IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

Division Three

First Amendment Coalition; KQED Inc., Petitioners, **Superior Court of California for the County of San Francisco**, Respondent, **Rob Bonta, Attorney General of the State of California; California Department of Justice**, Real Parties in Interest.	Case No. A165888 (related to Becerra v. Superior Court, No. A157998)

San Francisco County Superior Court, Case No. CPF-19-516545
Dept. 611, Hon. Curtis E. A. Karnow, Judge

Reply in Support of Petition for Writ of Mandate and Memorandum in Support

Gov't Code § 6259 (Public Records Act Review)

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A. Introduction

Defendants now acknowledge that SB 1421 supersedes at least *some* CPRA exemptions, including exemptions other than the investigatory exemption contained in section 6254(f). *See* Opp. at 19 (conceding SB 1421 could supersede section 6254(c), which exempts certain personnel records from disclosure where privacy concerns are implicated). Yet they simultaneously claim that this Court's decision in *Becerra v. Superior Court* means that SB 1421 does not supersede *any* CPRA exemptions. Opp. at 11; 44 Cal. App. 5th 897 (2020). As this contradiction suggests, the government's absolutist reading of *Becerra* is wrong. Rather than supporting Defendants' position in this case, that opinion confirms that "those provisions of law that conflict with" section 832.7(b) "are inapplicable" to disclosure under SB 1421. *Becerra,* 44 Cal. App. 5th at 925.

The three confidentiality provisions here at issue conflict with § 832.7(b) because they would prohibit what California's landmark transparency statute commands. *See* Stats. 2018 ch. 988 § (1)(b) (SB 1421) (declaring that the public "has a right to

know *all about* serious police misconduct, as well as about officer-involved shootings and other serious uses of force") (emphasis added). The Supreme Court has specifically held in an open-government case that "two statutory schemes conflict" when one of them "prohibits disclosure of information that [the transparency statute] deems public." *State Dep't of Pub. Health v. Superior Ct.*, 60 Cal. 4th 940, 958 (2015) ("*SDPH*"). This is precisely the situation here. Unlike in *Becerra*, where this Court allowed the government to invoke § 6255(a) to avoid being saddled with "a limitless obligation" to fully comply with every request for records, no matter how burdensome, 44 Cal. App. 5th at 927, Defendants now invoke confidentiality statutes that would prohibit the release of information that SB 1421 states "shall not be confidential." Because these statutes would "prohibit[] disclosure of information that [SB 1421] deems public," they cannot apply to records covered by the new transparency statute. *See SDPH,* 60 Cal. 4th at 958.

Senate Bill 16, which the Legislature passed in 2021, is not to the contrary. Rather than back away from SB 1421's sweeping transparency mandate, as Defendants frame SB 16, the new law doubled down on transparency by making disclosable additional

categories of records, and clarifying that the attorney client privilege does not prevent the release of factual information from a disclosable investigation even when that investigation is conducted by a public agency's attorney, which these kinds of investigations frequently entail.

Moreover, even if Defendants were correct that SB 1421 supersedes only those confidentiality statutes that protect the same interests as § 832.7(a) or § 6254(f), the statute still would override two of the three confidentiality statutes here at issue. The interests that Defendants claim are protected by § 11183 and Penal Code § 6126.3(c) are the same interests protected by § 6254(f)—the integrity of investigations and victim and witness confidentiality. *Compare* Opp. at 24, 28 *with Haynie v. Superior Ct.*, 26 Cal. 4th 1061, 1070-71 (2001) (finding that § 6254(f) protects investigative integrity by keeping secret witness and victim identities so witnesses do not "disappear or refuse to cooperate" and victims are not "reluctant to report suspicious activity"). Thus, even under Defendants' narrow reading of SB 1421, these statutes cannot allow withholding of records covered by this transparency statute.

In addition, as to the thousands of potentially responsive records from Bakersfield that Defendants have refused even to log: Defendants have failed to show how *public* records relating to peace-officer conduct that SB 1421 declares "shall not be confidential" can possibly constitute "private" records concerning "*confidential* or private transactions, property, or business" that § 11183 protects (emphasis added). The public records Defendants have withheld are not private under any definition of the term, and they do not relate to confidential or private transactions. As this Court observed in *Becerra*, it is the *content* of the records – not the record's location or which agency prepared the record – that matters. *Becerra,* 44 Cal. App. 5th at 923. Thus, even if § 11183 could apply to records within the scope of SB 1421, it does not apply to these records.

Finally, to the extent any of these statutes are ambiguous, the California Constitution requires that they be read in favor of transparency. *See, e.g., ACLU Found. v. Superior Ct.*, 3 Cal. 5th 1032, 1042 (2017) (calling this constitutional mandate "[p]erhaps the most critical point" of the court's analysis in holding that certain law-enforcement records are not exempt). Even if Defendants' policy claims were correct (and they are mostly not,

because they ignore SB 1421's multiple safeguards against unwarranted disclosure), they would founder under the force of this constitutional mandate and its corollary rule that "all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary." *Sierra Club v. Superior Ct.*, 57 Cal. 4th 157, 166 (2013) (citations omitted).

For these reasons, this Court should issue an order to show cause and, after full briefing and any argument, order the Superior Court to require Defendants to release the records at issue.

B. Section 832.7(b) supersedes the three confidentiality statutes Defendants invoke.

Defendants' argument that "any other law" refers only to some narrow class of laws is unsupported by any authority or argument. They fail to explain why the Legislature would want to restrict the scope of "any" to include only those statutes similar to the two they listed. Doing so would defeat the entire purpose of using the phrase "notwithstanding … any other law," which is to relieve the Legislature of the burden posed by identifying all the circumstances in which the law might apply. *See* Pet. at 40-44. Moreover, even under Defendants' analysis, SB 1421 supersedes

the laws here in question, because those laws protect the same interests as § 6254(f) and § 832.7(a).

1. SB 1421 supersedes "any other law" that conflicts with it.

Defendants now concede that their absolutist position is not right, that "any other law" must refer to *some* statutes, and that SB 1421 requires release of at least *some* records that would otherwise be exempt from CPRA disclosure. *See* Opp. at 19 (acknowledging that SB 1421 overrides 6254(c)). However, they then claim that SB 1421 supersedes only those statutes that serve the same interests as § 832.7(a) or § 6254(f). *See id*. But they neither provide any authority or argument to support this novel theory nor discuss—much less distinguish—the contrary precedent raised in the Petition. Both the plain language of the statute and binding caselaw defeat their claims.

To the extent Defendants are arguing that the phrase "any other law" only encompasses laws that are similar to those listed in § 832.7(b)(1), their claim contradicts the plain statutory language. "From the earliest days of statehood [the Supreme Court has] interpreted 'any' to be broad, general and all embracing." *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Warwick*,

17 Cal. 3d 190, 195 (1976); *see id.* ("the 'word 'any' means every"). Indeed, the Supreme Court just last week reaffirmed as much, holding that, because a sentencing provision applied "'[n]otwithstanding any other law', the statutory scheme clearly requires" that it "take[] precedence over *any* conflicting provision." *People v. Henderson*, 2022 WL 16985422, at *9 (Cal. Nov. 17, 2022) (emphasis added).

Thus, the "phrase 'notwithstanding any other law' is all encompassing." *People v. Espinoza*, 226 Cal. App. 4th 635, 639-40 (2014); *see People v. Palacios*, 41 Cal. 4th 720, 728-29 (2007)[1] (emphasizing "the broad and unambiguous scope of 'notwithstanding any other provision of law,'" a phrase that "means what it says"). If the phrase "*can* literally be followed" to supersede another statute, "it must be." *Palacios*, 41 Cal. 4th at 730. The fact that a statute lists some specific provisions that it supersedes does not change this. *See id.* at 726; Pet. at 41-44. Thus, as this Court previously explained, "'those provisions of law that conflict with' section 832.7(b) … are inapplicable" to

[1] Holding superseded by 2017 statutory amendment as discussed in *People v. Tirado*, 12 Cal. 5th 688, 696 (2022).

disclosure of records within the scope of SB 1421. *Becerra,* 44 Cal. App. 5th at 925 (quoting *Arias v. Superior Ct.*, 46 Cal. 4th 969, 983 (2009), citing *Klajic v. Castaic Lake Water Agency*, 121 Cal. App. 4th 5, 13 (2004)). Defendants present nothing to suggest any other result. SB 1421 thus supersedes every statute that conflicts with its disclosure requirements. This includes the statutes that Defendants invoke—Penal Code § 6126.3(c), Government Code § 11183 and Unemployment Insurance Code § 1094(a)—because they would allow withholding where SB 1421 demands disclosure. *See* Pet. at 52-56.

To the extent Defendants' argument is instead that only those exemptions that promote the same interests as those listed in § 832.7(b)(1) can conflict with that statute, they are again wrong. As an oft-cited case makes clear, two statutes conflict if they would lead to different results when applied to the same facts. *See Klajic*, 121 Cal. App. 4th at 13; *see also, e.g*, *Souvannarath v. Hadden*, 95 Cal. App. 4th 1115, 1125–26 (2002) (The term "notwithstanding any other provision of law" is "an express legislative intent that the specific statute in which it is contained controls in the circumstances covered by that statute, despite the existence of some other law which might otherwise apply to

require a different or contrary outcome."). In contrast, there is no conflict between provisions that mandate the same result or govern different factual or procedural scenarios. *See Arias*, 46 Cal. 4th at 983 ("notwithstanding" provision that exempted certain suits "from class action requirements" did not "also exempt those actions from all other provisions of law, including statutes of limitation and pleading requirements" that applied to all civil cases). But other cases similarly and consistently hold that statutes that apply "notwithstanding [an enumerated statute] or any other provision of law" broadly supersede any statutes that would otherwise lead to a different result, even if those statutes have nothing to do with the enumerated statute. *See, e.g, People v. Duff*, 50 Cal. 4th 787, 793-4, 797-99 (2010) (statute applying "[n]otwithstanding Section 4019 or any other provision of law," supersedes Penal Code § 654).[2] Defendants

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[2] *Duff* analyzed whether Penal Code § 2933.2(c), which prohibits people convicted of murder from receiving certain custody credits "[n]otwithstanding Section 4019 or any other provision of law," supersedes Penal Code § 654, which generally prohibits multiple punishments for the same act. *See id.* at 794-95, 797-99. The defendant argued that § 2933.2's reference to Penal Code § 4019 meant that it only superseded statutes that are, like § 4019, "generally applicable rules governing conduct

have failed to present any authority supporting their novel alternative to this settled approach.

Moreover, the Supreme Court followed this established approach when it held that a transparency statute conflicted with and thus superseded a confidentiality statute. *See SDPH*, 60 Cal. 4th at 956, 957-58. Applying this analysis, the *SDPH* court unanimously held that "two statutory schemes conflict" when one of them "prohibits disclosure of information that [an open-government law] deems public." *Id.* at 958.

Notably, *SDPH* applies a stricter conflict standard than is appropriate here, because neither statute contained "notwithstanding" language. *See id*. at 955. Absent such language, courts will go to great lengths to harmonize apparently inconsistent statutes and will find a conflict only when the two laws are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." *SDPH*, 60 Cal. 4th at 955-56 (citation omitted); *see also In re Greg F.*, 55 Cal. 4th

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and worktime credit." *Id*. at 799. But the Supreme Court rejected this argument, holding that the plain language of § 2933.2 superseded all other statutes that might result in awarding credits to a defendant convicted of murder. *See id*.

393, 407 (2012). In contrast, when one statute applies *notwithstanding* other laws, there is no need to try to harmonize statutes in this way. *See People v. Superior Ct. (Romero)*, 13 Cal. 4th 497, 524 (1996) (Statute that applies "notwithstanding any other law" "takes the place of whatever law would otherwise determine" the outcome and "thus eliminates potential conflicts" with other statutes.); *People v. Espinoza*, 226 Cal. App. 4th 635, 639–40 (2014) ("The phrase 'notwithstanding any other law' is all encompassing and eliminates potential conflicts between" competing statutes). Instead, as all these authorities make clear, courts simply enforce the statute that applies "notwithstanding" other laws in any case where it and another law would result in different outcomes. This is a significantly less-stringent test than applies in the absence of "notwithstanding" language, as in *SDPH*. *See In re Greg F.*, 55 Cal. 4th at 406-07. Because SB 1421 applies "notwithstanding … any other law," the less-stringent test applies, and SB 1421 supersedes any statute that would allow the government to withhold records that the transparency statute declares non-confidential.

In any event, the conflict between the statutes here is the same as in *SDPH* and thus meets even the stricter test: the three

confidentiality statutes that Defendants invoke would normally prohibit disclosure of information that "shall not be confidential" under SB 1421. The statutes are therefore "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." *SDPH*, 60 Cal. 4th at 955-56. The statute that applies "notwithstanding … any other law" must therefore prevail. *See Palacios*, 41 Cal. 4th at 728-29; *Klajic*, 121 Cal. App. 4th at 13.

Defendants' only response is to quote dicta from this Court's prior decision in *Becerra* broadly suggesting that SB 1421 does not supersede *any* of the CPRA's exemptions. But the Court in *Becerra* was concerned with *burden*, not confidentiality, and its actual holding was only that the CPRA's long-standing catchall exemption does not conflict with SB 1421; no other exemptions were at issue. *See Becerra*, 44 Cal. App. 5th at 927, 934 (noting that "the catchall exemption has been used to justify withholding documents based on a range of public interests, including the 'expense and inconvenience involved in segregating nonexempt from exempt information'") (citation omitted). Neither that holding, nor the *Becerra* Court's reasoning, applies here, because

Section 6255 is not a confidentiality statute; and Defendants are not withholding records on burden grounds. *See* Pet. at 46-52.

Furthermore, SB 1421 expressly *allows* agencies to withhold information under the same standard as § 6255(a). *Compare* § 832.7(b)(7) *with* § 6255(a). *Becerra* thus does not grant agencies any authority they do not have under § 832.7(b)(7)'s balancing test to withhold information because of its content or to deny a narrow request for records. Instead, the only additional authority that agencies have under *Becerra* is that they can withhold entire records under this test, rather than redacting information from those records. Agencies can withhold records when the burden of production "clearly outweighs" the public interest in the information. *See Becerra*, 44 Cal. App. 5th at 929-32. This does not allow the government to withhold a narrow collection of records containing important information about a covered incident. *See id*. at 932-33. Moreover, this authority to withhold records is further limited by agencies' statutory duty to assist requestors to "make a focused and effective request that reasonably describes an identifiable record or records." *See* § 6253.1. Allowing agencies to invoke § 6255's balancing test therefore "should not frustrate section 832.7's aim to provide

greater transparency around officer misconduct issues." *Becerra*, 44 Cal. App. 5th at 929. It simply frees them from what would otherwise be "a limitless obligation" to locate and provide every record that is responsive to a CPRA request, no matter how burdensome and even if made "for no particular reason," an obligation that "would not be in the public interest" and the Legislature would not have intended. *Id*. at 926-27.

In contrast, Defendants now request the authority to completely and categorically deny access to records under any of the hundreds[3] of provisions of State law that may exempt records from disclosure under the CPRA, no matter how narrow the request or how important the public interest in that information, and even when the public has no other way to get access to information about an incident. This presents a far greater conflict with SB 1421 than does the provision at issue in *Becerra*.

Moreover, the dicta that Defendants cite are inconsistent with the Court's ultimate conclusion and with Defendants' own

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[3] There are more than 600 statutes that create CPRA exemptions. *See* §§ 6275-6276.48 (listing statutes and constitutional provisions that "may operate to exempt certain records, or portions thereof, from disclosure" under the CPRA).

arguments. *Becerra* itself acknowledged that "those provisions of law that conflict with" section 832.7(b) … are inapplicable" to disclosure of records within the scope of the transparency law. *Becerra*, 44 Cal. App. 5th at 925. Defendants concede that SB 1421 conflicts with and thus supersedes some CPRA exemptions, including § 6254(c). *See* Opp. at 19. They thereby acknowledge that *Becerra* did not establish a categorical rule that agencies can withhold records covered by SB 1421 whenever any CPRA provision would otherwise exempt them from disclosure. It is authority only for its holding that § 6255(a) does not conflict with SB 1421, not for Defendants' broader statements regarding other exemptions. *See People v. Mendoza*, 23 Cal. 4th 896, 915 (2000) ("we must view with caution seemingly categorical directives not essential to earlier decisions") (citation omitted); Pet. at 51-52.

2. Even under the government's analysis, SB 1421 supersedes § 11183 and Penal Code § 6126.3(c).

Even if the government were correct that SB 1421 supersedes only those exemptions that are similar to those listed in § 832.7(b)(1), the statutes here at issue could not justify withholding, because they *are* similar to § 6254(f), which

Defendants concede SB 1421 overrides. This CPRA exemption authorizes agencies to withhold

> "[r]ecords of … investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, … and any state or local police agency, or any investigatory … files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes." § 6254(f).

The purpose of this "broad exemption from disclosure for law enforcement investigatory records" is to protect the integrity of law enforcement investigations and the confidentiality of witnesses. *See* W*illiams v. Superior Ct.*, 5 Cal. 4th 337, 349, 356 (1993); *Rackauckas v. Superior Ct.*, 104 Cal. App. 4th 169, 174-175 (2002). Without § 6254(f)'s protections, disclosure would "impair … investigations." *Haynie*, 26 Cal. 4th at 1070-71. "Suspects, who would be alerted to the investigation, might flee or threaten witnesses. Citizens would be reluctant to report suspicious activity. Evidence might be destroyed." *Id.*

These are precisely the interests that Defendants claim are protected by § 11183. They argue that this section's "confidentiality provisions facilitate witness cooperation," "protect the integrity of the Department's investigations," and

protect "sensitive investigation details" and "sensitive tactical or security protocols." Opp. at 23-24. Thus, even if SB 1421 only superseded statutes that protect the same interests as § 6254(f), it would supersede § 11183, as read by Defendants.

The same is true for Penal Code § 6126.3(c). That provision exempts from disclosure a variety of records of the Office of the Inspector General, which is charged with oversight of the CDCR's internal-affairs and disciplinary investigations and procedures. *See* Penal Code § 6126(a); Pet. at 29. The government asserts that the confidentiality provisions of this statute serve to "facilitate[] thorough investigations, witness cooperation, and candid disclosure." Opp. at 28. Again, these are the same interests that § 6254(f) is meant to serve, as just discussed. Under Defendants' theory, SB 1421 supersedes § 6126.3(c), too.

3. SB 16 does not authorize the government to withhold records under § 6254(k).

Defendants also suggest that SB 16, which mandates disclosure of additional categories of police records and clarifies that the attorney-client privilege does not prevent the release of factual information from an investigation into a disclosable incident even when the investigation is conducted by an agency's

attorney, somehow expanded agencies' authority to withhold non-privileged records. Nothing in SB 16 supports this claim.

Bill analyses before the Legislature when it was considering SB 16 indicated that whether agencies can assert CPRA exemptions to withhold records covered by SB 1421 was "an open legal question." *See* Office of Senate Floor Analyses, Senate Floor Analysis of SB 16 at 6 (Sept. 1, 2021), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB16#. The Legislature responded to this uncertainty by including a provision in SB 16 to "clarif[y] the application of the attorney-client privilege to SB 1421 records." *Id.* at 6. The new law "specifically incorporates the privilege into the 832.7 disclosure scheme" and creates a bright-line rule under which agencies can withhold legal opinions from disclosable 1421 records, but must release underlying factual material and billing records:

> (A) For purposes of releasing records pursuant to this subdivision, the lawyer-client privilege does not prohibit the disclosure of either of the following:
> (i) Factual information provided by the public entity to its attorney or factual information discovered in any investigation conducted by, or on behalf of, the public entity's attorney.
> (ii) Billing records related to the work done by the attorney so long as the records do not relate to active

> and ongoing litigation and do not disclose information for the purpose of legal consultation between the public entity and its attorney.
> (B) This paragraph does not prohibit the public entity from asserting that a record or information within the record is exempted or prohibited from disclosure pursuant to any other federal or state law.
>
> § 832.7(b)(12) (as amended by stats. 2021, ch. 402 § 3 (SB 16)).

SB 16 does *not* address withholding of any other records or attempt to resolve any other aspect of the broader "open question" identified in the Senate Floor Analysis. Defendants nevertheless suggest that the final sentence of paragraph (B) allows them to withhold records under laws such as § 11183. But by its very text this sentence does no such thing, because it applies only to disclosures under "[t]his paragraph," which governs only the scope of attorney-client privilege. Rather than apply broadly, that provision merely makes clear that even factual material or billing information in an attorney-client communication can be withheld if, for example, the public interest in doing so outweighs the public interest in disclosure under § 6255(a) or § 832.7(b)(7). Thus, by its express terms, it does not affect disclosures under any other part of § 832.7(b). And without *express* legislative authorization, the government cannot withhold information from the public. *Sierra Club*, 57 Cal. 4th at

166. SB 16 does not support the government's argument that it can withhold records covered by SB 1421 under every otherwise-available CPRA exemption.[4]

In any event, it is not surprising that this appeared to the Legislature to be an open question: courts have long recognized that the interaction of the attorney-client privilege with open-government laws presents unusual challenges. *See Citizens for Ceres v. Superior Ct.*, 217 Cal. App. 4th 889, 912 (2013) ("The question presented here is difficult."). For example, CEQA requires that the administrative record of agency lands-use decisions contain certain materials "'notwithstanding any other provision of law," without any exception for privileged materials. *See id*. at 908. The Third and Fifth Districts have, however, read an exception into this requirement to allow agencies to withhold material protected by the attorney-client privilege out of the public record. *See id*. at 907-913; *California Oak Found. v. Cnty.*

[4] To the extent Defendants are arguing that SB 16 indicates some legislative understanding of the scope of SB 1421 before it was amended, they have failed to point to anything that actually shows this. Furthermore, what matters is "the Legislature's intent *when it enacted the statute*," not any "hypothetical legislative intent at some time after enactment." *In re Pedro T.*, 8 Cal. 4th 1041, 1047–48 (1994).

of Tehama, 174 Cal. App. 4th 1217, 1221 (2009). The Third District similarly held that the attorney-client privilege created an implicit exception to the Brown Act, which requires that local meetings be open "notwithstanding the conflicting provisions of any other state law." *Sacramento Newspaper Guild v. Sacramento Cnty. Bd. of Supervisors*, 263 Cal. App. 2d 41, 55 (1968). The Legislature responded by amending the statute (and the State's other main open-meeting law) to partially abrogate this decision and instead allow these bodies to invoke a more limited version of the same privilege. *See S. Cal. Edison Co. v. Peevey*, 31 Cal. 4th 781, 811 (2003) (Baxter, J., dissenting); *see also* Stats. 1987 ch. 1320 (SB 200) §§ 2, 5.

In all these holdings, the courts emphasized the unique status of statutory privileges—and particularly of the attorney-client privilege—but have not created analogous exceptions that would allow agencies to withhold materials that are not protected by Evidence Code privileges. *See Citizens for Ceres*, 217 Cal. App. 4th at 911-13; *Cal. Oak Found*, 174 Cal. App. 4th at 1221; *Sacramento Newspaper Guild*, 263 Cal. App. 2d at 55–56. The same is true of SB 16. That the Legislature has chosen to clarify the applicability of the attorney-client privilege to records covered

by SB 1421 does not affect the applicability of the confidentiality statutes here at issue.

C. Section 11183 does not authorize the withholding of public, non-confidential records.

Even if Defendants were correct that the Court in *Becerra* found that SB 1421 overrides only § 6254(f) and § 832.7(a) (and they are not), the government's withholding of records under § 11183 still would be improper. By its express terms, § 11183 applies only to "private" materials "in respect to the confidential or private transactions, property or business of any person." Defendants' argument that this provision converts non-confidential public records into secret ones flies in the face of this unambiguous statutory language. Moreover, their policy arguments ignore that § 6254(f) still applies to records that are not covered by SB 1421, and that those records can therefore still properly be withheld under § 11183.

1. The text of § 11183 shows that it does not apply to records covered by SB 1421.

The relevant language of § 11183 was first enacted in 1921 as part of section 353 of the former Political Code. *See* stats. 1921, ch. 602 § 1, at 1023-25; *People ex rel. Dep't of Conservation v. El Dorado Cnty.*, 36 Cal. 4th 971, 994 n.14 (2005). That statute

made it illegal for an officer to "divulge any information acquired by him from the private books, documents or papers of any person, firm or corporation … in respect to the confidential or private transaction, property or business of any person, firm or corporation." Stats. 1921, ch. 602 § 1 at 1025. Then, as now, as applied to documents or information, "private" and "confidential" refer to a matter that is not available to the public. Thus, Webster's 1913 dictionary defines private as "[n]ot publicly known; not open; secret" and "peculiar to one's self; unconnected with others; personal." *See* https://www.websters1913.com/words/Private. It defines "confidential" as "[c]ommunicated in confidence; secret." https://www.websters1913.com/words/Confidential. The terms still carry this meaning. *See Vigil v. Muir Med. Grp. IPA, Inc.*, 84 Cal. App. 5th 197, 300 Cal. Rptr. 3d 32, 42 (2022) ("The common or ordinary dictionary definition of 'confidential' is 'private' or 'secret.'"). Section 11183 thus serves to preserve the confidentiality of private records relating to private or confidential matters; it does not transmogrify public records into private files. *See People v. Park*, 87 Cal. App. 3d 550, 570 (1978) ("[I]nformation obtained through the investigative efforts of the

department *retains* its confidential character….") (emphasis added).

SB 1421 states that records within its scope "shall not be confidential" and "shall be made available for public inspection." § 832.7(b)(1). These records are by definition not "private." Nor do they relate to the "confidential or private transaction, property, or business" of any person—they relate to law-enforcement activities that the Legislature has declared must be open to the public. Section 11183 does not apply to them.

In response, Defendants cite an Attorney General opinion stating that "private" generally refers to "an individual rather than the government or the public." Opp. at 26. This is of course one meaning of the term, now and in Webster's 1913 dictionary. *See* https://www.websters1913.com/words/Private (definition 3). But if this is the sense in which § 11183 uses the term, the government's position is even weaker, because the provision protects only "private" records. The documents at issue are by definition "public records" because they "relat[e] to the conduct of the public's business" and are "prepared, owned, used, or retained" by a public agency. *See* § 6252(e). They cannot be

"private books, documents, or papers" under the government's definition.

Neither of the authorities cited by Defendants even suggests a different result. The attorney general opinion involved a "copy of a private check obtained by the FPPC." *Fair Political Practices Comm'n Question*, 87 Cal. Ops. Atty. Gen. 181 (2004). The Attorney General explained that because this check was "evidence of a private financial transaction" it "cannot be considered to be part of the public domain." *Id.* at *4. The judicial opinion involved "financial records" belonging to several private companies. *See State Water Res. Control Bd. v. Baldwin & Sons, Inc.*, 45 Cal. App. 5th 40, 47–48 (2020). Both of these authorities thus involved records that were private in all senses of the term—they belonged to non-governmental entities or individuals and were not open to the public. Neither of them involved government records or records of governmental activity, much less non-confidential public records that another agency would have to disclose upon request and that are therefore part of the public domain.

Finally, the fact that the records may contain information about private individuals is irrelevant, because the statute does

not protect records simply because they contain such information; instead, it protects only "private books" or other materials that contain information about the "confidential or private transactions, property or business of any person." § 11183. A public record does not become a private record simply because it may contain information about private individuals. Defendants have failed to point to any authority suggesting that § 11183 applies to non-confidential government records.

2. Defendants' policy arguments do not support their position.

Doubtless recognizing that their position finds no support in the text of the statute or any precedent, Defendants' primary argument is that they *should* be allowed to keep these materials secret. *See* Opp. at 23-25. As this Court explained when it rejected Defendants' previous attempt to withhold records it had obtained from local agencies as part of its oversight authority, these policy arguments should be directed at the Legislature, not the courts. *See Becerra*, 44 Cal. App. 5th at 922 (government's "policy argument affords no ground for a judicial interpretation that shields responsive records in the Department's possession"). But even if Defendants' purported interest in secrecy could

override the clear statutory language and the constitutional mandate that the statute be read in favor of disclosure, their claim does not withstand scrutiny, because SB 1421 provides ample authority to address any legitimate need for secrecy.

As an initial matter, materials obtained under § 11183 that are not within the scope of SB 1421 are exempt from disclosure under § 6254(f) because they are "Records of … investigations conducted by … the office of the Attorney General and the Department of Justice." § 6254(f); *see* Pet. at 64-65 & n.4. Moreover, since the originating agency could withhold these records from the public under § 6254(f) and § 832.7(a), they may be private records and therefore covered by § 11183. Records protected by § 832.7(a) would continue to receive that protection. *See Fagan v. Superior Ct.*, 111 Cal. App. 4th 607, 616–17 (2003). It is only those materials that the originating agency would have to disclose under SB 1421 that are at issue here, and the Court's holding should not affect the status of any other records.

And for the records here at issue, SB 1421 itself provides ample authority to withhold information to protect legitimate needs for secrecy. *See* Pet. at 56-57. Records must be redacted to "preserve the anonymity of whistleblowers, complainants,

victims, and witnesses." § 832.7(b)(6)(B). Personal data must be removed, as must information that could create a security risk. § 832.7(b)(6)(A), (C). Agencies can withhold records during an investigation or prosecution. *See* § 832.7(b)(8). And the catchall exception allows redaction whenever the public interest warrants. § 832.7(b)(7).

The Legislature has thus crafted a detailed statute that accommodates the government's legitimate interests in secrecy while accomplishing the legislative goal of allowing public access to records relating to the types of misconduct covered by SB 1421. These rules address all the policy concerns that Defendants raise. *Cf.* Opp. at 23-24. Although Defendants plainly would like to be exempt from these disclosure requirements, they have not made any convincing arguments that they should be, much less that the Legislature has granted them this authority.

Defendants' position also conflicts with a fundamental purpose of SB 1421. In their previous petition to this Court in this matter, Defendants argued that SB 1421 allowed them to categorically refuse to release records that they had obtained from local agencies. *See Becerra*, 44 Cal. App. 5th at 913, 917-923. In rejecting this argument, this Court emphasized that a major

purpose of the transparency statute is to ensure public access to records of Defendants and other State agencies that oversee local law enforcement agencies. *See id.* at 920-21. "These legislative aims are best advanced by a construction that authorizes disclosure of all responsive officer-related records in the possession of a state agency, regardless whether they pertain to officers employed by the agency and no matter which agency created them." *Id*. at 921. The Legislature could not have intended to allow State oversight agencies to circumvent the disclosure requirements by invoking § 11183, any more that it intended to allow them to categorically withhold records it had obtained from other agencies.

In addition, allowing access also to these records that Defendants have obtained using § 11183 will allow public access to records that local agencies have since destroyed. As both the record in this case and SB 16's legislative history reveal, numerous local agencies "attempt[ed] to thwart disclosure of records covered by SB 1421 by destroying records." *See* Sept. 1, 2021 Senate Floor Analysis of SB 16, *supra*, at 5-6 ("cities such as Downey, Inglewood, Fremont and Morgan Hill destroyed records before January 1, 2019, to avoid producing responsive

documents"); Petitioners' Reply Appendix at 840-899 (May 10, 2019 Decl. of D. BondGraham showing that the cities of Livermore, Union City, Fremont, and Santa Ana destroyed covered records between the enactment and effective date of SB 1421). If Defendants can refuse to provide the copies of these records that they have obtained, the public will have no access to this information.

Finally, under Defendants' position, agencies could lawfully thwart disclosure simply by refusing to provide records to the Attorney General (or other State oversight agencies) without a subpoena. Those oversight agencies would then be absolutely prohibited from disclosing the records or any information contained in them. *See* Pet. at 62. Under Defendants' position, agencies that seek to avoid disclosure of its officers' misconduct or uses of force would have an incentive to refuse to voluntarily provide records to State oversight agencies, knowing that by demanding a subpoena they could prevent public access to their records or any information contained in them.

D. Conclusion

As the Legislature explained when it enacted SB 1421, "[t]he public has a strong, compelling interest in law enforcement

transparency because it is essential to having a just and democratic society." SB 1421 § 4 ¶ 2. It therefore enacted SB 1421 to establish a public "right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force." *Id*. § 1(b). To accomplish this goal, the statute mandates public access to records covered by the new statute notwithstanding *any* other law that would otherwise exempt them from disclosure. Its detailed redaction and withholding provisions balance the public's right to know with privacy, the integrity of investigations, and other interests in secrecy. Requiring (or allowing) the government to categorically withhold records relating to these types of incidents whenever they are covered by any of the hundreds of confidentiality statutes[5] that otherwise allow CPRA withholding, without regard to the public interest in disclosure, would upset this balance, defeat the express intent of the transparency law, and contradict its unambiguous statutory language.

[5] More than 600. *See* note 3, *supra*.

For these reasons, this Court should issue a writ of mandate requiring the Superior Court to order Defendants to release the records at issue.

Dated: November 23, 2022

Law Office of Michael T. Risher

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Dated: November 23, 2022

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PROOF OF SERVICE

I declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111.

I caused to be served the following document(s):

Reply in Support of Petition for Writ of Mandate and Memorandum in Support
Gov't Code § 6259 (Public Records Act Review)

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By: */s/ Aysha D. Lewis*
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