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

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TRAVERSE

A. Introduction.

SB 1421 requires that, "notwithstanding [832.7(a), former § 6254(f)], or any law," records within its scope "shall not be confidential" and must be released to the public under the CPRA. § 832.7(b)(1). This language is both broad and clear. *See* Pet. at 36-45. As this Court previously explained, it means that "provisions of law that conflict with section 832.7(b) … are inapplicable" to disclosure of records within the scope of SB 1421. *Becerra v. Superior Ct.*, 44 Cal. App. 5th 897, 925 (2020).

The three statutes here at issue flatly prohibit the release of certain information on the grounds that it is "confidential." *See* § 11183; Unemp. Ins. Code § 1094(a); Pen. Code § 6126.3(c)(1). This conflicts with SB 1421's unqualified command that records within its scope "shall not be confidential." § 832.7(b)(1). These confidentiality statutes therefore conflict with SB 1421 and cannot apply to records covered by the transparency statute. *See State Dep't of Pub. Health v. Superior Ct.*, 60 Cal. 4th 940, 958 (2015) ("SDPH"); *Becerra*, 44 Cal. App. 5th at 925.

Defendants' contrary arguments conflict with the text of the statute and with binding caselaw; the only support they muster for this is dictum. Their statutory argument rests on an assertion that "any law" means only those laws that allow withholding "for the sole reason that the responsive records are personnel records" or solely "because of their status as records related to law enforcement." Traverse at 38-39 & n.4. In other words, they say that "any other law" refers only to laws that are nearly identical to the two provisions mentioned in § 832.7(b)(1), § 832.7(a) and former § 6254(f). But when the Legislature wants only to supersede exemptions from disclosure that are similar to the statutes it has listed, it says so. *See, e.g.,* § 7921.505(b) (disclosure of records waives enumerated CPRA exemptions and "[o]ther similar provisions of law"). Here, it instead said "any other law."

Defendants do not cite any authority for their novel theory that "any" means "similar"; nor do they explain how it can be squared with the prior caselaw discussing conflicts between statutes or with the statutory language. Instead, they simply ignore this precedent and the statutory language. Moreover, they are unable to identify any laws that would qualify as conflicting under their standard (although, as discussed below, the Inspector

General confidentiality statutes would in fact qualify). Defendants essentially ask this Court to re-write the statute from one that *prohibits* agencies from withholding records based on "any … other law" to one that *allows* them to withhold records based on any other law. This is the opposite of what the statute requires.

This Court's prior decision in *Becerra* does not support Defendants' position. *Becerra* allowed Defendants to invoke former § 6255(a) to reject requests that are so burdensome that the public interest in complying with them "clearly outweighs" the public interest in fulfilling them. *See* 44 Cal. App. 5th at 926-27. It did this to avoid saddling the government with "a limitless obligation" to fully comply with every request for records, no matter how burdensome. 44 Cal. App. 5th at 927. But *Becerra* did not allow agencies to withhold records based on their content or to refuse to provide any particular record or type of information in response to a properly tailored request. Doing so would conflict with the unqualified legislative command that records covered by the statute are "not confidential." Neither *Becerra* nor former § 6255 authorizes or "prohibits disclosure of information that [SB 1421] deems public." *See SDPH,* 60 Cal. 4th at 958. They

therefore do not create a conflict with SB 1421. Here, in contrast, all three statutes would prohibit disclosure of information that SB 1421 deems public. They therefore conflict with SB 1421 and cannot be used to withhold records within its scope. The statements in *Becerra* that suggest otherwise are dicta and do not control the questions here at issue. *See* Pet. at 51-52; *People v. Mendoza*, 23 Cal. 4th 896, 915 (2000) ("we must view with caution seemingly categorical directives not essential to earlier decisions").

In addition, as to the thousands of potentially responsive records from Bakersfield that Defendants claim are protected by § 11183: Defendants have failed to show how *public* records relating to the conduct of *public* employees that SB 1421 declares "shall not be confidential" can possibly constitute "private" records concerning "*confidential* or private transactions, property or business" that § 11183 protects. The public records Defendants have withheld are not private under any definition of the term; nor do they relate to confidential or private transactions. As this Court explained 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.

Defendants' new argument that SB 1421 is categorically inapplicable to records they create as part of a pattern-and-practice investigation is both irrelevant and incorrect. It is irrelevant because the records here at issue were created by Bakersfield; they are the prototypical local-agency records covered by SB 1421. The fact that they are now in Defendants' possession does not change their status or authorize Defendants to withhold them. *See Becerra,* 44 Cal. App. 5th at 917-23. Neither the law nor Defendants' policy arguments can justify categorically withholding these records, which Bakersfield would have to release in response to a CPRA request. To the extent any of them contain sensitive information, Defendants can use SB 1421's redaction and withholding provisions to withhold such information on remand.

Defendants' new argument is also incorrect as a matter of law. The only textual support for it — that SB 1421 refers to records relating to "an incident," rather than "an incident or incidents" — is wrong because the Legislature's use of the singular includes the plural. *See* § 13; *People v. Morelos*, 168 Cal.

App. 4th 758, 764 (2008) (statutory reference to "a check" includes multiple checks). And if Defendants were right, it would mean that if a local police department investigates numerous incidents as part of a single investigation, it can (indeed, must) refuse to release records relating to this investigation, because they relate to multiple incidents. This cannot be right. It may well be that some records that Defendants themselves create as part of a pattern-and-practice investigation do not fall within the scope of SB 1421 because they do not "relat[e] to the report, investigation, or findings of … [a]n incident" listed in the statute. § 832.7(b)(1). But that does not mean that the statute categorically excludes all records relating to such investigations by either state or local agencies. And, again, it cannot affect the records here at issue because Defendants did not create them.

Finally, to the extent any of these statutes are ambiguous, "the constitutional principle that the people have a right to access information concerning the conduct of the people's business and that restrictions on this right are narrowly construed" requires that they be read in favor of disclosure. *Becerra*, 44 Cal. App. 5th at 922; *see* Pet. at 36-37. The Supreme Court has emphasized that this constitutional mandate is "critical" to the analysis of

statutes governing the disclosure of law-enforcement records. *See 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). Defendants do not even discuss this constitutional rule, much less explain how their strained reading of the statutes in favor of secrecy could possibly comport with it.

Moreover, this constitutional provision means 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). Thus, even if Defendants' policy claims were correct (and they are mostly not, because they misconstrue the statutes and ignore SB 1421's multiple safeguards against unwarranted disclosure), they would be irrelevant. *See Becerra*, 44 Cal. App. 5th at 922 (Defendants' "policy argument affords no ground for a judicial interpretation that shields responsive records" from disclosure).

For these reasons, and as discussed below, Defendants are wrong to claim that they can permanently and categorically prevent the public from ever seeing the records here at issue. The

Court should grant the Petition and hold that Defendants cannot rely on the three confidentiality statutes at issue to withhold records covered by SB 1421. This will result in release of the records related to the Inspector General and unemployment insurance, because Defendants do not claim that these records are exempt for any other reasons. For the Bakersfield records, Defendants will still be able to assert on remand that individual records may be withheld or redacted, either because they do not fall within the scope of SB 1421 or because they, or parts of them, are exempt from disclosure for reasons other than § 11183.

B. The CPRA Recodification Act of 2021.

The CPRA Recodification Act of 2021 renumbered the Public Records Act without substantive changes. *See* §§ 7920.005-7920.120 (effect of recodification). Plaintiffs adopt Defendants' convention of continuing to refer to the following CPRA provisions, which were central to the prior briefing, by the section numbers used in that briefing. *See* Return at 23 n.1.

- Former § 6254(f)'s exemption for investigatory records, which is now § 7923.600.
- Former § 6254(c), protecting privacy, which is now § 7927.700.

- Former § 6254(k), allowing withholding based on other provisions of state law, which is now § 7927.705.
- Former § 6255's catchall balancing test, which is now part of § 7922.000.

As in prior briefing, all undesignated section references are to the Government Code except references to § 832.7, which refer to that section of the Penal Code as it currently reads.

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

Defendants' restrictive reading of SB 1421's requirement that records within its scope are not confidential notwithstanding any other law is unsupported by any authority or argument. They fail to explain why the Legislature would have used this plain and broad language if it had wanted only to supersede laws that are exactly like the two that it listed in the statute. And, although the Petition challenged Defendants to point to some "other law" that this term could refer to, *see* Pet. at 40, Defendants fail to do so. Their goal is apparently to render the phrase meaningless, an approach the Supreme Court has repeatedly rejected.

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

"From the earliest days of statehood [the Supreme Court has] interpreted 'any' to be broad, general and all embracing." *California State Auto. A'ss'n Inter-Ins. Bureau v. Warwick*, 17 Cal. 3d 190, 195 (1976); *see id*. ("the word 'any' means every"). 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 reduce the scope of "any *other* law." *See id.* at 726, 728-29 (statute that applied "[n]otwithstanding [Penal Code §] 1385 or any other provision of law" supersedes Penal Code § 654) (emphasis added); Pet. at 41-44.

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

SB 1421 requires that, "notwithstanding [832.7(a), former § 6254(f)], or any other law," records within its scope "shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act." § 832.7(b)(1).[2] The statute's Legislative history "highlighted" this language. *Becerra,* 44 Cal. App. 5th at 920-21. Thus, as this Court previously explained, "'those provisions of law that conflict with' section 832.7(b) … are inapplicable" to disclosure of records within the scope of SB 1421. *Id.* at 925 (quoting *Arias v. Superior Ct.*, 46 Cal. 4th 969, 983 (2009), which in turn quotes *Klajic v. Castaic Lake Water Agency*, 121 Cal. App. 4th 5, 13 (2004)). The key question is therefore whether the statutes that Defendants invoke —Penal Code § 6126.3(c), Government Code § 11183 and Unemployment Insurance Code Insurance Code § 1094(a) — conflict with SB 1421.

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; *accord, e.g., Souvannarath v. Hadden*, 95 Cal. App. 4th 1115, 1125–26 (2002) (The term

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[2] As used in the Government Code "'shall' is mandatory." § 14.

"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."). The Supreme Court has relied on this rule to hold that 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) (citing *Klajic* for rule). But, consistent with *Klajic*, courts consistently hold that statutes that apply "notwithstanding [enumerated statutes] 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 statutes. *See, e.g, People v. Duff*, 50 Cal. 4th 787, 793-94, 797-99 (2010) (statute applying "[n]otwithstanding Section 4019 or any other

provision of law," supersedes Penal Code § 654)[3]; *Palacios*, 41 Cal. 4th at 726, 728-29 (statute that applied "[n]otwithstanding [Penal Code §] 1385 or any other provision of law" supersedes Penal Code § 654); *see* Pet. at 41-42 (listing other examples). The conflict analysis turns purely on the operation of the statutes: if they would lead to different results in the same factual circumstances, they conflict.

Most relevant to the present case, the Supreme Court followed this established approach when it held that a transparency statute conflicted with and thus superseded a confidentiality statute. *See State Dep't of Pub. Health v. Superior Ct.*, 60 Cal. 4th 940, 956, 957-58 (2015) (*SDPH*). Applying this analysis, the *SDPH* court unanimously held that "two statutory

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[3] *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 793-94, 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 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.*

schemes conflict" when one of them "prohibits disclosure of information that [an open-government law] deems public." *Id.* at 958; *see* Pet. at 38-40.

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; *see also In re Greg F.*, 55 Cal. 4th 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' … 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. Under either analysis, 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.

2. Defendants' alternative conflict theory conflicts with the statutory text and with established precedent.

Defendants do not discuss any of this law in their Return, even though Plaintiffs discussed it in depth in their Petition and Informal Reply. *See* Pet. at 37-46; Informal Reply at 12-18. Defendants fail even to cite — much less try to distinguish — cases such as *State Department of Public Health*, which is both on-point and binding authority. Instead, they present an alternative theory that is unsupported by any authority and contradicts the statutory text and all the caselaw just discussed. They also quote dicta from *Becerra*. Neither argument is persuasive.

First, Defendants' alternative legal theory: In their informal opposition, Defendants conceded that "any other law" must refer to *some* statutes that conflict with SB 1421's disclosure requirements, and that SB 1421 must therefore mandate release of at least *some* records that would otherwise be exempt from CPRA disclosure. *See* Informal Opp. at 19. They even provided an example: they acknowledged that SB 1421 overrides then-6254(c) (now § 7927.700). *See id.* But they now retract even this small concession, claiming that "any law" means only those laws that

allow withholding "for the sole reason that the responsive records are personnel records," and "for reasons unrelated to other broader public policy interests" or solely "because of their status as records related to law enforcement." Return at 38-39 & n.4. They are unable to identify any such laws other than § 832.7(a) and former § 6254(f). Since these two statutes are listed in the statute, they cannot be the "other law" the Legislature referenced. Defendants' current absolutist position would thus render the phrase "any other law" meaningless, in violation of the rule against surplusage (unless, as discussed below, they agree that the Inspector General confidentiality statues are superseded). *See* Pet. at 41-42. It ignores the plain meaning of the phrase "notwithstanding any other law." And it finds no support in any precedent construing that phrase; Defendants do not cite anything in support of their novel approach, and it conflicts with the cases discussed above and in the Petition, all of which make clear that statutes conflict when they would lead to different results when applied to the same facts. When the legislature intends only to override similar laws, it says so, and it has done so in the CPRA itself. *See* § 7921.505(b) (disclosure of records waives listed CPRA exemptions and "[o]ther similar provisions of

law"). Here, it instead chose to use "any other law," a phrase that is both "broad and unambiguous." *See Palacios*, 41 Cal. 4th at 728-29; *see also California State Auto. Ass'n Inter-Ins. Bureau v. Warwick*, 17 Cal. 3d 190, 195 (1976) ("the word 'any' means every").

3. *Becerra* does not support Defendants' position.

Rather than engaging with the statutory text or this settled doctrine, Defendants instead quote dicta from this Court's prior decision in *Becerra* broadly suggesting that SB 1421 does not supersede *any* of the CPRA's exemptions. Return at 35-37. But *Becerra* itself emphasized 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. *Becerra* thus 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 instead held only that § 6255's balancing test does not conflict with SB 1421, leaving open the question of whether other provisions might conflict with the transparency law. And the factors that led this Court to conclude that § 6255(a) does not conflict with SB 1421 do not apply to the statutes here at issue.

First, the Court in *Becerra* was concerned with *burden*, not confidentiality. *See Becerra*, 44 Cal. App. 5th at 927, 934. This matters because SB 1421's "notwithstanding" language governs two distinct clauses, one absolute and one qualified. The qualified clause was the one at issue in *Becerra* — records "shall be made available for public inspection pursuant to the" CPRA. § 832.7(b)(1). This indicates that SB 1421 incorporates at least some aspects of the CPRA's procedures and standards for releasing records, at least those that do not conflict with the newer statute's provisions (for example, the procedures for requesting and providing records, since SB 1421 does not itself include any such provisions). But SB 1421 contains a separate clause that also applies notwithstanding any other law: records within the statute's scope "shall not be confidential." § 832.7(b)(1). This clause is not qualified by any reference to the CPRA; it is absolute.

Unlike § 6255, the statutes that Defendants now invoke are pure confidentiality statutes that *require* the government to withhold records because of their content. The protection for subpoenaed records applies only to "confidential or private" information. § 11183. The Unemployment Insurance Code makes

the information at issue "confidential." Unemp. Ins. Code § 1094(a); *see* Return at 62. And the Inspector General statute that Defendants invoke covers records that are covered by specified or "other applicable laws regarding confidentiality." Pen. Code § 6126.3(c)(1); *see* Return at 61.

If these records are exempt from disclosure, it is because they are "confidential." But SB 1421 unambiguously and unqualifiedly states that records within its scope "shall not be confidential." § 832.7(b)(1). This is a quintessential conflict under any definition of the term. Moreover, it is precisely the situation that the Supreme Court held to create a conflict: when a confidentiality statute "prohibits disclosure of information that [a transparency statute] deems public." *State Dep't of Pub. Health*, 60 Cal. 4th at 958. That case and the plain statutory language, not dicta from *Becerra*, control here.

The present dispute differs from *Becerra* in another important respect: 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, when the burden of production justifies it.

This authority is limited. 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 would not allow the government to withhold, for example, a single requested report 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* § 7922.600. This means that if a requestor wants (or is willing to settle for) only a small set of records, neither § 6255 nor *Becerra* will prevent them from obtaining them: the government will have a duty to help such requestors narrow their request to something that will not be unduly burdensome to produce. It is only requestors who are unwilling to narrow their requests to a reasonable scope that can have their requests completely denied under *Becerra*. Allowing agencies to invoke former § 6255(a) thus "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 categorically deny access to records under any of the hundreds[4] of provisions of State law that may exempt records from disclosure under the CPRA. They want to be able to do this 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. Unlike with § 6255, allowing this *will* "frustrate section 832.7's aim to provide greater transparency around officer misconduct issues." *Becerra*, 44 Cal.

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[4] 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).

App. 5th at 929. SB 1421 itself provides ample authority for the government to redact or withhold records based on their content; there is no reason to think that the Legislature intended to allow withholding based on the hundreds of confidentiality statutes scattered throughout California's codes.

In short, *Becerra*'s holding and reasoning are fully consistent with Plaintiff's position and with how § 6255 and SB 1421 should operate. The broad dicta that Defendants rely on cannot justify deviating from the unambiguous language superseding confidentiality statutes like those at issue here or from Supreme Court precedent such as *State Department of Public Health*. *See People v. Mendoza*, 23 Cal. 4th 896, 915 (2000) ("we must view with caution seemingly categorical directives not essential to earlier decisions"); Pet. at 51-52.

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

Defendants also suggest that SB 16 somehow expanded agencies' authority to withhold non-privileged records. Nothing in SB 16 supports this claim. That statute simply 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. If the Legislature had wanted SB 16 to allow agencies to rely on confidentiality provisions scattered throughout the Codes, it would simply have removed the "any other law" from § 832.7(b)(1). But it instead chose to leave this critical language intact.

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" following this Court's *Becerra* decision. *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 v. Superior Ct.*, 57 Cal. 4th 157, 166 (2013). SB 16 does not support the government's argument that it can withhold records covered by SB 1421 under every otherwise-available CPRA exemption.[5]

In any event, it is not surprising that that applicability of the attorney-client privilege appeared to the Legislature to be an open question: courts have long recognized that the interaction of this venerable 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

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[5] 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).

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. 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 Sup'rs*, 263 Cal. App. 2d 41, 55 (1968) (abrogated by Stats. 1987 ch. 1320 (SB 200) §§ 2, 5).[6]

[6] The Legislature responded to this decision 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. California 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, particularly of the attorney-client privilege. *See Citizens for Ceres*, 217 Cal. App. 4th at 911-13; *California Oak Found.*, 174 Cal. App. 4th at 1221; *Sacramento Newspaper Guild*, 263 Cal. App. 2d at 55–56. But the statutes at issue in the present case do not create privileges; they are simply confidentiality statutes. *See Davies v. Superior Ct.*, 36 Cal. 3d 291, 298–99 (1984) (confidentiality statutes do not create privilege). Courts have not created analogous exceptions that would allow agencies to withhold materials that are not protected by Evidence Code privileges. [7] 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. To the contrary, the fact that the Legislature chose not to amend the "notwithstanding … any other law" language shows that it

[7] SB 1421 states that materials within its scope "shall not be confidential"; because confidentiality provisions do not create privileges, whether this language indicates that they shall not be privileged is beyond the scope of this case.

intended to maintain the force of this broad command. *See In re Greg F.*, 55 Cal. 4th 393, 407 (2012).

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

Even if Defendants were correct that SB 1421 overrides only § 6254(f) and § 832.7(a) (and they are not), their 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." This unambiguous statutory language belies Defendants' argument that this provision converts non-confidential public records into secret files. Moreover, Defendants' policy arguments ignore the reality 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, p. 1025[8]. 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 transactions, property or business of any person, firm or corporation." Stats. 1921, ch. 602 § 1. The relevant language was moved to § 11180 *et. seq*. in 1945 as part of a larger effort to recodify the Government Code. *See* 1945 stats. ch. 111, p. 439 (SB 1138)[9]. Counsel has been unable to locate any legislative history relating to the 1921 enactment. [10] The legislative history of the 1945 legislation simply states that

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[8] Available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1921/21Vol1_Chapters.pdf.

9 Available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1945/45Vol1_Chapters.pdf#page=2.

[10] The State Archive reports that it has nothing related to this statute because its legislative-history collection extends back only to 1943. The law libraries at Stanford and Berkeley law schools do not have legislative history from this year, either.

nothing in the recodification was intended to make substantive changes to the numerous statutes that were reorganized.[11]

Fortunately, the text of the statute is clear. Then, as now, as applied to documents or information, "private" and "confidential" referred to matters that are 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, 213 (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 secret matters; it does not transmogrify public records into private files. *See People v. Park*,

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[11] An April 24, 1945 Office of Legislative Counsel report on the measure states that the law and related measures "make no substantive changes in existing laws, but rearrange and restate in simplified language the substance of existing laws."

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. Even if the statutory test were not so clear, article I § 3(b)(2)'s requirement that the court "interpret [these statutes] in a way that maximizes the public's access to information" requires that it be read in favor of transparency. *See Sierra Club v. Superior Ct.*, 57 Cal. 4th 157, 175 (2013); Pet. at 36-37.

2. Defendants' contrary arguments conflict with the plain statutory language and the constitutional mandate to read the statute in favor of disclosure.

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* § 7920.530. They cannot be, simultaneously, "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" during its investigation of a complaint. 87 Cal. Op. Att'y 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

involved records of private financial transactions that belonged to individuals or private businesses 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 already 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. And, again, they ignore the constitutional requirement that § 11183 must be "narrowly construed [because] it limits the right of access" to government records and information. Cal Const. art. I § 3(b)(2). To the extent that records contain truly private information, they

can be redacted under SB 1421's detailed provisions for protecting such information. *See* Pet. at 56-57.

E. Defendants' new claim that SB 1421 excludes pattern-and-practice investigations is irrelevant and wrong.

Defendants raise a new argument[12] in support of withholding in their Return: that SB 1421 doesn't apply to records relating to pattern-and-practice investigations because those are not records of "individual incidents." Return at 57-58. Thus, say Defendants, they can withhold these records under former § 6254(f), even though SB 1421 specifically prohibits withholding based on this statute.

Defendants' argument is both inapplicable to the records here at issue and wrong. Their attempt to exempt records from disclosure because they relate to multiple incidents finds zero support in the statutory text, particularly because, in the Government Code, the "singular number includes the plural."

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[12] This Court has the discretion to consider new arguments only if they involve questions of pure law. *See POET, LLC v. Cal. Air Res. Bd.*, 218 Cal. App. 4th 681, 750–51 (2013); *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1167 (2009). To the extent Defendants attempt to make a new factual argument, it is forfeited by their failure to raise it below.

§ 13. It ignores the established rule that the content of a record, not its location, determines whether it must be released. *See Becerra*, 44 Cal. App. 5th at 823. Indeed, it is largely a reframing of an argument that this Court rejected in *Becerra*, which squarely held that SB 1421 requires Defendants to release records they have obtained from other agencies. *See id.* at 817-23.

1. The records in question were not created as part of a pattern-and-practice investigation.

As an initial matter, even if Defendants' legal claims were correct, they would not apply to the records here at issue, because these records were created by Bakersfield. Although Defendants argue that *their investigation* of Bakersfield focused on patterns and practices, they do not claim (much less present evidence showing) that the records they obtained from Bakersfield are anything other than the type of local law-enforcement records that fall squarely within the scope of SB 1421. Indeed, their argument is that they can withhold these records even though they are (or were) covered by SB 1421 and open to the public under SB 1421 when in Bakersfield's possession. Return at 17 ¶ 57 (admitting Pet. at 26 ¶ 57).

The statute thus covers all records "relating to the report, investigation, or findings of" any of the listed types of incidents, whether a single or multiple. § 832.7(b)(1). This means that the fact that Defendants have obtained these records as part of a broader investigation does not in itself affect whether they are covered by SB 1421. *Becerra*, 44 Cal. App. 5th at 917-23. Records that were covered by SB 1421 in Bakersfield are still covered by SB 1421. Thus, even if Defendants were correct that SB 1421 does not cover some or all of the records they create as part of a pattern-and-practice investigation, they have not met their burden to show that this would allow them to withhold the records here at issue. *See* Pet. at 17-18 (government has burden of proof to provide "detailed justification" to support withholding).

2. Nothing in SB 1421 categorically excludes records created as part of a pattern-and-practice investigation.

In any event, Defendants' legal position is meritless. Their only textual argument is that the phrase "an incident" is singular and thus cannot encompass records that relate to multiple incidents. *See* Return at 57. But this cannot be correct, because it would mean that if, after learning that that an officer had engaged in a series of sexual assaults, a police department then

conducted a single investigation into all the incidents, it would be prohibited from releasing any records. Thus, the City of Oakland would have been prohibited from releasing any records relating to the notorious Celest Guap sex abuse scandal, which involved multiple incidents and officers. *See* Thomas Peele, Sukey Lewis, and David Debolt, *Oakland releases partial records from Celeste Guap sex scandal*, San Jose Mercury News (June 26, 2019), available at https://www.mercurynews.com/2019/06/26/oakland-releases-partial-records-from-celeste-guap-sex-scandal/; *see also BondGraham v. Superior Court*, Case No. A165187 (Order to Show Cause issued Oct. 13, 2022) (involving propriety of redactions to records relating to this investigation). It would be absurd if the statute prohibited the public from learning about covered incidents simply because multiple incidents were investigated together.

Fortunately, the statute does not even suggest such a result, because its use of the singular "incident" includes the plural. § 13. That the statute refers to "an incident" does not change this. *See People v. Morelos*, 168 Cal. App. 4th 758, 764 (2008) (statute prohibiting possession of "a check" with intent to defraud can encompass multiple checks, meaning that a person who possesses

several checks can be convicted of only one offense); *People v. Carter*, 75 Cal. App. 3d 865, 868 n.1, 871-72 (1977). The Legislature need not specify "an incident or multiple incidents"; it can instead rely on § 13, knowing that courts will understand that it did not intend to exclude records simply because they involve multiple incidents. The statute thus covers all records "relating to the report, investigation, or findings of" any of the listed types of incidents, whether a single or multiple. § 832.7(b)(1).

This Court's prior decision in this matter confirms that SB 1421 covers records Defendants obtain as part of their oversight responsibilities. One of the two issues there was whether SB 1421 requires Defendants to disclose records that they had obtained from other agencies. *See Becerra*, 44 Cal. App. 5th at 917-23. In holding that it does require them to do this, this Court explained that the text of SB 1421 and the CPRA mean that the new law applies to "all records maintained by a state agency relating to reports, investigations, or findings from incidents involving" the covered conduct. *See* 44 Cal. App. 5th at 918. "[H]ad the Legislature intended to limit its disclosure" mandate to exclude any of these records, it would have done so explicitly. *Id.* at 919.

Moreover, SB 1421's legislative findings and history show that the statute was intended to apply to State agencies such as Defendants that have oversight authority:

> "the legislative intent behind Senate Bill 1421 was to provide transparency regarding instances of an officer's use of significant force and sustained findings of officer misconduct by allowing public access to officer-related records maintained either by law enforcement employers or by *any state* or local agency *with independent law enforcement oversight authority*." *Becerra*, 44 Cal. App. 5th at 921 (emphasis added).

Defendants now, however, seem to claim that this Court got it wrong, and that the Legislature instead intended that SB 1421 applies only to local oversight agencies. *See* Return at 58 (citing Sen. Rules Com. … at 7). Their sole support for this theory is that some of the legislative history lists several local boards. *See id*. But this section of the legislative history simply explains that these local boards had previously been able to hold public hearings until a 2006 Supreme Court case prohibited them. It in no way suggests that SB 1421 would apply only to these specific types of oversight boards. In short, nothing in the legislative history "even remotely suggest[s] any limitation on this mandate; to the contrary, it shows that the Legislature intended to allow access to records "maintained by … agencies exercising

independent law enforcement oversight responsibilities," including Defendants. *Becerra*, 44 Cal. App. 5th. at 922.

Finally, Defendants argue that "[i]n the absence of clear direction from the Legislature that Penal Code section 832.7 should be broadly read to overturn the exception for pattern-or-practice investigations," this Court should read it narrowly to exclude records relating to these investigations. This is wrong for two fundamental reasons.

First, there is no CPRA exception for pattern-and-practice investigations; these are covered only by former § 6254(f), which SB 1421 expressly supersedes. This is a "clear direction."

Second, the California Constitution requires that SB 1421 be read "broadly" in favor of disclosure. *Becerra*, 44 Cal. App. 5th at 913. Defendants can withhold records only if the Legislature has expressly given them the authority to do so. *Sierra Club*, Pet. at 39. Nothing in SB 1421 expressly gives Defendants the authority to withhold records they have obtained from a local agency as part of a pattern-and-practice investigation (or any other records relating to such investigations). They therefore have no authority to do so.

3. Plaintiffs do not argue that all of Defendants' pattern-and-practice files are open to public inspection.

None of this means that Defendants must provide unfettered access to their pattern-and-practice files. SB 1421 requires disclosure of records "relating to the report, investigation, or findings of" one of the listed types of incidents. § 832.7(b)(1)(A)-(C). This disclosure mandate is broad, because "the ordinary meaning of 'relating to' is a broad one — 'to stand in some relation; to have bearing or concern; to pertain; refer.'" *Tanen v. SW. Airlines Co.*, 187 Cal. App. 4th 1156, 1163 (2010). But it is not unlimited. It may well be that some documents that Defendants create as part of their pattern-and-practice investigations do not meet this definition because they are simply too attenuated from any individual incident. If records are not within the scope of SB 1421, the Department can withhold them under former § 6254(f). Even if they are within SB 1421's scope, they can be redacted or withheld under SB 1421's provisions to protect any truly sensitive information. But that is not an issue in this proceeding — the records at issue were created by Bakersfield, and Defendants have not even examined them, much less provided evidence as to their contents. *See* PA 295 n. 1.

Questions relating to individual records — whether they are within the scope of SB 1421 and, if so, whether they can nevertheless be withheld under that statute, will be addressed on remand.

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

Doubtless recognizing that their positions find no support in the text of the statute, the legislative history, or any precedent, Defendants' primary argument is that they *should* be allowed to keep these materials secret. *See* Return at 45-46, 47-55. 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 favoring transparency, their claim does not withstand scrutiny, because SB 1421 provides ample authority to address any legitimate need for secrecy. There

is no reason to hold that that these records must be categorically and permanently kept from the public.

As an initial matter, some of Defendants' policy arguments are premised on an incorrect reading of the law and of Plaintiffs' arguments. For example, their claim that allowing access to the records here at issue would mean that they would never have the authority to withhold public records they obtain by subpoena ignores the fact that materials obtained under § 11183 that are *not* within the scope of SB 1421 are exempt from disclosure under § 6254(f) because they are "[r]ecords of … investigations conducted by … the office of the Attorney General and the Department of Justice." § 6254(f); *see* Pet. at 64-65 & n.4. That statute does not apply here because SB 1421 supersedes it, but it would apply to records not covered by the transparency statute. Moreover, since the originating agency could withhold these records from the public under former § 6254(f) and § 832.7(a), they would generally be private records and therefore covered by § 11183 (unless that agency had already released them to the public and thereby waived this protection under § 7921.505). 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. *Contra* Return at 45-48.

Even if this were not the case, Defendants have not explained how releasing already-public records will harm investigations. Defendants have not pointed to any instance in which a State agency has ever used its authority under § 11181 to obtain such records; indeed, there would in fact seem little need for them to do so, since they could simply request them under the CPRA. *See Los Angeles Unified Sch. Dist. v. Superior Ct.*, 151 Cal. App. 4th 759, 768-75 (2007) (holding that government officials may obtain records under CPRA). It is not even clear that other State agencies would use § 11181 to obtain records from governmental entities, as opposed to the private individuals and entities that they regulate. The only other State agency that seems likely to do so is the Officer of the Inspector general, which has its own subpoena authority that does not include a provision prohibiting dissemination of records obtained. *See* Penal Code §§ 6127.3, 6127.4 (although some of this information would doubtless be protected by one of the confidentiality statutes that Defendants here invoke, Penal Code § 6126.4).

Even if some State agencies did use § 11181 to obtain public records from another governmental agency, requiring them to disclose these same records would not be likely to cause them any harm. By definition, these records are available from the agency that originally provided them. The originating agency —which is the agency being investigated —would know exactly which records it had provided to Defendants. If there were factors in an individual case that would allow the originating agency to withhold or redact records under the catchall-balancing test or some other basis, Defendants could withhold or redact the records on that same basis. And Defendants' evidence concerning their Bakersfield investigation doesn't even suggest how release of the records in question would cause them any harm. *See* PA 446. Speculative concerns about the effects of disclosure are irrelevant to the proper construction of the statute. *See Haggerty v. Superior Ct.*, 117 Cal. App. 4th 1079, 1091–92 (2004) (rejecting argument "that a disclosure of the Internal Affairs report [at issue] will have a chilling effect on every law enforcement agency's ability to" investigate civilian complaints as "speculative" and irrelevant to interpreting *Pitchess* statutes).

Moreover, to the extent Defendants or any other agencies have legitimate reasons to withhold records, they have ample authority to do so, regardless of whether those records are covered by SB 1421. For records not covered by the new transparency statue, agencies can withhold them under the CPRA's catchall balancing test whenever the public interest in non-disclosure clearly outweighs the public interest in disclosure. *See* § 7922.000 (former § 6255); *see also, e.g., Times Mirror Co. v. Superior Ct.*, 53 Cal. 3d 1325, 1338-39, 1346-47 (1991) (explaining that interests protected by specific provisions of CPRA should factor into catchall balancing test analysis). As for the records like those here at issue that are covered by SB 1421, the transparency statute 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). It may even be that agencies can withhold records that are privileged, rather than simply confidential. *See generally* Section (C)(4), *supra*; *Davies v. Superior Ct.*, 36 Cal. 3d 291, 298–99 (1984) (distinguishing between the two protections). Defendants have not shown that these protections are inadequate.

In any event, in enacting SB 1421, the Legislature has determined that the need for transparency outweighs these potential harms. *See Becerra*, 44 Cal. App. 5th at 920-21. It decided that "greater transparency would promote important public policies." *Id.* at 920. None of the harms that Defendants claim would arise from transparency are unique to investigations involving § 11183, to pattern-and-practice investigations, or to the Department of Justice; they are inherent in the new duties that SB 1421 and SB 16 impose on all law-enforcement agencies. *Contra* Return at 45-48. Defendants' policy arguments are essentially an attack on the new transparency laws themselves; but the Legislature, not the Attorney General, has the authority to balance the value of transparency against any harms to agencies covered by the new statutes. And the Legislature has decisively decided that policy question in favor of transparency.

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, 917-23. 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 than it intended to allow them to categorically withhold records it had obtained from other agencies.

In addition, allowing access 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"); May 10, 2019 Dec. of D. BondGraham (Petitioners' Reply Appendix at 840-899) (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.

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 thus 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.

Finally, SB 1421 is meant to ensure that "the public has a right to know how an agency investigates and resolves questions" into the alleged and sustained misconduct articulated in this legislation. April 16, 2018 Senate Committee on Public Safety Analysis of SB 1421 at 14 (available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1421#). This includes the right to know how the Department of Justice and the elected Attorney General are performing their oversight responsibilities. *See Becerra*, 44 Cal. App. 5th at 920. Defendants acknowledge the importance of their oversight duties to investigate and address officer misconduct, both in individual cases and through pattern-and-practice investigations. *See* Return at 49-50, 54, 58, n.10; AA at 440-441 (Newman Dec.). They emphasize that the statute that authorizes Defendants to bring pattern-and-practice suits was enacted to "increase accountability and oversight" over local law enforcement agencies. *See* Return at 50. Their subpoena power under § 11181 *et seq*. is an integral part of how they fulfill these duties. *See* Return at 53 (arguing that § 11183's provisions

further Defendants' "unique role in providing statewide oversight" over law-enforcement agencies). But if Defendants are right, they must categorically and permanently deny public access to all records relating to incidents covered by SB 1421 that they obtain under their subpoena power. This directly contradicts the legislative intent to allow the public to know how Defendants and other oversight agencies are investigating the types of serious misconduct listed in § 832.7(b)(1).

G. Defendants cannot withhold records relating to the Inspector General.

Defendants' discussion of the purpose of the Inspector General confidentiality provisions shows that these statutes serve the same purposes as do former § 6254(f) and are therefore superseded by SB 1421 even under Defendants' novel conflict theory. *Compare* Return at 61-62 (arguing that Inspector General statutes are "aimed at facilitating thorough investigations, witness cooperation, and candid disclosure") *with Haynie v. Superior Ct.*, 26 Cal. 4th 1061, 1070–71 (2001) (former § 6254(f) serves to reduce danger that "witnesses … might disappear or refuse to cooperate" or that "[e]vidence might be destroyed"). Even if Defendants were correct that SB 1421 supersedes only

those statutes that serve the same purposes of § 832.7(a) or former § 6254(f), it would still supersede the Inspector General confidentiality statutes. *See* Return at 38 & n.4.

Defendants' discussion of the 2019 amendments to these statutes adds nothing to their arguments. They assert that because the Legislature amended the statutes relating to confidentiality of Inspector General records in 2019, it somehow exempted them from SB 1421's disclosure requirements. *See* Return at 61-62. This makes no sense. First, aside from adding a requirement to Penal Code § 6133(b)(3) that the Inspector General post certain reports on its website, the amendment had nothing to do with public access. And the fact that the Legislature left the confidentiality provisions intake is irrelevant; Plaintiffs do not argue that those provisions are invalid; they argue that they cannot apply to records covered by SB 1421. Again, the Legislature makes statutes applicable notwithstanding any other laws so that it need not identify and list (or amend) every law that it intends to supersede.

H. 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 make them confidential. 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[13] 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.

Even if agencies could withhold records based on some confidentiality statutes, Defendants cannot do so here. Section

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[13] More than 600. *See* note 4, *supra*.

11183 does not apply to public records that the subpoenaed agency must release under SB 1421. And the Inspector General statutes are exactly the type of laws that are superseded by the transparency law even under Defendants' approach.

For these reasons, this Court should issue a writ of mandate requiring the superior court to order Defendants to release the records withheld under the provisions relating to the Inspector General and the Unemployment Insurance Code. The writ should also direct the superior court to order production of any of the Bakersfield records that are within the scope of SB 1421 and that are not exempt under any of SB 1421's provisions, without reference to the protections of § 11183.

Dated: March 23, 2023

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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 50 California Street, 23rd Floor, San Francisco, California 94111.

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

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By: */s/ Aysha D. Lewis*
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