

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into on the effective date (hereinafter, the “Effective Date”) set forth below, by and between Nevada Policy Research Institute, Inc., dba Transparent California, a nonprofit corporation formed and operating under the laws of the State of Nevada (hereafter, “Petitioner”), and Fresno Council of Governments, a joint powers agency formed and operating under the laws of the State of California, and Les Beshears, Finance Director for the Fresno Council of Governments, sued in his official capacity (hereafter, Fresno Council of Governments and Les Beshears are referred to as “FCOG”). Petitioner and FCOG are herein referred to collectively as the “Parties” and individually as a “Party” to this Agreement.

RECITALS

WHEREAS, on September 6, 2017, Petitioner filed a Verified Petition for Writ of Mandate; Complaint for Injunctive & Declaratory Relief (hereafter, the “Verified Petition”) in Fresno County Superior Court and thereby commenced Case Number 17CECG03051 (hereafter, the “Action”); and

WHEREAS, the Verified Petition, in essence, asserts that:

- a) Petitioner submitted a request to FCOG for a record showing the names and salaries of individuals employed by FCOG during calendar year 2016; and
- b) FCOG partially satisfied the request for records by providing records showing the position titles and salaries of persons employed by FCOG during the calendar year 2016, but refused to provide the names of these employees; and
- c) FCOG’s refusal to provide the names of the persons employed by FCOG during calendar year 2016 violated the California Public Records Act (hereafter, “PRA”); and

WHEREAS, Les Beshears has been at all relevant times herein an employee of Fresno Council of Governments; and

WHEREAS, FCOG maintains that it has meritorious defenses to the Action; and

WHEREAS, the Parties wish to avoid the disruption, inconvenience, uncertainty, and costs associated with further litigation with respect to this matter, and as such, the Parties seek to settle and resolve the issue based upon the terms set forth herein.

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AGREEMENT

1. **Effective Date.** The Effective Date of this Agreement shall be September 28, 2017.
2. **Incorporation of Recitals.** The Recitals set forth above are incorporated herein by this reference and are made a part of this Agreement as if set forth in their entirety.
3. **FCOG's Obligations.**
 - a) **Production of Record.** On or before the fifth (5th) business day following the Effective Date, FCOG shall transmit a record to Petitioner in Microsoft Excel format which contains the full names, as shown in the records of the Fresno Council of Governments, and corresponding wages or salaries, as applicable, for all employees employed anytime during the 2016 calendar year, except for any employee for whom there, in the determination of the Fresno Council of Governments, is a legitimate basis under the PRA for his or her name to be withheld, and for such employee(s) FCOG will withhold the name of the employee and provide a written explanation regarding why the name(s) is being withheld.
 - b) **Payment of Fees and Costs.** Subject to Section 4(a) of this Agreement, on or before the fifth (5th) business day following the Effective Date of this Agreement, FCOG will remit payment of five thousand, six hundred eighty-four dollars and twenty-nine cents (\$5,684.29) (the "Settlement Amount") to Petitioner, as full compensation for and satisfaction of all fees and costs it alleges it incurred associated with the Action. Said Settlement Amount is to be made payable to the law offices of Clark Hill, PLLC, and shall be delivered to Petitioner's legal counsel, at the address set forth in Section 18.
 - c) **Full Satisfaction.** Upon production of the record described in Section 3(a) and payment of the amount set forth in Section 3(b), FCOG will fully satisfy all relief Petitioner alleged it was entitled to, or could have alleged it was entitled to, in the Action.
 - d) **No Additional Payments by FCOG.** Under no circumstances will FCOG be required to pay more or less than the Settlement Amount pursuant to this Agreement.

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4. **Petitioner's Obligations.**

- a) **Request for Taxpayer Identification Number and Certification.** On or before the third (3rd) business day following the Effective Date, Petitioner shall deliver to Fresno Council of Governments a properly-completed IRS Form W-9, Request for Taxpayer Identification Number and Certification, with respect to Clark Hill, PLLC.
- b) **Request for Dismissal With Prejudice.** Within three (3) business days of receipt of the latter of the record described in Section 3(a) of this Agreement or the payment described in Section 3(b) of this Agreement, Petitioner shall file a Request for the Dismissal of the Action with prejudice.
- c) **Waiver of Fees and Costs.** Petitioner hereby agrees to waive and relinquish any right to recover any attorney's fees and/or costs from FCOG relating to the Action, except as to those fees and costs to be paid pursuant to Section 3(b) and those which may be payable pursuant to Section 14.

5. **Release of Claims and Covenant Not to Sue.** In consideration for the agreements contained herein, and except as to obligations created herein, Petitioner for itself, and its successors, assigns, heirs, executors, administrators and representatives, and any other person or entity claiming (now or in the future) to be acting through or on behalf of the Petitioner (each a "Releasor," and collectively, the "Releasors"), hereby fully and finally release and forever discharge the Releasees (hereinafter defined) from any and all claims, demands, and causes of action of whatever kind or nature whether known or unknown included in the Action, or which could have been included in the Action. Fresno Council of Governments, including Fresno Council of Governments' governing board, officers, agents, employees, and attorneys, and Les Beshears are each a "Releasee" and are collectively the "Releasees" under this Agreement. Petitioner acknowledges and affirms that it is familiar with Section 1542 of the California Civil Code, which provides that:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT EXISTS IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Petitioner hereby knowingly and voluntarily waives the provisions of Section 1542 of the California Civil Code with respect to any claim alleged or which could have been alleged in the Action, and acknowledges and agrees that this waiver is an essential and material term of the settlement which led to this Agreement.

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As of the Effective Date, Releasors, hereby absolutely, unconditionally and irrevocably, covenant and agree with and in favor of the Releasees that Releasors will not bring, file, charge, claim, sue or cause, assist, or permit to be brought, filed, charged or claimed any action, cause of action, or proceeding (at law, in equity, in any regulatory proceeding or otherwise) against the Releasees on the basis of any matter released, surrendered, or discharged by the Releasors pursuant to this Agreement. If any Releasor violates the foregoing covenant, such Releasors, jointly and severally agrees to pay, in addition to such other damages as any Releasee may sustain as a result of such violation, all reasonable attorneys' fees and costs incurred by any Releasee as a result of such violation.

6. **No Admission.** This Agreement is the compromise and the final and complete resolution of all disputes claims asserted, or that could have been asserted, in the pleadings on file in this action and fully and finally settles the asserted claims, or claims that could have been asserted, in the Action. Nothing in this Agreement shall be interpreted or construed to be an admission of liability on the part of any person or party named herein.
7. **Modification.** This Agreement may not be altered, amended, or modified in any respect, except by a writing duly executed by the Parties.
8. **Binding Effect of Agreement.** This Agreement, and all the terms and provisions hereof, shall be binding upon, and shall insure to the benefit, of the Parties and their respective heirs, legal representatives, successors, and assigns.
9. **No Third Party Beneficiaries.** Notwithstanding anything else to the contrary herein, the Parties acknowledge and agree that no other person, firm, corporation, or entity shall be deemed an intended third-party beneficiary of this Agreement.
10. **Attorneys Fees' and Costs.** Except as set forth in Sections 3(b) and 14 herein, each Party shall bear its own attorneys' fees and costs related to this Agreement.
11. **Voluntary Settlement.** The Parties agree that the Settlement Amount and the other terms of the Settlement as described herein were negotiated in good faith by the Parties, and reflect a settlement that was reached voluntarily after consultation with competent legal counsel. The Parties specifically represent that, prior to signing this Agreement, they have been provided a reasonable period of time within which to consider whether to accept this Agreement. The Parties further represent that they have each carefully read and fully understand all of the provisions of this Agreement, and that they are voluntarily, knowingly, and without coercion, entering into this Agreement based upon their own judgment.
12. **Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, illegal, or unenforceable, that provision shall be interpreted as severable and severed from this Agreement and all other provisions in this Agreement shall nevertheless continue and remain in full force and effect. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties hereto shall negotiate in good faith to modify this Agreement so as to effect the

original intent of the Parties as closely as possible in an acceptable manner so that the transaction contemplated by the Parties is fulfilled to the greatest extent possible.

13. **Waiver.** Failure to insist on compliance with any term, covenant, or condition in this Agreement shall not be deemed a waiver of that term, covenant, or condition, nor shall any waiver or relinquishment of any right or power in this Agreement at any one time or more times be deemed a waiver or relinquishment of any right or power at any other time or times.
14. **Enforcement of this Agreement.** This Agreement is enforceable pursuant to Code of Civil Procedure section 664.6. Petitioner and FCOG agree that the terms of this Agreement are not confidential and may be introduced in court to enforce the terms of the settlement they reflect. If any action is required to enforce the terms of this Agreement, the prevailing party shall be entitled to its reasonable attorneys' fees and costs incurred to enforce this Agreement, provided that the action is initiated by the filing of a pleading in the Superior Court not later than the sixtieth (60th) day following the Effective Date. No attorneys' or costs may be recovered by a prevailing party for any action commenced after the sixtieth (60th) day following the Effective Date.
15. **Retention of Jurisdiction and Resolution of Disputes.** The Parties agree, and hereby request of the Superior Court, that the Superior Court retain jurisdiction over the Action and the Parties to this Agreement for the purposes of confirming full performance of this Agreement, permitting the exercise of all rights under this Agreement. The Parties agree that the Superior Court shall have sole jurisdiction to decide any dispute arising out of this Agreement.
16. **Cooperation.** The Parties agree to and shall cooperate fully with each other in the performance of this Agreement, and shall take all actions which may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.
17. **Execution in Counterparts.** This Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Counsel for the Parties shall exchange Portable Document Format ("PDF") copies of the signed counterparts by email and originally signed counterparts by U.S. Mail.

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18. **Notices.** All notices, consents, approvals, requests, correspondence, documents, reports, demands and other communications (collectively, "Notice") which the Parties are required or desire to serve upon or deliver to one another shall be in writing and shall be sent by any of the following methods: (a) personal delivery, in which case notice is effective upon delivery; (b) certified or registered United States mail, return receipt requested, in which case notice shall be deemed delivered upon receipt of delivery is confirmed by a return receipt; or (c) nationally recognized overnight courier, with charges prepaid or charged to the sender's account, in which case notice is effective on delivery if delivery is confirmed by the delivery service addressed in the appropriate manner for the method of service, as set forth below:

FCOG:

Fresno Council of Governments
Attention: Tony Boren, Executive Director
2035 Tulare Suite 201
Fresno, California 93721

Copies of notices to FCOG shall also be given to:

Office of the Fresno County Counsel
Attention: Arthur G. Wille, Senior Deputy County Counsel
2220 Tulare Street, Suite 500
Fresno, California 93721

Petitioner:

Robert Fellner, Transparency Director
Nevada Policy Research Institute, Inc.
7130 Placid Street
Las Vegas, Nevada 89119

Copies of notices to Petitioner shall also be given to:

Nicholas M. Wieczorek, Esq.
Clark Hill, PLLC
3800 Howard Hughes Parkway
Suite 500
Las Vegas, Nevada 89169

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19. **Authorization to Execute.** Each Party represents and warrants to the other Party that such Party is duly authorized and empowered to execute, enter into, and perform its obligations set forth in this Agreement, and that the individual signing this Agreement on behalf of such Party has been duly authorized to execute this Agreement on behalf of such Party, and will, by signing this Agreement on such Party's behalf, legally bind such Party to the terms and conditions of this Agreement.

Each Party further represents and warrants to the other Party that no other person or entity is required to give its approval or consent to this Agreement in order for such Party to authorize, enter into, and perform its obligations under this Agreement, or that if such approval or consent to this Agreement is required, that such approval or consent has been obtained.

20. **Headings; Construction; Statutory References.** The headings of the sections and paragraphs of this Agreement are for convenience only and shall not be used to interpret this Agreement. This Agreement is the product of negotiation between the Parties. The language of this Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any Party. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. All references in this Agreement to particular statutes, regulations, ordinances or resolutions of the United States or the State of California shall be deemed to include the same statute, regulation, ordinance or resolution as hereafter amended or renumbered, or if repealed, to such other provisions as may thereafter govern the same subject.

21. **Governing Law and Venue.** This Agreement shall be deemed to have been entered into in Fresno County, and shall be interpreted under, and enforced by the laws of the State of California. The Agreement and obligations of the parties are subject to all laws, orders, rules, and regulations of the authorities having jurisdiction over this Agreement (or the successors of those authorities). Any suits brought pursuant to this Agreement shall be filed and heard in courts having jurisdiction and located in the Fresno County, State of California.

22. **Integrated Agreement.** This Agreement contains the sole, complete, and entire agreement and understanding of the Parties concerning the matters contained herein, and supersedes all previous negotiations, proposals, commitments, writings, and understandings of any nature whatsoever, unless expressly included in this Agreement.

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IN WITNESS WHEREOF, the parties hereto have entered into this Agreement to be effective as of the Effective Date.

Nevada Policy Research Institute, Inc.

Fresno Council of Governments

By John A. Tsarpalas

By _____

Print Name: John Tsarpalas

Print Name: _____

Title: President

Title: Executive Director of Fresno Council of Governments

Dated: 9/20/17

Dated: _____

~~By _____~~

**Les Beshears, Finance Director
Fresno Council of Governments**

~~Print Name: _____~~

~~Title: Chief Financial Officer~~

~~Dated: _____~~

Dated: _____

APPROVED AS TO LEGAL FORM FOR
Petitioner
Clark Hill, PLC

APPROVED AS TO LEGAL FORM FOR
FCOG
Daniel C. Cederborg, County Counsel

By Nicholas M. Wiczorek, Esq.
216239726.1

By _____
Arthur G. Wille, Senior Deputy