Hearing: January 22, 2021
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Item 2

Proposed Minutes

COMMISSION ON STATE MANDATES

Location of Meeting: via Zoom
December 4, 2020

Present: Member Gayle Miller, Chairperson
Representative of the Director of the Department of Finance
Member Andre Rivera
Representative of the State Treasurer, Vice Chairperson
Member Lee Adams
County Supervisor
Member Jeannie Lee
Representative of the Director of the Office of Planning and Research
Member Sarah Olsen
Public Member
Member Carmen Ramirez
City Council Member
Member Jacqueline Wong-Hernandez
Representative of the State Controller

NOTE: The transcript for this hearing is attached. These minutes are designed to be read in conjunction with the transcript.

CALL TO ORDER AND ROLL CALL

Chairperson Miller called the meeting to order at 10:07 a.m. Executive Director Heather Halsey called the roll and Members Adams, Lee, Miller, Olsen, Ramirez, Rivera, and Wong-Hernandez all indicated that they were present.

APPROVAL OF MINUTES

Chairperson Miller asked if there were any objections or corrections to the September 25, 2020 minutes. Member Olsen made a motion to adopt the minutes. With a second by Member Rivera, the September 25, 2020 hearing minutes were adopted by a unanimous voice vote of members present.

PUBLIC COMMENT FOR MATTERS NOT ON THE AGENDA

Chairperson Miller asked if there was any public comment. There was no response. Assistant Executive Director Heidi Palchik stated that there was a resolution of the Commission in recognition of Member Ramirez's eight years of serving the Commission. Chairperson Miller thanked Member Ramirez for her understanding, great questions, support, and service to the State of California. Assistant Executive Director Palchik read the resolution into the record. Member Ramirez replied in appreciation of the work of staff, litigants and fellow Commission members. Member Olsen stated that she enjoyed the experience of serving with Member

Ramirez, Member Wong-Hernandez thanked her for her service, and Executive Director Halsey thanked her for her dedication and congratulated her on her new position as a supervisor for the County of Ventura.

CONSENT CALENDAR

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLES 7 AND 8 (action)

STATEWIDE COST ESTIMATE

Item 6* *Public School Restrooms: Feminine Hygiene Products*, 18-TC-01

Education Code Section 35292.6; Statutes 2017, Chapter 687 (AB 10)

Executive Director Halsey stated that Item 6 was proposed for consent. Chairperson Miller asked if there were any objections to the Consent Calendar. There was no response.

Member Wong-Hernandez made a motion to adopt the Consent Calendar. Member Ramirez seconded the motion. Chairperson Miller asked if there was any public comment on the Consent Calendar. There was no response. The Consent Calendar was adopted by a unanimous voice vote of members present.

HEARINGS AND DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, ARTICLE 7 (GOV. CODE, § 17551, 17557, 17559, and 17570) (action)

Executive Director Halsey swore in the parties and witnesses participating in the Article 7 portion of the hearing.

APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181.1(c) (info/action)

Item 2 Appeal of Executive Director Decisions

Executive Director Halsey stated that there were no appeals to consider for this hearing.

TEST CLAIM

Item 3 *Accomplice Liability for Felony Murder*, 19-TC-02

Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)

County of Los Angeles, Claimant

Executive Director Halsey stated that the claimant representative will not be attending the hearing but has authorized three witnesses to speak on behalf of the claimant, County of Los Angeles.

Senior Commission Counsel Juliana Gmur presented this item and recommended that the Commission adopt the Proposed Decision to deny this Test Claim.

The following appearances were made: Lucia Gonzalez, Craig Osaki, and Felicia Grant appeared as witnesses for the claimant; and Christina Snider and John O'Connell appeared on behalf of the County of San Diego.

Following the parties, interested parties, and witnesses stating their positons and providing evidence, and discussion between Member Olsen, Member Wong-Hernandez, Member Ramirez, Chairperson Miller, Member Adams, and Commission staff, Chairperson Miller made a motion to adopt the staff recommendation. With a second by Member Ramirez, the motion to adopt the staff recommendation was adopted by a vote of 4-3 with Member Adams, Member Olsen, and Member Wong-Hernandez voting no.

PARAMETERS AND GUIDELINES

Item 4 *Vote by Mail Ballots: Prepaid Postage*, 19-TC-01

Elections Code Section 3010; Statutes 2018, Chapter 120 (AB 216)

County of Los Angeles, Claimant

Senior Commission Counsel Eric Feller presented this item and recommended that the Commission adopt the Proposed Decision and Parameters and Guidelines.

The following appearances were made: Lucia Gonzalez appeared on behalf of the claimant; Dillon Gibbons appeared on behalf of the California Special Districts Association; and Andy Nichols appeared on behalf of Nichols Consulting.

Following the parties and interested persons stating their positons, and discussion between parties, interested persons, and Commission staff, Member Olsen made a motion to adopt the staff recommendation. With a second by Member Wong-Hernandez, the motion to adopt the staff recommendation was adopted by a vote of 7-0.

HEARINGS ON COUNTY APPLICATIONS FOR FINDINGS OF SIGNIFICANT FINANCIAL DISTRESS PURSUANT TO WELFARE AND INSTITUTIONS CODE SECTION 17000.6 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, ARTICLE 2 (info/action)

Item 5 Assignment of County Application to Commission, a Hearing Panel of One or More Members of the Commission, or to a Hearing Officer

Executive Director Heather Halsey stated that no SB 1033 applications have been filed.

REPORTS

Item 7 Chief Legal Counsel: New Filings, Recent Decisions, Litigation Calendar (info)

Chief Legal Counsel Camille Shelton presented this item.

Item 8 Executive Director: Workload Update and Tentative Agenda Items for the January and March 2021 Meetings (info)

Executive Director Halsey described the Commission's pending caseload.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 AND 11126.2 (info/action)

A. PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126(e)(1):

Trial Courts:

1. ***On Remand from the California Supreme Court, Case No. S247266, and the First District Court of Appeal, Case No. A148606***
   California School Board Association (CSBA) v. State of California et al.
   Alameda County Superior Court, Case No. RG11554698
   [Multiple Causes of Action on the Mandates Process]

Courts of Appeal:

1. ***On Remand from California Supreme Court, Case No. S214855,*** *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region v. Commission on State Mandates and County of Los Angeles, et al* (petition and cross-petition)
   Second District Court of Appeal Case No. B292446
   [Los Angeles County Superior Court, Case No. BS130730, Related Appeal from Second District Court of Appeal, Case No. B237153 [*Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21, Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001, Parts 4C2a., 4C2b, 4E & 4Fc3]
2. ***On Remand from the Third District Court of Appeal, Case No. C070357***
   State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Board, San Diego Region v. Commission on State Mandates and County of San Diego, et al. (petition and cross-petition)
   Third District Court of Appeal, Case No. C092139
   Sacramento County Superior Court Case No. 34-2010-80000604
   [*Discharge of Stormwater Runoff*, Order No. R9-207-000 (07-TC-09), California Regional Water Control Board, San Diego Region Order No. R9-2007-001, NPDES No. CAS0108758, Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c) iv-vii & x-xv, and L]
3. *City of San Diego v. Commission on State Mandates, State Water Resources Control Board, Department of Finance*
   Third District Court of Appeal, Case No. C092800
   Sacramento County Superior Court, Case No. 2019-80003169
   (*Lead Sampling in Schools: Public Water System No. 3710020* (17-TC-03))

California Supreme Court:

1. *Coast Community College District, et al. v. Commission on State Mandates,*
   California Supreme Court, Case No. S262663
   (Petition for Review Filed June 10, 2010)
   Third District Court of Appeal, Case No. C080349
   Sacramento County Superior Court, Case No. 34-2014-80001842
   [*Minimum Conditions for State Aid*, 02-TC-25/02-TC-31
   (Education Code Sections 66721, 66721.5, 66722, 66722.5, 66731, 66732, 66736, 66737, 66738, 66740, 66741, 66742, 66743, 70901, 70901.5, 70902, 71027, 78015, 78016, 78211.5, 78212, 78213, 78214, 78215, 78216, 87482.6, and 87482.7; Statutes 1975, Chapter 802; Statutes 1976, Chapters 275, 783, 1010, and 1176; Statutes 1977, Chapters

36 and 967; Statutes 1979, Chapters 797 and 977; Statutes 1980, Chapter 910; Statutes 1981, Chapters 470 and 891; Statutes 1982, Chapters 1117 and 1329; Statutes 1983, Chapters 143 and 537; Statutes 1984, Chapter 1371; Statutes 1986, Chapter 1467; Statutes 1988, Chapters 973 and 1514; Statutes 1990, Chapters 1372 and 1667; Statutes 1991, Chapters 1038, 1188, and 1198; Statutes 1995, Chapters 493 and 758; Statutes 1998, Chapter 365, 914, and 1023; Statutes 1999, Chapter 587; Statutes 2000, Chapter 187; and Statutes 2002, Chapter 1169; California Code of Regulations, Title 5, Sections 51000, 51002, 51004, 51006, 51008, 51012, 51014, 51016, 51018, 51020, 51021, 51022, 51023, 51023.5, 51023.7, 51024, 51025, 51027, 51100, 51102, 53200, 53202, 53203, 53204, 53207, 53300, 53301, 53302, 53308, 53309, 53310, 53311, 53312, 53314, 54626, 54805, 55000, 55000.5, 55001, 55002, 55002.5, 55004, 55005, 55006, 55100, 55130, 55150, 55160, 55170, 55182, 55200, 55201, 55202, 55205, 55207, 55209, 55211, 55213, 55215, 55217, 55219, 55300, 55316, 55316.5, 55320, 55321, 55322, 55340, 55350, 55401, 55402, 55403, 55404, 55500, 55502, 55510, 55512, 55514, 55516, 55518, 55520, 55521, 55522, 55523, 55524, 55525, 55526, 55530, 55532, 55534, 55600, 55601, 55602, 55602.5, 55603, 55605, 55607, 55620, 55630, 55750, 55751, 55752, 55753, 55753.5, 55753.7, 55754, 55755, 55756, 55756.5, 55757, 55758, 55758.5, 55759, 55760, 55761, 55762, 55763, 55764, 55765, 55800, 55800.5, 55801, 55805, 55805.5, 55806, 55807, 55808, 55809, 55825, 55827, 55828, 55829, 55830, 55831, 58102, 58104, 58106, 58107, 58108, 59404, and 59410; Handbook of Accreditation and Policy Manual, Accrediting Commission for Community and Junior Colleges (Summer 2002); and "Program and Course Approval Handbook" Chancellor's Office California Community Colleges (September 2001).]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126(e)(2):

Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members or staff.

B. PERSONNEL

To confer on personnel matters pursuant to Government Code section 11126(a)(1).

The Commission adjourned into closed executive session at 11:52 a.m., pursuant to Government Code section 11126(e)(2), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and to confer with and receive advice from legal counsel regarding potential litigation; and to confer on personnel matters pursuant to Government Code section 11126(a)(1).

RECONVENE IN PUBLIC SESSION

REPORT FROM CLOSED EXECUTIVE SESSION

At 12:14 p.m., the Commission reconvened in open session. Chairperson Miller reported that the Commission met in closed executive session pursuant to Government Code section 11126(e)(2) to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the public notice and agenda, and to confer with and receive advice from legal counsel regarding potential litigation, and, pursuant to Government Code section 11126(a)(1) to confer on personnel matters.

ADJOURNMENT

Hearing no further business, Chairperson Miller requested a motion to adjourn the meeting. Member Olsen made a motion to adjourn the meeting. Member Rivera seconded the motion. The December 4, 2020 meeting was adjourned by a unanimous voice vote at 12:15 p.m.

Heather Halsey
Executive Director

STATE OF CALIFORNIA

COMMISSION ON STATE MANDATES

PUBLIC MEETING

FRIDAY, DECEMBER 4, 2020

10:07 A.M.

MEETING HELD

VIA ZOOM,

A VIDEO COMMUNICATIONS PLATFORM

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ORIGINAL

REPORTED BY:
KATHRYN S. SWANK
Certified Shorthand Reporter No. 13061
Registered Professional Reporter

KATHRYN S. SWANK, CSR
303 Paddock Court
Roseville, California 95661
Telephone (916) 390-7731
KathrynSwankCSR@sbcglobal.net

A P P E A R A N C E S

(All attendees appeared remotely, via Zoom.)

COMMISSIONERS PRESENT

GAYLE MILLER
Representative for KEELY BOSLER, Director
Department of Finance
(Chair of the Commission)

ANDRE RIVERA
Representative for FIONA MA
State Treasurer
(Vice Chair of the Commission)

JACQUELINE WONG-HERNANDEZ
Representative for BETTY T. YEE
State Controller

JEANNIE LEE
Representative for KATE GORDON, Director
Office of Planning & Research

LEE ADAMS III
Sierra County Supervisor
Local Agency Member

SARAH OLSEN
Public Member

M. CARMEN RAMIREZ
Oxnard City Council Member
Local Agency Member

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COMMISSION STAFF

ERIC FELLER
Senior Commission Counsel

JULIANA GMUR
Senior Commission Counsel

HEATHER A. HALSEY
Executive Director

A P P E A R A N C E S C O N T I N U E D

HEIDI PALCHIK
Assistant Executive Director

CAMILLE N. SHELTON
Chief Legal Counsel

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PUBLIC PARTICIPANTS

DILLON GIBBONS
California Special Districts Association

LUCIA GONZALEZ
County of Los Angeles, Claimant

FELICIA GRANT
County of Los Angeles, Claimant

ANDY NICHOLS
Nichols Consulting

JOHN O'CONNELL
County of San Diego

CRAIG OSAKI
County of Los Angeles, Claimant

CHRISTINA SNIDER
County of San Diego

---o0o---

E R R A T A S H E E T

Page	Line	Correction
16	14	and ~~ended~~ did it so well.

I N D E X

I N D E X C O N T I N U E D

I N D E X C O N T I N U E D

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FRIDAY, DECEMBER 4, 2020, 10:07 A.M.

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CHAIRPERSON MILLER: The meeting on the Commission of State Mandates will come to order.

Welcome and thank you to everyone for participating via Zoom.

Please note that in response to COVID-19 and its impact on public meetings, under the Bagley-Keene Open Meeting Act, Governor Newsom's Executive Order N-2920 suspends, on an emergency basis, pursuant to California Government Code section 8571, certain requirements for public meetings.

Accordingly, requiring the physical presence of board members at public meetings and providing a physical space for members of the public to observe and participate have been suspended until further notice, so long as the agency makes it possible for members of the public to observe and address the meetings remotely; for example, via web or audio conferencing such as Zoom.

The Commission is committed to ensuring that our meetings are accessible to the public and the public has the opportunity to observe the meeting and to participate by providing written and verbal comment on Commission matters.

During this extraordinary time, and as we explore

new ways of doing business with new technologies, we ask that you remain patient with us.

Please note that the materials for today's meeting, including the notice, agenda, and witness list, are all available on the Commission's website, www.csm.ca.gov, under the "Hearings" tab.

Ms. Halsey, will you please call the roll.

MS. HALSEY: Mr. Adams.

MEMBER ADAMS: Here.

MS. HALSEY: Ms. Lee.

MEMBER LEE: Here.

MS. HALSEY: Ms. Miller.

CHAIRPERSON MILLER: Here.

MS. HALSEY: Ms. Olsen.

MEMBER OLSEN: Here.

MS. HALSEY: Ms. Ramirez.

MEMBER RAMIREZ: I'm here.

MS. HALSEY: Ms. Rivera -- Mr. Rivera, sorry.

MEMBER RIVERA: I'm here.

MS. HALSEY: Ms. Wong-Hernandez.

MEMBER WONG-HERNANDEZ: Here.

MS. HALSEY: Thank you.

CHAIRPERSON MILLER: Great. Thank you very much.

The next item is Item Number 1. Are there any objections or corrections to the minutes from

September 25th, 2020?

MEMBER OLSEN: I will move adoption.

CHAIRPERSON MILLER: Thank you, Ms. Olsen.

May we have a second, please.

MEMBER RIVERA: I second.

CHAIRPERSON MILLER: Great. Thank you, Mr. Rivera.

We have a motion and a second for the adoption of the September 25th, 2020, minutes.

All those in favor of adopting the minutes, please signify by saying "aye." Please unmute yourselves.

(Ayes)

CHAIRPERSON MILLER: Great.

Are any opposed?

(No response)

CHAIRPERSON MILLER: Any abstentions?

(No response)

CHAIRPERSON MILLER: Seeing none, the minutes are adopted. Thank you very much.

MS. HALSEY: And now we will take up public comment for matters not on the agenda. Please note that the Commission cannot take actions not on the agenda. However, it can schedule issues raised by the public for consideration at future meetings.

CHAIRPERSON MILLER: Great. Any -- Ms. Palchik, do you see anyone?

MS. PALCHIK: So I see nobody going for public comment, Madam Chair.

CHAIRPERSON MILLER: Great.

MS. PALCHIK: And then we do have the resolution, please.

CHAIRPERSON MILLER: Yes. And I'm hoping one of you will be able to read that for me.

So I just wanted to make sure -- we are so incredibly grateful to Carmen Ramirez. It's been such a pleasure getting to know you and learning from you. And I am just kind of in awe of how well you understood this and the great questions you asked and your support of me as, a new chair, and the staff. It's been a true pleasure, Ms. Ramirez, and I'm just incredibly grateful for your service to the State of California and the way you delved into these issues and really, really made this process so fair and forthright. And I think we, the State of California, owe you a huge debt of gratitude.

So Ms. Palchik, could you maybe read that beautiful resolution for us, please.

MS. PALCHIK: Absolutely. It would be my pleasure.

MEMBER RAMIREZ: I didn't see this on agenda.

MS. PALCHIK: Before we take any other public comment, we would like to present a resolution of the

Commission to Ms. Carmen Ramirez in recognition of her eight years serving the Commission. So I will begin:

Before the Commission on State Mandates, in honor of Maria "Carmen" Ramirez, Member, Commission on State Mandates, 2012-2020.

Whereas, M. Carmen Ramirez is a public interest lawyer who has served the community since she was admitted to practice in December 1974, and was elected to Oxnard City Council, the 19th largest city in California, in November 2010, while maintaining a private legal practice focusing on consumer matters, Social Security Disability cases, as well as immigration; and

Whereas, since Governor Jerry Brown appointed her to the Commission on State Mandates in 2012, Ms. Ramirez has distinguished herself as a member representing local agencies, as well as a member of the Commission's legislation and litigation subcommittees; and

Whereas, in her eight years as a Commission member, Ms. Ramirez has participated in over 40 Commission hearings and advised and influenced the Commission in determining test claims, parameters and guidelines, incorrect reduction claims and other matters related to article XIII B, section 6 of the California Constitution, including Test Claims on Behavioral

Intervention Plans (and its mandate redetermination), Standardized Testing and Reporting II and III, Race to the Top, California Assessment of Student Performance and Progress, Public School Restrooms: Feminine Hygiene Products, and the heavily-litigated Sexually Violent Predators mandate redetermination; and

Whereas, Ms. Ramirez is always well-prepared for Commission hearings having thoroughly read through the hundreds of pages of analyses and materials; and

Whereas, Ms. Ramirez makes all the parties and witnesses feel welcomed and comfortable at Commission hearings and validates their particular concerns; and

Whereas, Ms. Ramirez is always supportive of Commission staff offering appreciation for work accomplished or a job well done; and

Whereas, Ms. Ramirez is being honored by the Members and Staff of the Commission on State Mandates in appreciation of her outstanding dedication, leadership, and service to the State of California;

Now Therefore, be it resolved that the Members and Staff of the Commission on State Mandates warmly congratulate M. Carmen Ramirez on her election to the Ventura County Board of Supervisors, knowing that her service to the people of Ventura County will be as excellent as her service to the Commission has been.

On this fourth day of December 2020, County of Sacramento, State of California, in witness, thereof by Members and Staff of the Commission on State Mandates.

(Applause)

MEMBER RAMIREZ: Whoa. Thank you. Thank you. What a surprise. It seemed like it was just -- I forgot it was eight years. And I will -- it's been such a pleasure. This is a great place for a lawyer to be, and I think that's why I really appreciated all of the work of the staff and the litigants and my fellow Commission members, dealing with things that people don't quite see the complexity when they are standing apart.

And I will just never forget the hardworking staff of this Commission. It's just awesome how hard you work to make -- to get this done. And, really, thank you. I will miss being here, but I will follow what you are up to.

And thank you for this very much. Appreciate it.

CHAIRPERSON MILLER: Thank you very much, many Ms. Ramirez.

I know some of your fellow board members, I think, would like to make a comment, and I just -- I want to make sure to give Ms. Halsey and Ms. Shelton a moment too.

And Ms. Palchik, that may have been the best

reading of a resolution I have ever heard. So thank you for that.

MS. PALCHIK: Thank you.

CHAIRPERSON MILLER: Everything is so true, and I loved how much passion was in that. Thank you for that.

Ms. Olsen.

MEMBER OLSEN: Well, Carmen, I have just enjoyed immensely the experience of serving with you. And I just want you to know, as the person who I am most likely to get eye contact with, given our seating arrangement, I have appreciated the nonverbal communication also that has gone between us.

So thank you so much for your service.

MEMBER RAMIREZ: I was trying to get you to do a motion.

MEMBER OLSEN: I know. Who is motioning? Who is seconding?

CHAIRPERSON MILLER: Great.

Anyone else want to make a comment?

Ms. Wong-Hernandez, please.

MEMBER WONG-HERNANDEZ: I just wanted to also add my thanks to Ms. Ramirez, because you were -- when I was a new chair and just being on here -- I haven't been on nearly as long as she has. And just -- you were so welcoming and, obviously, you are such a great

commissioner in terms of asking questions and really trying to do what's right and help all of us tease it out, and especially with your legal perspective too.

So thank you, and thank you for your service, and they are lucky to have you and congratulations.

CHAIRPERSON MILLER: Anyone else?

Oh, please, Ms. Halsey.

MS. HALSEY: I would just like to say thank you for your service and for being on the Commission. You have been such a thoughtful member and so well prepared, and I know how much work it is to read those analyses and look at that evidence and come prepared on top of your other full-time job and how much work that is, and just that you were so dedicated to it and ended it so well. I really appreciate it.

And we will miss you and, certainly, Ventura County's gain is our loss. No doubt that. So I wish you Godspeed in Ventura County, and I think that they are very fortunate to have you as a supervisor.

MEMBER RAMIREZ: Thank you.

CHAIRPERSON MILLER: Thank you.

Well, thank you again, truly, Ms. Ramirez.

Any other public comment, either in general or just to congratulate Ms. Ramirez? Ms. Palchik, do we see anyone in the queue?

MS. PALCHIK: No, Madam Chair.

CHAIRPERSON MILLER: Great. Thank you very much.

Okay. So seeing none, we will move to the next item, please, Ms. Halsey.

MS. HALSEY: Item 6 is proposed for consent.

CHAIRPERSON MILLER: Great.

Are there any objections to the proposed consent calendar?

(No response)

CHAIRPERSON MILLER: Seeing none, may we have a motion and a second, please.

MEMBER WONG-HERNANDEZ: Move approval of the consent calendar.

MEMBER RAMIREZ: I will second.

CHAIRPERSON MILLER: Okay. Great. Moved by Ms. Wong-Hernandez; seconded by Ms. Ramirez.

So we're going to do the -- any public comment on the consent calendar at all?

(No response)

CHAIRPERSON MILLER: No? Seeing none, the motion was moved by Ms. Wong-Hernandez; seconded by Ms. Ramirez.

All those in favor, please unmute yourselves and say "aye."

(Ayes)

CHAIRPERSON MILLER: All opposed, please say -- unmute yourselves and say "no."

(No response)

CHAIRPERSON MILLER: Seeing none, any abstentions?

(No response)

CHAIRPERSON MILLER: Great. The consent calendar passes.

MS. HALSEY: Thank you.

Let's move to the Article 7 portion of the hearing. Now will the parties and witnesses for Items 3 and 4 please turn on your video and unmute your microphones and please rise.

(Parties/witnesses stood to be sworn or affirmed.)

MS. HALSEY: Please be seated and turn off your videos and mute your microphones.

Thank you. Item 2 is reserved for appeals of Executive Director decisions. There are no appeals to consider for this hearing.

Next is Item 3. Senior Commission Counsel Juliana Gmur will please turn on her video and unmute her microphone and present a proposed decision on a test claim on *Accomplice Liability for Felony Murder.*

At this time we invite the witness parties and witnesses for Item 3 to please turn on their video and

unmute their microphones. The claimant representative will not be attending this hearing, but he has authorized three witnesses to speak on behalf of the claimant, County of Los Angeles.

MS. GMUR: Good morning.

CHAIRPERSON MILLER: Good morning. We're so glad to see you. Welcome.

MS. GMUR: Thank you so much. It's my pleasure to be here.

Test claims addresses changes to criminal law which limit the application of the felony murder rule and the Natural and Probable Consequences Doctrine to only those individuals who have either an intent to kill or who were major participants in the underlying crime and acted with reckless indifference to human life.

To apply these standards retroactively, Penal Code section 1170.95 sets forth a petition process allowing those individuals who were convicted of first or second degree murder under the felony murder rule or the Natural and Probable Consequences Doctrine to request the Court to vacate the murder conviction and to resentence the petitioner on any remaining counts.

The claimant seeks reimbursement for the costs associated with the participation in the petition hearing process by county district attorneys and public

defenders when appointed to defend the petitioner.

Staff finds, however, that the test claim statute and the costs and activities alleged by the claimant do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6, because the test claim statute eliminated a crime within the meaning of Government Code section 17556(g).

Accordingly, the staff recommends that the Commission adopt the proposed decision to deny the test claim, and authorize staff to make any technical, nonsubstantive changes to the proposed decision following the hearing.

CHAIRPERSON MILLER: Great. Thank you very much. And we're really thrilled for all the work you've been doing at the Commission. Thank you.

Parties and witnesses, will you please state your names for the record, and may we please begin with the County of Los Angeles.

MS. GONZALEZ: Lucia Gonzalez with the Office of County Counsel, County of Los Angeles.

MR. OSAKI: Craig Osaki with the L.A. County Public Defender's Office.

MS. GRANT: Felicia Grant with the Los Angeles County Alternate Public Defender's Office.

CHAIRPERSON MILLER: Great. Thank you very much for that.

So we'll go to comments. Does the public -- does the Department of Finance have any comments?

(No response)

CHAIRPERSON MILLER: Seeing none, please -- will you please begin with your comments on these items? Ms. Gonzalez, do you want to start, or would you like one of your colleagues to start?

MS. GONZALEZ: Yes. I would like to start. Thank you.

CHAIRPERSON MILLER: Thank you.

MS. GONZALEZ: Yes.

Good morning, Commissioners and Commission staff. Thank you for the opportunity to present this test claim at this hearing today.

The County of Los Angeles respectfully requests that the Commission redraft the proposed draft decision to deny the test claim for *Accomplice Liability for Felony Murder.*

Under California Constitution Article XIII B, whenever the Legislature or any state agency mandates a new program or higher level of service in any local government, the State shall provide a subvention of funds requiring the State to reimburse local government

for the cost of those programs.

The Commission staff concedes that by enacting Penal Code section 1170.95, Senate Bill 1437 imposes additional requirements on the County. In fact, this test claim imposes additional requirements on county departments, such as the Office of the Public Defender, the Office of the Alternate Public Defender, and the Office of the District Attorney, and the sheriff's department, by requiring a new petition process and hearing process that allows those convicted of first and second degree murder, under the felony murder rule or Natural and Probable Consequences Doctrine, who would not have been convicted under the amended Penal Code sections 188 and 189 to obtain a review.

So what is at issue today is whether these requirements are reimbursable under article XIII B, section 6 of the California Constitution.

The County asserts that indeed this Commission may grant this test claim consistent with the requirements under the constitution and the Government Code and make a finding that SB 1437 mandated a new process on the County, which requires the County to reimbursement.

I will now ask that Ms. Felicia Grant, head deputy for the Alternate Public Defender's Office, provide a statement; and then following, if any questions or

additional statements, Mr. Craig Osaki with the Los Angeles Public Defender's Office.

Thank you.

CHAIRPERSON MILLER: Thank you.

Ms. Grant, please go ahead.

MS. GRANT: Thank you. Good morning.

I have reviewed all the comments submitted to this Commission, asking you to reconsider the decision to deny reimbursement for costs incurred in connection with Penal Code section 1170.95. And I won't take up this Commission's time reiterating all of the well-taken arguments and the comments.

However, I do think it's important to speak to you about a point that I think is at the heart of this test claim.

Los Angeles County respectfully contends that the Commission's decision to deny the test claim because the test claim statute eliminates a crime within the meaning of Government Code section 17556(g) is an error. A "crime," in the context of our statutes, means an offense that may be prosecuted by the State and is punishable by law.

Crimes of criminal offenses contained in the Penal Code: First-degree murder is a crime; second-degree murder is a crime.

In order to convict a defend of a crime, a jury must unanimously agree that the prosecution proved the elements of the crime beyond a reasonable doubt. In contrast, felony murder and the Natural and Probable Consequences Doctrine are just theories that the prosecution may argue to a jury in order to prove that the defendant committed the crime of murder.

These are not crimes in and of themselves, and, in fact, the law is very clear that a jury need not unanimously agree on any one particular theory. A defendant may properly be convicted of the crime of murder even if the jurors don't agree on one or more of the theories proposed by the prosecution. It's sufficient that each juror believes, beyond a reasonable doubt, that the defendant is guilty of murder as that offense is defined by statute.

Let me give you an example:

Two men go into a 7-Eleven to rob a cashier. At trial, the prosecutor presents evidence that the second defend yells "Shoot him," to the first defendant, who, in fact, then shoots and kills the cashier.

In argument, the prosecutor tells the jury that the Defendant 2 is guilty of murder as a direct aider and abettor because he acted with the intent that Defendant 1 shoot and kill the cashier.

But just to hedge his bets, he also says, in argument, if the jury doesn't believe the evidence that the Defendant Number 2 acted with the intent to encourage Number 1 to commit a murder, he is still guilty of murder under the felony murder rule, regardless of what his intent is.

Jurors go back into the jury room.

Eight of them believe the prosecutor's argument that, in fact, Juror [sic] Number 2 is guilty of murder as a direct aider and abettor. Four of them disagree. They think the evidence was insufficient to show that he was a direct aider and abettor, but they think that he's guilty under the felony murder rule.

Does the prosecutor care? No. It doesn't matter to the prosecutor at all because, at the end of the day, all that matters to the prosecutor is that the defendant is convicted of murder, because the crime is murder. The theory is not the crime.

What SB 1437 did was modify the scope of malice aforethought. Penal Code section 188 now reads:

"Except as stated in subdivision (e) of section 189, in order to be convicted of murder, a principal in a crime should act with malice aforethought, and malice shall not be imputed to a person based solely on his or her participation in a crime. Even with the changes to

the scope of malice aforethought, the doctrine of felony murder is not eliminated."

As pointed out by the Court in *People v. Cervantes* at 46 Cal.App.5th 213, SB 1437 modified California's felony murder rule and Natural and Probable Consequences Doctrine to ensure that murder liability is not imposed on someone unless they were the actual killer, acted with the intent to kill, or acted as a major participant in the underlying felony, and with reckless indifference to human life.

And, additionally, Penal Code section 189(f) provides that when a defendant kills a peace officer during the commission of an enumerated felony, regardless of their intent, they are guilty of murder under the felony murder rule.

So the felony rule is still alive and well, albeit modified. No crime was eliminated by 1437's amendments to 188 and 189 of the Penal Code. These amendments merely modified the scope of malice aforethought, but they did not, in any way, eliminate the crime of murder, nor did it change the penalty for the crime of murder.

Therefore, subdivision (g) of Government Code section 17556 has no application to SB 1437.

Los Angeles County respectfully urges this Commission to reconsider its decision and find that the

test claim imposes a reimbursable state mandate on the County within the meaning of Article XIII B, section 6, of the California Constitution, without exception.

Thank you.

CHAIRPERSON MILLER: Thank you very much.

Please go ahead, Mr. Osaki.

MR. OSAKI: Thank you. Good morning, members of the Commission.

The purpose of the California Constitution, Article XIII B, section 6, was to prevent the State from unfairly shifting the costs of government on to local entities that were ill-equipped to shoulder the task. This mandate process allows local government to seek reimbursement for costs incurred as a result of higher burdens imposed upon them by passage of the laws, and SB 1437 is such a law.

It created a post-conviction proceeding, which required an enormous amount of resources from both -- from the Public Defender's Office, the Alternate Public Defender's Office, and the LA District Attorney's Office. Oh, and including the sheriff's department as well.

What happened -- what has to happen is that we have to look at old transcripts, perhaps decades old; we have to recreate the record; investigations must be

completed; experts may have to be consulted with. It's an enormous burden put upon the local government at this time.

It appears the sole basis of the proposed Commission decision for its denial of the test claim is section 17556(g), specifically a clause stating that a crime has been eliminated. However, 1437 did not eliminate a crime. The crimes at issue are first and second-degree murder.

After the passage of 1437, the crimes -- those crimes were not eliminated. It created a new process where an analysis is conducted to see whether there are other theories of liabilities which could sustain a conviction for murder or not.

Given the purpose behind article XIII B, section 6, of the California Constitution, we believe the 17556(g) be interpreted as written: Meaning that a crime must be eliminated, not theories of liability. As Ms. Grant pointed out, they are not the same thing.

To the extent that the Commission's proposed decision utilizes 17556(g) to deny the claim, we believe that it runs counter to the purpose behind the California Constitution and is unconstitutional.

We respectfully request that this Commission reconsider its proposed decision.

Thank you.

CHAIRPERSON MILLER: Great. Thank you very much. I appreciate that.

Any further public comment?

MS. HALSEY: I just wanted to say one clarifying thing, and it's just procedural.

But there's been no Commission decision. This is the first time this proposed decision has been before the Commission, so there's no decision to overturn or revise. This is just the proposed decision and the Commission is now, for the first time, hearing argument on it. So that's what I wanted to clarify.

CHAIRPERSON MILLER: Thank you for that clarification.

And just -- any additional public comment? And I just want to ask one more time if the Department of Finance has any comments.

MS. SNIDER: This is Christina Snider with the County of San Diego, and I and my colleague, John O'Connell, did sign up to comment as well.

But I will defer to the Department of Finance if they have comments.

CHAIRPERSON MILLER: Thank you.

I don't see the Department of Finance, so, please, Ms. Snider, go ahead, and thank you for stating your

name for the record.

MS. SNIDER: Great.

So, again, I'm Christina Snider. I'm a senior deputy county counsel with County Counsel of the County of San Diego.

I have my colleague here, John O'Connell, who is the deputy public defender, who has been practicing criminal law for, I think, 26 years, and so he knows the ins and outs of criminal law a little bit better than I do. So I have asked him to speak about the issue of eliminating a crime.

And then I would like to pivot and talk about whether 1170.95 should be considered independently of Penal Code 188 and 189, so I'm going to defer to Mr. O'Connell now and let him make his comments, and then we'll come back to me.

CHAIRPERSON MILLER: Great. Thank you.

Mr. O'Connell.

MR. O'CONNELL: All right. Thank you for letting me speak to you. I'm going to keep my comments brief because some of the -- my arguments have already been made, I think eloquently --

CHAIRPERSON MILLER: Mr. O'Connell, could you state your name, for the record, please, sir.

MR. O'CONNELL: Oh, yeah. It's John O'Connell.

I'm a deputy public defender with the County of San Diego. I apologize.

Again, I will be brief, because, again, I think Ms. Grant eloquently has stated a lot of the arguments.

But I do want to emphasize one point: And that, again, is on the issue of whether or not Senate Bill 1437 eliminated a crime, because, again, I think the Commission's proposed decision is confusing crimes with liabilities.

I also am reading the revised decision, got the impression that the -- at least the writers of the proposed decision thought that our argument, that these are separate -- that crimes and theories are separate was an interesting argument but that it was wrong.

What I want to point out, is it not just an interesting argument, that it is actually the law. The California Supreme Court has been very clear in the fact that felony murder and natural and probable consequences are only theories and are not crimes.

As pointed out in our response to the Commission, you can find this in the law of jury unanimity, which I cannot say. Ms. Grant, I think, again, clearly laid out the law of jury unanimity, so I'm not going to go over it again. But I do want to point out a couple specific cites for the Commission:

One is in *People v. Moore,* which was not listed in our response, but is part of the extensive case law involving this issue. It is at -- it was decided in 2011. It is at 51 Cal.4th 386. And at page 418, the California Supreme Court specifically laid out, and I quote, "Felony murder and premeditated murder are not distinct crimes."

They had to hold that again to show that juries could not -- don't have to be unanimous in deciding those particular issues. On the issue of natural and probable consequences, which cannot be found anywhere in the murder statutes, but is based on aiding and abetting statutes, I'm going to turn to another case: *People v. Jenkins* -- which is cited in our response -- which was decided in 2000, at cite 22 Cal.4th 900 at page 1025.

In that case, the California Supreme Court held -- and I quote -- "Naturally, in order to return a guilty verdict, the jury must agree unanimously that each element of the charged crime has been proved, but the factors that establish aiding and abetting liability are not included as elements of the crime of murder."

So when it comes to natural and probable consequences, not only is it not a crime, but the factors used in natural and probable consequences are not even considered to be elements of the crime. So,

again, the elimination of those factors do not eliminate any crime.

So, again, just to my conclusion, the revised decision stating that Senate Bill 1437, by narrowing the felony murder rule and narrowing the definition of "implied malice," which, in essence, eliminates natural and probable consequences for murder, the decision stating that those eliminate crimes is contrary to law, as established by the California Supreme Court.

And that's all I have to say. Thank you.

CHAIRPERSON MILLER: Excuse me. Thank you very much.

Ms. Snider.

MS. SNIDER: I will pick up from there then.

Thank you, Mr. O'Connell.

So my concern -- and I first should start with, I know that the Commission staff works very hard and is very thoughtful about these opinions, so these are very respectful comments and just trying to maybe show a different approach to the analysis.

So my concern is that the Commission staff -- the revised proposed decision looks at all three of the statutes as one, as opposed to three. And I'm concerned that that is contrary to mandates law, in general, and perhaps the way that the Commission has looked at

statutes in the past.

And I will quote from page 41 of the revised proposed decision. The page -- it says -- the decision says, "This petition and hearing process is not a stand-alone process, but instead is inexorably linked to the amendment to section 188 and 189 and therefore part of the elimination of a crime under Government Code section 17556(g)."

And to be clear, there, the Commission is referring to the petition and hearing process contained in 1170.95.

And so the Commission -- or the Commission staff has linked 188, 189, and 1170.95 and consider them to be one statute, while they are three separate statutes. And they did all come from one bill, and maybe there was one intention behind it, to deal with this issue, but that they should be considered as three separate statutes. And mandates law says that each statute should be considered separately, I propose.

So let's go to Cal Government Code 17514, which we did cite in our comments, but it's just one of the basic Commission on State Mandates's Mandates Government Code sections.

And that says (as read), "Costs mandated by the State means any increased costs which a local

agency...is required to incur...as a result of any statute enacted on or after January 1st, 1975."

And then there's a lot more to that step -- to that particular statute.

So we're looking at every statute, and that particular section of the Government Code doesn't define the word "statute," so we don't have a definition for what "statute" means within context of unfunded mandates. Unfortunately, I found no case law on that.

There are some definitions of statutes contained in different sections of different codes, but they are all very specific to that -- those code sections. So you are not going to find a definition of the word "statute" that applies.

And it could be because we -- as we all know, when we're doing statutory construction, you are just supposed to consider the reasonable and ordinary meaning of the word. So it could be that they didn't need to define the word "statute" because each statute is supposed to be considered separately.

So -- and also, case law, recent case law, does describe 1170.95 as a new statute. And these are three cases that we also didn't cite in our comments because it's something I found about -- I thought about later. But if you just look through any of the cases that are

describing what the bill 1437 did, they say, 1437 amended Penal Code sections 188 and 189, and it created this new statute, 1170.95, so this is a whole new statute that we need to review independently and say, does that particular statute impose a new mandate?

And if you look at the requirements in 1170.95, they are extensive. And I think there's no doubt that revised proposed decision does not even hint that these particular requirements in 1170.95 actually eliminate a crime. In order to reach that conclusion, staff links them with 188 and 189. There's no doubt that 1170.95 standing alone does not eliminate a crime.

But back to -- back to the three -- I will just put them on the record just so that we have them. There are three cases, three recent cases, that specifically describe 1170.95 as a new statute:

That's *People v. Prado*, 49 Cal.App.5th 408; *People v. Garcia,* 57 Cal.App.5th 1100 -- I'm sorry. 100; and *People v. Carter,* 34 Cal.App.5th 831. And there's no particular need to go dig into those cases, because, as I said, what they do is just describe 1170.95 as a new statute.

So I think everyone does see that as a new statute.

The question is, for purposes of unfunded mandates, why wouldn't that be also looked at as a separate

statute from 188 and 189? We look and that and say, did 1170.95 impose new costs?

And I know that past Commission decisions, there's no precedential value. But I will note that there -- there's a similar one out there, to the extent the Commission staff would like to look at it. And that's the post-conviction DNA court proceedings. That's number 00-TC-21 and 00-TC-08.

And in that decision, basically the Legislature had created a new proceeding for people to go to court and ask for their DNA to be looked at.

And if -- in the end, if their DNA, you know, exculpated them, of course their convictions would be vacated or reversed, but the Commission didn't look at it that way. They said, this is a separate proceeding that has been created.

So even if their crimes would be eliminated, quote/unquote, because the DNA would show that they weren't guilty, that there were still costs incurred for coming to court and initiating that completely separate proceeding, which is the same thing as what's happening here. There's a separate post-conviction proceeding under 1170.95. That proceeding in and of itself, that is where the costs are incurred.

And then if you just look at other Commission

proceedings, Commission decisions in the past, I think that all the statutes and regulations have not been considered in conjunction but have been considered separately.

And I won't go through all of them, and I will say, I really appreciate the new search function that's on the new -- that's on the Commission website now. That's helpful. But I still, of course, don't know all of the Commission decisions as well as Commission staff does, but I did find a couple of them. One of them was the peace offer training 17-TC-06, and, there, there were various Penal Code sections and the Commission viewed them differently, and said some of these sections do impose mandates; some of these sections don't.

And then, I will point this one out, just because everyone is aware of it right now: The minimum conditions for state aid. I know that one, for the education, I know that one is on appeal right now, but my understanding is there were -- if I got this right -- 27 Education Code sections and 141 regulations contained in that test claim. And the Commission said, well, some of these are unfunded mandates; some of them aren't.

So I would just propose the same analysis be conducted here, even if the Commission believes that 188 and 189 fall within an exception, they -- or they don't

impose costs on a local agency, I propose that the Commission view 1170.59 independently, its own statute; what does that particular statute do, and not consider it in conjunction with the other two.

But with that, thank you for all your work, and that's all I have.

CHAIRPERSON MILLER: Great. Thank you very much, Ms. Snider.

Any other public comment?

(No response)

CHAIRPERSON MILLER: No. And we still don't have anyone from Finance. Great. Obviously their record is in there.

Yes, please, Ms. Shelton.

MS. SHELTON: Just -- Juliana can answer any of your specific questions about this analysis, but I do want to make clear, when you are looking at the analysis, there are separate mandate findings on each code section pled. So that has been complied with.

In addition, on -- if you look on page 18, that is a citation and a full quote of section 1170.95. And subdivision (a)(3) expressly refers to section 188 and 189, and says that the person can seek a petition process when "the petitioner could not be convicted of first or second degree murder because of the changes to

section 188 or 189 made effective January 1, 2019."

And under the rules of statutory construction, you have to read them all together to understand the meaning of 1170.95.

So to be clear, mandate findings are made on each code section independently. 189 and 188 do not impose any state-mandated activities, so those could not be eligible for reimbursement. And 1170.95 went through the full mandate process, or analysis, found that there were new requirements, but those new requirements do not result in costs mandated by the State.

CHAIRPERSON MILLER: Thank you very much, Ms. Shelton.

I'm now going to open it up to board members.

Please, Ms. Olsen, Ms. Wong-Hernandez. And if anyone else has questions, please just raise your hand.

Ms. Olsen.

MEMBER OLSEN: I actually find the testimony from Los Angeles County and San Diego County rather compelling.

I would like the Commission staff to address this issue of theories versus crimes.

MS. GMUR: And that would be my pleasure, Madam Chair, if I may.

So Ms. Grant was quite correct. The crime is an

offense against the state, and it's been prosecuted and punished. And when you learn about crimes and the individual crimes, and, in this case, a crime of murder, they have elements. Generally speaking, the elements are a mental state and an act. Depending on the crime, the acts may be different, but it does require the mental state.

In order to obtain a mental state, it either has to be proven by the evidence in front of you or you may apply a theory. Let's talk about the felony murder rule theory.

And let's use Ms. Grant's -- let's use Ms. Grant's example of the two people holding up a 7-Eleven. Let's change the facts slightly: The people come in with the intent to rob the 7-Eleven. Defendant Number 2 believes that Defendant Number 1 is unarmed. Defendant -- I'm sorry. Believes that Defendant Number 1 is armed, but is not going to shoot.

Defendant 1 panics and shoots, or doesn't even have to shoot. He can just scare an individual who falls over, hits their head, or has a heart attack. Any death in the commission of the crime can then be imputed, under the theory of the felony murder rule, to the aider and abettor, Defendant Number 2.

That's the way the law used to be.

We imply intent because you intended the underlying crime. You intended to be there for the robbery. So, therefore, if a death occurs, any death, then you intended the death.

The statute has changed.

The test claim legislation has now taken a look and said, we're not going to impute intention anymore. We're going to look at the actions of Defendant Number 2. We are going to say, did that person individually have the intent to kill? That is, the prosecution is going to have to prove that point. Or did that person, an aider and abettor, have the -- was that person a major participant who acted with reckless indifference to human life? A different kind of intent.

We are no longer going to use the legal theory, although it still exists. To impute the intent, we have to look at the individual actions of Defendant 2 to prove the intent for the conviction.

Did that help, Ms. Olsen?

MEMBER OLSEN: No. I think that just restated what had been said before. But I --

MS. SHELTON: Can I clarify thought?

The result of that, with the successful petition, means that the crime of murder is vacated for that individual. So the crime of murder has been eliminated

for those who -- whose intent would have been originally applied under prior law. There's no -- the person's crime of murder is vacated if they have a successful petition.

MEMBER OLSEN: But -- okay. So my concern here is that we don't generally look at the Commission's work, as applied individually, but as -- I'm not an attorney. I will say that right here. Okay?

But it seems impractical, to me, and different than what we usually do, to look at this as crime rather than theory at the individual level. Either a crime has been eliminated or it has not, and I don't see that the crime itself has been eliminated.

I actually find it rather compelling, this idea that how you apply the theory is what's -- is what has changed here, not the underlying crime.

Can you address that?

MS. GMUR: I understand that.

CHAIRPERSON MILLER: Let me -- oh, please, if you want to go ahead and answer that.

MS. GMUR: Thank you, Madam Chair.

Yes, I understand that. And you are correct, the crime of murder is still on the books, the theories still exist. And I understand your position for -- that it's individual, and it is, to a degree, individual. It

is how it is applied to a class of people.

So prior to the law, Defendant Number 2, prior to the change in law, Defendant Number 2, walking into a 7-Eleven to rob it, could be charged and convicted under felony murder. Now that individual cannot.

So we have an entire class of people who cannot -- no longer be charged and convicted with murder, because the elements of the crime have changed.

Before, we had the act. In this case, this person walked in to commit the act; they are committing robbery. And they had the mental state. Except, for Defendant Number 2, there is no mental state here. We didn't have to prove it. We proved you walked in. That means you must have intended to commit one crime, burglary, therefore, in for a penny, in for a pound, you intended the death.

Now we say, for this class of people, you have to prove their individual intent.

Also, if there were no change in law, there would be no need for the petition process. Now, we have people who are convicted of murder, who can make that conviction go away by applying the new law retroactively to their -- to their conviction.

And that's the process set forth in 1170.95.

CHAIRPERSON MILLER: Right.

And I thank you for that, Ms. Gmur. And I think, Ms. Olsen, it's not that it eliminated the crime of murder. It eliminated a crime of murder, under the felony murder rule. So it's within the meaning of 17556(g), like Ms. Gmur said. So it's not the entire crime. It's the crime -- it's a crime of murder. So obviously murder still exists.

Ms. Wong-Hernandez, do you want to --

MEMBER WONG-HERNANDEZ: Yeah. I actually -- my questions are of a different type.

I had -- thank you, Ms. Olsen, for the questions you asked, because I was feeling the same way and sort of -- and found the local testimony really compelling.

My question -- and I'm not sure who this is best suited for, probably for multiple people who have already testified -- is really about the right to counsel in the post-conviction hearing, and then the post-conviction hearing, sort of, itself.

So my question is, absent the enactment of the hearing process, in 1170.95, which would happen if somebody believed that they had a habeas claim due to the changes in 188 and 189? Like absent -- so those changes have made -- let's say 1170.95 never gets enacted, so they don't have that separate hearing process. And maybe, Ms. Snider, maybe it's you. I'm

not sure.

But if those had happened, like, what is the recourse for somebody for whom the law has now changed that led to their conviction, or they believe that the law has changed, right? Because, I mean, the law has changed, but they believe they are affected by it. Because, to everyone's prior points, it's not that the felony murder rule or the theory of probable -- I'm losing the -- the consequences can't be applied. It's that they are limiting the application.

So we don't actually know, right? Like, I may think that I fall under one of the exceptions now, and I should never have been charged that way. And I think one of the commenters -- I don't remember if it was L.A. County or others -- said, essentially, that they have reviewed some number of petitions that they can look at on face and say this doesn't apply to you. But that there are others where they really have to do a lot more digging.

So my, sort of, question is -- to restate again -- absent the creation of a specific new hearing process, what would have been the recourse for individuals who felt like they were no longer able to be convicted under these rules?

MS. SNIDER: And I will respond briefly, just

because you called out my name. I'm actually going to defer to the claimant and, I think, probably Mr. Osaki, because he had commented -- I think he had helped draft some comments in that regard. But I will defer to the claimant. And then if Mr. O'Connell would like to chime in, then I will defer to him as well. I'm just a mere civil litigator.

MEMBER WONG-HERNANDEZ: Well, because you had mentioned the hearing process as being taken sort of separately from everything else. And I really am fixated on the hearing process, because that felt very new to me and that it was specifically and affirmatively put in there by the Legislature to say, this is your specific recourse.

But I don't have the legal knowledge and I didn't see any -- in any of the documentation, anyone speak to what would happen, specifically absent that provision.

MS. SNIDER: Okay.

MR. OSAKI: So if I can -- and, perhaps, Ms. Grant, if you could help out with this, as well, because this is more of an appellate matter than a trial one.

So as far as I -- as far as I know, there's something called the Estrada rule. And so if a case is closed, that individual has -- really has no recourse unless the Legislature allows it. And in this case, the

Legislature allows case, that's long considered to be final, to be basically reopened with this new procedure.

And so if -- for those individuals who had been convicted long ago, and whose appellate rights have lapsed, those individuals would not get the benefit of this, and there would be no recourse for them.

I actually -- and Ms. Grant, if you could correct me if I'm wrong.

MS. GRANT: You are not wrong at all.

If their cases were final on appeal, then they would be post-conviction habeas. We're not funded for that. So those -- the only way that they get our services is by the statutes specifically saying that they are entitled to it.

MEMBER WONG-HERNANDEZ: So I have a follow-up question, then, just to make sure that I understand what you are saying is, if I am this person and I say, like, okay, the law has changed now. I feel like -- I have a habeas claim. I need to go either find an attorney, file a petition on my own. Like, essentially somebody would -- if I were to figure this out and file a petition, I have a right to potentially having my conviction vacated, but I don't have to be provided counsel.

Is that what I'm hearing? You are not saying that,

absent this statute, no one who had been convicted in the past could go back and say, I want my conviction vacated.

MS. GRANT: Well, you can go back.

But so what happens is, if you are in the process of appeal, your appeal is not final. The appellate court can remand it back, but the courts, through Estrada, have sort of had a cut-off point, which says, basically, if your case is final on appeal, then you don't actually have a vehicle to get back into trial court unless you file a habeas. And that's a post-conviction habeas. Laws change all the time on those.

Like, for instance when --

MEMBER WONG-HERNANDEZ: Right. That's why I'm trying to figure out what is -- what's the procedure for a post-conviction habeas?

MS. GRANT: So what generally happens is if -- if the statute itself provides for representation, then we, as public defenders, will take it.

But if the cases are final -- an example of this is three-and five-year priors became discretionary. Some other one-year priors are no longer in effect.

A lot of those clients, in prison right now, want to try to get back into the trial court to be

resentenced. And if their case is final on appeal, they don't have a mechanism to do it. We don't represent them in those unless somehow they have gotten back into court. So they often will -- so, yeah.

I guess the bottom line is, the public defender generally does not handle post-conviction habeases unless there's some type of legislation that gives us the authority to do so.

I don't know. Mr. O'Connell, maybe you have a different opinion from San Diego, but that's basically the way it generally works here.

MR. O'CONNELL: No. I don't have a different opinion.

Just a couple things: I tried looking up some stuff, and I actually found what's called a writ of audita querela. And I will spell that: It's A-U-D-I-T-A Q-U-E-R-E-L-A. And that is basically a means of attacking a judgment that was correct at the time rendered, but which is rendered infirm by matters which arise after its rendition.

However, I also found a case, *People v. Vasilyan.* I'm going to spell it because I can't pronounce it: V-A-S-I-L-Y-A-N. That's 174 Cal.App.4th 443, page 457, and footnote 2, which basically says, that's a -- was a writ of common law, and they don't believe it exists in

criminal law anymore.

So I think the answer is correct; there is actually no writ that you can get or a habeas in this situation.

The only thing I would note, at least in my office, when we do get these habeas petitions, and we get assigned to them, my understanding is, we get, in those cases, reimbursed by the State. So those have been found to be something that the State reimburses us for. So I just want to point that out, because it's not the typical thing that public defenders do. Post-conviction stuff is something outside our normal realm, and when we do it, we actually are reimbursed by the State.

MEMBER WONG-HERNANDEZ: Thank you, all, for answering my questions. I really appreciate it.

What I am struggling with is the idea that the Legislature would put a new hearing into law and specifically say that you have a right to counsel, kind of for a post-conviction proceeding, that is nonstandard, and that we would say that that is not a state-imposed mandate, like a reimbursable mandate. Like, I'm really struggling with that, and I'm open to somebody explaining to me why that's correct.

I do think of 188 and 189 as separate. And I do -- I don't actually think -- I think that those fall under -- I don't know if it falls strictly under the

sort of crimes and infractions disclaimer, but I am compelled by the idea that, look, if we change the law and it changes the way that you provide counsel to your clients, that that's -- I don't think that that is a new duty or a higher level of service. But I am -- I remain concerned about 1170.95.

And I -- it feels -- this doesn't feel right to me, the idea that they would put into law, because whenever a law has changed, that changed a criminal penalty or a crime, there hasn't always been a hearing put into statute that said, here's going to be the procedure for how you go back and get something vacated. And, certainly, then specifically, guaranteeing right to counsel in that new hearing, I think is new. I don't know how we could honestly say that that's not a mandate by the State on to the locals.

So I'm happy to keep hearing that, but that's -- that's how I'm looking at this right now. I think that it's -- you know, and if we find that -- that's the issue that I'm having with the proposed decision right now. It's a different issue than the one that Ms. Olsen is having, but perhaps that goes back to the theory of unanimity. We kind of have our different issues with the proposed decision.

But I also think that even -- however we end up

deciding as a reimbursement, like, we should. Like, we the State, should fund this. If this was the way that we decided that we were going to go about correcting a wrong or dealing with changing a law in a way that's sort of more just, it seems appropriate that the Legislature should -- you know, should fund this, especially if it's going to be mostly a one-time thing.

I mean, it will be some amount of ongoing, but these are short-term activities. If you are talking about going back, everything going forward -- like, at a certain point, it should drop off. There should be people who have the opportunity to, you know, make their case for why their conviction should be vacated or they should be resentenced; and then we should just have a going-forward point.

Sorry. I have talked a lot. I'm going to stop talking now. I'm sure other people have questions.

CHAIRPERSON MILLER: Thank you.

I'm going to open it up. I do just want to make the point that the legislative intent, while it may have been the intent, it would be -- that's not how the Commission staff see it, the law as written, because of the way they actually eliminated the crime. So I would like the commission staff to speak to that.

So, obviously, the Legislature would have an

opportunity to write a law that was a little bit different as well. So I just want to make sure we're not speaking to legislative intent as providing a higher level of service, because I do think that that could be a dangerous precedent for us to have as a Commission.

But, Ms. Gmur and Ms. Shelton, do you want to go ahead and speak to that?

MS. GMUR: Yes. Actually, I definitely would.

Thank you, Commissioner Wong-Hernandez, for that, because I too struggled with that point for quite some time. And my initial work was that it was separate.

And, yet, as I'm looking at the hearing process from 1170.95, it definitely is linked, because it is the mechanism by which the application of the changes of Penal Code sections 188 and 189 are applied retroactively. It is simply a mechanism that allows that to be applied to those who have already been convicted and it -- as you noted, as you go forward, it will cease to exist because the laws -- the changes to 188 and 189 will be applied prospectively. So I too struggled with that, but I couldn't actually make it to break it off.

As Ms. Shelton already pointed out, the language references the changes in sections 188 and 189. In addition, it really is -- it can't stand on its own,

because, without the changes in 188 and 189, there would be no reason to go back.

Also, we cannot delve into the legislative history if the statutes are clear on their face. And in this case, they are very clear on their face, especially 1170.95. It is very well laid out as to how this process is supposed to go forward.

So why? I don't -- I don't know.

But I can say that, as much as I tried to see it as a stand-alone, ultimately, I had to conclude that it was directly linked to the rest of 1437 and the rest of the legislation.

MEMBER WONG-HERNANDEZ: Thank you.

I can appreciate that.

What -- I guess what I'm -- I'm not saying that it should be a stand-alone. I'm saying that I think that 188 and 189 stand alone; that they could exist without the additional of the hearing -- the addition of the hearing process, and -- because there would be a different mechanism, and it wouldn't involve a right to counsel. And please tell me if that's not the case, if there wouldn't be any other mechanism, but that's what I was just hearing from Ms. Grant. And I don't feel like -- I mean, if what Ms. Grant said is not your understanding, I would love to hear that.

And then the only other thing I wanted to say is, with regard to legislative intent, I'm not suggesting in any way that we look at legislative intent, and I apologize if I was unclear.

All I'm saying is that if this Commission decides not to reimburse, that we decide that it does not meet the tests necessary to qualify under the constitution as a reimbursable mandate, I believe that the Legislature passed the law and imposed the new requirements, that we all agree are requirements, whether or not they are reimbursable. And I think we all agree that they are cost-driving, even if they are not reimbursably mandated by the State; that the right thing to do would also be for them to include an appropriation and a subvention of funds for those purposes, even if it does not meet the letter. And that could be -- that would be done outside of a mandates process.

CHAIRPERSON MILLER: I appreciate that clarification. Thank you.

Ms. Shelton, and then I'm going to go to Ms. Ramirez.

MS. SHELTON: I think I am wanting to speak so a point that was made a little bit earlier. And I'm sort of questioning myself, but I want to bring this up.

So if you read through the history in this test

claim, the courts were questioning the felony murder rule of the Natural and Probable Consequences Doctrine, and one of the cases, I believe, found that it was cruel and unusual punishment, in that particular case, to find that the person be convicted of murder.

It's very similar to this legislation. It's very similar to a test claim the Commission had, about a year ago, in youth offender parole hearings; where, there, you were, under prior law, holding people that committed crimes as juveniles in life without the possibility of parole or 25 years to life, which, there, the courts also found to be cruel and unusual punishment.

And the Legislature did lay out, by statute, a new petition process to change that penalty in that case. Similarly, here, they have created a new statute to allow a petition process to eliminate that crime in those circumstances where the defendant doesn't have intent to kill or was not a major participant of -- in that particular crime and it caused reckless disregard to human life. So for that class of individual, the crime of murder has been eliminated.

So this analysis does agree that there are new requirements, and, certainly, there are a lot of costs, no doubt, to counties for their D.A. and their public defender.

But we are following the mandate rules in 17556(g), and it says, when it eliminates a crime -- and, here, we're finding, it's pretty clear that it's eliminating a crime for that class of defendant, then we can't find that reimbursement is required under the constitution.

CHAIRPERSON MILLER: Thank you.

Ms. Ramirez, did you have a question?

MEMBER RAMIREZ: Well, I have a comment too. I'm very -- I am very compelled, because I see what it takes to provide justice for people. And we know -- we know there have been many cases where it's tragic, where the actual person sitting in the car, not understanding what's going on, inside the 7-Eleven, actually gets the death penalty, not specifically in California, but other cases; and the person who actually did the shooting does not. And -- so there's been so much injustice with the death penalties, totally aside from what we're dealing with today, and it's very troubling.

So I think -- totally agree with Ms. Wong-Hernandez about the Legislature. So many times we have come up with this situation where we see what it takes to comply. And we find that the mandates statute, the amendment, just doesn't allow us to do -- this Commission to do what some of us feel is the right thing to do, because it's not within our power, and that's

always a headache for me.

And it is a problem for the Legislature not -- for whatever good or indifferent reason, not providing the resource that we know all the State is really strapped in terms of resources now to provide to our cities and counties.

So I don't -- I don't know what we could do to get around what Ms. Shelton is saying about the mandates statutes.

I'm very troubled. I would like to see if we have some other -- I don't know if we can make a compromise here at all. Let me -- let me know. Can we have staff address that at all?

CHAIRPERSON MILLER: I'm going to have Ms. Shelton -- if you want to address that. And then I saw your hand, Mr. Osaki. I will call on you next.

MS. SHELTON: Unfortunately, these are questions of law. So a court would review the Commission's decision de novo and determine whether it's correct as a matter of law. So it really is, you have to either find that this is reimbursable, under Article XIII B, section 6, or it's not. And the Commission does not have the authority to negotiate any kind of agreement.

MEMBER RAMIREZ: That's what I thought.

CHAIRPERSON MILLER: Thank you for that.

Mr. Osaki. And then I'm going to see if there's any other board member question. So please raise your hands, Board Members, if you have questions.

Go ahead, Mr. Osaki.

MR. OSAKI: Well, Ms. Ramirez, I wanted to address that particular point, because if we -- if you feel constrained by the statute, 17556(g) specifically says it has to eliminate a crime. And so, as case law -- as Mr. O'Connell and Ms. Grant have pointed out -- it's not about eliminating a legal theory. It's -- the statute specifically says "eliminate a crime."

The crime here is first- and second-degree murder. So just because a class of individuals would not obtain any liability as a result of the passage of this statute, here, the crime at issue is first- and second-degree murder, and those crimes have not been eliminated by the passage of this statute.

Just a clear wording of 17556(g) is such that, you know, if you just follow that, it would be clear that there -- there is a valid test claim here and that you have to add additional words to the statute in order for you to just -- to follow the staff's recommendation. If you just look at 17556(g), it has to eliminate a crime. And I don't -- and we just don't have that.

CHAIRPERSON MILLER: I'm going to -- thank you.

I'm going to -- I see Mr. O'Connell. I'm going to call on staff.

So obviously the statute doesn't speak to first- and second-degree. It's the intent. So, I mean, we understand where the disagreement is in the words in the statute. So, you know, we're not suggesting that this eliminates first- and second-degree murder as a crime. We're suggesting that it eliminates this provision of intent, so it's a crime within that murder statute.

So I think that is clearly where the disagreement is, and I think the -- and that's where staff has done their analysis. But, certainly, no words have been added. We -- but we are disagreeing on the interpretation. So I just want to correct that for the record.

Any other board member questions -- I'm actually going to start to call the question here -- from the board? To -- Mr. Adams, please.

MEMBER ADAMS: Thank you, Madam Chair -- Chairwoman.

I'm having a little problem with section 17556(g), because I'm seeing it reads, created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction.

How does that spell out, where this, in fact, is

changing a penalty for a certain class of offender?

MS. GMUR: If I may, Madam Chair.

CHAIRPERSON MILLER: Please, thank you.

MS. GMUR: So, actually, when you look at it, it doesn't change the penalty, because if you have somebody who is convicted, who is an aider and abettor, basically convicted before the change in law, and that individual petitions, it doesn't change the penalty. It reverses -- it reverses the conviction. It vacates the sentence. It makes it go away.

It applies to -- if you would not have been convicted under the new law, it makes your conviction go away. That does, in a way, change the penalty, because you are not paying any penalty, but it does so by eliminating the underlying crime. It finds you didn't commit the murder because it can't be proven under the new law, and, thus, you vacate the prior sentence.

CHAIRPERSON MILLER: Thank you.

Any follow-up to that, Mr. Adams?

MEMBER ADAMS: I do.

CHAIRPERSON MILLER: Please.

MEMBER ADAMS: Thank you.

My follow-up question is, if -- under the new rules, if the DA or the public defender do not proceed with this, what happens to folks that are otherwise

convicted under the old felony murder rule?

By operation of law, can they potentially go away, or does somebody, in fact, have to take action to have these penalties changed or, again, if the DA just decides not to pursue it and not to incur costs. Once a claim is filed, A, I was convicted under the old law, and I want this change.

MS. GMUR: Again, if I may.

So the process requires that it -- that you do have to act. The convicted individual can file the petition on their own and get the ball rolling, get the court to review. The court may overturn it on its face. They may call for a hearing, and, at that point, you would get counsel and the -- the district attorney.

If you were -- and then -- and then upon the hearing, if you did have -- if the evidence did show that you had your own personal intent, then you wouldn't be able to apply the new law, and -- but it is not automatic. It does require the filing of a petition with the court to get the ball rolling.

MEMBER ADAMS: Thank you for that.

And just a final comment: I'm struggling with the idea that a crime has been eliminated. I really appreciate the argument that has been put forward. Thanks.

CHAIRPERSON MILLER: Thank you, Mr. Adams.

Any other board member questions?

I see your hand, Mr. O'Connell. Any other board member questions?

(No response)

CHAIRPERSON MILLER: Okay. Mr. O'Connell, why don't we have one final comment from you, and then I'm going to let the staff close. And assuming there's no other board member questions, we'll see the disposition of the board.

Mr. O'Connell.

MR. O'CONNELL: Yes, I kind of want to address the issue -- I think Ms. Olsen had it right -- the difference between individuals now not being convicted of the crime and the crime itself being eliminated, because I think that's very clear. All SB 1437 did was narrow the number of people who can be convicted, and it didn't eliminate crimes. It also didn't eliminate the intent, as being stated. It just basically redefined and gave different definitions for those crimes and intent.

I would give an example. For example, let's say the Legislature decided, in the next session, to raise the standard of proof, from beyond a reasonable doubt to beyond all doubt. If they did that, that would make it

that certain people now would not be convicted of the crime. I don't think that would eliminate any crimes. It would just make it more difficult for the prosecution to prove that somebody was guilty of it. That's all SB 1437 did.

In theory, the prosecution might still be able to convict some of these people in the future, under different other theories or other facts or making certain arguments. They use these usually because they didn't have to, but they may be able to in the future. So all it did was made it more difficult.

Another example I can think of is, what if the Legislature decided to eliminate self-defense. They decided you can no longer claim self-defense. Now a whole bunch of people who might have been able to get acquitted of murder, may now be convicted of. But does that now create a crime? Do we now have a crime of non-self-defense murder? No. It just made it so the group of people -- more people could be convicted of murder.

SB 1437, all it did was narrow -- it very narrowly -- actually, it's a very small sliver of people now -- will no longer be able to be convicted. The crime itself still exists.

And that's all I have to say.

CHAIRPERSON MILLER: Thank you.

And, again, therein lies the question as to whether or not the crime itself still exists.

And so a couple, just, points on that:

I do think that this is a case where the Legislature probably did need to write a law that was a little bit more clear, because the black-and-white reading of the law is that it eliminated this provision of the crime of murder.

I completely understand what you are saying.

And to Ms. Wong-Hernandez's point, does the Legislature need to consider what it did? Those are all true, but that's not within the scope of what the Commission on State Mandates can look at. And so that is the -- that is -- that's the issue here.

So I actually am going to move the staff recommendation that we do approve the decision, and I will -- I will open that question to the board, assuming that there's no further public comment.

Let me see if there's a second.

MEMBER RAMIREZ: I -- reluctantly yes; I will second that.

CHAIRPERSON MILLER: Thank you. So it was moved by Miller; seconded by Ms. Ramirez.

And I appreciate how extraordinarily difficult this

is.

So with that, Ms. Halsey, are there any -- I'm just going to call one more time on Finance to see if there's any additional public comment.

(No response)

CHAIRPERSON MILLER: I don't see any from Finance.

Any other comment, Ms. Palchik, that we see?

MS. PALCHIK: No. There's none.

CHAIRPERSON MILLER: Great. Thank you very much.

Any other final board member questions before we take the roll?

(No response)

CHAIRPERSON MILLER: Okay. Seeing none, it's been moved and seconded.

And Ms. Halsey, will you please call the roll.

MS. HALSEY: Sure.

Mr. Adams.

MEMBER ADAMS: No.

MS. HALSEY: Ms. Lee.

MEMBER LEE: Sorry about that. I couldn't find my -- find my microphone.

I agree with Miller -- or Chair Miller and Ms. Ramirez.

MS. HALSEY: So aye?

MEMBER LEE: Aye. Sorry.

MS. HALSEY: All right.

Ms. Miller.

CHAIRPERSON MILLER: Aye.

MS. HALSEY: Ms. Olsen.

MEMBER OLSEN: No.

MS. HALSEY: Ms. Ramirez.

MEMBER RAMIREZ: Yes.

MS. HALSEY: Mr. Rivera.

MEMBER RIVERA: Aye.

MS. HALSEY: Ms. Wong-Hernandez.

MEMBER WONG-HERNANDEZ: No.

CHAIRPERSON MILLER: Thank you.

MS. SHELTON: So the motion carries with four votes.

CHAIRPERSON MILLER: Great. Thank you very much, and I really appreciate that discussion and how incredibly challenging this is to the representatives here, from L.A. and San Diego and certainly encourage you to work with the Legislature.

So thank you so much for you time and your diligence and your integrity during this call. Sincerely appreciate it, and especially to the board members for the thoughtful discussion and to Ms. Gmur, who had a really tough first presentation. Thank you for that.

MS. GMUR: Thank you.

CHAIRPERSON MILLER: Ms. Halsey.

MS. HALSEY: We now ask the presenters for Item 3 to please turn off their videos and mute their microphones.

And next is Item 4. Senior Commission Counsel Eric Feller will please turn on his video and unmute his microphone, and present a proposed decision and parameters and guidelines on *Vote By Mail Ballots: Prepaid Postage*.

At this time, we invite the parties and witnesses for Item 4 to turn on their videos and unmute their microphones.

MR. FELLER: Good morning. I would like to add my congratulations to those who have already been said (verbatim) to Ms. Ramirez. Been a pleasure working with you.

So this is the proposed decision and parameters and guidelines for *Vote By Mail: Prepaid Postage* test claim, that provides reimbursement for elections officials to provide prepaid postage, identification envelopes delivered to voters with their vote by mail ballots, beginning January 1, 2019, for elections required by law. Reimbursement is not required for discretionary elections or elections that could have been consolidated

with a regular election within statutory deadlines, or for elections where the county or city has fee authority to hold the election.

Some of the comments on the draft parameters and guidelines requested that cities and special districts for which elections are conducted be eligible for reimbursement. Local entities that do not conduct elections are not mandated by the State to provide prepaid postage and identification envelopes for vote by mail ballots, even though these entities may incur costs by paying a county or city to conduct their elections for them.

The staff finds that only local entities that conduct elections are eligible for reimbursement.

Other comments focused on a business reply mail subscription to provide prepaid postage, and staff found that that business reply mail subscription is a reasonably necessary way to comply with the mandate.

The proposed decision and parameters and guidelines also identifies offsetting funds from the 2018, 2019, and 2020 State Budget Acts, that were appropriated and can be used to pay for the mandate.

Staff recommends the Commission adopt the proposed decision and parameters and guidelines and authorize staff to make any technical, nonsubstantive changes to

those following the hearing.

CHAIRPERSON MILLER: Thank you very much.

Will the parties and witnesses for this item please state your name for the record.

MS. GONZALEZ: Hello. Lucia Gonzalez with the Office of County Counsel for Los Angeles County.

We concur with the Commission's draft proposed decision and parameters and guidelines.

CHAIRPERSON MILLER: Thank you, Ms. Gonzalez, and nice to see you again.

Mr. Gibbons.

MR. GIBBONS: Dillon Gibbons with the California Special Districts Association.

CHAIRPERSON MILLER: Great. Thank you.

Mr. Nichols?

MR. NICHOLS: Andy Nichols. I'm sorry. Andy Nichols. State mandated-cost consultant to cities, counties, and special districts.

CHAIRPERSON MILLER: Great. Thank you very much.

Any other witnesses here?

(No response)

CHAIRPERSON MILLER: Seeing none. I don't see anyone from the Controller's Office.

Great. So may we begin then? We've heard from Ms. Gonzalez, Mr. Gibbons. And Mr. Nichols, do you have

anything you wanted to add to that?

Go ahead, Mr. Nichols.

MR. NICHOLS: I think I was listed first, but Mr. Gibbons was going to lead on this one.

CHAIRPERSON MILLER: All right. Great. Thank you.

MR. GIBBONS: Thank you. Chair, Members of the Commission, my name is Dillon Gibbons, and I'm the senior legislative representative for the California Special Districts Association.

Thank you for allowing me the opportunity to address you today about this additional, added cost to local elections, and thank you for the staff for working with me to make it happen.

And, again, special congratulations to Commissioner/Supervisor Ramirez.

As noted in our comments to the Commission dated September 25th, CSDA is opposed to the Commission adopting this proposed decision and parameters and guidelines related to prepaid postage for vote by mail ballots.

We ask that the Commission and staff reevaluate the proposed decision.

And I have a question that I would like answered by the Commission.

Article XIII B, section 6 of the State

Constitution: "A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsible responsibility for a required program for which the State previously had complete or partial financial responsibility."

My question to the Commission is, when the Legislature is requiring financial responsibility for a new program be absorbed by a county running an election, and those costs associated for a different local agency are then forced on to them by the State, via the county, those cities and special districts are now paying for a higher level of service mandated by the State Legislature.

How is that not similar to the passthrough of costs described in Article XIII B, section 6?

The Commission --

MR. FELLER: Would you like me to address that?

MR. GIBBONS: Well, let me -- I got to add one more comment, and then, yes, that would be great.

So the Commission is very clear that the county cannot absorb the increased costs mandated by the Legislature and claim it to be reimbursable, as there is a fee authority offset. The cost of that fee authority

on cities and special districts for the mandated activity is a direct result of legislative mandate.

So thank you again for allowing me to present. I look forward to the Commission -- to the Commission's response.

CHAIRPERSON MILLER: Thanks, Mr. Gibbons.

Go ahead, Mr. Feller.

MR. FELLER: So the provision --

CHAIRPERSON MILLER: Please state your name for the record, sir.

MR. FELLER: Eric Feller, Commission on State Mandates.

The provision that Mr. Gibbons refers to prohibits a transfer of financial -- a responsibility from the State to the locals -- to the local agencies without the State paying for it.

The -- in this case, that's not what's happening. The -- what's happening is that the counties who -- and -- primarily, and some cities, who run the elections are the ones that are required by the test claim statute to provide the service of prepaid postage.

The special districts and the other districts are not providers of that service. They are consumers of that service. And while we do not deny that they may incur increased costs, the California Supreme Court has

said that, in a 2004 case footnoted on page 60 -- on page -- I think -- no, footnote 69 of your analysis, that increased cost alone do not require reimbursement.

The local agencies have to actually be providing a new program or a higher level of service. And, in this case, that -- that -- this only applies to elections officials, and elections officials are employed by counties and sometimes cities if they hold their own elections.

So that is consistent with our test claim decision and consistent with Article XIII B, section 6, as it's been interpreted by the California Supreme Court.

MS. SHELTON: May I also just add that that finding has already been made and it is included in a final decision of the Commission on this test claim for vote by mail. So the P's & G's have to be consistent with that.

Also, to clarify even further, Mr. Gibbons, a question about the transfer of state fiscal responsibility to special districts or cities that don't conduct their elections; that provision in the Constitution only works if the State had prior responsibility for the program before, and that has never been shifted. Counties have always been the elections officials, and sometimes cities, to conduct

these elections, so that never changed, and that provision does not apply.

You have to have a state-mandated activity imposed on you, and the only activity imposed on here are those election officials that are conducting the elections.

So we have a final decision that can't be overturned.

CHAIRPERSON MILLER: So this is -- go ahead, Mr. Gibbons. But just to be clear, this is -- you know, we do all these decisions in stages, and this is the end.

Go ahead, Mr. Gibbons.

MR. GIBBONS: Yeah. I understand that.

And that's -- I completely agree with the -- where we're at in the process. As far as counties are required to hold the elections for the State, they put things on the ballot; the counties are required to do them. So that is a mandate on the counties to do the State's activities.

When those costs go up, as a result of this mandate, where special districts are also required to consolidate our elections, per legislation -- so, in, 2016, statutes went into effect that required special districts to consolidate their elections with statewide elections. Should voter turnout not be at a certain

level, we are now required to participate in that election process. It is not an option; we're required to.

So now, we're required to participate in that election. That election -- those elections costs go up. As a mandate from the State, those two things combined, now increased our costs as a result of the State mandate. Not just because the costs are going up, because we now have a pay for a portion of a requirement to run a statewide election.

So that's where we're at.

And I -- again, I know where we're at in the process, so I'm not anticipating we're going to undo this.

But I just want to make it clear that, you know, special districts, when counties pass along the cost of the added mandate from the State, we're on the hook for this. This is an added cost from a mandate and this sets a bad precedent, that we can just have passthrough costs from counties on to special districts, and say no, because the special districts isn't directly having to pay the cost to the -- of the State; it's the county cost that now we're not eligible for reimbursement. I think it sets a bad precedent.

Thank you very much.

CHAIRPERSON MILLER: Thanks, Mr. Gibbons.

Mr. Feller, go ahead, please.

MR. FELLER: So in addition to what we have already said, and as Camille pointed out, this is a final, binding decision that already took place in the test claim phase.

But the fact that special districts have to hold elections is not new. They have always had to hold elections. The timing may have changed, but they have always held elections because they have board members that have to be elected and other things.

So in addition to the reasons that we stated, elections generally are not new to special districts, and this -- this particular cost for prepaid postage is, and we understand that. But that's just not a new thing. The timing may be new, but the contract with the counties generally have always taken place, at least since the special district has been formed.

CHAIRPERSON MILLER: Great. Thank you.

Any -- Mr. Gibbons, we can't hear you if you are trying to speak.

MR. GIBBONS: I don't -- I don't want to end up getting in a back-and-forth, so I'll end it.

CHAIRPERSON MILLER: I appreciate that. Yes.

Thank you.

Any other comments or questions?

(No response)

CHAIRPERSON MILLER: From the State Controller -- again, do you have any comments?

(No response)

CHAIRPERSON MILLER: Ms. Palchik, can I just confirm with you that we don't have the State Controller on the line?

MS. PALCHIK: That's correct. Nobody has offered to appear on behalf of the State Controller, and I see no hands.

CHAIRPERSON MILLER: Great. Thank you very much.

Are there any members that have questions?

MR. NICHOLS: Madam Chair, may I be allowed to speak?

CHAIRPERSON MILLER: Oh, I'm sorry, Mr. Nichols. I thought you did. Yes, please, go ahead. I sincerely apologize.

MR. NICHOLS: I greatly appreciate that.

CHAIRPERSON MILLER: Trying to keep track of all my squares on the Zoom. Thank you, Mr. Nichols. Please.

MR. NICHOLS: Thank you, Madam Chair.

My name is Andy Nichols. As I mentioned before, I'm a state-mandated cost consultant for cities, counties, and special districts. And I do want to thank

the Commission staff, and I do appreciate the analysis.

And although I do disagree with it, I did want to share a few things as we go -- as we look at this. I recognize that a decision is in place, but I'm going to kind of date myself with this a little bit. I'm not going to talk terribly long, but back in the summer of 1997, I assisted Jim Cunningham, who was then the legislative mandate specialist for San Diego Unified School District on a parameter and guidelines amendment to the existing program absentee ballots, which covered the full costs of the absentee ballots.

And as a result of that amendment, it allowed, at that time, school districts and college districts to claim their absentee ballot costs that were being passed on to them, when it was previously only a special city and county and special district local agency reimbursement program.

The reason I mention that is, when that occurred in December 1997, the parameters and guidelines had included -- they were included before then, but they were still in there afterwards. If you looked at my Exhibit F, which is the letter I wrote back on September 22nd, on those adopted P's & G's by the Commission, you will see, under section A, three separate methods for agencies that have elections done

by the county election official and billed to the local agency those three separate methods for them to claim their reimbursement when they were being invoiced for that program. And it was usually a line item cost.

It's interesting, Los Angeles -- once again, to date myself; obviously I don't lead a very exciting life here. But Los Angeles County, when I spoke to Leonard Kay, for those of you who may be familiar with the name, he put it right on the bill, and we do identify it as reimbursable under this program.

And that's what I was envisioning when this test claim came through and was approved, that this was something where it was analyzed and may have been misstated, hence my letter on the 22nd.

If you -- it would be something where it would be something as straightforward as a method of claiming those costs.

Additionally, I recognized that in the case of cities, if they run their own election, as Mr. Feller had stated, they would be eligible for costs. But if they contracted with the county, they would not be.

What I found curious, though, is they may call an election, hire a third party -- let's say someone in Contra Costa County that runs elections, known as The Helsing Group. And even though they are not technically

doing all the work, they would get a bill from The Helsing Group, and I'm sure there would be a line item amount that they would be able to claim under what has been approved by the Commission on State Mandates.

To -- in a separate direction here, to Mr. Gibbons's point, under Article XIII B, section 6(c), I recognize that that applies to the State shifting a program on to -- directly on to a local government agent. But we have the State Legislature, the legislative wing of our government, passing 216, AB 216. And then we have the administrative arm of the State. The commission telling counties, like Mr. Gibbons was stating, telling those folks that conduct the elections, you must bill other folks that you're doing this work for, because we're not going to reimburse you, because it must show up -- you have fee authority, and it must show up separately. It can't be part of your reimbursement claim.

And with that in mind, you have two -- two different arms or two different wings of state government sending those costs to cities and special districts that have elections run by someone else.

And like Mr. Gibbons said, this -- this is one of those things where it's an added cost. It's been allowed in the past, under the absentee ballot program,

which still is an existing program, even though it's been Budget Act-suspended for the past ten years.

So I guess, for me, I'm frustrated. I recognize that the Commission disagrees with this. The staff has -- wants -- believes it's a different direction. But I would respectfully request the Commission consider an alternative motion, including these cities and special districts. They are being charged as a direct result of AB 216.

Thank you very much, and I appreciate your time.

CHAIRPERSON MILLER: Great. Thank you very much, Mr. Nichols.

Any further comments? Just making sure I didn't miss anyone else. I apologize again.

Questions or comments from the board?

(No response)

CHAIRPERSON MILLER: Seeing none, and seeing no further public comment -- correct, Ms. Palchik?

MS. PALCHIK: That is correct.

CHAIRPERSON MILLER: Great. Thank you for that.

Is there a motion?

MEMBER OLSEN: So moved. I will move the staff's recommendation.

CHAIRPERSON MILLER: Thanks, Ms. Olsen.

MEMBER WONG-HERNANDEZ: Second.

MEMBER RIVERA: Second.

CHAIRPERSON MILLER: Moved by Ms. Olsen. Seconded by Ms. Wong-Hernandez.

Thank you.

Ms. Halsey, will you call the roll, please?

MS. HALSEY: Mr. Adams.

MEMBER ADAMS: Aye.

MS. HALSEY: Ms. Lee.

MEMBER LEE: Aye.

MS. HALSEY: Ms. Miller.

CHAIRPERSON MILLER: Aye.

MS. HALSEY: Ms. Olsen.

MEMBER OLSEN: Aye.

MS. HALSEY: Ms. Ramirez.

MEMBER RAMIREZ: Aye.

MS. HALSEY: Mr. Rivera.

MEMBER RIVERA: Aye.

MS. HALSEY: Ms. Wong-Hernandez.

MEMBER WONG-HERNANDEZ: Aye.

CHAIRPERSON MILLER: Great. Thank you.

That motion carries.

MS. HALSEY: Item 6 was on consent.

Item 7. Chief Legal Counsel Camille Shelton will present the Chief Legal Counsel Report.

MS. SHELTON: Good morning.

Since our last hearing, the City of San Diego has filed a notice of appeal on its challenge to the Commission's decision in *Lead Sampling in Schools*. There, the trial court did agree with the Commission's decision, in finding that the requirement to test for lead in the drinking water of every K-12 school that had a public water system and that serves -- that requested the testing at no cost to the school does not impose a new program or higher level of service.

We have no other recent decisions.

As you can see from the hearing calendar, we do have a case management conference scheduled for January 29th, 2021, in *California School Board Association* case.

Secondly, on the remand of the Commission's decision on *Municipal Stormwater,* that case is pending in the Second District Court of Appeal. It has had two court hearings in the Court of Appeal, and the Court of Appeal has just issued a request for supplemental briefing, which is due December 9th. And they will issue their opinion after that supplemental briefing.

And that's all I have.

CHAIRPERSON MILLER: Great.

Any questions for Ms. Shelton?

(No response)

CHAIRPERSON MILLER: Seeing none, Ms. Halsey with the Executive Director Report, please.

MS. HALSEY: Sure.

After this hearing, there are 41 pending test claims, including one new filing, 39 of which are regarding NPDES permits, or stormwater permits. There's also one active parameters and guidelines and two statewide cost estimates pending.

And on inactive status, pending the outcome of litigation, there is an additional parameters and guidelines and an additional statewide cost estimate, and both of those are regarding NPDES permits. And there is one parameters and guideline amendment regarding graduation requirements.

Finally, there are ten IRCs, or incorrect reduction claims, pending, including three new filings.

Commission staff currently expects to complete all currently pending test claims and IRCs by approximately the July 2023 Commission hearing, depending on staffing and other workload. And some of the test claims and IRCs may be heard and decided earlier than currently indicated if they are consolidated for hearing, and then those consolidation issues are pending.

Please take a look at the Executive Director Report to see if an item you are interested in is likely to

come up in the next hearing or two. You can also use our pending caseload, which has all of our caseload on it. And that is also updated at least bimonthly, and that's available on our website and you can see when something is tentatively scheduled for hearing.

And that's all I have.

CHAIRPERSON MILLER: Great. Thank you.

Any questions for Ms. Halsey? Ms. Olsen, do you have a question?

MEMBER OLSEN: Nope.

CHAIRPERSON MILLER: Oh, okay. Sorry. I just saw your hand move.

Great. Thank you very much.

Now the Commission will meet in closed executive session -- Ms. Halsey just resent the closed session Zoom invitation -- pursuant to Government Code section 11126(e) to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice -- on the published notice and agenda -- excuse me -- and to confer with and receive advice from legal counsel regarding potential litigation. The Commission will also confer on personnel matters pursuant to Government Code section 11126(a)(1).

And we will reconvene in open session in approximately 15 minutes.

With that, please leave this Zoom, go to your e-mail, find the new Zoom link, and join us in closed session.

Thank you, everyone, and see you momentarily.

(Closed session was held from 11:52 a.m. to 12:14 p.m.)

CHAIRPERSON MILLER: I think we have a quorum, so I can go ahead and get started. Right, Heather?

Okay. Great. Thank you.

The Commission met in closed executive session pursuant to Government Code section 11126(e)(2) to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and to confer with and receive advice from legal counsel regarding potential litigation; and, pursuant to Government Code section 11126(a)(1), to confer on personnel matters.

With no further business to discuss, I would like to wish all of you very happy holidays.

And just, again, congratulations to Ms. Ramirez and a huge thank you to the Commission staff for everything they have done during these incredibly trying times,

really, to all of you, because your service is really important to the State of California. So thank you very much.

And with that, I will entertain a motion to adjourn, please.

MEMBER OLSEN: So moved.

CHAIRPERSON MILLER: Thanks, Ms. Olsen.

All those in favor --

MEMBER RIVERA: I will second.

CHAIRPERSON MILLER: -- please unmute and signify by saying "aye."

(Ayes)

CHAIRPERSON MILLER: Anyone opposed to adjourning?

(No response)

CHAIRPERSON MILLER: No? Great.

Well, thank you for much, and the meeting is adjourned. Take care, everyone, and happy holidays.

(Proceedings concluded at 12:15 p.m.)

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CERTIFICATE OF REPORTER

I, KATHRYN S. SWANK, a Certified Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing proceedings were reported in shorthand by me, Kathryn S. Swank, a Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said proceedings nor in any way interested in the outcome of said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of December 2020.

KATHRYN S. SWANK, CSR
Certified Shorthand Reporter
License No. 13061