Companies are tasked with compiling the Codes which, again, are codified official edicts governing each subject, comprised of the state of Oregon's amendments *and* the model codes Oregon purchases from the Private Standards Companies. In other words, the Private Standards Companies provide the standards, which are incorporated into the Codes, and then BCD gives the Private Standards Companies the exclusive right to distribute and sell the Codes to the public and the government (*See* FAC, Ex 1 at 1 (BCD contract with IAPMO); at 8 (BCD contract with ICC); at 21 (BCD contract with NFPA).)

The Private Standards Companies then sell the Codes for a hefty price. For example, access to a copy of the 2021 Oregon Plumbing Specialty Code (OPSC), a "Hardcopy 3 ring binder," costs IAPMO Members $120, while non-members pay $150. (FAC., Ex. 1 at 2.) For an e-book version, IAPMO Members pay $112, while non-members pay $140. (*Id*.) For the Oregon Structural Specialty Code, the Oregon Mechanical Specialty Code, the Oregon Residential Specialty Code (ORSC) and the Oregon Fire Code (OFC), ICC provides PDF versions for purchase on its website, pursuant to the contract. (FAC., Ex. 1 at 1, 8.)[2] So too for NFPA's distribution of the Oregon Electrical Specialty Code (OESC). BCD's contract with NFPA (whose licensee is BNi) provides

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[1] https://www.oregon.gov/bcd/enforcement/pages/index.aspx (last visited April 21, 2025).

[2] *See* https://shop.iccsafe.org/custom-codes/state-codes/oregon.html (Current iterations of the 2022 Oregon Fire Code, 2023 Oregon Residential Specialty Code, 2022 Oregon Mechanical Specialty Code, and 2022 Oregon Structural Specialty Code for sale. For all four, it costs $44.85/month for a digital subscription, or $578 for a PDF.) (last visited April 22, 2025.)



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that "BNi shall make the OESC/NEC available for sale to the State of Oregon, local governmental agencies, and the general public on or before January 15, 2018." (FAC, Ex. 1 at 1, 23.)

The contracts ensure – by their terms – that BCD lacks possession of any copy of the integrated Codes.

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

These terms guarantee that BCD lacks the ability to respond to a PRL request for the Codes. Additionally, and as explained above, BCD grants licenses to the Private Standards Companies to charge for access to the Codes. (FAC., Ex. 1 at 2, 11, 22-23.)

**1. BCD Denied Public Resource's Public Records Law Request.**

As noted in the FAC, Public Resource's mission is to make government records accessible for free online. (FAC ¶ 5.) Public Resource has reproduced the official codes of countless government entities on its website, providing free access for private parties, governments, scholars, and in accessible formats for the visually and hearing impaired. (FAC ¶¶ 6, 8.) Public Resource wishes to copy and reproduce the entirety of the Codes, including the adopted standards, on its website so that members of the public, including the visually and hearing impaired, can have reasonable access to the laws governing them. (FAC ¶¶ 1, 6, 14.) To effectuate its mission here in Oregon, Public Resource served a Public Records Request on BCD to disclose the Codes. (*Id*. ¶ 12.) In response, BCD (through the Oregon Department of Justice) refused Public Resource's request, explaining that BCD does not possess any digital copies of the Codes, including the standards that had been incorporated by the state. Through letters attached to the FAC, the Oregon Department of Justice explained that the "official versions of the Oregon building and fire codes"



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were available for free on the Oregon Secretary of State's website, but noted that the publicly-available version *does not* contain the "incorporated model specialty codes." (FAC, Ex. 2, at 1-2.) In essence, only part of the Codes are freely available on the Secretary's website. To receive the *full* text of the Codes – both the amendments *and* the incorporated standards – Public Resource would need to get them from the Private Standards Companies. (FAC, ¶13; Ex. 3.) The Motion omits this key distinction. (Mot. at 3.)

Notably, BCD did not dispute the Codes' status as public records under Oregon law. (FAC, Exs. 3, 4.) Rather, BCD simply asserted that it does not have possession of the Codes. (*Id.*) As explained above, the reason that BCD lacks possession of the Codes is apparent, and it is alleged directly in the FAC. (*Id*. ¶ 35.) BCD has contracted with the Private Standards Companies to outsource possession of any copy of the Codes that could possibly be subject to a PRL request, and could therefore be subsequently "spoken" publicly. BCD has created a closed loop to ensure that no one, and especially Public Resource, will be able to speak the Codes.

**C. The "Free" Versions of the Codes are Woefully Inadequate.**

The Private Standards Companies provide "free" versions of the Codes on their websites, to which BCD links from its own website. (FAC ¶ 14.) But as described in the FAC, these "free versions" are anything but. Not only do the "free" versions come at the cost of requiring a user to agree to private terms of use (*id.*), but they are so technologically limited that a user cannot search, print, copy, or paste the Codes. Because of the technological and legal limitations placed on users by the Private Standards Companies, Public Resource cannot use the "free" online versions to "speak" the Codes freely in any way, shape, or form. (*Id*.)

For example, ICC's Terms of Use page expressly prohibits: "derivative use of any Service or E-Content; ***downloading, copying, distribution, or display*** of E-Content (or a portion thereof) or account information to, by, or for the benefit of any third party (for example, a user other than You or any Additional Authorized User)."[3] The user must agree that "***no portion of the***

[3] https://www.iccsafe.org/about/terms-of-use/ (ICC terms of use) (last visited April 22, 2025).



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Nor, to be sure, do the "hard copies" available at select locations for "public inspection" alleviate this problem in the slightest. Public Resource can "inspect" the hard copies – to reference them – but Public Resource cannot photocopy, photograph, print, or otherwise reproduce the hard copy Codes. (FAC, Ex. 3 at 2; Mot. 3.) Accordingly, the hard copies are simply part of the closed loop, and present the same problem; Public Resource is not allowed to speak the Codes.

**D. Procedural History**

Public Resource filed its original complaint on June 24, 2024, asserting two claims for declaratory relief. After a conference with the parties on January 6, 2025, this Court granted BCD's Motion to Dismiss on the basis that the original complaint had failed to plead ultimate facts to state a claim. On Public Resource's first claim, the Court held that Public Resource had failed to identify the legal basis for its claim in the complaint – specifically, Public Resource had not invoked the legal mechanism for its request for declaratory relief under the Uniform Declaratory Judgments Act. ORS 28.010. With respect to Public Resource's second claim, the Court held that Public Resource's request for relief should seek production under the Public Records Law based on an

[4] *See* https://iapmo.org/terms-of-use (IAPMO terms of use) (last visited April 22, 2025); https://www.nfpa.org/customer-support/products-terms-of-use (NFPA terms of use) (last visited April 22, 2025).



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agency's denial of a public records request, as opposed to declaratory relief. ORS 192.401(2). Accordingly, the Court dismissed the second claim as well.

Public Resource revised its complaint in accordance with the Court's decision, and filed the FAC on January 24, 2025. Pursuant to a stipulated briefing schedule between the parties, the instant Motion was filed on March 28, 2025.

## III. ARGUMENT

### A. The First and Third Claims are Justiciable

The Motion contends that the First and Third Claims in the FAC do not articulate a justiciable controversy. In light of the relevant authorities, the Motion's arguments are unpersuasive.

#### 1. Justiciability.

Under the Declaratory Judgment Act ("DJA"), "[a]ny person * * * whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of 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." ORS 28.020. "Declaratory judgment is preventive justice, designed to relieve parties of uncertainty by adjudicating their rights and duties before wrongs have actually been committed." *Beason v. Harcleroad*, 105 Or App 376, 805 P2d 700 (1991).

Pursuant to a motion, a declaratory action should only be dismissed if it fails to allege a justiciable controversy. *Petix v. Gillingham*, 325 Or App 157, 165, 528 P3d 1152 (2023) (citing *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982)). The motion should be denied if the complaint "involves an actual and substantial controversy between parties having adverse legal interests" and the dispute "involve[s] present facts as opposed to a dispute which is based on future events of a hypothetical issue." *Weber v. Oakridge Sch. Dist*. 76, 184 Or App 415, 424, 56 P3d 504 (2002) (internal citation omitted); *see also Petix*, 325 Or App at 165 (emphasizing that a dismissal of a prior claim was proper because the controversy was alleged in hypothetical terms



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rather than present). In essence, there are two requirements for justiciability: present facts, and meaningful relief. *Hale v. State*, 259 Or App 379, 384, 314 P3d 345 (2013).

**2. The First Claim Presents a Justiciable Controversy.**

Public Resource's First Claim seeks a declaration that (1) the entire text of the Codes, as adopted, are officially the laws of the State of Oregon; and (2) that BCD or any other Oregon administrative agency cannot restrict free public access to the Codes, as adopted and enforced against Oregonians. (FAC ¶ 21.)

The Motion contends that the relief sought in the First Claim will have no effect on Public Resource's rights in the present. (Mot. at 6.) The Motion argues that, because the First Claim will have no effect on Public Resource's historical practice of hosting and reformatting state and federal safety codes to make them searchable, copyable, and accessible, there is no meaningful relief to be provided here. (*Id.*) Not so. Public Resource desires to post the Codes to its website, but cannot do so for fear of liability. (FAC ¶ 14.) An order from this Court – an Oregon court of competent jurisdiction – declaring that the Codes carry the force of law will invariably mean that the text of the Codes are not ownable, and that Public Resource cannot be subject to liability for distributing of their contents. *Georgia v. Public.Resource.Org, Inc*., 590 U.S. 255, 266 (2020) ("The animating principle behind this rule [the government edicts doctrine] is that no one can own the law. Every citizen is presumed to know the law, and it needs no argument to show . . . that all should have free access to its contents." *Id*. at 265 (citations and quotations omitted) (ellipses in original).

An order on Public Resource's First Claim would facilitate Public Resource's precise mission, and intention, with respect to posting the Codes of Oregon. Specifically, Public Resource wishes to "speak" the Codes – to post, host, transmit, reproduce, and reformat the Codes so that they are freely available and accessible to all, including the visually and hearing impaired – without fear of reprisal. Article I § 8 guarantees Public Resources' right to do so, and the First Claim seeks resolution of a question of Oregon law that bears directly upon Public Resource's rights and intentions. To be sure, there is nothing "contingent" about the relief sought in the First Claim. It does not depend on the occurrence of future events that may not happen. Nor does its effect in



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resolving this dispute somehow depend upon the actions of third parties. Pursuant to the Declaratory Judgement Act, Public Resource has stated a justiciable controversy as to the First Claim and is entitled to a decision as to whether the Codes are laws so that it can disseminate them in accordance with its mission.

**3. The Third Claim Presents a Justiciable Controversy and Public Resource Has Standing to Pursue it.**

Public Resource's Third Claim seeks alternative relief "to the extent that the Court finds that the Codes are public records, but that BCD has satisfied its obligations under the PRL because it does not have possession of the Codes as a result of BCD's contracts with the Private Standards Companies to maintain sole possession." (FAC ¶ 35.) In essence, the Third Claim seeks to break the closed loop that BCD has created with the Private Standards Companies to prohibit Public Resource from speaking the Codes. The Motion makes two arguments with respect to the Third Claim.

First, the Motion argues that this Court lacks jurisdiction because the Private Standards Companies are not parties to this action. (Mot. at 6.) The Motion cites *Hale v. State*, 259 Or App 379 (2013) in support, but its reliance on *Hale* is misplaced. In *Hale*, plaintiffs were organic farmers whose neighbors were using pesticides on their property that, according to plaintiffs, had migrated onto plaintiffs' land and created a trespassory invasion. Defendants moved to dismiss under Oregon's "Right to Farm and Right to Forest Act," ORS 30.930 *et seq*., which immunizes farming activities from tort claims like trespass. Plaintiffs dismissed their original suit, and pursuant to the statute, were forced to pay defendants' attorneys' fees. Plaintiffs then sued the state, contending that the Right to Farm Act was unconstitutional for depriving them of a remedy in violation of Article I § 10 of the Oregon constitution. The Court of Appeals recognized that plaintiffs had alleged a present controversy based on the statute and its potential incongruity with the constitution, but affirmed dismissal on the basis that a declaration that the Right to Farm Act was unconstitutional would not have any effect on plaintiffs, as any meaningful relief depended on a series of uncertain hypothetical contingencies: (1) that plaintiffs would have reason to bring,



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and do bring, another hypothetical trespass lawsuit, (2) that the Right to Farm Act would apply to immunize the hypothetical defendant, and (3) the hypothetical lawsuit does not settle. *Hale* at 387-88.

Here, there are no such contingencies necessary for meaningful relief that would render the Third Claim illusory, and any opinion by this Court advisory. If this Court enters an order declaring that BCD's contracts with the Private Standards Companies are void for public policy under the Oregon constitution and/or the PRL, those contractual provisions will be unenforceable. This Court can direct BCD to procure a copy of the Codes that it is statutorily directed to maintain and enforce, and that copy will be subject to the PRL request by Public Resource, which Public Resource contends remains unsatisfied. (FAC, Claim Two.) Alternatively, this Court can order BCD to comply with the retention requirements in the PRL which mandate each state agency to maintain "a public record or accurate copy" of public records. ORS 192.108; 192.105. In stark contrast to the relief plaintiffs sought in *Hale*, the relief sought by the Third Claim does not depend on any hypothetical future events. It does not depend upon a future lawsuit against a hypothetical defendant based on hypothetical facts, nor the invocation of an immunity defense *in* that hypothetical lawsuit, or the lack of settlement of that hypothetical lawsuit. Indeed, the Third claim doesn't depend on any hypotheticals at all. (FAC, Claim Three.)

Moreover, the Motion misreads the Court of Appeals' actual holding and reasoning in *Hale*. The Court of Appeals politely *rejected* the state's argument, which is quoted in the Motion, and quoted in the court's opinion. (); *Hale* at 386Mot at 6. The state argued that, because the neighbors were not a party to the lawsuit, they could not be bound to the court's order declaring the Act unconstitutional, and could therefore "raise the Act's [grant of] immunity in any future" action. *Id*. at 386. The Court of Appeals recognized that the neighbors would not technically be bound by its order, but the court was "reluctant to attribute to the state the untenable position" that third parties would not be affected by the court's declaration that an act of the legislature was unconstitutional. *Id*. at 386 ("That is not the law."). Of course a court's declaration that an act is unconstitutional would affect third parties, as said act would become void and lack legal authority.



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The court actually held that the plaintiffs in *Hale* lacked a justiciable controversy because of the triple-contingency hypothetical explained above, *not* because the neighbors were not a party to the lawsuit.

This precept is enforced by the Court of Appeals' decision in *Morse Bros. Prestress, Inc. v. Lake Oswego*, 55 Or App 960, 640 P2d 650 (1982), which Public Resource cited in the FAC. In *Morse Bros*., plaintiff contract bidder challenged an order from the trial court that dismissed his lawsuit against the city and its public works director alleging that the award of a contract, to a third party, violated Oregon law. ORS 279.017; *Id*. at 962. Plaintiff sought a declaration that the "contract [was] unlawful and void." *Id*. The city argued that plaintiff's interest was "based solely on an abstract interest in the correct application of the city's contract and purchasing procedures and that plaintiff has no standing, because it is not directly involved in the bidding." The Court of Appeals rejected the city's argument, reasoning that "[i]n the present case, plaintiff has more than an abstract interest in seeing that the city complies with statutory requirements." *Id*. at 964. "Standing to bring a declaratory judgment proceeding," the court held, "does not depend on the direct involvement of the plaintiff with the defendant." *Id*. at 963. The "proper question is whether plaintiff has alleged an impact on some legally recognized interest of plaintiff great enough to assure an adversary proceeding sufficient for adequate presentation of the issues."

Here, Public Resource clears this threshold inquiry. Public Resource has alleged impacts on two legally protected interest which assure an adversity sufficient for adequate presentation of the issues in its Third Claim. First, Public Resource has alleged that BCD's contracts' express outsourcing of any usable copy of the Codes violates Public Resource's constitutional right to "speak*** or print freely on any subject whatever." Article I § 8 Oregon Constitution. (FAC ¶ 36.) This violation is all the more acute given that the Codes constitute legal edicts whose directives carry the force of law. Second, Public Resource has alleged that BCD has unlawfully circumvented the PRL through its contracts with the Private Standards Companies. (FAC ¶ 37-39.) By dispossessing itself of any non-rival copies of the Codes fit for distribution, BCD has created a closed loop with the Codes that insulates BCD from the requirements of the PRL, and consequently



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deprives Public Resource of the precise rights the PRL purportedly protects.[5] Both of these legally recognized interests are more than sufficient to create a justiciable controversy.

**B. Public Resource Has Standing to Bring the First and Third Claims**

Next, BCD argues that Public Resource lacks standing under the UDJA for its First and Third Claims. BCD is mistaken.

"'Standing' is a term of art that is used to describe when a party 'possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties.'" *Morgan v. Sisters Sch. Dist. No. 6*, 353 Or 189, 194, 301 P3d 419 (2013). Notably, standing is not a constitutional requirement in Oregon state court. *Kellas v. Dep't of Corr.*, 341 Or 471, 478, 145 P3d 139 (2006). This is because the Oregon Constitution lacks the "cases" and "controversies" provision appearing in the federal constitution. *Id.* Standing under Oregon law therefore depends on the statute under which the plaintiff seeks relief. *MT & M Gaming, Inc. v. City of Portland*, 360 Or 544, 553, 383 P3d 800 (2016).

Three factors determine a plaintiff's standing to bring a declaratory judgment action under the DJA. *Id.* at 554. Standing exists under the DJA if: (1) the challenged law or action causes "some injury to or impact upon a legally recognized interest of the plaintiff's, beyond an abstract interest in the correct application or the validity of [the] law"; (2) the claimed injury or impact is

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[5] Oregon's PRL was passed to effectuate the precise rights and interests that Public Resource seeks to vindicate in this proceeding. ORS 192.001(b) ("As local programs become increasingly intergovernmental, the state and its political subdivisions have a responsibility to ensure orderly retention and destruction of all public records, whether current or noncurrent, and to ensure the preservation of public records of value for legal, administrative, fiscal, tribal cultural, historical or research purposes.") As alleged in the FAC, Public Resource has *no* method to freely speak – reproduce or distribute – the Codes such that they can be freely used for any historical or research purpose whatsoever. *Id*. sub. (c)(2) ("The purpose of ORS 192.005 to 192.170 and 357.805 to 357.895 is to provide direction for the **retention** or destruction **of public records in Oregon in order to ensure the retention of records essential to meet the needs of** the Legislative Assembly, the state, its political subdivisions and **its citizens**, **insofar as the records affect the** administration of government, **legal rights and responsibilities**, and the accumulation of information of value **for research purposes of all kinds**, and in order to ensure the prompt destruction of records without continuing value.") (emphasis added).



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"real or probable, not hypothetical or speculative"; and (3) a decision by the court "will in some sense rectify the injury" or have a "practical effect on the rights that the plaintiff is seeking to vindicate." *Id.* at 555.

Public Resource's FAC satisfies all three requirements. As to the first and second element, Public Resource has suffered a current, concrete injury. Specifically, Public Resource alleges that its unique non-profit mission for the last fifteen years has been to make government records and the law more readily available and accessible to citizens. (FAC ¶ 5.) It accomplishes this mission by acquiring copies of such records and publishing them online in easily accessible formats for free. (FAC ¶ 6.) But BCD's actions prevent Public Resource from achieving its distinct mission here. Because BCD refused Public Resource's public records request, and because of the lack of any non-rival copies of the Codes available to the public, Public Resource cannot reproduce the Codes. Public Resource's Article I § 8 rights are violated because it cannot currently speak the laws. That injury is not hypothetical or speculative—it is an immediate and current constitutional harm.

Nor does Public Resource seek to vindicate some abstract interest in the correct application of the law divorced from the actual injury it suffered. It is true that, if Public Resource prevails on its constitutional claims, all Oregonians will enjoy the benefits of free access to the digital Codes. *See Hale*, 259 Or App at 386 (declaration of unconstitutionality applies to nonparties). But the fact that a judicial decision declaring that BCD's actions are unconstitutional will impact nonparties does not lessen the direct injury Public Resource has suffered, nor will it strip Public Resource of standing. *See Budget Rent-A-Car of Washington-Oregon, Inc. v. Multnomah Cnty.*, 287 Or 93, 95, 597 P2d 1232 (1979) (holding that plaintiff had standing under the DJA when it challenged the constitutionality of a county tax because the challenged act directly affected the plaintiff's rights, status, or other legal interests).

Finally, as to the third element of redressability, the Court can remedy the harm caused by BCD in many ways. It can (1) declare that that the entire text of the Codes are officially the law of the State of Oregon such that BCD cannot restrict Public Resource's free, public access to the



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Codes; (2) declare that BCD's contracts with the Private Standards Companies are void and cannot be used to prevent BCD from exercising its constitutional right to view and speak the Codes; or (3) issue whatever relief that the Court, in its equitable discretion, deems just and proper. Such orders and declarations on Public Resource's claims provide immediate resolution as to the legal nature of the Codes and assure Public Resource that it cannot be held liable for reproducing them. *See Barcik v. Kubiaczyk*, 321 Or 174, 191, 895 P.2d 765 (1995) (holding that a declaration that defendants deprived a plaintiff of free-speech rights is a remedy courts can issue to rectify the plaintiff's constitutional injury).

Despite these allegations, BCD contends that Public Resource lacks standing because the wrongs alleged in the FAC are "public in character" and Public Resource has not suffered a real or probable injury. (Mot. at 7.) As explained above, the fact that a constitutional injury affects other people, including the public, does not strip a plaintiff of their right to seek a remedy for their own injury. Furthermore, even the caselaw BCD cites shows that BCD is wrong.

Consider BCD's citation to the Oregon Supreme Court's decision in *League of Oregon Cities v. State of Oregon,* 334 Or 645, 56 P3d 892 (2002). In that case, multiple plaintiffs brought a declaratory judgment action challenging the constitutionality of an initiative that required state and local governments to compensate landowners for regulations that devalued their land. *Id*. at 649–51. The Oregon Supreme Court held that two of the plaintiffs had standing to challenge the initiative: (1) a rancher who testified that the initiative jeopardized his farm and income; and (2) a town mayor, who asserted that his home would decrease in value. *Id*. at 660-61. Although the initiative measure did not directly apply to those plaintiffs, "the plaintiffs alleged that their land values and other financial interests were affected indirectly, by the measure's operation on state and local governments." *MT & M Gaming, Inc.*, 360 Or at 557 (discussing the holding of *League of Oregon Cities*). That indirect effect was sufficient to "demonstrate[ ] that the measure would adversely affect their 'legally cognizable interests' and that the plaintiffs therefore had standing." *Id*.



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Here, Public Resource has suffered far more of a direct, personal injury than what was recognized in *League of Cities*. BCD's actions, as described in the FAC, outright prevent Public Resource from exercising its free-speech rights under Article I § 8 of the Oregon Constitution. This alone is a sufficient constitutional violation to confer standing to challenge government action. *Bates v. Oregon Health Auth*., 335 Or App 464, 475, 559 P3d 924, 931 (2024) (holding in an action for declaratory judgment that a statute restricting packaging design "is an unconstitutional restriction of speech under Article I, section 8.")

Accordingly, the Court should find that Public Recourse has standing to pursue its claims under the DJA.

**C. Public Resource States a Claim for Relief Under the Public Records Law.**

**1. Pleading Standard**

On a motion to dismiss for failure to state a claim under ORCP 21 A(1)(h), the Court assumes the truth of all allegations in plaintiff's pleadings and "view all reasonable inferences in the light most favorable to the plaintiff." *Sunshine Farm, LLC v. Glaser*, 331 Or App 429, 431, 545 P3d 1248 (2024) (quoting *Munson v. Valley Energy Investment Fund*, 264 Or App 679, 703, 333 P3d 1102 (2014)). Pursuant to this liberal standard, all reasonable inferences must be drawn in the nonmovant's favor. *See Wathers v. Gossett*, 148 Or App 548, 550, 941 P2d 575 (1997) (*citing Hansen v. Anderson,* 113 Or App 216, 218, 831 P2d 717 (1992)). Oregon pleadings require "A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition" only. ORCP 18 A. An ultimate fact is one from which a legal conclusion may be drawn and serves to give defendants notice of the nature of the claims against them. *See Fearing v. Bucher*, 328 Or 367, 374, 977 P2d 1163 (1999).

A cause of action arises under the PRL when "a person is denied the right to inspect or receive a copy of a public record in the custody of an elected official, *or in the custody of any other person* but as to which an elected official claims the right to withhold disclosure…" ORS 192.427 (emphasis added). Oregon courts have heard causes of action arising out of a public body's denial of custodianship as a means of "completing" a PRL request, much like the instant case. *See*



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*Bialostosky v. Cummings*, 319 Or App 352, 355, 511 P3d 31 (2022) (reversing summary judgment to city council member where defendant had argued that the council was "not the custodian of the requested records" and therefore the response was complete.)

**2. The Second Claim Was Pursued Based on Guidance from the Court.**

At the January 6, 2025 conference of the parties, counsel for Public Resource asked the Court whether a claim under the PRL would be proper, given that BCD had *not* invoked an exemption, but rather denied possession of the Codes. The Court instructed counsel that the claim should be brought under the PRL. Accordingly, Public Resource followed the Court's directive, and included the Second Claim in the FAC. Public Resource also brought the Third Claim based on the prediction – which proved true – that BCD would contend that the Second Claim should be dismissed because BCD lacks possession and therefore satisfied its obligations under the PRL. Nevertheless, Public Resource has stated a claim for relief pursuant to the PRL.

**3. Public Resource Alleged Facts Sufficient to Establish a Claim Under the PRL.**

BCD argues that the FAC fails to state a claim for relief under the PRL for two reasons. First, BCD asserts that they properly completed the PRL request when they informed Public Resource that they were not the custodian of the integrated Codes, and that therefore there is no cause of action under the PRL. (Mot. at 2.) Second, BCD argues that the FAC establishes only that BCD does not maintain the Codes in Public Resource's *preferred* digital format. (*Id.* at 11 (emphasis added).) And because the hard copy of the integrated Codes are available for in-person inspection, no violation of the PRL has been established. (*Id.*) This is untrue.

**a. Public Resource's PRL Request is Not Complete.**

BCD contends that, because it does not have possession of an integrated digital copy of the Codes, their obligations are satisfied. The FAC recognizes this premise, but rejects the conclusion and seeks relief from this Court on that basis.

The FAC alleges that BCD's response to Public Resource's request for a copy the Codes was not completed . (FAC ¶ 32.) To support this allegation, the FAC alleges that BCD entered into contracts with the Private Standards Companies to dispossess themselves of the right to produce



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the integrated codes. (*Id*. ¶ 29.) Although this posture is unconventional, Oregon law is not so wooden as to turn a blind eye to these types of arrangements— BCD's conduct is an improper withholding of public records by a state agency. "[I]t is self-evident that an improper withholding of a public record could occur in any number of ways short of some formal 'denial' of a records request, such as by stonewalling or other obstructive conduct on the part of the public body." *Int'l Longshore & Warehouse Union v. Port of Portland*, 285 Or App 222, 396 P3d 235, 240 (2017). To be sure, a state agency cannot outsource possession of public records to private parties and abdicate its responsibility under the PRL. *See also, Guard Pub. Co. v. Lane Cnty. School Dist. No. 4J*, 310 Or 32, 39-40, 791 P2d 854 (1990) (holding that the school district could not contract away their obligation to disclose certain public records in response to a request under the PRL.). Oregon's sister jurisdictions are in accord on this point of law. *See Tober v. Sanchez*, 417 So2d 1053, 1054 (Fla Dist Ct App 1982) (Public bodies charged by law with the maintenance of public records pursuant to [FL PRL] may not transfer physical custody of the records to a third party to avoid compliance with the [FL PRL]); *WIREdata, Inc. v. Vill. of Sussex*, 310 Wis 2d 397, 441, 751 NW2d 736 (2008) (public bodies may not contract "collection, maintenance, and custody" of public records to an independent contractor, thereby avoiding liability under the Wisconsin PRL).

To allow public bodies like BCD to exempt themselves from disclosure of public records by offloading possession to private parties would "violate both the letter and the spirit of the relevant statutes which reflect the strong and enduring policy that public records…be open to the public." *Guard Pub. Co.*, 310 Or at 39 (citation omitted). Yet that is precisely what the FAC alleges here.

The Motion also disputes the validity of the Second Claim because the FAC "does not ask that this Court compel DCBS to complete the response." (Mot. at 9.) This is false. (FAC ¶ 32; 33) ("Pursuant to ORS 192.407 and ORS 192.411, Public Resource seeks a judgment and order from this Court, pursuant to the PRL, declaring: (1) that the Codes are "public records" under the PRL, (2) that BCD is the custodian of the Codes, (3) that BCD is not exempt from producing the Codes, and (4) directing BCD to make the Codes available to Public Resource pursuant to its valid



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request under the PRL.")

**b. The Motion's Argument With Respect to Document Formats Misses the Point, and Demonstrates the Need for Declaratory Relief.**

As predicted in the FAC, the Motion argues that Public Resource's request for relief is based on Public Resources' preferred format, and because BCD does not maintain a copy of the Codes in a digital format, BCD's job here is done because it is not the custodian. (Mot. at 11; FAC ¶ 35.)

BCD's argument misses the point about the other "formats" available for inspection by completely neglecting to address the factual allegation that Public Resource must enter into a private contract, with the Private Standards Companies, for access to the electronic versions of the Codes (both the "free" versions, and the paid versions) (FAC ¶ 14.) Those Terms of Use expressly require a user to agree to never share or reproduce the Codes, which Public Resource alleges are government edicts and public records. (*Id*.) On this point, the Motion has no argument, and indeed nor could it, as there is no principle of Oregon law that permits a state agency to offshore public records to a private entity with the authority to dictate terms of access and usage. Nor, to be sure, do the "hard copies" resolve the issue. Although the hard copies are not subject to any private terms of use, they have their own restrictions. As explained above, and as repeated throughout the Motion, the hard copies are for "inspection" only. (FAC, Ex. 3 at 2; Mot. 10, n. 3.) Thus, as with private versions of the Codes, Public Resource cannot copy and print its own hard copy codes for its own usage.[6] This is the essence of the closed loop that BCD has created – the Codes are *never* available for Public Resource to copy and reproduce.[7] Such restrictions, Public Resource contends,

[6] Notably, BCD's provision of "hard copies" do not permit a "reasonable opportunity to inspect or *copy the public record*." ORS 192.324(b)

[7] The Motion observes that: "Plaintiff does not allege that the paid versions of the digital integrated codes are the law while the free digital versions or the hard copy versions are not." (Mot. at 10.) True enough. Public Resource does not make this argument, and nor could it. Public Resource concedes that *all* versions of the Codes (the entire body of amendments and standards adopted by



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are unconstitutional. *Or. Newspaper Publrs. Ass'n v. Dep't of Corr*., 329 Or 115, 988 P2d 359 (1999) (conditions placed upon witnesses to an event were unconstitutional, since the state could not "condition" a witness's attendance on an agreement "that they will waive their rights to free expression respecting certain things that they might see and that they will be subject to injunction and may be required to respond in damages if they violate that agreement."). Here, Public Resource's "inspection" of the Codes is expressly conditioned on its agreement to not reproduce them elsewhere. Public Resource can "see" or "witness" the Codes, but it cannot copy them and speak them.

This arrangement demonstrates precisely why the First Claim and the Third Claim are necessary to resolve this dispute – because no one, including Public Resource, can "speak" the Codes under the current paradigm. Public Resource contends that the Codes are laws, and that as such, BCD cannot restrict Public Resource's (and the public's) ability to speak them freely. If Public Resource prevails on its First Claim, then Public Resource can copy and distribute the Codes without fear of reprisal. Further, if Public Resource prevails on its First Claim, BCD's arrangement with the Private Standards Companies to insulate the Codes from any reproduction becomes all the more problematic. And to the extent that BCD has abdicated its own responsibility under the PRL to furnish copies of the Codes upon request, that arrangement is unlawful for creating a closed loop that violates the PRL and Article I § 8 of the Oregon constitution.

## IV. CONCLUSION

The Motion should be denied. Under the current paradigm, Public Resource is outright forbidden from copying and reproducing – *i.e.* speaking – a vast swath of Oregon law. BCD has created a closed loop with the Private Standards Companies that violates core principles of an open and accountable republic, the Oregon constitution, and the Public Records Law. Public Resource seeks relief from this Court to clarify the nature of the Codes, as well as the legality of BCD's

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Oregon) are laws. Public Resource's argument, however, is premised on the fact that it cannot copy and distribute *any* available version of the Codes.



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stewardship of them. The Motion contains no argument as to how a state agency can legally create a cyclical money train for private parties while the public is barred from speaking the very laws that govern their conduct. The Motion instead seeks to terminate any inquiry into this pernicious arrangement with arguments that the Court lacks the ability to even comment upon this issue. The Motion's arguments are unavailing, and accordingly, Public Resource respectfully requests that the Motion be denied and this case set for trial.

DATED: April 24, 2025

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**CERTIFICATE OF SERVICE**

I, Ryan O'Hollaren, hereby certify that on this 24th day of April, 2025, I caused a copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT** to be served via U.S. Mail and electronic mail, on the following:

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