

S267205

No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NEVADA POLICY RESEARCH INSTITUTE, dba
TRANSPARENT CALIFORNIA
Petitioner/Appellant,

v.

CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM;
CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION;
CALIFORNIA PROFESSIONAL FIREFIGHTERS; CAL FIRE LOCAL 2881;
AND CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN

Respondents and Intervenors/Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT,
Case No. C091543

From Sacramento County Superior Court
Case No. 34-2018-80002962-CU-WM-GDS
Assigned to Judge Laurie M. Earl, Department 25

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

This Court has long held that the right of taxpayers to see how the government is spending their money is fundamental, both supported by the California Public Records Act (“CPRA”) and enshrined in the state Constitution. Attempts by government agencies, however, to slow play the disclosure of public records prompted the Legislature to replace the usual, often lengthy appeal process with writ review. The legislative objective was to ensure speedy public access to vital information through a more effective appellate remedy. Yet in cases where parties timely but incorrectly file an appeal beyond the writ petition deadline, California appellate courts differ on whether they have the discretion to treat the appeal as a petition for writ of mandate under limited circumstances. This lack of uniformity merits this Court’s scrutiny to resolve not only the conflicting case law, but also to ensure that an issue of significant public importance in the instant case, i.e. whether the CPRA mandates disclosure of the type of benefit (service, disability, industrial disability) received by thousands of individuals collecting taxpayer-funded pensions, is resolved on its substance and not its form.

Accordingly, NPRI asks this Court to determine whether appellate courts have the discretion to treat an appeal from a non-appealable order as a writ petition under extraordinary circumstances, notwithstanding the statutory time frame set forth in Government Code Section 6259(c) for filing a writ petition.

INTRODUCTION

NPRI is not the first party to mistakenly file an appeal of a non-appealable order denying a public records disclosure request, when a petition for writ of mandate was the proper mechanism to secure appellate review. *See, e.g.*, Government Code Section 6259(c). Courts of Appeal in various contexts have previously considered whether they have the discretion to treat an appeal as a petition for writ relief, and thus address the merits of the challenge, with inconsistent results. Based on a review of the appellate decisions that in some way address the discretion of the appellate courts to convert an appeal to a writ

petition, two conflicting rules emerge. Courts have held that the failure to file a writ petition within the statutory time frame is fatal because the time limits for writ review are jurisdictional. *See e.g., People v. Superior Court (Brent)*, 2 Cal.App.4th 675, 684 (1992). Other courts have exercised their discretion to treat an appeal from a non-appealable order as a petition for writ relief, under appropriate circumstances. *See e.g., MinCal Consumer Law Group v. Carlsbad Police Depart.*, 214 Cal.App.4th 259, 263-265 (2013); *Coronado Police Officers Assn. v. Carroll*, 106 Cal.App.4th 1001, 1006 (2003); *H.D. Arnaiz, Ltd. v. County of San Joaquin*, 96 Cal.App.4th 1357, 1366-1367 (2002).

The unexplained decision by the Third Appellate District in the instant matter to deny NPRI's Motion for Leave to File Petition for Extraordinary Writ of Mandamus and Petition for Extraordinary Writ of Mandamus ("Motion for Leave") also specifically conflicts with those appellate courts that have permitted conversion, or at least recognized their right to do so, in the public records context, where the briefs and the record contain in substance all of the elements for an original mandate proceeding and extraordinary circumstances justify the exercise of that power. *See MinCal Consumer Law Group v. Carlsbad Police Depart.*, 214 Cal.App.4th at 263-265; *Coronado Police Officers Assn. v. Carroll*, 106 Cal.App.4th at 1006.

This Court has never ruled, in the public records context, on the issue of whether the Court of Appeals has discretion, and if so under what circumstances, to treat a timely appeal mistakenly made from an immediately reviewable but non-appealable order as a petition for writ relief and thus determine the merits of the challenge to the order. NPRI respectfully asks it to do so now.

STATEMENT OF THE CASE

NPRI seeks through its public records request to aid the public's understanding of a system that consumes billions of tax dollars annually. To ascertain whether individual retirees were receiving service or disability retirement benefits, NPRI made its first public records request of CalPERS on December 28,

2016. (Joint Appendix¹ (“JA”), Vol. 1, pp. 20-21.) The request sought CalPERS’ 2016 pension payout report, inclusive of information regarding the final average salary and benefit type (service, disability, or industrial disability) paid to pension recipients. (*Id.*)

Relying on California Government Code Sections 6254(c) and (k), 6255, and 20230, CalPERS initially withheld information regarding both the final average salary of pension recipients and the benefit type as purportedly exempt from disclosure. (JA, Vol. 1, pp. 23-24.) NPRI contested CalPERS’ claimed exemption, and on August 18, 2017, CalPERS provided the requested final average salary information but still withheld production of the benefit type information for individual retirees. (JA, Vol. 1, pp. 35-36, 38.)

Following a series in the *Los Angeles Times* that detailed workers’ compensation and pension fraud by Los Angeles City police and firefighters, uncovered in part through the benefit type data point produced by the Los Angeles City Employees Retirement System, NPRI on April 20, 2018 renewed its request of CalPERS for information regarding the type of benefit received by pension recipients. (JA, Vol. 1, pp. 28-30.) In response, CalPERS agreed to provide aggregate data related to benefit type, but the information disclosed did not identify the type of benefit received by any particular retiree, as requested. (JA, Vol. 1, p. 28.)

Following CalPERS’ refusal to provide the individualized records, on August 17, 2018, NPRI filed its Verified Petition for Writ of Mandate; Complaint

¹ In support of the proceedings in the Third Appellate District, Appellant and Respondents agreed to the filing of a joint appendix, which was submitted to the Court of Appeal on November 23, 2020. In denying Appellant’s motion for permission to file the petition for writ of mandamus, the Court of Appeal also ordered the joint appendix rejected. Contemporaneous with this Petition, NPRI intends to seek permission of the presiding justice, for good cause, to attach the proposed petition and joint appendix for consideration. Cal. Rules of Court, Rule 8.504(d)(4).

for Injunctive & Declaratory Relief in the Superior Court. (JA, Vol. 1, pp. 8 – 38). On November 6, 2019, the Superior Court entered its Order After Hearing on Petition for Writ of Mandate finding that the benefit type data point sought by NPRI is confidential, pursuant to Government Code Section 20230. (See JA, Vole. 2, pp. 493-516). On December 11, 2019, the Superior Court entered its Judgment Denying Petition for Writ of Mandate denying NPRI’s petition in its entirety and entered judgment in favor of CalPERS and Intervenors. (JA, Vol. 2, pp. 517-553). On December 20, 2020, CalPERS served a Notice of Entry of Judgment of Order. (JA, Vol. 3, pp. 563-602).

On January 31, 2020, NPRI mistakenly filed a timely Notice of Appeal in lieu of a writ petition. (JA, Vol. 3, pp. 603-605). Thereafter, on October 5, 2020, NPRI sought a brief extension of time and filed a Stipulation and Order Regarding Extension of Time to File Appellant’s Opening Brief. (JA, Vol. 3, pp. 614-616). On November 23, 2020, instead of an opening brief, NPRI filed a Petition for Extraordinary Writ of Mandamus Pursuant to Government Code Section 6259 of the California Public Records Act (“Petition”), with Memorandum of Points and Authorities, and Joint Appendix filed under separate cover. NPRI submitted the writ petition in lieu of an opening brief in an effort to address its procedural error.

On December 11, 2020, at the request of the Court, NPRI filed Appellant’s Motion for Leave to File Petition for Extraordinary Writ of Mandamus and Petition for Extraordinary Writ of Mandamus (“Motion for Leave”), which moved the Third Appellate District to convert the initial appeal to a petition for writ relief and consider it on the merits. The Court denied the Motion for Leave, without explanation, on January 11, 2021, and dismissed the appeal, on its own motion, as an appeal from a non-appealable order. (See **Exhibit A**). It further rejected the Petition for Extraordinary Writ of Mandamus and Joint Appendix for filing in the record. (See **Exhibit B**).

LEGAL ARGUMENT

I. This Court Should Grant Review in This Case to Settle the Conflicting Authority Regarding Whether Appellate Courts have Discretion, Consistent with the Public Policy Underlying the CPRA, to Treat an Appeal from a Non-appealable Order as a Writ Petition Under Limited Circumstances and Consider It on the Merits.

The CPRA is based on the principles that “[i]mplicit in the democratic process is the notion that government should be accountable for its actions” and that, “to verify accountability, individuals must have access to government files” as a check against the arbitrary exercise of power and secrecy in the political process. *CBS, Inc. v. Block*, 42 Cal.3d 646, 651 (1986). In furtherance of this vital purpose, the California Constitution provides that each statute, court rule, and other authority “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, subd. (b)(2).

Yet in contravention of this clear policy prioritizing government transparency, conflicting authority in the appellate courts has resulted in inconsistent access to appellate review of orders denying public records requests when a party seeks relief through the wrong procedural vehicle. This Court, which has never ruled on this issue in the public records context, should determine whether appellate courts have the discretionary authority to treat a timely appeal from a non-appealable order as a petition for writ of mandate under limited circumstances and thus determine the merits of the challenge to the order.

A. The Applicability of Government Code Section 6259.

An order of the superior court compelling or denying disclosure under the CPRA is not appealable, rather it is subject to immediate review by an original writ proceeding. Section 6259(c); *see also Filarsky v. Superior Court*, 28 Cal.4th 419, 426 (2002). The Legislature’s purpose in replacing the usual appeal process with writ review was not to impair judicial power, but instead to expedite the process and make the appellate remedy more effective. *Filarsky v. Superior*

Court, 28 Cal.4th at 426-27; *Powers v. City of Richmond*, 10 Cal.4th 85, 112 (1995); *Times-Mirror Co. v. Superior Court*, 53 Cal.3d 1325, 1336 (1991). The California Supreme Court in *Powers v. City of Richmond* explained, "... the Legislature's purpose in replacing review by direct appeal with review by extraordinary writ was in no sense to disadvantage litigants seeking review of PRA decisions or to constrict the power of the Courts of Appeal to correct errors in those decisions." 10 Cal.4th at 112.

The time period for seeking writ review under Government Code Section 6259 begins to run upon entry of "an order of the trial court." *City of San Jose v. Superior Court*, 74 Cal.App.4th 1008, 1016 (1999). Section 6259(c) shortens the general 60-day writ filing period to a 20-day period, with 5 days added if served by mail, and an additional 20 days for good cause shown. Government Code Section 6259(c); *see also Powers v. City of Richmond*, 10 Cal.4th 85 at 112. These truncated time periods are intended for the benefit of the party seeking review. *See, e.g., Powers v. City of Richmond*, 10 Cal.4th at 112; *Times-Mirror Co. v. Superior Court*, 53 Cal.3d 1325 at 1336.

In the instant case, the superior court's final order was noticed by mail on December 20, 2019. With 5 days for mailing, the filing deadline to seek writ relief was January 14, 2020, with an extension possible until February 3, 2020. NPRI mistakenly filed a notice of appeal in lieu of a writ petition on January 31, 2020, well within the allowable time period for an appeal but more importantly, well within the allowable time period for the filing extension contemplated by Section 6259(c). NPRI would obviously have sought and obtained the appropriate extension had it not made the honest mistake of seeking appeal, as it had previously done in similar cases in Nevada.

B. California Appellate Courts Disagree as to Whether They Have the Authority to Treat a Timely Appeal of a Non-appealable Order as a Petition for Writ Relief Absent Strict Compliance With Section 6259(c) for the Filing of a Writ Petition.

Some California appellate courts acknowledge and exercise their discretion to treat an appeal of a non-appealable order as a petition for writ relief and thus address the merits of the challenge, where the briefs and the record contain the necessary elements of a writ proceeding and extraordinary circumstances justify the exercise of that power. *See e.g. H.D. Arnaiz, Ltd. v. County of San Joaquin*, 96 Cal.App.4th at 1366-67. The Second District, in *City of Gardena v. Rikuo*, acknowledged this authority, though did not exercise it, where the defendant conceded at oral argument that it failed to seek to have its appeal treated as a petition for extraordinary relief. 192 Cal.App.4th 595, 599 (2011). Similarly, the Third District has not only found it is appropriate to treat an appeal as a petition for writ of mandate, it did so in *H.D. Arnaiz, Ltd. v. County of San Joaquin*, finding it would have been a waste of judicial resources to hold a trial, the record was adequate, the trial court would be no more than a nominal party, and the appealability of the order was not clear. 96 Cal.App.4th at 1366-67.

Conversely, the Fifth District in *People v. Superior Court (Brent)*, held that the failure to timely file a writ petition within the statutory time limit, even by a single day, was fatal because the time limits for writ review are jurisdictional. 2 Cal.App.4th at 684. Although the forfeiture matter tied to illegal drug activity involved an untimely writ petition, and not a request of the court to exercise its discretion to treat an appeal as a petition for writ of mandate, it was cited by the Fourth District in a public records case for the proposition that statutory writ deadlines are jurisdictional and may not be disregarded. *See e.g. MinCal Consumer Law Group v. Carlsbad Police Dept.*, 214 Cal.App.4th at 265.

Tellingly, in *MinCal*, the only case with a fact pattern analogous to the instant matter, however, the Fourth District fully recognized the right to disregard the jurisdictional time limit set forth by Section 6259(c), although ultimately

declining to do so. *See MinCal*, 214 Cal.App.4th at 266 (finding it will not consider MinCal’s appeal as a writ petition where it “presents no extraordinary or compelling reason for us to disregard the jurisdictional time limit” and “fails to convince us that our discretion should be exercised in MinCal’s favor.”).

Central to the analysis in cases involving the CPRA, like *MinCal* and the instant matter, is whether a refusal to exercise such discretion will leave the requester without any remedy at all, other than to propound another request for the same documents from the same government entity and initiate yet another round of litigation to reach the issues that are already fully briefed and pending before the court. *Coronado Police Officers Assn. v. Carroll*, 106 Cal.App.4th at 1006. In *Coronado Police Officers Assn.*, the Fourth District reached the merits of the appeal by treating it as a petition for extraordinary writ because the brief and record contained in substance all of the elements for an original writ proceeding, and it found “extraordinary circumstances justifying the exercise of that **discretionary** power,” which included, but were not limited to, the Association’s filing of the notice of appeal within the statutory time period for seeking writ review. 106 Cal.App.4th at 1006 (emphasis added).

Although not a published opinion, and cited here solely to show the recurrence of an issue that remains unresolved,² the Fourth District in *Dyche v. City of San Diego*, held that it had the discretion to treat an appeal from a nonappealable order as a petition for writ relief and reach a decision on the merits under limited circumstances, notwithstanding the appellant’s failure to file the appeal within the statutory time frame for filing a writ petition. *See Dyche v. City of San Diego*, Court of Appeal, Fourth Appellate District, D053552. The Fourth District explained that this exercise of discretion was, “... consistent with, the

² NPRI cites to *Dyche v. City of San Diego*, an unpublished opinion, not to rely on it for its reasoning, but instead to support the argument that the instant matter should be heard on its merits to resolve an existing conflict in the law. *See e.g. Mangini v. J.G. Durant Int’l*, 31 Cal.App.4th 214, 219 (1994).

policies underlying the general requirement for writ review rather than appellate review or orders compelling or denying disclosures under the Act because it facilitates expedited proceedings to determine the public agency's obligation to disclose records within the purview of the Act.”

In furtherance of the underlying policy considerations of the CPRA, the split of authority amongst the Courts of Appeal merits this Court's review to determine whether appellate courts have the discretion to treat an appeal from a non-appealable order as a writ petition under extraordinary circumstances, notwithstanding the statutory time frame set forth in Government Code Section 6259(c) for filing a writ petition.

C. The Underlying Public Records Request Raises an Issue of Significant Public Importance Which Should Be Resolved on its Merits.

It is axiomatic that Californians have the right to see what the government is doing with their money. And, unless this Court intervenes, NPRI, and by extension, the citizens of California will be denied appellate review of the superior court's decision allowing CalPERS to withhold public records documenting how taxpayer-funded benefits are calculated and distributed. For more than four years, CalPERS has denied NPRI's lawful request for records showing the type, i.e. service, disability or industrial disability, of retirement benefit received by those collecting pension benefits. To provide the public with the information it deserves and to fulfill the vital purpose of the CPRA, this Court should resolve the split of authority at issue herein to permit the substantive review of NPRI's Petition for Extraordinary Writ of Mandamus.

Although NPRI can only speculate regarding the basis for the denial of its Motion for Leave, there can be no dispute that its proposed Petition for Extraordinary Writ of Mandamus and Joint Appendix submitted to the Third District prior to the Motion for Leave contained all of the elements necessary under the California Rules of Court for an original mandate proceeding. Thus, the completeness of the available record is not in question. Further, under the

circumstances of the instant case, without the appellate court's exercise of discretion to treat the initial appeal as a writ, NPRI will have no remedy, other than to make another CPRA request for the same documents from CalPERS and begin again at the trial court level to reach the same issues that are fully briefed and available for appellate review. Given the practical realities of the instant matter, the Third District's decision declining to exercise its power to reach the merits, impeded rather than advanced both judicial or party economy. Finally, to the extent NPRI would be barred by *res judicata* from making a second request for the same documents, this would only add to the extraordinary circumstances that justify the exercise of discretion to treat the initial appeal as a writ.

Accordingly, the Third District's exercise of discretion in this case would in no way contravene, and would in fact be entirely consistent with, the general requirement for writ review rather than appellate review of orders denying disclosures under the CPRA, because it will facilitate expedited proceedings to determine the public agency's obligation to disclose records within the purview of the CPRA. For all of these reasons, this Court's review would further the public interest regarding an issue of significant public importance.

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CONCLUSION

For all of the reasons set forth above, NPRI respectfully requests that this Court grant the Petition for Review and resolve the split amongst the appellate courts to determine whether they have the discretionary authority, in the public records context, to treat a timely appeal from a non-appealable order as a petition for writ of mandate under limited circumstances and thus determine the merits of the challenge to the order.

DATED: February 22, 2021

FOX ROTHSCHILD LLP

By: /s/ Kevin Sutehall

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CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.504(d)(1), the text of this petition consists of 4,320 words as counted by Microsoft Word's "Word Count" function.

DATED: February 22, 2021

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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in Las Vegas, Nevada. My business address is 1980 Festival Plaza Drive, Suite 700, Las Vegas, Nevada 89135.

On February 22, 2021, I electronically filed and served the foregoing **PETITION FOR REVIEW** on the interested parties in this action as follows:

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The Hon. Laurie M. Earl
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Third District Court of Appeal
914 Capital Mall
Sacramento, California 95814

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California Association of Highway Patrolmen*

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

Executed on February 22, 2021, at Las Vegas, Nevada.

/s/ Natasha Martinez
Natasha Martinez

EXHIBIT A

**COURT OF APPEAL, THIRD APPELLATE
DISTRICT'S ORDER DENYING MOTION
FOR LEAVE TO FILE WRIT PETITION
C091543
JANUARY 11, 2021**

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

NEVADA POLICY RESEARCH
INSTITUTE,

Plaintiff and Appellant,

v.

CALIFORNIA PUBLIC EMPLOYEES
RETIREMENT SYSTEM,

Defendant and Respondent;

CALIFORNIA PROFESSIONAL
FIREFIGHTERS et al.,

Interveners and Respondents.

C091543

Sacramento County

No. 34201880002962CUWMGDS

BY THE COURT:

Appellant's motion for leave to file a petition for writ of mandamus is denied. The clerk of this court is directed to reject the appellant's petition and appendixes submitted on November 23, 2020, and the respondents' joint preliminary opposition submitted on November 30, 2020.

Further, on the court's own motion, the appeal filed on January 31, 2020, is dismissed as an appeal from a nonappealable order.


BLEASE, Acting P.J.

cc: See Mailing List

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: Nevada Policy Research Institute v. California Public Employees Retirement System
C091543
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EXHIBIT B

**REJECTION NOTICES OF PETITION FOR
EXTRAORDINARY WRIT OF MANDAMUS
AND JOINT APPENDIX
C091543
JANUARY 11, 2021**

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