Case No. C093542

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

Almond Alliance of California, California Association of Pest Control Advisers, California Citrus Mutual, California Cotton Ginners and Growers Association, California Farm Bureau Federation, Western Agricultural Processors Association, and Western Growers Association,

Plaintiffs and Respondents,

v.

California Fish and Game Commission and California Department of Fish and Wildlife,

Defendants and Appellants,

Xerces Society for Invertebrate Conservation, Defenders of Wildlife, and Center for Food Safety,

Intervenors and Appellants.

Intervenor-Appellants' Opening Brief

On Appeal from the Superior Court for the State of California, County of Sacramento, Case No. 34-2019-80003216
Hon. James Arguelles

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under California Rule of Court 8.208.

Dated:
Sept. 13, 2021

Respectfully submitted,

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INTRODUCTION

The California we know today depends on pollinators, including and especially bees. Pollinators are a pillar of the state's mighty agricultural sector—one in three mouthfuls of food that humans eat requires pollination. Pollinators are also responsible for natural wonders like the wildflower fields in Carrizo Plain National Monument and the serene meadows that enliven the Sierra Nevada. Without pollinators, California would lie dusty and barren, devoid of the flowering fields that make this state an agricultural powerhouse and the exemplar of natural beauty.

Yet for all the benefits Californians reap from vital pollinators, many of them are in jeopardy. This case concerns four such species—the Crotch, Franklin, Suckley Cuckoo, and Western bumble bees (the "California bumble bees"). These bees are indigenous to California and are essential pollinators of California's farmed and wild plants. And they are on the brink of extinction. Recognizing the urgency of preserving these critical species, in June of 2019 the California Fish and Game Commission designated the California bumble bees as a "candidate" species under the California Endangered Species Act

(CESA), with the potential to be listed as "endangered" or "threatened" after further review. This case is about the lawfulness of that designation—specifically, whether CESA protects insects, including the California bumble bees. It does.

The central question here is one of statutory interpretation. CESA is part of the Fish and Game Code, Section 45 of which defines "fish" to include "invertebrates." The Fish and Game Code states that its definitions govern the entire code, including CESA. Because CESA protects "fish," CESA protects invertebrates, including the California bumble bees. Contemporaneous bill analyses from the California Department of Fish and Wildlife confirm this reading.

The Superior Court avoided this straightforward conclusion, relying on colloquial meanings instead of the plain statutory text. The court concluded that Section 45's definition of "fish" refers to "marine" invertebrates, and therefore does not include terrestrial insects such as bumble bees. But Section 45 says nothing about "marine" invertebrates, and it includes mollusks and crustaceans, of which there are tens of thousands of species that have no association with marine environments. Indeed, the Commission has already listed one exclusively

terrestrial invertebrate as "threatened" and two freshwater invertebrates as "endangered" under CESA, facts the Superior Court ignored.

In fixating on what it thought CESA ought to say, the Superior Court ignored more than the Legislature's words. The court also ignored binding precedent that requires courts to liberally construe CESA to advance the statute's core conservation purpose. That requirement is in place for good reason. Once a species vanishes, it is impossible to recover. Losing the California bumble bees would be especially devastating. They are, like many insects, "keystone species," playing a role of outsized importance in their natural environments. Accordingly, failing to protect the California bumble bees would not only violate CESA; it would also break a vital link in the fragile chain of the ecosystems upon which all Californians depend.

The Court should reverse the trial court's order and affirm the California Fish and Game Commission's legal authority to list the California bumble bees under CESA.

STATEMENT OF APPEALABILITY

This appeal is from a final trial court judgment and is authorized by Code of Civil Procedure section 904.1(a)(1).

BACKGROUND

I. Legal background

A. CESA's purpose, listing process, and protections

CESA declares that it is "the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat," § 2052, because California's wildlife is "of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this state," § 2051(c).[1]

Before a species can benefit from CESA's protections, it must be listed pursuant to the petition process. §§ 2071–2075.5. The listing process begins when either the California Department of Fish and Wildlife ("the Department") or any "interested person" petitions the Commission to list a species as "endangered" or "threatened." §§ 2071, 2072.7. Once a petition is

[1] All section citations are to the California Fish and Game Code ("the Code") unless otherwise specified.

received, the California Fish and Game Commission ("the Commission") refers it to the Department for review. §§ 2071–2073.5; *see also* 14 C.C.R. § 670.1(d) (requirements for listing petitions). The Department must evaluate the petition and advise the Commission on whether the petition contains sufficient information to suggest the requested listing may be warranted. § 2073.5. The Commission then holds a public hearing on the petition and determines whether to accept the petition for consideration. § 2074.2. If the Commission accepts a petition for consideration, then the species becomes a "candidate species" receiving CESA's full protections until the Commission makes a final listing decision. § 2074.4. To make a final decision on listing a species as "endangered" or "threatened," the Commission and the Department conduct a formal review process of the species' status. §§ 2074.4–2075.5.

CESA protects listed species in four ways: prohibiting "take," imposing civil liability for "take," restricting public agency actions that would harm listed species or their habitat, and authorizing recovery plans and voluntary conservation programs for private citizens.

First, CESA prohibits the import, sale, possession, or "take" of "endangered," "threatened," and "candidate species" by any person or public agency. § 2080. "Take" is defined as to "hunt, pursue, catch, capture, or kill." § 86.

Second, the Fish and Game Code authorizes the Department to impose civil liability on violators to enforce the "take" prohibition. For instance, the Department may fine those who "[u]nlawfully export, import, transport, sell, possess, receive, acquire, or purchase . . . any plants, insects, or other species listed pursuant to the California Endangered Species Act." § 2582(a)(2).

Third, CESA prohibits public agencies from approving projects that "would jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of [essential] habitat." § 2053(a). State agencies are also required to consult with the Department under the California Environmental Quality Act on all projects and to implement reasonable alternatives that the Department recommends to conserve impacted species. § 2053(b).

Fourth, CESA empowers the Department to develop and implement "recovery plans for the conservation and survival of [listed] species" if the Legislature appropriates funds or if other funding is available. § 2079.1(a). The Department may also approve programmatic Safe Harbor Agreements with landowners—including private citizens, municipalities, and tribes—who have a CESA-protected species' current or potential habitat on their land. §§ 2089.2–2089.25. In these agreements, landowners manage their land to benefit the listed species and the Department authorizes "incidental take," so long as the species experiences net conservation benefits. § 2089.6.

B. "Endangered," "threatened," and "candidate" species protected by CESA

CESA defines "endangered," "threatened," and "candidate species" as "a species or subspecies of bird, mammal, fish, amphibian, reptile, or plant" close to or threatened with extinction. §§ 2062, 2067–2068. The provisions of the Fish and Game Code ("the Code") that codify CESA do not define these terms. *See* §§ 2060–2068. Instead, CESA relies on the Code's definitions of "bird," "fish," and "mammal." §§ 22, 45, 54. The Code defines "fish" as "a wild fish, mollusk, crustacean,

invertebrate, amphibian, or part, spawn, or ovum of any of those animals." § 45. Because the Code provides that the definitions in Section 1 through 89.5 "govern the construction of this code and all regulations adopted under this code," § 2, Section 45's definition of "fish"—which includes invertebrates—applies to that term as it is used in CESA's "endangered," "threatened," and "candidate species" provisions.

Another provision of the Code explicitly states that CESA protects insects. In 1988, the California Legislature established civil liability for individuals who "[u]nlawfully export, import, transport, sell, possess, receive, acquire, or purchase . . . any plants, *insects*, or other species listed pursuant to the California Endangered Species Act." § 2582(a)(2) (emphasis added). The Code instructs that provisions like Section 2582 are "construed as restatements and continuations" of CESA, not as separate enactments, because they "relat[e] to the same subject matter" in the Code. § 3. Accordingly, Section 2582 confirms that CESA protects insects.

C. CESA's agricultural exemptions

The Code provides agricultural exemptions to CESA's "take" prohibition. §§ 2086–2087. In 1997, the Legislature

enacted Section 2087 to shield "farmer[s'] or rancher[s'] . . . otherwise lawful routine and ongoing agricultural activities . . ." from liability for accidental take. § 2087; *see also* 14 C.C.R. § 786.1 (defining "routine and ongoing agricultural activities"). A second exemption authorizes any incidental take resulting from agricultural activities if a farm or ranch participates in a voluntary conservation program approved by the Department. § 2086.

D. CESA's legislative history

In 1970, the Legislature enacted CESA, changing the Code's then-piecemeal protections for individual species to comprehensive protection of all animals threatened with extinction. The Legislature found that "many species of animals are endangered" because of "habitat loss, commercial exploitation, disease, predation, and other factors." 1970 Cal. Stat., c. 1510, § 3. The 1970 version of CESA authorized the Commission to designate "endangered" and "rare animals"—now defined as "threatened"—and prohibited their import, sale, or "take." *Id.* The Legislature defined "endangered" and "rare animals" as "a species or subspecies of birds, mammals, fish, amphibia, or reptiles" close to or threatened with extinction. *Id.*

At the time of CESA's enactment, the Legislature had already defined "fish" to include "mollusk[s], crustacean[s], [and] invertebrate[s]" the previous year. § 45. *See* Appendix of Intervenors-Appellants Xerces Society for Invertebrate Conservation, et al. ("App."), 138–39 (expanding Section 45 in 1969 to protect more animals, and specifically "to include invertebrates and amphibians"). The Legislature did not change the Code's definition of "fish" when it enacted CESA.

In 1984, the Legislature amended CESA to strengthen the law's protections for native animals and plants. *See* 1984 Cal. Stat., cc. 1162, 1240 (A.B. 3309, 3270). The Department twice offered its view of the Legislature's amendment of CESA. *See* App. 211, 218. As relevant here, the Department wrote that, although amending CESA to explicitly include "invertebrates" could clarify the Commission's authority to protect insects, doing so was unnecessary because Section 45 already defined "fish" to include "invertebrates." *Id.* The Department cautioned that, if the Legislature amended CESA to add the word "invertebrates" to the provisions that identify the species eligible for CESA's protections, the Legislature would also need to amend "other references in the Fish and Game Code to the various groups of

animals . . . to add the term invertebrates" to make the Code consistent. *Id.*

Ultimately, the Senate removed an amendment to explicitly include invertebrates in CESA, on the ground that it was unnecessary. App. 220–21. One Senate Committee report, commenting on the removal of that amendment, opined that, as amended, CESA would not cover invertebrates. App. 397. The Senate Committee report, however, failed to discuss Section 45's definition of "fish," the Department's bill analyses, or the Commission's then-recent listing of three invertebrates—the Shasta Crayfish, the California freshwater shrimp, and the terrestrial Trinity bristle snail—as "threatened" or "endangered species." App. 257–62.

II. Factual background

A. Native bumble bees are vital to human nutrition and wildlife biodiversity.

Native bumble bees are generalist pollinators, and thus play a central role in providing humans nutritious food and maintaining wildlife biodiversity. The extinction of the California bumble bees would weaken an important link in the

ecological chain upon which our food production and ecosystems depend.

Adequate, human nutrition requires an abundance of pollinators; one in three mouthfuls of food requires pollination. Certified Administrative Record ("AR") 6; AR 264. Many vital nutrients are found almost exclusively in insect-pollinated plants, directly linking human health with pollinators' survival. *Id.* Bumble bees, including the four species at issue in this case, are among agriculture's most valuable pollinators. Because bumble bees can fly in cool temperatures and in low light, they pollinate for more hours of the day and in more inclement weather than honey bees. AR 23. Bumble bees perform an especially effective "buzz pollination" to release trapped pollen from plants that insects such as the honey bee cannot pollinate, like tomatoes and blueberries. *Id.* Wild bumble bees also pollinate other California crops including peppers, melons, and squash. AR 23–24.

Because strong bumble bee populations are critical to nutritious and robust food supplies, wild bumble bee decline threatens reliable food production in California. AR 264. Many counties in California, shown below in red, have large areas of pollinator-dependent crops but low wild bee abundance. AR 321.

This supply-demand mismatch for pollinators increases farming costs and risks interrupting food production. *Id.*

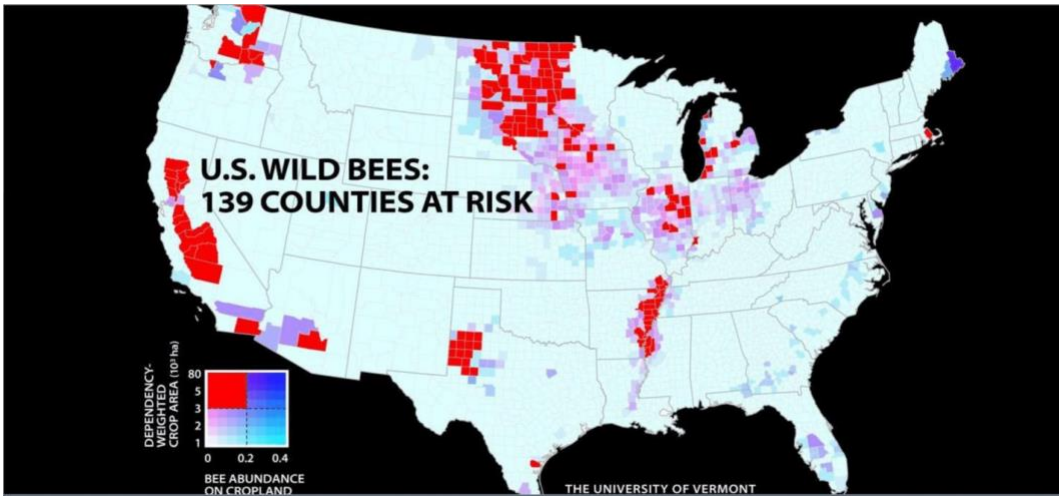


Figure 1: Map showing counties in which low wild bee abundance corresponds to large areas of pollinator-dependent crops. AR 321 (citing Insu Koh et al., *Modeling the Status, Trends, and Impacts of Wild Bee Abundance in the United States*, 113 Proc. of the Nat'l Acad. of Sci. 140, 141 fig.1 (2016)).

Abundant bumble bees are also vital to California's non-agricultural wildlife. Bumble bees, along with other wild bees, are keystone species, meaning that other species depend on them. Indeed, more than 85 percent of flowering plants require pollination to reproduce. AR 286. Bumble bees also provide food for wildlife, directly or through the plants, fruits, and seeds they pollinate. AR 290. Bumble bees' impact on California's ecosystems is especially evident in the vast flowering fields of the Carrizo Plain and the mountain meadows of the Sierra Nevada.

AR 254; AR 917. These wild places could not exist without generalist pollinators like bumble bees, because insect-pollinated plant populations decline when bumble bee species go extinct. AR 31.

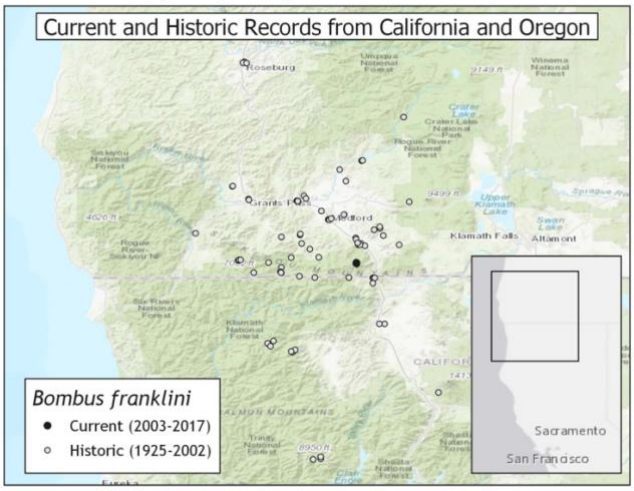
B. The California bumble bees are nearly extinct.

Despite their importance, the California bumble bees are quickly disappearing. To the detriment of human nutrition and wildlife biodiversity, the California bumble bees have each declined 57 to 77 percent on average between 2002 and 2012 compared to their pre-2002 levels. AR 8. Figure 2 visualizes this decline, showing the California bumble bees' distributions prior to 2002 in white, and their now sparse distributions between 2003 and 2017 in black.

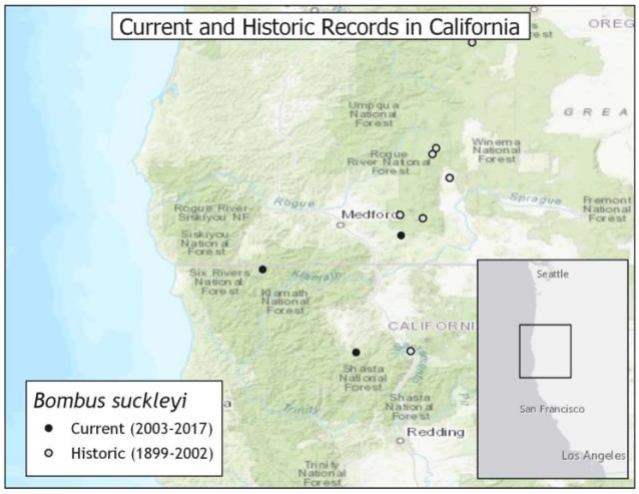
(continued next page)

Western bumble bee (*Bombus occidentalis occidentalis*) California Distribution

Franklin's bumble bee (*Bombus franklini*) Global Distribution



Suckley Cuckoo Bumble Bee (*Bombus suckleyi*) California Distribution



Crotch bumble bee (*Bombus crotchii*) Global Distribution

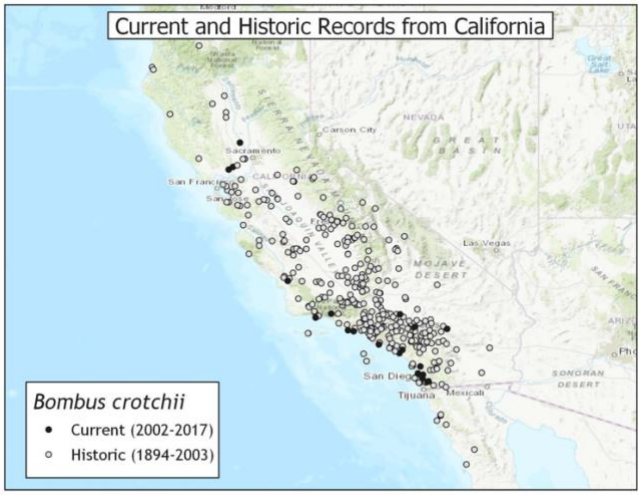


Figure 2: Declines in the California bumble bees' distributions. AR 114–16, 118. Black dots represent known occurrences between 2003 and 2017. White dots show known occurrences of the species between 1899 and 2002.

The California bumble bees are rapidly declining on each metric entomologists use to determine a species' status: extent of occurrence, persistence, and relative abundance, as shown by Figure 3. AR 8. Extent of occurrence (the total area in which a

species is found) and persistence (the proportion of the species' historical range that is currently occupied) together capture changes in the species' range between two time periods: pre-2002 and 2002 through 2012. Relative abundance measures the presence of one species compared to all the other species within a data set. Compared to pre-2002, the California bumble bees' relative abundances have each declined between 84 and 98 percent in 2002 through 2012, meaning that the California bumble bees are struggling far more than other bumble bees. AR 8.

Species	Historic Distribution	Range Decline: Extent of Occurrence	Range Decline: Persistence	Relative Abundance Decline	Average Decline	Reference
Crotch bumble bee (*Bombus crotchii*)	**United States** (CA) **Mexico** (B.C.)	25%	79%	98%	67%	Hatfield et al. 2015a
Franklin's bumble bee (*Bombus franklini*)	**United States** (CA, OR)	44%	67%	85%	65%	Hatfield 2018b, unpublished data
Western bumble bee, southern subspecies (*Bombus occidentalis occidentalis*)	**United States** (AZ, CA, CO, ID, MT, NE, NV, NM, OR, SD, UT, WA, WY) **Canada** (AB, BC, SK)	53%	33%	84%	57%	Hatfield 2018a, unpublished data
Suckley cuckoo bumble bee (*Bombus suckleyi*)	**United States** (AK, CA, CO, ID, MT, NY, ND, OR, SD, UT, WA, WY) **Canada** (AB, BC, MB, NL, NT, NS, ON, QC, SK, YT)	57%	84%	90%	77%	Hatfield et al. 2015c

Figure 3: Summary of decline in the range and relative abundance of the California bumble bees between recent (2002-2012) and historic (pre-2002) time periods. AR 8.

Just this summer the U.S. Fish & Wildlife Service listed the Franklin bumble bee as endangered under the federal

Endangered Species Act. 86 Fed. Reg. 47,221 (Aug. 24, 2021). The Franklin and Suckley cuckoo bumble bees are included as "critically endangered" on the International Union for the Conservation of Nature's Red List of Threatened Species. AR 63–64. Although the Western bumble bee subspecies that occurs in California has not yet been assessed, it also meets the Red List's criteria to qualify as endangered. AR 912. The International Union for the Conservation of Nature, a leading science-based conservation organization, maintains the Red List, which is the most comprehensive and authoritative inventory of species that need protection. AR 861; AR 963. In 2019, the International Union for the Conservation of Nature considered only six of forty-six North American bumble bee species to be endangered or critically endangered; this case will determine whether half of those six species receive the legal protection they desperately need. *Id.*

C. Recognizing that the California bumble bees are nearing extinction, the Coalition petitioned the Commission to list the bees as "endangered" under CESA.

Alarmed by the California bumble bees' near extinction, Intervenor-Appellants Xerces Society for Invertebrate

Conservation, Defenders of Wildlife, and the Center for Food Safety ("the Coalition") petitioned the Commission to list the bees as endangered under CESA. In October of 2018, the Coalition submitted a 119-page listing petition documenting the California bumble bees' rapid decline based on nearly two centuries of historical data. AR 1–119. The Commission referred the petition to the Department, accepted comments, and held a public hearing on the listing petition. AR 1019. The Department concluded that the petition "provides sufficient scientific information to indicate that the petition action may be warranted" and recommended that the Commission accept the petition. AR 831. In June of 2019, the Commission accepted the listing petition for further consideration under CESA and designated the California bumble bees as "candidate species." AR 1019.

Although the California bumble bees face many threats—habitat loss, increased pesticide use, disease, competition with managed honey bees, fire, fire suppression, loss of genetic diversity, and climate change, AR 37–62—we can still save them. Their listing under CESA would lead to a number of vital management practices, including identifying, protecting, and restoring high-quality habitat; promoting pollinator friendly

plants in field margins; limiting exposure to managed bees to prevent disease transmission; preventing managed honey bee use in high-quality native bumble bee habitat; and minimizing pesticide impact by, for instance, using the least toxic option and lowest effective application rate, applying when bumble bees are not active, limiting spray to crops, and reducing spray drift. AR 64–70. If the California bumble bees are listed as "endangered," CESA empowers the Department to save them through recovery plans, voluntary conservation programs with farmers and ranchers, and Safe Harbor agreements with other private landowners that employ these and other management practices.

Even if the California bumble bees are listed, CESA's agricultural exemption would prevent farmers and ranchers from incurring liability for incidental take of the bees resulting from routine agricultural activities. *See* § 2087. During the June, 2019, meeting at which the Commission accepted the Coalition's petition and decided to designate the California bumble bees as "candidate species," the Department's director stated that the agricultural exemption, along with its prosecutorial discretion and the ability to authorize "take" under Sections 2081 and 2084,

are "tool[s] [the Department] would want to embrace" to address any new regulatory uncertainty and minimize adverse effects on agricultural stakeholders. AR 988–89.

III. Procedural background

On September 9, 2019, Respondents the Almond Alliance of California, California Association of Pest Control Advisers, California Citrus Mutual, California Cotton Ginners and Growers Association, California Farm Bureau Federation, Western Agricultural Processors Association, Western Growers Association, and The Wonderful Company LLC ("the Almond Alliance") filed a petition for writ of mandate under California Code of Civil Procedure Section 1094.5. App. 12. On October 4, 2019, the Almond Alliance filed an amended petition, which was identical to the first except for the removal of one petitioner, The Wonderful Company LLC. App. 32–46.

The amended petition alleged that the Commission exceeded its authority by accepting the Coalition's petition for further consideration and designating the California bumble bees as "candidate species." App. 40–42. Specifically, the Almond Alliance argued that CESA does not protect insects, including the California bumble bees. App. 40. The Coalition intervened to

defend the Commission's decision. On November 17, 2020, after briefing and a hearing, the trial court issued an order granting the petition for writ of mandate. App. 482. On November 30, 2020, the trial court entered final judgment. App. 493. On February 5 and 8, 2021, the Coalition, the Commission, and the Department timely filed notices of appeal. App. 526-45.

In its November 17, 2020, order, the Superior Court held that the Commission exceeded its legal authority by designating the California bumble bees as "candidate species" under CESA. App. 486. The court held that CESA does not protect insects like the California bumble bees, on four grounds.

First, the trial court concluded that, "[i]n context, the word 'invertebrates' as it appears in Section 45's definition of 'fish' clearly denotes invertebrates connected to a marine habitat" and not terrestrial insects like bumble bees. App. 486. The Superior Court did not explain how the "context" of Section 45 narrowed the meaning of "invertebrate" to "marine" species. App. 486. Given that Section 45 includes only one purely aquatic group of animals (fish) and lists other groups that may rely on freshwater habitats, partially terrestrial, or wholly terrestrial (mollusks, crustaceans, invertebrates, and amphibians), it is unclear how

the trial court determined that the "context" of Section 45 circumscribed the meaning of "invertebrate" to include only those connected to a "marine" habitat. The trial court may have sought to harmonize Section 45's definition with the Court's own colloquial understanding of "fish," instead of interpreting Section 45's plain language.

Second, the trial court held that, even if CESA's text was ambiguous, extrinsic aids showed that CESA does not protect insects. App. 486–87. Considering CESA's legislative history, the trial court adopted the interpretation of a 1984 Senate Committee report, which concluded that the deletion of "invertebrate" from an amendment to CESA had the effect of excluding invertebrates. App. 487. The Court held that the committee report took precedence over the Department's two expert bill analyses, both of which concluded that including the term "invertebrates" in the CESA update was unnecessary because the statute was widely understood to protect insects and would have caused confusion unless other provisions of the Code were amended to explicitly include invertebrates. App. 487. The trial court also gave "great weight" to a 1998 Attorney General opinion, which concluded in a single page of analysis that CESA

does not protect insects. App. 488. The trial court did not grapple with the analytical shortcomings in the senate report and the Attorney General opinion: Neither document acknowledges Section 45's definition of the term "fish" or the Commission's listing of three invertebrates—the California freshwater shrimp, the Shasta Crayfish, and the wholly terrestrial Trinity bristle snail—as "threatened" or "endangered species" under CESA in 1980.

Third, the trial court disregarded the Commission's longstanding interpretation that CESA protects insects. App. 488. In particular, the court dismissed the listing in 1980 of three invertebrates on the ground that the Office of Administrative Law ("OAL") had rejected the listing of two butterfly species the same year. App. 488. The trial court relied on the OAL's decision even though the actual decision rejecting the listing cannot be found. The trial court also reasoned that the Commission's scientific expertise in administering CESA did not warrant deference because its legal interpretation was "at odds with the Legislature's." App. 489. Further, the trial court found that a Department regulation undermines the Commission's longstanding interpretation, App. 489 (citing 14

C.C.R. § 783.1), without considering the origins or purpose of that regulation or whether the Department has implicitly disapproved of that regulation by participating in this case.

Fourth, the Superior Court dismissed Section 2582 of the Code, which establishes civil liability for the take of "any plants, *insects*, or other species listed pursuant to" CESA. § 2582(a)(2) (emphasis added). The trial court disagreed that "Section 2582 constitutes the Legislature's view" of CESA as protecting insects, on the ground that such a construction is contrary to the enacting Legislature's intent. App. 490. The trial court also rejected the alternative argument that Section 2582 is an implied amendment to CESA that brought insects within CESA's umbrella of protection. App. 490. The court concluded that in Section 2582 "the Legislature did not purport to grant authority under CESA. Instead, it at most potentially declared insects to be among the animal life subject to CESA's protections," which the court deemed an improper declaration of existing law. App. 490. The court adopted this reasoning even though implied amendment analysis requires courts to determine whether a new enactment is at odds with an older provision of law, and recognize the later as an implied amendment if the two enactments cannot be

harmonized. *Peatros v. Bank of Am.*, 22 Cal. 4th 147, 167–68 (2000).

Finally, the trial court dismissed this Court's appellate case law requiring a broad construction of CESA as inapplicable in light of the trial court's view that the text of CESA unambiguously does not protect insects. App. 491.

STANDARD OF REVIEW

The Courts of Appeal review questions of statutory interpretation de novo. *Christensen v. Lightbourne*, 7 Cal. 5th 761, 771 (2018). Courts should defer to an agency's statutory interpretation where, as here, the agency has technical knowledge and expertise regarding the relevant subject and the agency's interpretation was promulgated with care. *See Ass'n of Cal. Ins. Cos. v. Jones*, 2 Cal. 5th 376 (2017) (citing *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 13–16 (1998)). Evidence of an agency's care includes indications that it adopted its interpretation contemporaneously with the statute's enactment. *Yamaha Corp.*, 19 Cal. 4th at 13.

SUMMARY OF ARGUMENT

In June of 2019, the Commission accepted a petition to list the California bumble bees as "candidate species" under CESA. After the Almond Alliance challenged the listing's validity as an improper exercise of the Commission's power, the Superior Court held that CESA's protections do not extend to insects. But the court employed a colloquial understanding of the Code's text, blinding it to what the statutory language actually commands, which is that CESA protects insects. And the court relied on extrinsic sources that fail to read CESA in its proper context, elevating them over more persuasive analyses.

I. The Code's plain language shows that CESA protects insects. The Legislature defined "fish" as "wild fish, mollusk[s], crustacean[s], invertebrate[s], [or] amphibian[s]." § 45. This definition applies to the entire Code, including CESA. § 2. Thus, the term "fish" as it is used in CESA includes invertebrates. Contrary to the Superior Court's finding, the Code's definition of fish is not limited to "marine" invertebrates. The species listed in Section 45 can live on land, in freshwater, or in salt water. Further, the Commission has listed one exclusively terrestrial invertebrate as "threatened" under CESA.

Another section of the Code, Section 2582, clearly states that insects can be listed under CESA. It refers to "any plants, insects, or other species listed pursuant to the California Endangered Species Act." § 2582(a)(2). The only grammatically correct way to read this provision is that insects can be listed under CESA. If it is read to mean that plants and insects are not "species listed pursuant to CESA," then "other" becomes meaningless, as there is no "remainder" of CESA-listed species for the word to modify. But courts must strive to give meaning to every word of a statute, and so a reading that renders "other" superfluous is impermissible.

Alternatively, Section 2582 is an implied amendment of CESA. Where two laws directly conflict and cannot be harmonized, courts consider the later statute to have impliedly amended the earlier one. If CESA's listing provisions are construed to exclude insects, then those provisions conflict with Section 2582's explicit statement that CESA protects insects. The only way to resolve the conflict is to recognize that Section 2582, which was passed four years after CESA, impliedly amended CESA to protect insects, including bees.

II. Courts must give great weight to contemporaneous bill analyses issued by the agency tasked with implementing a statute. In this case, the Superior Court had two such analyses, both written by the Department during the 1984 CESA amendment process. In the first summary, the Department said that it understood CESA to already protect insects through Section 45's use of "invertebrates." While the Department acknowledged that adding "invertebrates" to CESA itself may resolve any doubts about CESA's scope, it did not say that doing so was necessary to ensure their legal protection. In the second bill report, the Department affirmed its understanding that CESA already protected invertebrates, and it concluded that including the term in the statute would only result in confusion, because the entire Fish and Game Code would then have to be revised for consistency.

The Superior Court discounted these expert analyses in favor of a Senate committee report concluding that CESA excludes all invertebrates. But the report says nothing about Section 45's definition of "fish," even though the Legislature is presumed by law to have been aware of that definition when it enacted CESA. In deferring to such an incomplete analysis, the

court ignored precedent holding that legislative history is useful only to the extent that it is reliable. *Martinez v. Regents of Univ. of Cal.*, 50 Cal. 4th 1277, 1292 (2010). The Department's two bill reports provide a more rigorous and reliable analysis of CESA's scope.

III. California's courts recognize that CESA should be liberally construed to achieve its aim of conserving imperiled species. *Cal. Forestry Ass'n v. Cal. Fish and Game Comm'n*, 156 Cal. App. 4th 155, 1545 (2007); *Watershed Enforcers v. Dep't of Water Res.*, 185 Cal. App. 4th 969, 979 (2010). Interpreting CESA to protect insects would further conservation by protecting species like the California bumble bees. This interpretation would also advance the conservation of other listed species, such as insect-pollinated plants, which depend on pollinators like the California bumble bees. Thus, interpreting CESA to protect insects adheres to the settled mandate to construe CESA liberally.

Where CESA is susceptible to more than one plausible interpretation, courts must choose the one that furthers its conservation purpose. Thus, even if it were plausible to argue that CESA's definition of "fish" is strictly colloquial, the mandate

to liberally construe CESA would still require reading CESA in light of Section 45's definition of "fish" as including all invertebrates. Limiting the term "fish" to its colloquial meaning denies protection to several essential keystone species; doing so would frustrate, rather than further, conservation, contrary to the liberal construction mandate.

IV. The trial court rested its order on several other unpersuasive authorities. One of them is a letter from the OAL that appears to have suggested that CESA does not protect insects. However, the letter has been lost, so its full reasoning is unknown, and the OAL has authority over procedural compliance, not substantive soundness.

The second authority is an Attorney General opinion concluding that CESA does not protect insects. The opinion is almost bereft of analysis; what little analysis it does offer completely omits the crucial question of Section 45's definition of "fish." What's more, the Superior Court overlooked a rule requiring the devaluation of Attorney General opinions when they concern laws that courts have interpreted elsewhere. Courts have repeatedly adopted a broad reading of CESA that clearly

conflicts with the narrow reading set forth in the Attorney General's opinion.

Finally, the Superior Court cited Title 14, Section 783.1 of the California Code of Regulations as evidence that CESA does not protect insects. This regulation's sole purpose was to regulate take permits. If the regulation were intended to redefine CESA's scope, the Department would have so indicated in its notice promulgating the regulation. And, of course, the Department has joined the Commission in this case in arguing that CESA protects insects, including the California bumble bees.

ARGUMENT

Interpreting CESA starts with the "basic premise that 'laws providing for the conservation of natural resources' such as CESA 'are of great remedial and public importance and thus should be construed liberally'" to effectuate their purpose. *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1544 (quoting *San Bernardino Valley Audubon Soc'y v. City of Moreno Valley*, 44 Cal. App. 4th 593, 601 (1996)). CESA has one purpose: to "conserve, protect, restore, and enhance any endangered or any threatened species and its habitat." *Id.* at 1545 (quoting § 2052).

Thus, courts must broadly construe CESA to serve its conservation purpose.

The well-established rules of statutory interpretation govern CESA's construction. "The fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." *Watershed Enforcers*, 185 Cal. App. 4th at 978 (citation omitted). To glean the Legislature's intent, courts first consult the statute's words, which are the best indicators of intent, and "construe the words in question in context, keeping in mind the statute's nature and obvious purposes." *Id.* at 978–79. In short, courts must harmonize individual statutory provisions with the statute's overarching framework. *Id.*

If statutory language is ambiguous, then courts may look to extrinsic aids, including the legislation's objectives and history. *Id.* (quoting *People v. Cole*, 38 Cal. App. 964, 975 (2006)). Language is ambiguous if more than one reasonable interpretation could apply to a statutory provision. *Id.* Even when considering extrinsic sources, courts cannot construe statutes "with a view to . . . defeating the general statutory

purpose." *Id.* at 979 (quoting *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1545).

I. CESA protects insects, including bees.

A. Section 45's definition of "fish," which applies to CESA, includes all invertebrates.

CESA protects "native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant." §§ 2062, 2067–2068. The provisions of the Code that codify CESA do not define these terms. Instead, CESA relies on the Code's definitions of "bird," "fish," and "mammal," §§ 22, 45, 54, per Section 2's requirement that "unless the provisions or the context otherwise requires, the definitions in this chapter govern the construction of this code," § 2. Section 45 defines the term "fish" to mean "wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals." § 45. Section 45's definition of "fish" serves as the definition of that word as it is used in CESA, as neither of Section 2's exemptions are present in this case: CESA's "endangered," "threatened," and "candidate species" provisions do not opt out of the Code's definitions, and the context of these provisions—preserving imperiled species, *see Watershed*

Enforcers, 185 Cal. App. 4th at 982—is consistent with Section 45's broad definition. Therefore, CESA protects "invertebrates."

Insects, such as the California bumble bees, are "invertebrates." Since the Legislature has not defined "invertebrate" in CESA or the Code, it is appropriate to look to dictionaries. *See Gutierrez v. Carmax Auto Superstores Cal.*, 19 Cal. App. 5th 1234, 1249 (2018). "Invertebrate" is generally defined as "[a]n animal without a backbone." *Invertebrate*, *Oxford English Dictionary* (3d ed. 2010). Insects conform to that definition because they do not have a backbone or internal skeleton. *Insect, Oxford English Dictionary* (3d ed. 2010) ("a small invertebrate animal . . ."). Because insects, including the California bumble bees, are "invertebrates" within the ordinary usage of the word, CESA protects them.

This conclusion is consistent with the central principle of statutory interpretation that statutes should be construed to effectuate their purpose. Reading CESA and Section 45 to protect insects effectuates CESA's purpose: conserving, protecting, and enhancing threatened fish, wildlife, and plants. § 2052. Conversely, interpreting Sections 2062, 2067, and 2068 to exclude insects would frustrate CESA's purpose. It would be

illogical for the Legislature to express its objective to protect all "fish, wildlife, and plants," *id.*, and to define "fish" to include all "invertebrates," § 45, only to deny the Commission authority to fulfill this policy by excluding insects from CESA's protections. Further, the Commission's ability to protect animals and plants that depend on pollinators will be impeded if the Commission cannot protect pollinators, like the California bumble bees. The plain meaning of the Code—that CESA protects insects—furthers the Legislature's purpose.

In holding that CESA does not protect insects, the Superior Court impermissibly relied on its colloquial understanding of the term "fish" over the Legislature's chosen meaning. The trial court's rejection of *Cal. Forestry* reveals its improper reliance on colloquial understandings. In that case, this Court held that CESA protects "wild fish," as opposed to hatchery fish, by concluding that Section 45 defines the term "fish" in CESA. *See* 156 Cal. App. 4th at 1552. The trial court concluded that *Cal. Forestry* is inapposite, because it viewed defining "fish" as "wild fish" to not require the same "exertion" as defining "fish" to include "invertebrates." App. 486. But "exertion"—or the conflict between the court's colloquial understanding of a term and the

Legislature's intended meaning of that term—has no role in statutory interpretation. A court cannot refuse to apply the Legislature's chosen definition because the court finds it counter-intuitive; "[i]f the Legislature has provided an express definition, [the court] must take it as [the court] find[s] it." *Adoption of Kelsey S.*, 1 Cal. 4th 816, 826 (1992). The Legislature defined "fish" to include "invertebrate[s]" throughout the Code, including CESA. § 45. That definition cannot be redlined to strike out "invertebrate." The text's plain language, CESA's purpose, and the case law all require the Court to embrace the Legislature's chosen meaning and conclude that CESA protects insects.

B. "Invertebrates" in Section 45 signifies both terrestrial and aquatic invertebrates.

Section 45 of the Fish and Game Code reads: "'Fish' means a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of these animals." The Superior Court concluded that this definition "clearly denotes invertebrates connected to a marine habitat, not insects such as bumble bees." App. 486. The trial court is incorrect. Of the animals listed in the Section 45 definition, only "wild fish" are exclusively aquatic. Limiting Section 45's definition of "fish" to

animals connected to a marine habitat would also render the Legislature's inclusion of amphibians superfluous, because no species of marine amphibians exist. Additionally, crustaceans and mollusks can be aquatic or terrestrial; indeed, the Trinity bristle snail, an invertebrate mollusk listed in 1984 as threatened under CESA, is wholly terrestrial, living its entire life on land. *See* App. 257–58. If Section 45's definition of "fish" were limited to creatures "connected to a marine habitat," then the Trinity bristle snail could not be listed.[2]

This Court should read Section 45's definition of "fish" to include all invertebrates. In confining Section 45's definition of fish to marine invertebrates, the Superior Court applied the interpretive canon of *ejusdem generis*, which provides that when general words follow specific words in a list, the general words should be read to encompass only objects similar in nature to

[2] The Superior Court also erred when it wrote that the species listed in Section 45 all live in "marine" habitats. App. 486. "Marine" refers specifically to species "inhabiting or growing in the sea," *Marine*, *Oxford English Dictionary* (3d ed. 2010), whereas several freshwater invertebrates, such as the Shasta Crayfish and the California freshwater shrimp, have been listed under CESA. The trial court's conflation of "marine" and "aquatic" is further evidence that, in interpreting CESA, the court impermissibly relied on its own colloquial understanding of statutorily defined terms.

those suggested by the specific terms. *Circuit City Stores v. Adams*, 532 U.S. 105, 114–15 (2001). But the California Supreme Court has cautioned that *ejusdem generis* "is only an aid in getting the meaning and does not warrant confining the operations of a statute within narrower limits than were intended." *Wishnev v. Nw. Mutual Life Ins. Co.*, 8 Cal. 5th 199, 214 (2019) (citation omitted). Applying the canon here materially curtails CESA's protections, thereby thwarting its purpose and contravening the Supreme Court's command. *See Watershed Enforcers*, 185 Cal. App. 4th at 979 ("We must construe a statute to comport with apparent legislative intent and with a view to furthering, not defeating, the general statutory purpose.").

C. Section 2582 of the Fish and Game Code expressly states that CESA covers "insects," or at least amends CESA to do so.

The Fish and Game Code's plain text and the principles of statutory interpretation are sufficient to show that CESA protects insects, including the California bumble bees. But there is more. In 1988, the Legislature passed an amendment to the Fish and Game Code that expressly states that CESA protects "insects." The Court should read this amendment as further confirmation that, properly read in the context of Section 45's

definitions and CESA's use of the word "fish," the Legislature understood and intended CESA to protect invertebrates, including insects. *Cf. Fleming v. Kent*, 129 Cal. App. 3d 887, 891 (1982) ("It is an . . . established principle of statutory construction that a more recent statute will govern and take precedence over an earlier provision."). Alternatively, the Court can regard the 1988 enactment as implicitly amending CESA to protect insects.

1. Section 2582 can only be read to mean that insects may be listed under CESA.

In 1988, four years after it passed CESA, the Legislature enacted Section 2582 of the Fish and Game Code, which imposes civil liability for the unlawful sale or transport of certain endangered species. In particular, Section 2582(a)(2) imposes such liability upon anyone who "[u]nlawfully export[s], import[s], sell[s] . . . any plants, insects, or other species listed pursuant to the California Endangered Species Act." On its face, this language shows that "insects" can be listed under CESA.

To confirm this conclusion, consider the alternative reading of Section 2582(a)(2) that the Almond Alliance advanced below: that plants and insects are separate from "other species listed pursuant to CESA." This reading is both nonsensical and

impermissible. The California Supreme Court has held that courts must strive to give meaning to a statute's every word. *See, e.g., People v. Arias*, 45 Cal. 4th 169, 180 (2008) ("'Significance should be given, if possible, to every word of an act. Conversely, a construction that renders a word surplusage should be avoided.'"). There is only one grammatically correct reading of Section 2582(a)(2) that satisfies this rule: The provision applies to any organism listed under CESA, including plants and insects. To read Section 2582(a)(2) any other way renders the word "other" superfluous. That is, Section 2582(a)(2) uses "other" in the sense of "designating the remainder of like people, objects, etc." *Other*, *Oxford English Dictionary* (3d ed. 2010). The word thus signals that plants and insects are to be considered *types* of CESA-listed species. If Section 2582(a)(2) is read to mean that plants and insects are not species listed pursuant to CESA, then "other" becomes meaningless; there is no "remainder" of CESA-listed species for the word to modify, since, under that reading, no CESA-listed species have yet been mentioned.

If the Legislature had wished to indicate that plants and insects are something different from "species listed pursuant to [CESA]"—or if it thought that CESA does not protect insects—

then it would have omitted "other" altogether, so that the law forbade the illegal import and export of "any plants, insects, or species listed pursuant to CESA," a phrasing that leaves no doubt that plants and insects are not eligible for CESA listing. But since the Legislature did include "other," and since courts must strive to give meaning to each word in a statute, Section 2582(a)(2) can only be read as affirming what Section 45 and CESA's text already demonstrate: that CESA's protection of "fish" includes invertebrates, and therefore insects.

2. Alternatively, Section 2582 impliedly amended CESA to extend to insects.

Alternatively, the Court should view Section 2582 as an implied amendment of CESA. Where two laws directly conflict and cannot be harmonized, courts consider the later statute to have impliedly amended the earlier one. *Peatros*, 22 Cal. 4th at 167-68; *see also McLaughlin v. State Bd. of Educ.*, 75 Cal. App. 4th 196, 219 (1999) ("An implied amendment is an act that creates an addition, omission, modification or substitution and changes the scope or effect of an existing statute.").

As noted, the Legislature enacted CESA's current definitions of "endangered," "threatened," and "candidate species"

in 1984, and it passed Section 2582 in 1988. And, as the previous section shows, the only plausible reading of Section 2582(a)(2) is one in which insects are considered "species listed pursuant to [CESA]." Accordingly, if CESA's listing provisions are construed to exclude insects—if, in other words, its use of "fish" is read without reference to Section 45's definition of "fish" as including "invertebrates"—then those provisions conflict with Section 2582. The only way to resolve the conflict, then, is to recognize Section 2582 (the more recent statute) as impliedly amending CESA to protect insects, including bees. There is no way to harmonize a reading of CESA that excludes insects with Section 2582, for the latter explicitly states that CESA protects insects.

The trial court misunderstood this argument. As the court saw it, the Coalition contended that the Legislature, in enacting Section 2582, interpreted the meaning of existing law (i.e., CESA), which is solely a judicial function. App. 490. The court cited three cases in which the Legislature improperly described an enactment as "declaratory of existing law." App. 490 (citing *Nat'l Asian Am. Coal. v. Newsom*, 33 Cal. App. 5th 993, 1011–12 (2019); *City of Emeryville v. Cohen*, 233 Cal. App.4th 293, 309

(2015); *Peralta Cty. College Dist. v. Fair Employment & Housing Comm'n*, 52 Cal. 3d 40 (1990)).

But these cases are inapposite. For one thing, they do not involve the clear statutory conflicts that could give rise to an implied amendment. For another, when the Legislature enacted Section 2582, it did not describe the bill as "declaratory of existing law," and so Section 2582 was not an interpretation of an existing statute. The Coalition made and makes no claim to that effect. Instead, we contend that if Section 2582 does not cover insects by its plain language, then at the very least the Court should view the statute as an implied *amendment* of CESA which, upon its passage in 1988, brought insects under CESA's umbrella of protection.

II. CESA's legislative history confirms that it protects insects.

Because the plain language of both CESA and the Fish and Game Code is unambiguous, the Court need not consult any extrinsic sources. *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1103 (2007). And if the Court deems CESA's plain language susceptible of more than one reasonable interpretation, it is bound to construe the statute liberally. *Cal. Forestry Ass'n*,

156 Cal. App. 4th at 1545. But if, after this construction, the Court finds any residual ambiguity, it "may consider extrinsic aids such as legislative history to facilitate . . . interpretive analysis." *Cal. Bldg. Indus. Ass'n v. State Water Res. Control Bd.*, 4 Cal. 5th 1032, 1041 (2018). CESA's legislative history shows that it protects insects.

In 1984, the Department issued two bill summaries of AB 3309, the bill at the center of that year's CESA overhaul. These summaries show that the Legislature knew that its update of CESA would protect insects. "The contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, although not controlling, is entitled to great weight." *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d. 1379, 1388 (1987); *see also Yamaha Corp.*, 19 Cal. 4th at 13 (finding that where an agency's interpretation is contemporaneous with a law's enactment, judicial deference to that interpretation may be warranted). Bill summaries prepared by implementing agencies are especially illuminating, since they inform the Legislature how the agency will apply the law under consideration. *See Cleveland Nat'l Forest v. City of San Diego*, 37 Cal. App. 5th 1021, 1047–48, 1060 (2019) (examining summaries

by the Department of Conservation to discern purpose of Williamson Act amendments and holding that agency's interpretation was correct).

In its first bill summary, issued in June of 1984 while the Legislature was considering AB 3309, the Department informed the Legislature that it understood the 1970 version of CESA to already protect invertebrates (and thus insects). The Department's conclusion rested on the controlling definition of "fish" in Section 45 of the Code. According to the summary, when the Legislature was drafting the original 1970 law, "[i]t was not believed necessary to include the term invertebrate . . . because 'fish' is defined in the Fish and Game Code to include 'invertebrates.'" App. 214. The summary also explained that "the Department has had a long history of regulation and management of numerous classes of invertebrates," including, as noted above, listing as "rare" or "endangered" the Shasta Crayfish, California freshwater shrimp, and terrestrial Trinity bristle snail. App. 214. The Department's summary acknowledged that adding the word "invertebrates" "would serve to remove any doubts as to the Commission's authority to designate insects as threatened." App. 214. Crucially, however,

the summary did not say that including invertebrates was *necessary* to ensure their protection, for that was already achieved through Section 45's definition of "fish," which applied to CESA. That is, the Department did not push for a CESA amendment that explicitly included insects precisely because it was commonly understood that Section 45 already protected insects by defining "fish" to include invertebrates.

Not only did the Department not push to amend AB 3309 to include insects; in its second bill summary, it actually advocated against doing so. After receiving the Department's first summary and a Senate committee report (discussed below), the Legislature amended AB 3309 to delete the word "invertebrates" from the definitions of "endangered" and "threatened" species. App. 220-21. This was a predictable emendation, given that the Department's previous summary had informed the Legislature that CESA already protected "invertebrates" and thereby made inclusion of that word clarifying but not legally necessary. Also, the Legislature merely deleted the word "invertebrates" from AB 3309's provisions; it did not do anything to exclude them from CESA's protections, such as revising Section 45's definition of "fish." The Department's second summary, an enrolled bill report

sent to the governor after the bill's passage, confirms this reading. In the report, the Department concluded after further analysis that "sufficient authority currently exists" in CESA for protecting insects, and "that adding the term invertebrates would only serve to confuse the matter" because "it would have required that, for consistency, all other references in the Fish and Game Code to the various groups of animals be amended to add the term invertebrates, as necessary." App. 221. These bill summaries show that at the time of CESA's passage, the Department understood CESA to protect invertebrates through Section 45. The Department therefore told the Legislature it was not necessary to include the term "invertebrates" in CESA itself.

In concluding otherwise, the Superior Court discounted both of the Department's bill summaries. The court acknowledged that agency reports can be useful interpretive aids, but held that, in this case, the summaries were trumped by a report from the Senate Committee on Natural Resources analyzing the penultimate version of AB 3309 (the one in which "invertebrates" was deleted). App. 487. That committee report states, "Unlike federal law, the bill would *exclude all invertebrates* from eligibility for listing as threatened or

endangered species." App. 397. The Superior Court cited California precedent suggesting that courts should give greater weight to committee reports than to assembly bills. *See Conservatorship of Whitley*, 50 Cal. 4th 1206, 1218 n.3 (2010). On that basis, the court concluded that it should "not defer to the Department's statements in the enrolled bill report in the face of other, clear evidence that the Legislature did not intend for CESA to protect invertebrates categorically." App. 487.

However, the Superior Court failed to mention both the Legislature's presumptive awareness of existing law and the Natural Resources Committee's omission of any Section 45 considerations. When the Legislature passes a law, it is presumed to be "aware of all existing statutes," including statutory definitions. *Gutierrez v. Carmax Auto Superstores Cal.*, 19 Cal. App. 5th at 1250 (citing *People v. Harrison*, 48 Cal. 3d 321, 329 (1989)). Thus, the Legislature is presumed to have been aware of Section 45's governing definition of "fish" when it passed CESA. Yet the Natural Resources Committee analysis that the Superior Court relied on says nothing about Section 45. App. 397. Instead, it merely asserts, by way of comparison with federal law, that invertebrates are excluded, even though the bill

did not explicitly exclude them, and even though properly interpreting CESA in light of Section 45 leads to the unmistakable conclusion that CESA does include invertebrates.

The incompleteness of the Natural Resources Committee's report undermines the Superior Court's conclusion that the committee analysis is "clear evidence" of legislative intent. The California Supreme Court has held that such a deficient bill analysis should not be granted undue weight. In *Martinez v. Regents of University of California*, for instance, the plaintiffs adduced a U.S. Congress conference committee report as evidence that Congress intended to bar states from exempting undocumented immigrants from paying nonresident tuition at state universities. 50 Cal. 4th at 1292. The Court rejected this argument because "the report's general summary oversimplifies more nuanced statutory language." *Id.* at 1293. Similarly, the Natural Resources Committee report oversimplifies—indeed, omits entirely—the context essential to a proper interpretation of CESA. Judges should be wary of such oversimplifications:

> 'Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms,' and . . . 'judicial reliance on legislative materials like committee reports . . .

> may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.'

Id. (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2011)).

The Court should heed this warning in this case. Given the Natural Resources Committee report's silence on both Section 45 and the Department's two contrary and expert bill analyses, the committee report should not be regarded as shedding "reliable light" on the Legislature's intent. The Assembly's 1984 reconciliation report, wherein the Assembly accepted the Senate's amendments to AB 3309, bolsters this conclusion. *See* Intervenors-Appellants' Request for Judicial Notice ("RFJN"), Exh. A. at 1–3 (Assembly Off. of Res., Assembly File Analysis AB 3309 (August 29, 1984)). The reconciliation report says nothing about the Senate's deletion of "invertebrates." If the Assembly believed that this change would in fact remove 90 percent of all animals from the ambit of a law designed to comprehensively protect endangered species, it presumably would have said something to that effect.

In weighing pieces of legislative history, formal designations do not trump analytical rigor. By virtue of its origin, the Senate committee report may appear to express the Legislature's intent, but it does not address the crucial question of how Section 45 interacts with CESA or overcome Section 45's plain language. The Court should therefore look to the Department's bill summaries. These documents reveal how the agency tasked with enforcing CESA understood the law at the time of its passage and subsequent amendment. They apply Section 45 to CESA, making them complete interpretations that grasp how CESA operates, and how the Legislature understands CESA to operate, in the context of the broader Fish and Game Code.

III. Controlling case law requires interpreting CESA to protect insects.

California courts recognize that CESA is "of great remedial and public importance and thus should be construed liberally." *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1545; *Watershed Enforcers*, 185 Cal. App. 4th at 979. Every interpretation of CESA must be consistent with the statute's clear purpose: "[T]he 'conserv[ation], protect[ion], restor[ation], and enhance[ment] [of]

any endangered species or any threatened species.'" *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1545 (identifying the objects to be achieved expressed by the Legislature in CESA) (citing § 2052).

The liberal construction most consistent with CESA's purpose is one that furthers, not undermines, the conservation of imperiled species. This Court in *Cal. Forestry* interpreted the terms "species or subspecies" according to the liberal construction mandate by choosing the definitions that furthered species conservation. 156 Cal. App. 4th at 1547, 1551–52. For example, the Court interpreted the term "species or subspecies" to include evolutionarily significant units. *Id.* at 1546. This interpretation furthered conservation by enabling the listing of population segments that are threatened and important for a species' genetic diversity. *Id.* The Court simultaneously rejected an interpretation that "subspecies" are the smallest subgroups that may be listed under CESA, because it would "frustrate[] the intent of the CESA because [that interpretation] fails to protect subgroups of a species that are integral to the species' survival." *Id.* at 1548; *see also Watershed Enforcers*, 185 Cal. App. 4th at 973 (interpreting "person" in Section 2080, which prohibited any person from taking protected species without a permit, to include

"public agencies," furthering conservation by ensuring CESA applies to agencies).

In this case, interpreting CESA to protect insects is the only interpretation that is consistent with the mandate to liberally construe CESA. Recognizing that CESA protects insects would further conservation by enabling species like the California bumble bees to be listed and benefit from CESA's protections. This interpretation would also further the conservation of other listed species, such as insect-pollinated plants, that depend on generalist pollinators like the California bumble bees to survive. AR 286.

In holding that CESA does not protect insects, the trial court found that "the absence of authority to list insects under CESA, either as fish or otherwise, is clear. As a result, CESA's purposes do not confer authority that the Legislature withheld." App. 491. By overstating CESA's clarity, the Superior Court avoided this Court's controlling case law that CESA must be liberally construed to further its conservation purpose.

There is no clear "absence of authority to list insects." *Id.* As discussed above, the Code defines "fish," a protected CESA group, to include "invertebrates." § 45. The plain text of the

Code, CESA's purpose, and case law confirm that the term "fish" in CESA is defined by Section 45. For these reasons, CESA protects insects. That interpretation also adheres to this Court's mandate to liberally construe CESA to effectuate CESA's purpose: conserving imperiled species.

In the alternative, if interpreting "fish" in CESA according to its colloquial meaning remains plausible despite Section 45's existence, then the mandate to liberally construe CESA still requires interpreting CESA to protect insects. The trial court avoided this conclusion by ignoring the factors that confirm that Section 45 defines the term "fish" in CESA and instead requiring CESA to protect invertebrates with perfect clarity. But "courts have no authority to dictate the forms in which laws must be written to express the legislative intent," *People v. Medeiros*, 46 Cal. App. 5th 1142, 1150 (2020), and a lack of crystal clarity shows at most that the Code has been cobbled together piecemeal over time. Instead of demanding perfect clarity, as the trial court did, courts do and must resolve ambiguities in CESA in favor of conservation. *See Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1549. Limiting the term "fish" in CESA to its colloquial meaning would undermine conservation of the California bumble bees and the

listed species that depend on them; only the interpretation that CESA protects insects satisfies the mandate to liberally construe CESA to further conservation.

IV. The other authorities the trial court relied on do not support, and in some cases undermine, its decision.

A. The OAL lacks authority to overturn an expert agency's substantive decisions, and it has approved the CESA listing of invertebrates.

In the trial court, the Almond Alliance relied heavily on a letter issued in 1980 by OAL that appears to have precluded the Commission from listing certain butterfly species as "endangered" and to have suggested that CESA does not protect insects. App. 77, 357-58, 361; AR 575; *see also* App. 335. The original letter is not in the administrative record and the Almond Alliance did not provide it to the trial court. Nonetheless, the court accepted the Almond Alliance's representations of the letter as evidence that OAL categorically rejected CESA's extension to invertebrates. App. 488.

OAL's letter, such as it exists, is unpersuasive, for two reasons. First, OAL's bailiwick is procedural, not substantive, issues. It is tasked with reviewing agency regulations for clarity, consistency, and necessity, among other procedural criteria, not

for compliance with substantive law. *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 568 (1996); *see also* Cal. Gov't Code § 11349.1 (West). Thus, while OAL's opinions on administrative procedure may be entitled to some deference, it has little to say on substantive legal questions that are properly within the purview of an expert agency. *Compare Leighton v. Old Heidelberg, Ltd.,* 219 Cal. App. 3d 1062, 1071–72 (1990) (refusing to defer to the OAL's interpretation of the Labor Code) *with Central Coast Forest Ass'n v. Fish & Game Comm'n*, 18 Cal. App. 5th 1191, 1207 (2018) (deferring to the Commission in its interpretation of CESA because of its technical expertise). Indeed, courts have explained that OAL's judgment should not be substituted for the judgment of an expert agency. *Trancas Prop. Owners Ass'n v. City of Malibu*, 61 Cal. App. 4th 1058, 1062 (1998). Yet that substitution is exactly what the trial court did here.

Second, as mentioned earlier, OAL approved the CESA listing of the Shasta Crayfish and the California freshwater shrimp (both crustaceans) and the Trinity bristle snail (a mollusk) just three months after it rejected the Commission's listing of certain butterflies. App. 209–10. Crustaceans and

mollusks, of course, are not expressly protected under CESA. Rather, they are invertebrates that were listed pursuant to Section 45's definition of "fish." Because OAL's letter is missing, it is impossible to know its reasoning for rejecting the listing of invertebrate butterflies. But at the very least, OAL's subsequent listing of three invertebrates should defeat any inference that its butterfly disapproval amounted to a categorical bar to listing invertebrates under CESA. The Superior Court took no notice of this about-face.

B. The 1998 Attorney General's opinion is incomplete and disregards precedent.

In its order, the Superior Court gave considerable credence to a 1998 Attorney General opinion that CESA does not protect insects. App. 488. The Attorney General's opinion, with its threadbare analysis, cannot bear the weight the trial court placed upon it. The court also overlooked precedent requiring it to cast a skeptical eye on Attorney General opinions relating to statutes that courts have interpreted elsewhere. *Dep't of Alcohol Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 100 Cal. App. 4th 1066, 1075 (2002).

The opinion in question contains only a cursory discussion of whether CESA protects invertebrates. AR 470. It comprises a background section followed by discussion of four separate legal questions. AR 469–74. Just one of the opinion's nine pages is devoted to the issue of whether insects can be listed as "endangered" species under CESA, and that page consists largely of unabridged definitions lifted from CESA. AR 470. The opinion's single paragraph of analysis consists entirely of the unremarkable observation that the dictionary definition of "insects" does not fall under any of CESA's categories of protected species. Like the Senate Natural Resources Committee's report, the opinion makes no mention of either Section 45's definitions or of the Code's clear statement that those definitions govern the entire code, even though the opinion recognizes "that statutory subjects relating to the same subject must be harmonized." AR 469 (citing *Dyna-Med*, 43 Cal. 3d at 1387). Furthermore, the Attorney General's opinion was issued after the passage of Section 2582 of the Code (*see* Section I.C, *supra*), yet it does not mention that provision, either. Without grappling with these critical portions of the Code, the opinion falls far short of being a "strong" interpretation of CESA.

In addition, Attorney General opinions are far less persuasive where, as here, there is case law interpreting the statute at issue. *Dep't of Alcohol Beverage Control*, 100 Cal. App. 4th at 1075; s*ee also Mallet v. Superior Court*, 6 Cal. App. 4th 1853, 1969 (1992) ("We are not bound by opinions of the attorney general. Such opinions are advisory only and do not carry the weight of law. They are, however, entitled to serious consideration where no clear case law exists."). Where the case law conflicts with the Attorney General opinion, the opinion's authority is diminished, even if it addresses a statutory provision that courts have not specifically interpreted. *Dep't of Alcohol Beverage Control*, 100 Cal. App. 4th at 1075 & n.2. As already discussed, there is ample case law mandating a broad interpretation of CESA and applying Section 45's definitions to CESA, precedents that conflict with the narrow construction proposed by the 1998 Attorney General opinion. *E.g. Cal. Forestry Ass'n*, 156 Cal App. 4th at 1545; *Watershed Enforcers*, 185 Cal. App. 4th at 983; *San Bernardino Valley*, 44 Cal. App. 4th at 601. In light of these precedents, the Superior Court erred in relying on the Attorney General's opinion as "very strong" evidence of CESA's scope. App. 488.

C. 14 C.C.R. § 783.1 is irrelevant to the scope of CESA's protections.

The Superior Court also cited Title 14, Section 783.1 of the California Code of Regulations as evidence that CESA does not protect insects. In 1998, pursuant to several provisions of the Code (including CESA Section 2081), the Department promulgated Section 783.1 to govern the "take" of wildlife protected by CESA and other laws. The regulation prohibits the import, export, take, possession, purchase, or sale of any "endangered" or "threatened species." 14 C.C.R. § 783.1(a) (1998). Most relevant here, subdivision (d) reads: "The take of insects and other invertebrates that are not fish as defined in the Fish and Game Code is not prohibited." 14 C.C.R. § 783.1(d). The Superior Court held that this language, "[h]owever one reads it," is inconsistent with a construction of the Fish and Game Code that reads "fish" to encompass all invertebrates. App. 489.

The court is incorrect, for several reasons. First, the regulation does not concern the scope of CESA's protections. In its notice promulgating the regulation, the Department stated that the regulation's purpose "is to establish procedures for the orderly application and review of incidental take permits."

RFJN, Exh. B at 3 (Incidental Take, Cal. Reg. Notice Register 1998, No. 36-Z, p. 1724 (Sept. 3, 1998)). The Department did not say or even imply that the regulation's purpose was to delimit which species CESA protects, or even to clarify what the Fish and Game Code or other regulations say about which species CESA protects. In short, the Department viewed Section 783.1 as a narrowly targeted regulation about "take" that would not disturb the well-established extent of CESA's protections.

Second, the Department's regulatory notice states that certain species and activities protected and regulated under CESA are not protected or regulated under the federal Endangered Species Act. *Id*. at 4. The notice also states that CESA may still require a take permit for those activities that the Endangered Species Act does allow. *Id*. If the purpose of Section 783.1 were to delimit which species CESA protects, then the Department almost certainly would have said that the Endangered Species Act protects species that CESA does not (such as insects), and so a CESA permit may not be required for the take of species for which an Endangered Species Act permit is required.

Two other reasons suggest that the Department did not intend Section 783.1 to exclude insects from CESA's protection. One is timing. The Attorney General's opinion that CESA does not apply to invertebrates (discussed above) was issued on June 23, 1998. AR 468. The Department's notice of Section 783.1 was published just a few months later, on September 4, 1998. RFJN, Exh. B at 1. This sequence suggests that, in promulgating Section 783.1, the Department ignored the Attorney General's opinion, since the notice for Section 783.1 says nothing about it. (At most, if the Department meant Section 783.1 to exclude insects from CESA's protections, the timing shows that the Department likely relied on the Attorney General's impoverished legal analysis to do so.) Finally, whatever the Department's twenty-year-old regulations may say, the Department is an appellant in this case, joining the Commission in arguing that CESA protects insects.

CONCLUSION

The California Fish and Game Code defines "fish" to include "invertebrates." CESA, which protects "fish," is part of the Fish and Game Code and subject to its definitions. CESA therefore protects invertebrates, including the California bumble

bees. In addition to being the result commanded by the plain language of CESA and the Fish and Game Code, it is the result most consistent with CESA's legislative history and the judicial mandate to liberally construe CESA to effectuate its conservation purpose. Indeed, any other result would undermine that purpose, as the goal of preserving wildlife requires preserving all-important pollinators, including the California bumble bees. Accordingly, the Superior Court's order to set aside the listing of California bumble bees as "candidate species" under CESA must be reversed.

Dated:
Sept. 13, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the text of this brief consists of 11,477 words, not including tables, signature blocks, and required certificates, as counted by Microsoft Word, the computer word processing program used to generate the brief.

Dated:
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On September 13, 2021, I served true copies of the following document(s) described as **INTERVENOR-APPELLANTS' OPENING BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Mills Legal Clinic at Stanford Law School for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Stanford, California.

[X] BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to TrueFiling 3.0, through the user interface at https://tf3.truefiling.com/.

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

Executed on September 13, 2021, at Stanford, California.

Ana Villanueva

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