Case No. S194708

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SIERRA CLUB,
Petitioner,
v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE,
Respondent,

COUNTY OF ORANGE,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G044138
(195 CAL.APP. 4TH 1537, 125 CAL.RPTR.3D 913)
DENYING A PETITION FOR AN EXTRAORDINARY WRIT
TO THE SUPERIOR COURT FOR THE COUNTY OF ORANGE;
CASE NO. 30-2009-00121878-CU-WM-CJC
THE HONORABLE JAMES J. DI CESARE, JUDGE

APPLICATION OF THE ELECTORNIC FRONTIER FOUNDATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS* BRIEF IN SUPPORT OF PETITIONER SIERRA CLUB

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APPLICATION OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION TO FILE AN *AMICUS* BRIEF IN SUPPORT OF PETITIONER SIERRA CLUB AND STATEMENT OF INTEREST

Pursuant to California Rule of Court 8.520(f), the Electronic Frontier Foundation ("EFF") respectfully requests leave to file an *amicus* brief in support of Petitioner Sierra Club.[1]

EFF is a San Francisco-based, donor-supported, nonprofit civil liberties organization working to protect and promote fundamental liberties in the digital world. Through direct advocacy, impact litigation, and technological innovation, EFF's team of attorneys, activists, and technologists encourage and challenge industry, government, and courts to support free expression, privacy, and transparency in the information society.

As part of its FOIA Litigation for Accountable Government Project, EFF routinely files and litigates, at both the state and federal level, public records requests related to government use of technology. As part of its mission to foster openness and innovation, EFF also frequently serves as counsel or *amicus* in key cases addressing the scope and application of state and federal freedom of information laws.

As an organization devoted primarily to addressing novel legal questions arising from the use of technology, EFF is uniquely positioned to provide the

[1] No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amicus* contributed money intended to fund preparing or submitting this brief.

Court with a comprehensive perspective on the confluence of legal and technical issues at stake in this case. For these reasons, EFF has a particularly acute interest in the subject matter and resolution of this case.

For the foregoing reasons, *amicus* respectfully requests leave to file the attached brief.

DATED: March 7, 2012

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

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INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the sole issue to be decided is whether public geographic information may be withheld from disclosure simply because the information is stored in a specific electronic format. The answer – consistent with a reasonable interpretation of the California Public Records Act ("CPRA") and California's Constitution – is that the information must be disclosed in the requested format.

The Court of Appeal held that public geographic information – geographic boundaries of parcels, Assessor Parcel Numbers, street addresses, and the names and addresses of parcel owners – may be excluded from disclosure under the "computer software" provision of the CPRA. (*Sierra Club v. Superior Court of Orange County* (2011) previously published at 195 Cal.App.4th 1537; Slip Opinion ("Slip Op."); Cal. Gov't Code. § 6254.9.)[2] The Court held that the otherwise-public geographic information, when maintained in a GIS-compatible format, becomes "part of a computer mapping system" within the meaning of the software exclusion. (Slip Op. at 19.) The court, primarily relying on the exclusion's convoluted legislative history, held that neither the CPRA's broad mandate of disclosure, nor California's Constitutional directive to narrowly construe withholding statutes, compelled the disclosure of the OC Landbase. By so holding, the Court of Appeal created conflicting precedent concerning the

[2] Unless otherwise specified, all statutory references are to the provisions of the California Public Records Act, Government Code §§ 6250, *et seq*.

public record status of geographic information maintained by state agencies in a GIS-compatible file format. (*See County of Santa Clara v. Superior Court of Santa Clara County* (2009) 170 Cal.App.4th 1301.)

The Court of Appeal's decision was in error. Applying the decision's logic – that otherwise-public information may become a "part of" computer software, simply by virtue of the information's use, storage, or manipulation by software operated by an agency – it is difficult to conceive of any public information that could escape the exclusion's undefined statutory grasp. For example, along with "computer mapping systems," "computer programs" are similarly excluded from disclosure. (§ 6254.9(b).) Under the Court's logic, any agency document saved as a PDF, regardless of the document's content, could fall within the provision's exclusion. (*See* Section II(c), *infra* at 17.) This statutory construction, and its attendant anomalous results, runs in direct contravention of the CPRA, California's Constitution, and the software exclusion itself, which expressly guarantees that its limitations not "affect the public record status of information merely because it is stored in a computer." (§ 6254.9(d).) While the precise scope of the software exclusion's terms may be unclear, the Legislature almost certainly did not intend to provide agencies with a vehicle to avoid disclosure of all electronically stored public information.

Accordingly, *amicus* Electronic Frontier Foundation ("EFF") respectfully urges this Court to reverse the Court of Appeal's decision for two primary reasons: First, the OC Landbase is a public record, and the software exclusion does not

alter its status as such. This interpretation is consistent with the terms of the software exclusion, other provisions of the CPRA, and analogous CPRA precedent. Moreover, this interpretation avoids absurd results and comports best with the CPRA's broad purpose of ensuring government accountability. Second, the Court of Appeal's decision is inconsistent with California's Constitutional mandate to narrowly interpret statutes that inhibit the people's right to access public information. Finally, *amicus* urges this Court to resolve this case without ascribing definitions for notoriously malleable statutory terms, and instead focusing on § 6254.9(d)'s express guarantee. For these reasons, more fully described below, *amicus* respectfully urges this Court to reverse the Court of Appeal's decision and hold that information's public record status does not depend on the file format in which it is saved.

ARGUMENT

I. ACCORDING TO THE PLAIN LANGUAGE OF THE CPRA, THE OC LANDBASE IS A PUBLIC RECORD SUBJECT TO DISCLOSURE IN THE REQUESTED FORMAT

Consistent with the CPRA's broad mandate of disclosure, the CPRA's definition of public records "cover[s] every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed." (*Comm'n on Peace Officer Standards and Training v. Superior Court*, (2007) 42 Cal.4th 278, 288 (citations omitted) (holding information in computer database a public record).)

The information sought by Sierra Club easily fits within this ample definition. The OC Landbase is a collection of geographic information – geographic boundaries of parcels, Assessor Parcel Numbers, street addresses, and the names and addresses of parcel owners – relating to over 640,000 parcels in Orange County. (5 PA 1083, 1348.)[3]

The parties do not dispute that the geographic information, when contained in paper format, constitutes a public record. (Slip Op. at 4.) However, that public record status is not altered simply by virtue of the information's electronic storage: the software exclusion expressly guarantees that the exclusion does not "affect the public record status of information merely because it is stored in a computer." (§ 6254.9(d).) Thus, even when stored in a GIS-compatible file format, the geographic information maintains its public record status.

Finally, under the CPRA, a state agency must produce public records in "any electronic format in which it holds the information." (§ 6253.9(a)(1).) And

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[3] To create the OC Landbase, the public geographic information contained in tract maps, parcel maps, records of survey, deeds, and ordinances, (RT 164-168, 171, 191; 4 PA 789; 5 PA 1083, 1348), was entered and stored within a Database Management System (DBMS). (2 PA 568.). The geographic information is stored in a GIS-compatible file format, which enables its use with GIS software applications. (Slip Op. at 3.) Using a GIS software application, the geographic information can be viewed, manipulated, and analyzed. (*Id.*)

A DBMS is "complex set of software programs that controls the organization, storage and retrieval of data (fields, records and files) in a database." ("Database Management System," *Free Online Dictionary of Computer Terms*, www.foldoc.org.) Orange County currently maintains and stores the OC Landbase using Oracle's 10g DBMS software. (2 PA 568.) Sierra Club does not seek a copy of Orange County's DBMS software

Orange County's GIS software application is ArcGIS. (2 PA 568.) Sierra Club does not seek a copy of Orange County's ArcGIS software.

the agency lacks discretion to choose the electronic format in which to disclose the record: § 6253.9(a)(2) requires the agency to produce a copy of the information in the requested format if the agency has previously made copies for "its own use or provision to other agencies." Orange County has provided the OC Landbase to a variety of state agencies. (2 PA 559.) Thus, because the OC Landbase is a public record maintained in an electronic format, and because the County has provided the record to other agencies, according to the plain language of the CPRA, Orange County must produce the information in the format requested by Sierra Club.

II. THE COMPUTER SOFTWARE EXCLUSION DOES NOT ALTER THE OC LANDBASE'S PUBLIC RECORD STATUS

The construction of the "software exclusion" most consistent with the terms of the CPRA and the statute's overriding purpose is that the format of public information's storage does not affect its public record status. The County argues, by virtue of the geographic information's storage in a GIS-compatible format, the information becomes a "part of a computer mapping system." (Answer Brief of Real Party in Interest Orange Count ("Answer Brief") at 21.) However, this interpretation conflicts with the terms of the software exclusion itself, with other relevant provisions of the CPRA, and with analogous CPRA precedent. The County's interpretation would lead to absurd results and would inhibit the CPRA's primary purpose – enhancing government accountability through access to government information. For these reasons, the decision below should be reversed,

and the County should be ordered to produce the OC Landbase in the requested format.

A. *Despite the Court of Appeal's Construction of the Software Exclusion, § 6254.9(d) and § 6253.9(a)(1)-(2) Require the OC Landbase to Be Produced in the Requested Format*

This Court need only rely on two provisions of the CPRA to decide this case – §§ 6254.9(d) and 6253.9(a)(1)-(2). First, the software exclusion, by its own terms, makes clear that "[n]othing in [the software exclusion] is intended to affect the public record status of information merely because it is stored in a computer. Public records stored in a computer shall be disclosed as required by this chapter." (§ 6254.9(d).) Second, § 6253.9(a)(1) states an agency "shall" produce records in "any" electronic format in which the agency maintains the information. And, the agency must release that information in "the requested format" if the agency has used the format to create copies for its own use or for provision to other agencies." (§ 6253.9(a)(2).) Following the plain meaning of these two provisions, the information contained within the OC Landbase must be disclosed, and it must be disclosed in the format requested by the Sierra Club.

Yet the Court of Appeal's holding was directly to the contrary. According to the Court of Appeal, by storing public geographic information in a GIS-compatible file format, the information becomes a "part of a computer mapping system," thereby stripping it of its public record status. (Slip Op. at 19.) This holding, while in direct conflict with § 6254.9(d), is justifiable only in light of the Court's limited analysis of the provision:

> [S]ection 6254.9, subdivision (d)'s statement that "[p]ublic records stored in a computer shall be disclosed as required by this chapter" is not a mandate that all computer-stored information must be divulged under the Act.

(Slip Op. at 15-16.) The court's analysis failed to include the first sentence of § 6254.9(d): "Nothing in this section is intended to affect the the public record status of information merely because it is stored in a computer."[4]

Had the court instead assessed the entirety of § 6254.9(d), properly acknowledging the geographic information's public record status, the appropriate conclusion is that the information's public record status is not altered by its storage in a GIS-compatible format.

The parties do not dispute that, because the County's source documents contain information – the geographic boundaries of parcels, Assessor Parcel Numbers, street addresses, and the names and addresses of the owners of the parcels – relating to the "conduct of the public's business," the paper documents containing that information, therefore, are public records. (Answer Brief at 19; § 6252(e) ("'Public records' includes any writing containing information relating

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[4] Previously, in its discussion of the legislative history of § 6254.9, the court noted "[a] computer mapping database is not excluded 'merely' because it is stored on a computer, but because its development is time consuming and costly and the Legislature has made a policy decision that local governments should be allowed to recoup some of their development costs." (Slip Op. at 13-14.) That a public record is "time consuming and costly" to develop is, first, irrelevant to whether it relates "to the conduct of the public's business," (*see* § 6252(e)) and, second, could be said of any number of public records that require specialized personnel, training, or processes to create or develop. Finally, the court's assessment of the legislative policy decision presupposes that a database falls within the definition of a "computer mapping system."

to the conduct of the public's business[.]").) Once it is determined that the information, itself, "constitutes an identifiable public record," (§ 6253.9(a)), the public record-status of that information does not change simply by virtue of the information's form or format. (§ 6254.9(d).) Because paper copies of the information constitute public records, and because the OC Landbase contains identical information stored in a GIS-compatible file format, the OC Landbase's public record status is not altered simply by virtue of its electronic storage. (*See* § 6253.9(d).)

The Court of Appeal's analysis of § 6253.9 was similarly cursory. Again, the court failed to even discuss two relevant provisions: § 6253.9(a)(1) & (2). Instead, the Court of Appeal, operating from the presumption that the OC Landbase was not a public record, noted only that § 6253.9 "applies to electronically formatted 'information that constitutes an identifiable public record *not exempt from disclosure pursuant to this chapter*,'" (Slip Op. at 15 (emphasis in original)), and that agencies must make such information available in "*an* electronic format." (*Id.* (emphasis added); *but see* § 6253.9(a)(1), (2) (stating agencies "shall" make electronically stored information available in "any" format requested).)

Nevertheless, as described above, because § 6254.9(d)'s clear terms provide that information's public record status is not altered or abrogated by its electronic storage, the information within the OC Landbase "constitutes an identifiable public record not exempt from disclosure." (§ 6253.9(a).) Thus,

§ 6253.9(a)(1) requires that agencies make the information available in any format, and § 6253.9(a)(2) requires the production in the format requested – a GIS-compatible format.

B. *Cases Interpreting Other Provisions of the CPRA Support the Conclusion that the Manner, Location, or Format of Information's Storage Does Not Affect its Public Record Status*

Finding the public record status of the geographic information stored within the OC Landbase to be altered simply because of the format of its storage would not only run contrary to § 6254.9(d), but contrary to analogous precedent interpreting other CPRA exemptions. In the proceedings below, the Court of Appeal held that public geographic information becomes "a part of a computer mapping system" and is, therefore, excluded from disclosure. (Slip Op. at 19.) This transformation of information – from public to non-public – is unsupported by cases interpreting the CPRA.

For example, in *Commission on Peace Officer Standards*, this Court considered whether otherwise public information was exempt from disclosure under the CPRA, simply because it was contained within exempt "personnel files." ((2007) 42 Cal.4th 278.) There, this Court rejected the Court of Appeal's interpretation, where the mere placement of otherwise- public information in a personnel file "would render the document confidential, regardless of whether the document at issue was of a personal or private nature[.]" (*Id.* at 290.) In reversing the lower court's decision, this Court noted it was "unlikely the Legislature

intended to render documents confidential based on their location, rather than their content." (*Id.* at 291; *see also Williams v. Superior Court* (1993) 5 Cal.4th 337, 355 ("[T]he law does not provide[ ] that a public agency may shield a record from public disclosure, regardless of its nature, simply by placing it in a file labeled 'investigatory.'").) The situation here is directly analogous: the Legislature, as demonstrated by § 6254.9(d), did not intended to permit agencies to shield electronically stored, public information from disclosure simply by labeling it as part of a "computer mapping system."

Orange County approvingly cites *Williams v. Superior Court* (1993) 5 Cal.4th 337, and *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, because, according to the County, the cases demonstrate "other instances in which the Legislature exempted a record from production, but allowed or compelled disclosure of the information contained therein." (Answer Brief at 18.) Indeed, the case here *is* analogous: The Legislature has effectively excluded a category of records from the CPRA – computer software. The Legislature's inclusion of § 6254.9(d), which dictates that the software exclusion not "affect the public record status of information merely because it is stored in a computer," like in *Williams* and *Haynie*, similarly indicates a legislative decision to "compel[] disclosure of the information" within the exempted category of records – here, the information maintained within computer software, programs, mapping systems, or graphics systems. Were that the end of the analysis, the County's obligation under the CPRA could be satisfied by producing the non-exempt information in any

format – paper, PDF, or a GIS-compatible format. However, § 6253.9(a)(2) requires the County "provide a copy of an electronic record in the format requested." Thus, the relevance of *Williams* and *Haynie* only goes so far; §§ 6254.9(d) and 6253.9(a)(2), in conjunction, mandate disclosure of the information in the format requested by Sierra Club, a GIS-compatible format.

C. *The Court of Appeal's Interpretation of § 6254.9 Invites Absurd Results*

Although the plain meaning of §§ 6254.9(d) and 6253.9(a)(1)-(2) require production of the OC Landbase in the format requested by Sierra Club, this conclusion is underscored by the anomalous results which the Court of Appeal's construction of the software exclusion could invite. In construing a statute, "it is appropriate to consider 'the consequences that will flow from a particular interpretation. [Citation.]'" (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165.) Consistent with this principle, statutory language should be construed to "avoid [a] construction that would lead to unreasonable, impractical, or arbitrary results." (*Comm'n on Peace Officer Standards* (2007) 42 Cal.4th 278.) In spite of § 6254.9(d), the Court of Appeal interpreted the term "computer mapping systems" to include public geographic information stored in a GIS-compatible format, ultimately deciding that the information became "a part of a computer mapping system" by virtue of its storage, maintenance, and use within computer mapping software. (Slip Op. at 19.) That is, because otherwise public

geographic information was stored in, and used in conjunction with, computer mapping software, the information could be stripped of its public record status.

When the logic of the Court of Appeal's opinion is applied to the other enumerated examples of exempt "software" described in § 6254.9(b), the unsoundness of the decision becomes manifest. For example, if a state agency implemented a procedure, using commercially available software, whereby arrest mug shots were taken with a digital camera, then stored and viewed electronically, those mug shots – a paradigmatic example of public information – could lose their public record status, simply by virtue of their inclusion in a "computer graphics system." Like the geographic information maintained in the OC Landbase, the mug shot image data would be entered, stored, and maintained in government computers and software. And, like the OC Landbase was used in conjunction with GIS mapping software, the mug shot images would be viewed using software specifically designed for viewing graphics and images. Thus, like the public geographic information at issue here, mug shots could lose their public record status in their entirety, simply by their inclusion within such a "system."

Along with "computer mapping systems" and "computer graphics systems," "computer programs" developed by a state agency are similarly exempt from disclosure under § 6254.9. When the logic of the Court of Appeal's opinion is applied to "computer programs," the possible results are even more extreme. For example, a paper public record that is scanned (using a computer program), translated into a PDF (using a computer program), stored (using a computer

program), and viewed (using a computer program) could be withheld under the CPRA: at any step in the process, public information from the paper public record is transmitted, stored, or processed by one of many computer programs in a logically identical manner to the inclusion and use of geographic information within Orange County's computer mapping software. According to the Court of Appeal's opinion, the storage, editing, manipulation, and use of public information in a computer program is sufficient for that information to become a "part of" the excluded software. (*See* Slip Op. at 20.)

Taken to its logical extreme, a PDF, Word document, or an Excel spreadsheet – or, for that matter, nearly *any* public information stored on a computer – could lose its public record status following the precedent of the Court of Appeal opinion. The gradual evisceration of the CPRA in the digital age could not have been the policy impetus behind § 6254.9's passage. Instead, the more logical construction of § 6254.9(d) is that public information maintains its public record status, regardless of its association with computer software, or the form or format in which it is stored.

D. *Interpreting § 6254.9(d) to Include the OC Landbase Best Comports with the CPRA's Overriding Purpose*

The language of a statute should be construed to "harmonize the various parts of the enactment by considering them in the context of the statutory framework as a whole." (*In re C.H.* (2011) 53 Cal.4th 94, 100; *see also County of Sacramento v. State Water Res. Control Bd.* (2007) 153 Cal.App.4th 1579, 1588 (Statutory

"language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute [citation], and where possible the language should be read so as to conform to the spirit of the enactment.").) The Court of Appeal's decision, that public geographic information becomes "a part of a computer mapping system" simply by virtue of the format of its storage, threatens the overarching purpose of the CPRA – providing "access to information concerning the conduct of the people's business." (§ 6250.)

The ultimate rationale underlying California's broad commitment to ensuring access to government information is democratic accountability: "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process. [Citation]." (*Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-29.)

By refusing to disclose the OC Landbase without payment of a licensing fee, Orange County blocks effective citizen engagement in government decisions concerning county-wide land use policies. Here, the OC Landbase in a GIS-compatible format represents the consolidation of information from approximately 7 million pages of public records into a single, machine-readable, comprehensive

resource. (Opening Brief at 52 n. 13.)[5] The Landbase is "the most essential data set" the County possesses, (Request for Judicial Notice of Petitioner Sierra Club ("Pet. RJN"), Exh. 2 at RJN2-1455), and the OC Landbase likely represents the best tool available to citizens interested in critically assessing and understanding land-use decisions in Orange County. Yet, instead of enabling participatory government, Orange County has chosen to use technology, and a dubious interpretation of the CPRA, as a shield from public accountability. Technology should be used to fulfill the promise of citizen participation and government accountability, not to obstruct it. For this reason, the public information should not lose its public record status on account of its electronic storage.

III. CALIFORNIA'S CONSTITUTION COMPELS THE FINDING THAT THE OC LANDBASE IS A PUBLIC RECORD SUBJECT TO DISCLSOURE IN THE REQUESTED FORMAT

Even if doubt existed regarding the plain language of the CPRA and its application to the OC Landbase, California's Constitution resolves that doubt in favor of access to information concerning the conduct of the people's business and in favor of disclosure of the OC Landbase.

Article I, Section 3(b)(1) of California's Constitution provides the citizens of California with "the right of access to information concerning the conduct of

[5] Indeed, the Legislature's decision to pass § 6253.9 anticipated precisely this situation: voluminous copies of paper records can "effectively frustrate [a] request," and "render the information useless." (Pet. RJN, Exh. *1* at *RJN1-17*.)

the people's business." Section 3(b)(2) sets forth a Constitutional mandate to ensure that the "right of access to information" is not diminished:

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.

(Cal. Const., art I, § 3(b)(2).) According to the terms of the Constitution then, the affirmative portions of the CPRA are to be interpreted broadly in order to further "the people's right of access," and any exceptions or exemptions to the CPRA must be "narrowly construed." (*Id.*) In short, in California, government officials are constitutionally obligated to interpret ambiguities in statutes, rules, or any other authority in favor of disclosure.

It is axiomatic that the "California Constitution is the supreme law of our state—a seminal document of independent force that establishes governmental powers and safeguards individual rights and liberties." (*Sands v. Morongo Unified Sch. Dist.*, (1991) 53 Cal.3d 863, 902-03 (Lucas, C.J. *concurring*).) All state action, including judicial interpretation of statutes, must conform to the strictures of the Constitution. (*See, e.g., McClung v. Employment Dev. Dep't* (2004) 34 Cal.4th 467, 472.) Thus, according to the plain meaning of the Constitution, when construing provisions of the CPRA, courts, too, must resolve all ambiguities in favor of disclosure. (*See* Cal. Const. art. 1, § 3(b)(2).)

In this case, the Court of Appeal did precisely the opposite: the Court resolved every possible statutory ambiguity in favor of shielding the OC Landbase

from disclosure, thus limiting the people's Constitutional right of access. (*See* Slip Op. at 14-15.) The Court resolved every question of statutory construction concerning the scope of § 6253.9, (Slip Op. at 15), and the applicability of § 6254.9, (Slip Op. at 8), in ways that fundamentally limit access to public information.

The Court of Appeal reached a point in its analysis where application of the Constitutional rule was particularly appropriate: the court explicitly determined that the plain meaning of "computer mapping systems" under § 6254.9 was ambiguous and could plausibly support either parties' interpretation. (Slip Op. at 8 ("Section 6254.9's language is susceptible to both parties' interpretations, *i.e.*, a "computer mapping system" might or might not include data along with the associated computer program.").) Yet, instead of looking to § 3(b)(2) to determine the construction of the statute that would best promote public access, the court looked to the legislative history of § 6254.9, the statutory framework of the CPRA, and even the statutes of other states. (Slip Op. at 8-16.) Only then, after reviewing those authorities, did the court finally turn to, and summarily dismiss, California's Constitutional mandate to narrowly construe the statute. (*Id.* ("Sierra Club points out that the California Constitution mandates that a statute must be 'narrowly construed if it limits' the people's right of access to government information. We have construed section 6254.9 as narrowly as is possible consistent with its legislative history.").)

When interpreting § 6254.9, the Court's decision to value an ambiguous legislative history over a Constitutional mandate was error. While canons of construction and extrinsic aids, such as legislative history, are simply "tools, 'guides to help courts determine likely legislative intent,'" (*Cal. Redevelopment Ass'n. v. Matosantos*, (2011) 53 Cal.4th 231, 269) the Constitution is "the supreme law of our state." (*Sands* at 902.) After reviewing the plain language of the statute and its role within the larger legislative scheme, (*In re C.H.* (2011) 53 Cal.4th at 100), if the statutory language remains ambiguous, the California Constitution resolves the ambiguity: a statute "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Following § 3(b)(2), "computer mapping system" should be construed narrowly to avoid limiting the people's right of access.[6] Thus, California's Constitution compels the disclosure of the OC Landbase.

Orange County suggests that applying § 3(b)(2)'s mandate of statutory interpretation will require courts to "abandon long-established rules of statutory construction" and will "invite[] great uncertainty." (Answer Brief at 44.)[7] The

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[6] As a corollary, § 6254.9(d) should be construed broadly, as should § 6253.9; however the Court of Appeal's decision largely focused on the definition of "computer mapping system."

[7] Orange County also argues that § 3(b)(2) does not abrogate exemptions existing at the time of enactment. (Answer Brief at 44.) This argument simply obscures the issue, as the narrow interpretation of statutes and rules is distinct from their abrogation. Moreover, Article I, § 3(b)(5) makes clear that the provisions of Prop 59 did not "repeal or nullify" existing exemptions; the

County correctly asserts that a Court's primary responsibility when interpreting a statute is determining legislative intent. (Answer Brief at 44 (citing *Dubois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387).) However, in order to ascertain that intent, courts rely both on "a variety of extrinsic aids," *People v. Zambia*, (2011) 51 Cal.4th 965, 972, and various overriding presumptions that inform and constrain the court's interpretation of a statute.

Section 3(b)(2)'s mandate, properly construed, should operate similarly to many of the overriding presumptions courts typically employ to constrain the construction of statutes within appropriate interpretative frameworks. For example, the rule of lenity requires that, "when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant." (*People v. Avery*, (2002) 27 Cal.4th 49, 57.) The rule applies only when "two reasonable interpretations of the same provision stand in relative equipoise." (*Id.* at 58.) Remedial statutes operate under similar interpretative presumptions: in the face of ambiguity, a remedial statute "must be liberally construed to effectuate its object and purpose, and to suppress the mischief at which it is directed." (*Ford Dealers Ass'n. v. Dep't of Motor Vehicles* (1982) 32 Cal.3d 347, 356 (citations omitted).) Another overriding presumption requires the avoidance of constitutional issues: that is,

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amendments simply mandated that exemptions be construed to enhance the people's right of access. (Cal. Const., art I, § 3(b)(2).)

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

(*Curran v. Mount Diablo Council of the Boy Scouts*, (1998) 17 Cal.4th 670, 727-28.)

Like the rule of lenity, the broad construction of remedial statutes, and the canon of constitutional avoidance, while not supplanting a court's obligation to ascertain legislative intent when interpreting a statute, § 3(b)(2), operates as an overriding presumption to constrain statutory interpretation within appropriate bounds and to settle any dispute between statutory language reasonably susceptible to two meanings. As acknowledged by the Court of Appeal, the term "computer mapping system" is susceptible to both parties' interpretation; thus, § 3(b)(2)'s mandate requires the narrow construction of the statute and the disclosure of the OC Landbase

IV. RESOLUTION OF THIS CASE BASED ON § 6254.9(d)'S EXPRESS GUARANTEE, WITHOUT DEFINING THE SOFTWARE EXCLUSION'S TERMS, WILL BEST ENSURE ACCESS TO ELECTRONICALLY STORED INFORMATION

In contrast to the thorough definitions given other statutory terms in the CPRA, (*see, e.g.*, § 6252), the Legislature provided little guidance to assist courts in deciphering the meaning and scope of the items it sought to exclude from mandatory disclosure under § 6254.9. In light of the paucity of guidance, and in

light of the particular difficulty presented by accurately and narrowly defining technological terms, *amicus* urges this Court to resolve this case by focusing primarily on § 6254.9(d)'s mandate that the software exclusion not "alter the public record status of information merely because it is stored in a computer." (§ 6254.9(d).)

The terms used in the § 6254.9 – in particular, "computer software" and "computer programs" – are reasonably susceptible, for both technical and colloquial reasons, to a variety of definitions. And, though inconsistent with the CPRA and California's Constitution, the definitions of all the terms listed in § 6254.9 can be arbitrarily expanded to include any variety of items. Because of the difficulties inherent in accurately describing technology, and because of the increasingly prominent role technology plays in the "conduct of the people's business," *amicus* urges this Court, in light of the CPRA's broad mandate of disclosure, to be particularly wary of ascribing arbitrary definitions to statutory terms that could inhibit access to public information – both now and in the future.

Since its enactment in 1988, only two cases – this case and *Santa Clara* – have implicated the scope of the terms used in § 6254.9. While the Court should take this opportunity to quell the threat posed to the CPRA by the Court of Appeal's overly broad interpretation of "computer mapping systems," *amicus* urges the Court to do so narrowly, and without attempting to define notoriously difficult statutory terms peripheral to the Court's decision.

Instead, the case can be resolved simply and straightforwardly: by upholding and reaffirming the principle set forth in § 6254.9(d) – that public information stored electronically may not be withheld simply because it is stored in a particular format.

CONCLUSION

While the precise scope of the CPRA's computer software exclusion may be unclear, this case need not resolve every uncertainty associated with the provision. What is clear, however, is that the Legislature, in passing § 6254.9, did not intend to destroy the CPRA through subterfuge. The Court of Appeal's interpretation of an exception to the CPRA risks swallowing the rule, thus compromising California's fundamental commitment to transparency, accountability, and access to public records. This Court should reverse the Court of Appeal's decision in this case to ensure Californian's access to public records in the digital age. For the reasons described above, EFF strongly urges this Court to hold that the CPRA requires disclosure of public records stored electronically, regardless of the format of their storage.

DATED: March 7, 2012

Respectfully submitted,

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By: ______________________

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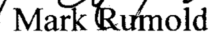
CERTIFICATE OF COMPLIANCE

Counsel for *Amicus Curiae* hereby certifies, pursuant to Rule 8.204(c) of the California Rules of Court, that the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 5,450 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 7, 2012

Respectfully submitted,

By: ______________________



Mark Rumold

PROOF OF SERVICE

I, Stephanie Shattuck, declare that I am employed in the city and county of San Francisco, California. My business address is 454 Shotwell Street, San Francisco, California 94110. I am over the age of eighteen years and am not a party to the within cause.

On March 7, 2012, I served the attached APPLICATION OF THE ELECTORNIC FRONTIER FOUNDATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF IN SUPPORT OF PETITIONER SIERRA CLUB on the interested parties in said cause by:

X U.S. Mail: placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in accordance with the firm's practice of collection and processing correspondence with the United States Postal Service, which in the normal course of business provides for the deposit of all correspondence and documents with the United States Postal Service on the same day they are collected and processed for mailing to the person(s) at the address(es) set forth below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: March 7, 2012

STEPHANIE SHATTUCK