In the Supreme Court of the State of California

DEPARTMENT OF PUBLIC HEALTH, **Petitioner,** **v.** **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO,** **Respondent,** **CENTER FOR INVESTIGATIVE REPORTING,** **Real Party in Interest.**	Case No. S214679

Court of Appeal, Third Appellate District, Case No. C072325
Honorable Harry E. Hull, Jr., Acting Presiding Justice
Honorable M. Kathleen Butz, Justice
Honorable Andrea Lynn Hoch, Justice
Sacramento County Superior Court, Case No. 34-2012-80001044
Honorable Timothy M. Frawley

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Petition for Review filed by the Center for Investigative Reporting (CIR) should be denied because it does not satisfy any basis for this Court's review. Applying well-established principles of statutory construction, the court of appeal properly construed both the patient privacy provisions of the Lanterman Act and the public notice requirements of the Long Term Care Act (LTC), and thereby correctly effectuated legislative intent. Review is not required to secure uniformity of decision because no other decision from the court of appeal, or any other source, conflicts with the court of appeal's analysis here. Nor is review necessary to settle an important issue for this Court. At best, CIR seeks error correction, which is neither a proper basis for review nor supported by the law.

Finally, CIR's favored construction, if adopted, would undermine rather than advance legislative intent. It would fail to give effect to the Legislature's continuing efforts to preserve the confidentiality of documents and records pertaining to the care of those with mental illness or developmental disabilities, as reflected in Lanterman Act enactments that post-date enactment of the LTC.

Accordingly, the Petition should be denied.

STATEMENT OF FACTS

1. CIR made a request under the California Public Records Act (CPRA) for citations issued by the California Department of Public Health (Public Health) to seven of the state's residential facilities for persons with mental illness or developmental disabilities, from January 1, 2002 to May 6, 2011.

2. Public Health produced citations after redacting all information obtained in the course of providing services to those with mental illness or developmental disabilities to comply with the confidentiality provisions of

the Lanterman-Petris-Short Act and the Lanterman Developmental Disabilities Services Act (collectively, the Lanterman Act), and the Information Practices Act. (Welf. & Inst. Code, §§ 5328.15, 5328, 4514, 4514, subd. (n); Civil Code, §§ 1798.23 & 1798.24.) Under the Lanterman Act, all information obtained in the course of providing services to individuals with mental illness or developmental disabilities must be kept confidential, with certain exceptions.

3. CIR filed a petition for writ of mandate to obtain the citations in unredacted or minimally redacted form.

4. The trial court issued a peremptory writ of mandate requiring Public Health to produce the requested citations without redaction, except as to the names of individuals other than the investigating officers.

5. Public Health filed a petition for extraordinary writ requesting that the court of appeal vacate the trial court's ruling.

6. The court of appeal issued a peremptory writ which harmonized the purposes of the Long Term Care Act's (LTC) public accessibility provisions with the Lanterman Act's confidentiality provisions. (Opinion at pp. 19-22.)

7. The court of appeal acknowledged that the Lanterman Act's strong protections are necessary to achieve its legislative purpose of encouraging people with mental illness or developmental disabilities to receive effective treatment, knowing that the treatment will remain confidential and free from stigma. (Opinion at p. 11.)

8. In harmonizing the LTC and Lanterman Act, the court of appeal required the deletion of any names contained in the citations, other than those of the authorized inspectors and investigators specified in Health and Safety Code section 1439 of the Long Term Care Act. (Opinion at p. 19.)

9. The court of appeal required Public Health to produce the citations in compliance with Health and Safety Code section 1423, subdivision (a)(2)

by describing with particularity the nature of the violation—for example, *what* was the harm, *what* was the abuse, *what* was the lack of respect or dignity afforded, and *what* was the action that the facility did or failed to do—and identifying the area of the facility where the violation occurred. (Opinion at pp. 20-21, emphasis added.)

10. The court of appeal acknowledged that Public Health had complied with the other requirements of Health and Safety Code section 1423, subdivision (a)(2)—namely that the citations provide the statutory provision, standard, rule, or regulation allegedly violated, the deadline for compliance, the classification of the citation, and the amount of the proposed civil penalty. (Opinion at p. 20.)

11. Under Health and Safety Code section 1424, subdivision (b) of the Long Term Care Act, Public Health is to document the relevant facts that it considered in determining the civil penalty on an attachment to the citation. (Opinion at p. 21.)

12. The court of appeal held that the aforementioned directives are subject to the limitation that the patient's mental, physical, and medical conditions, history of mental disability or disorder, and the risk the violation presents to that mental and physical condition, cannot be disclosed in CPRA-requested citations in light of the mental health-based confidentiality provisions of the Lanterman Act. (Opinion at p. 21; Health & Saf. Code, § 1424, subd. (a)(1)-(3); Welf. & Inst. Code, §§ 5328, 5328.15, 4514.)

13. The court of appeal held that the Lanterman Act's confidentiality provisions do not foreclose public disclosure of the good faith efforts by the facility to prevent the violation and the facility's history of compliance with regulations. (Opinion at p. 22.)

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ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT SATISFY ANY BASIS FOR REVIEW.

The Petition should be denied because the court of appeal applied well-established principles of statutory construction to reach the right result. Further, there is no current split of authority that requires resolution by this Court, nor does the case implicate an issue of statewide importance that merits review. Fundamentally, CIR seeks error-correction, but its claim of error is neither a proper basis for review nor supported by the law.

A. The Court of Appeal Applied Well-Established Principles of Statutory Construction to Reach the Right Result.

The court of appeal did not broach new ground in its analysis of the statutes at issue, but rather merely applied well-established and uncontroversial principles of statutory construction to reach the correct result.

The court of appeal began its analysis by acknowledging the bedrock principle that, "[w]hen engaged in statutory construction, our aim is to 'ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.'" (Opinion, p. 7 [quoting *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 986].) To that end, it then reviewed at length the relevant provisions of the Lanterman and LTC Acts, with an eye toward identifying both the controlling statutory text and legislative intent. (*Id.*, pp. 7-13, 15-18.) The court of appeal then noted its obligation, when reviewing potentially conflicting statutes to strive to "effectuate the purpose of each by harmonizing them, if possible, in a way that allows both to be given effect." (*Id.*, p. 15 [citing *Chavez v. City of Los Angeles, supra*, 47 Cal.4th at p. 986].)

The court of appeal found that both statutes could be harmonized because they seek a common purpose – "to promote and protect the health and safety of mental health patients" – while recognizing that they approach that purpose from "opposite directions." (Opinion, p. 18.) It found that the purposes of both statutes could be achieved through harmonization of the two statutes.

Under the court of appeal's harmonization, the nature of the violation (i.e. the specific harm and the facility's action or failure to act) and the relevant facts considered by Public Health in imposing the statutory penalty must be disclosed. (Opinion at pp. 20-21.) This furthers the LTC's purpose of public accountability. But the patient's medical conditions and medical history must be redacted from the citation. (Opinion at pp. 21-22.) This furthers the Lanterman Act's purpose of safeguarding the privacy of extremely vulnerable individuals with mental illness or developmental disabilities. In this way, the court of appeal construed the two statutes in a way that effectuates them both.

In choosing to harmonize the LTC and the Lanterman Act, the court of appeal abided by this Court's maxim that "[a]ll presumptions are against a repeal by implication." (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805.) Absent an express declaration of legislative intent, implied repeal is found "only when there is no rational basis for harmonizing the two potentially conflicting statutes" and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." (*Ibid.*) Because the court of appeal reasonably harmonized the LTC and the Lanterman Act, no review is required.

In contrast, CIR's interpretation would undermine legislative intent by nullifying the Lanterman Act. CIR's position would require publicizing the personal information of the vulnerable population of individuals who

have mental illness or developmental disabilities. This harm is both immediate and irreparable. "Public exposure, or even disclosure to limited numbers of government representatives, may have a chilling effect on patients' efforts to undergo these treatments." (*Aden v. Younger* (1976) 57 Cal.App.3d 662, 680.)

The court of appeal correctly noted that the Lanterman Act's strong confidentiality protections are necessary to achieve its legislative purpose of encouraging people with mental illness or developmental disabilities to receive effective treatment, knowing that the treatment will remain confidential and free from stigma. (Opinion, p. 11, citing *In re: S.W.* (1978) 79 Cal.App.3d 719, 721; *County of Riverside v. Superior Court* (1974) 42 Cal.App.3d 478, 481.) The court of appeal properly upheld the Lanterman Act's confidentiality because it extends beyond any matter that is protected by any privilege under the Evidence Code. (*In re: S.W.*, *supra*, 79 Cal.App.3d at p. 721; *Gilbert v. Superior Court* (1987) 193 Cal.App.3d 161, 169; Welf. & Inst. Code, §§ 5328, 5328.15, & 4514.)

The LTC's requirement of redacting patient names is insufficient to protect privacy because patients may still be identified from their particular medical conditions, medical histories, behaviors, and other personally identifying information, without the need for their names. This danger is especially acute because CIR is a media organization intent on widely disseminating this information. In the briefs that CIR filed in the trial court, it identified numerous patients by their names or their personally identifying information. (See, e.g., Appen., DPH 305, 307, 309-310, 312-314, 330-340, 342-343, 536-555, 1401.)

B. Review Is Not Required to Secure Uniformity of Decision.

Review cannot be justified by a purported need to secure unanimity of decision. (Cal. Rules of Ct., rule 8.500(b).) Here, the court of appeal's

decision is the *only* appellate ruling that addresses and provides guidance on harmonizing the Lanterman Act, the LTC, and the CPRA. There is no conflict among the appellate districts. Indeed, the petition does not identify any such conflict. Hence, review is not required to secure uniformity of decision.

CIR's efforts to create purported conflict must be rejected. CIR relies upon *Albertson v. Superior Court* (2001) 25 Cal.4th 796, and several Attorney General opinions, for the proposition that, from time to time, later statutory enactments have been held to create exceptions to the confidentiality provisions of the Lanterman Act. These references are inapplicable because the Lanterman Act is the later-enacted statute that controls over the LTC. Public Health relied upon Welfare and Institutions Code section 5328.15, which was enacted in 1980, after the LTC's Health and Safety Code section 1439 was enacted in 1973. Because Welfare and Institutions Code section 5328.15 is the later-enacted statute, the Lanterman Act controls.

Albertson and the Attorney General opinions in 65 Ops.Cal.Att.Gen. 345 (1982) and 58 Ops.Cal.Att.Gen. 824 (1975) are inapposite because they addressed Welfare and Institutions Code section 5328, not the later-enacted Welfare and Institutions Code section 5328.15. Moreover, none of these authorities involved construction of the LTC.

To the contrary, *Albertson* involved construction of a very specific, later-enacted statute, the Sexually Violent Predators Act (SVPA), and held that it carved an "exception to section 5328's general rule of confidentiality of treatment records." 25 Cal.4th at p. 805. Not only were the provisions of the SVPA far more specific than the broad based provisions of the LTC, but the disclosure permitted was far more limited – to a petitioning attorney in a commitment proceeding, rather than the general public. Likewise, the Attorney General opinions in 58 Op.Cal.Att.Gen. 824, 828 (1975), and 65

Ops.Cal.Att.Gen. 345, 358-359 (1982) required disclosure by psychologists and other mandatory reporters of child abuse to only law enforcement, rather than the public-at-large. Further and more importantly, neither *Albertson* nor the cited Attorney General Opinions take account the later enactments of the Lanterman Act—as recent as 2012—that confirm the Legislature's continuing intent that confidential information *in citations* relating to persons who receive services *under the Lanterman Act* be *redacted* unless an express statutory exception applies (e.g., to the nonprofit entity that protects and advocates for those with mental illness or developmental disabilities). (See Welf. & Inst. Code, §§ 5328.15, subd. (c), 4514, subd. (v), and 4903, subd. (h).)

C. There Is No Important Legal Issue for This Court to Settle.

Nor is review "necessary to settle an important question of law." (Cal. Rules of Ct., rule 8.500(b).) At best, CIR seeks review because it disagrees with the court of appeal's decision and seeks error correction. (Petn. for Review, pp. 10-11.) But disagreeing with the court of appeal's decision and requesting error correction are not grounds for review. (*People v. Davis* (1905) 147 Cal. 346, 348.)

1. Any Alleged Error in the Court of Appeal's Decision Is Not a Proper Basis for Review, Particularly Where the Result Would Not Change Were Review Granted.

Principally, CIR contends that the court of appeal erred when it attempted to "harmonize" statutes that conflict. As described in Part I, the court of appeal harmonized the two statutes in a manner that effectuated the purposes of both. However, even if CIR were correct that the court of appeal erred by attempting to harmonize the Lanterman Act and the LTC, such alleged error-correction would not be a proper basis for review.

That is especially true in this case where, even if the Petition were granted and error found, the result would not change. The court of appeal reached its result through harmonization, but it could have reached the same result through application of the very principles of statutory construction upon which CIR relies in arguing its position, or through the doctrine of "implied exceptions."

a. Redactions to the Citations Are Mandated Because the Lanterman Act, as the Later-Enacted and More Specific Statute, Controls if the Two Statutes Conflict.

The conclusion reached by the court of appeal is amply supported by application of principles of statutory construction used when statutes conflict. This is true for three separate and independent reasons: (1) the Lanterman Act is the later-enacted statute that controls; (2) its provisions are more specific, and therefore govern any conflict; and (3) its most recent amendment further confirms the Legislature's intent to maintain confidentiality of the information covered by the Lanterman Act.

In this case, the Lanterman Act provisions on confidentiality control, and survive the LTC, because Welfare and Institutions Code section 5328.15, passed in 1980, is the later-enacted statute that controls over LTC's Health and Safety Code section 1439, passed in 1973.

The Lanterman Act also controls because it is the special statute that pertains to the subclass of long-term care patients. When a special and a general statute are in conflict, the special statute governs, whether it was passed before or after the general statute. (*Nunes Turfgrass v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1539.)

This Court has long held that "a statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special." *(McDonald v. Conniff* (1893) 99 Cal. 386, 391.) When two statutes conflict over a particular subject, the

statute that extracts a subclass, or "particular persons" of the class, is the special statute which governs. (*In re Philip Ward* (1964) 227 Cal.App.2d 369, 374-375.) Here, the Lanterman Act is the special statute that trumps the LTC on the issue of patient confidentiality in citations because the Lanterman Act applies to a small subclass of long-term care patients—individuals with developmental disabilities or mental illness. Hence, the court of appeal was correct in requiring redactions based on the Lanterman Act.

Further, the most recent, 2012 amendment to Welfare and Institutions Code 5328.15 confirms the continuing viability of the Lanterman Act's confidentiality provisions. (Appen., DPH 174-176, Exh. 1 [Petition for Writ of Mandate, Exh. 8].) As the court of appeal itself noted, this statute was amended in 2012 to authorize the "protection and advocacy" agency to obtain otherwise confidential Lanterman Act information and records incorporated within "unredacted citation report[s]." (Welf. & Inst. Code, § 5328.15, subd. (c); see Opinion, p. 17; see also Welf. & Inst. Code, §§ 4514, subd. (v), and 4903, subd. (h).) Specifically, under the amended statute, confidential Lanterman Act information may be disclosed

> (c) To a protection and advocacy agency established pursuant to Section 4901, to the extent that the information is incorporated within . . .
>
> (2)An *unredacted citation report*, unredacted licensing report, unredacted survey report, unredacted plan of correction, or unredacted statement of deficiency of the State Department of Public Health, prepared by authorized licensing personnel or authorized representatives described in subdivision (n). This information shall remain confidential and subject to the confidentiality requirements of subdivision (f) of Section 4903.

(Welf. & Inst. Code, § 5328.15, subd. (c) [emphasis added]; see also Welf. & Inst. Code, §§ 4514, subd. (v), and 4903, subd. (h) [containing identical language].) Obviously, if the LTC trumped the Lanterman Act in the manner argued by CIR, there would have been no need for the Legislature, in 2012, to *authorize the production of citation records to certain disability advocates in unredacted form.* Put simply, this amendment would not have been necessary if the protection and advocacy agency could have obtained the confidential information via a CPRA request.

b. Redactions from the Citations Are Mandated as an Implied Exception to Disclosure under the LTC.

The court below also could have found a redaction requirement by construing the Lanterman Act as an implied exception to disclosure under the LTC. An implied exception is the appropriate method of reconciling two statutes where enforcement of the literal language would require performance of an impossible, impracticable, or futile act. (*Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 536.) Courts will recognize an implied exception when there is no other way to reconcile the purposes of two statutes. (*Ibid.*)

For example, in *Looney*, the appellate court reconciled Code of Civil Procedure section 36—which allows terminally ill plaintiffs to move for accelerated trial dates—and Code of Civil Procedure section 425.13—which requires plaintiffs to bring motions to add punitive damages claims to medical malpractice actions no less than nine months before their first trial dates—by holding that section 36 is an implied exception to section 425.13. (*Looney v. Superior Court, supra*, 16 Cal.App.4th at p. 536.) And even before the enactment of Code of Civil Procedure section 583.340, subdivision (c) in 1984, this Court recognized an implied exception to the mandatory five-year deadline to bring cases for trial, where complying

would be impossible, impracticable, or futile. (*Ibid.*; *Moran v. Superior Court* (1983) 35 Cal.3d 229, 237-238.)

Finding an implied exception is consistent with well-established principles of statutory construction because it gives effect to all provisions of the two statutes *when possible*. (*Pacific Palisades Bowl Mobile Estates LLC* (2012) 55 Cal.4th 783, 805 [when two codes are construed, they "must be regarded as blending each other and forming a single statute" and they "must be read together and so construed as to give effect, *when possible*, to all the provisions thereof."].) In this case, applying the doctrine of implied exception effectuates the purposes of both statutes without doing violence to either.

In sum, the court of appeal's decision to permit redaction under the Lanterman Act is amply supported by statute and by classic rules of statutory construction.

2. CIR's Remaining Arguments Fail.

CIR also argues that the court of appeal's decision will create confusion and problems for agency compliance because the decision will create a two-tiered system of LTC enforcement; the decision applies to CPRA requests but not to the posting of citations; the agency will improperly withhold information because it has complete discretion on what it will disclose; the potential for civil liability under the Lanterman Act will result in overly aggressive redactions; and the public will have inadequate access to information from Public Health's on-line consumer service system. (Petn. for Review, pp. 5-6, 19-20, 24-29.) CIR's concerns about the harms are unfounded, they are based on pure speculation, and there is no evidence that they will occur.

In any event, CIR's fears are not ripe for this Court's review because the record has not yet been developed. CIR did not raise its concerns to the court of appeal and the court of appeal did not address them. The court of

appeal only recently issued its decision and there has been insufficient time to see if any of CIR's concerns will materialize. Because CIR's assertions are premature and should be allowed to percolate further, this Court should deny the petition for review.

Finally, CIR overstates the number of people that this decision affects. The decision only applies to a small subclass of long-term care patients—individuals with developmental disabilities or mental illness. For the vast majority of long-term care patients, including those typically found in skilled nursing facilities, the LTC's public disclosure provisions remain unaffected.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Dated: December 9, 2013

Respectfully submitted,

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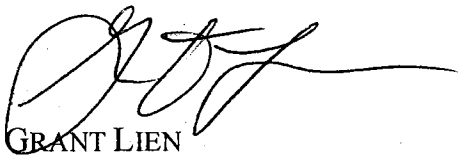

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 4225 words.

Dated: December 9, 2013

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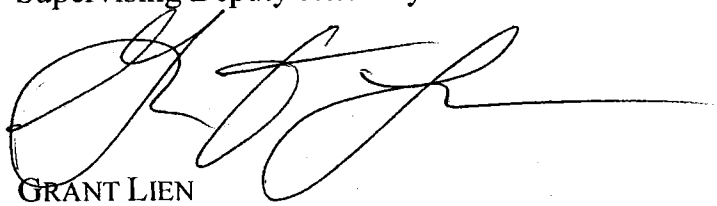

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Center for Investigative Reporting v. Department of Public Health**
No.: **S214679**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 9, 2013, I served the attached **ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 9, 2013, at Sacramento, California.

Wanda Thissen
Declarant

Wanda Thissen
Signature