BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Penal Code Sections 1171 and 1171.1 as Added by Statutes 2021, Chapter 728, Sections 2 and 3 (SB 483) Effective Date January 1, 2022 (Renumbered as Penal Code Section 1172.7 and 1172.75 by Statutes 2022, Chapter 58) Filed on December 28, 2022 County of San Diego, Claimant	Case No.: 22-TC-02 *Resentencing to Remove Sentencing Enhancements* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 22, 2023*) (*Served October 2, 2023*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on September 22, 2023.

Heather Halsey, Executive Director

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IN RE TEST CLAIM Penal Code Sections 1171 and 1171.1 as Added by Statutes 2021, Chapter 728, Sections 2 and 3 (SB 483) Effective Date January 1, 2022 (Renumbered as Penal Code Section 1172.7 and 1172.75 by Statutes 2022, Chapter 58) Filed on December 28, 2022 County of San Diego, Claimant	Case No.: 22-TC-02 *Resentencing to Remove Sentencing Enhancements* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 22, 2023*) (*Served October 2, 2023*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 22, 2023. Chris Hill appeared on behalf of the Department of Finance (Finance). The claimants did not appear on this matter.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 5-0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Regina Evans, Representative of the State Controller, Vice Chairperson	Absent
Jennifer Holman, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Renee Nash, School District Board Member	Absent
Sarah Olsen, Public Member	Yes
Spencer Walker, Representative of the State Treasurer	Yes

Summary of the Findings

This Test Claim alleges new state-mandated activities arising from Penal Code sections 1171 and 1171.1, as added by Statutes 2021, chapter 728 (later renumbered as Penal Code sections 1172.7 and 1172.75).[1] The test claim statute retroactively applies two prior changes in law that eliminated sentence enhancements for certain prior convictions, by declaring any sentence enhancement imposed by the changed laws for prior convictions that do not require sentence enhancements under current law to be legally invalid. To remediate these legally invalid sentences, county correctional administrators are required to identify to the sentencing courts all persons in their custody currently serving a term for a judgment that included the now legally invalid sentence enhancements. The counties are required to identify those individuals who have already served their base term and any other sentence enhancements by March 1, 2022, and then identify all other individuals by July 1, 2022. The Department of Corrections and Rehabilitation (CDCR) is also required to identify those individuals currently in its custody whose terms include the legally invalid sentence enhancements by the same deadlines. The courts are then required to confirm that the judgments of the individuals identified by the State and the county include the legally invalid sentence enhancements and if so, recall the defendant's sentence and hold a resentencing, at which time the defendant is entitled to legal counsel, by October 1, 2022 for defendants who have already served their base term and any other sentence enhancements, and by December 31, 2023 for all other defendants. A resentencing pursuant to the test claim statute is required to result in a lesser sentence by virtue of eliminating the invalid sentence enhancements, "unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety."[2] In addition, the test claim statute requires "a full resentencing, not merely that the trial court strike the newly 'invalid' enhancements."[3] Because the test claim statute requires a full resentencing, the court may also find that changes in law or post-conviction factors warrant reducing the sentence even further.[4]

The Commission finds that the test claim statute mandates a new program or higher level of service on county correctional administrators, public defenders to represent the defendants during resentencing, and district attorneys to represent the People during resentencing. However, there is not substantial evidence of increased costs in the record for county correctional administrators or public defenders to identify incarcerated persons with invalid sentence enhancements, or for district attorneys to represent the People during resentencing. More importantly, even if there were substantial evidence of these increased costs, there are no costs mandated by the state pursuant to

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[1] The code sections were renumbered by Statutes 2022, chapter 58.

[2] Penal Code section 1171(d)(1) and 1171.1(d)(1) (renumbered as 1172.7(d)(1) and 1172.75(d)(1)).

[3] *People v. Monroe* (2022) 85 Cal.App.5th 393, 402.

[4] Penal Code section 1171(d)(2)-(3) and 1171.1(d)(2)-(3) (renumbered as 1172.7(d)(2)-(3) and 1172.75(d)(2)-(3)).

Government Code section 17556(g). Government Code section 17556(g) says the Commission shall not find increased costs mandated by the state when it finds that a statute ". . . changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction." The test claim statute removes sentence enhancements from people currently serving prison sentences for a criminal conviction, thereby reducing their sentences and changing the penalty for their crimes. In addition, the activities of identifying inmates who are eligible for resentencing and representing them and the People during resentencing are not administrative in nature, but are indispensable to the scheme by which the Legislature has changed the penalty for the crime and thus, all mandated activities relate directly to the enforcement of the crime.[5] Accordingly, there are no costs mandated by the state pursuant to Government Code section 17556(g).

The Commission finds that the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

COMMISSION FINDINGS

I. Chronology

10/08/2021	Penal Code section 1171 and 1171.1, Statutes 2021, Chapter 728 (SB 483), effective January 1, 2022, was enacted.
12/28/2022	The claimant filed the Test Claim.[6]
04/28/2023	The Department of Finance (Finance) filed comments on the Test Claim.[7]
05/26/2023	The claimant filed rebuttal comments.[8]
07/06/2023	Commission staff issued the Draft Proposed Decision.[9]

II. Background

A. Prior Changes in Law

Until 2018, the Health and Safety Code required that when a person is convicted for one of several offenses related to possession or transport of controlled substances for the purpose of selling the controlled substance, the person would receive a full, separate, and consecutive three-year sentence enhancement for each prior felony conviction for a controlled substance offense.[10] In 2018, the Legislature amended the Health and

[5] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 643.

[6] Exhibit A, Test Claim, filed December 28, 2022.

[7] Exhibit B, Finance's Comments on the Test Claim, filed April 28, 2023.

[8] Exhibit C, Claimant's Rebuttal Comments, filed May 25, 2023.

[9] Exhibit D, Draft Proposed Decision, issued July 6, 2023.

[10] Former Health and Safety Code section 11370.2 (Stats. 1998, ch. 936, §1).

Safety Code so that when a person is convicted for one of several offenses related to possession or transport of controlled substances for the purpose of selling the controlled substance, the only prior conviction that enhances the sentence is a conviction for violating or conspiring to violate the law prohibiting an adult using a minor as their agent in a controlled substance offense.[11]

Similarly, until 2020, the Penal Code required that whenever a convicted defendant received a prison sentence under Penal Code section 1170, the sentence would include a consecutive one-year sentence enhancement for each prior conviction the defendant had, except for convictions that were prior to a five year period in which the defendant did not commit any offenses that resulted in a felony conviction and was not in prison or jail custody.[12] In 2020, the Legislature amended the Penal Code so that the only prior convictions that impose a one-year sentence enhancement are sexually violent offenses as defined by Welfare and Institutions Code section 6600(b).[13]

Normally, changes to the codes do not have retroactive effects unless explicitly stated.[14] There is an exception to this rule for changes that reduce the punishment for a crime, but it only extends a change in law's applicability to defendants who were charged before the change in law took effect, but received their final sentence after the change in law took effect.[15] Neither of these prior changes in law included any provisions to apply the changes in law retroactively, so people who were sentenced prior to the change in law still had these sentence enhancements, even though they would not receive sentence enhancements for their prior convictions if they were sentenced today.

B. Contemporaneous Changes to Sentencing Law at the Time of the Test Claim Statute

Prior to the test claim statute, the rules for resentencing a defendant could be found in Penal Code section 1170(d):

> When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison or a county jail pursuant to subdivision (h) and has been committed to the custody of the secretary or the county correctional administrator, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole

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[11] Health and Safety Code section 11370.2, as amended by Statutes 2017, chapter 677, section 1.

[12] Former Penal Code Section 667.5(b) (Stats. 2018, ch. 423, §65).

[13] Penal Code Section 667.5(b), as amended by Statutes 2019, chapter 590, section 1.

[14] See, for example, Penal Code section 3, "No part of it is retroactive, unless expressly so declared." See also, *People v. Stamps* (2020) 9 Cal.5th 685, 699 ("It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise.")

[15] *In re Estrada* (1965) 63 Cal.2d 740, 746-748.

> Hearings in the case of state prison inmates, the county correctional administrator in the case of county jail inmates, or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice. Credit shall be given for time served.[16]

At the same time that the test claim statute was going through the legislative process, the Legislature also passed Statutes 2021, chapter 719 (AB 1540), which moved the rules regarding resentencing to its own code section. Newly created Penal Code section 1170.03 (later renumbered as Penal Code section 1172.1) reads as follows:

> (a) (1) When a defendant, upon conviction for a felony offense, has been committed to the custody of the Secretary of the Department of Corrections and Rehabilitation or to the custody of the county correctional administrator pursuant to subdivision (h) of Section 1170, the court may, within 120 days of the date of commitment on its own motion, at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of a defendant incarcerated in state prison, the county correctional administrator in the case of a defendant incarcerated in county jail, the district attorney of the county in which the defendant was sentenced, or the Attorney General if the Department of Justice originally prosecuted the case, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, whether or not the defendant is still in custody, and provided the new sentence, if any, is no greater than the initial sentence.
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> (2) The court, in recalling and resentencing under this subdivision, shall apply the sentencing rules of the Judicial Council and apply any changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing.

[16] Former Penal Code section 1170(d) (Stats. 2020, ch. 29, § 15).

(3) The resentencing court may, in the interest of justice and regardless of whether the original sentence was imposed after a trial or plea agreement, do the following:

(A) Reduce a defendant's term of imprisonment by modifying the sentence.

(B) Vacate the defendant's conviction and impose judgment on any necessarily included lesser offense or lesser related offense, whether or not that offense was charged in the original pleading, and then resentence the defendant to a reduced term of imprisonment, with the concurrence of both the defendant and the district attorney of the county in which the defendant was sentenced or the Attorney General if the Department of Justice originally prosecuted the case.

(4) In recalling and resentencing pursuant to this provision, the court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice. The court shall consider if the defendant has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence, if the defendant was a victim of intimate partner violence or human trafficking prior to or at the time of the commission of the offense, or if the defendant is a youth or was a youth as defined under subdivision (b) of Section 1016.7 at the time of the commission of the offense, and whether those circumstances were a contributing factor in the commission of the offense.

(5) Credit shall be given for time served.

(6) The court shall state on the record the reasons for its decision to grant or deny recall and resentencing.

(7) Resentencing may be granted without a hearing upon stipulation by the parties.

(8) Resentencing shall not be denied, nor a stipulation rejected, without a hearing where the parties have an opportunity to address the basis for the intended denial or rejection. If a hearing is held, the defendant may appear remotely and the court may conduct the hearing through the use of remote technology, unless counsel requests their physical presence in court.

(b) If a resentencing request pursuant to subdivision (a) is from the Secretary of the Department of Corrections and Rehabilitation, the Board

of Parole Hearings, a county correctional administrator, a district attorney, or the Attorney General, all of the following shall apply:

(1) The court shall provide notice to the defendant and set a status conference within 30 days after the date that the court received the request. The court's order setting the conference shall also appoint counsel to represent the defendant.

(2) There shall be a presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18.[17]

C. The Test Claim Statute (Statutes 2021, Chapter 728)

In 2021, the Legislature enacted the test claim statute with the stated intent to retroactively apply the prior changes in law discussed above on all persons currently serving a term of incarceration based on the repealed sentence enhancements.[18] The Legislature found that the two prior sentence enhancements were ineffective at reducing crime; longer prison sentences were demonstrably injurious to families, particularly in minority communities; and that recent studies found that retroactively applying sentence reductions had no measurable impact on recidivism rates.[19] As originally proposed, the bill would have required the courts to "administratively amend" a defendant's sentence to remove the invalid sentence enhancements.[20] The Senate Appropriations Committee noted this was a novel and untested concept, and the more typical procedure was for the sentencing court to determine if the defendant was eligible for resentencing, and if so, whether the defendant should be resentenced.[21] "This traditional process aligns with the letter and presumed intent of the Victims' Bill of Rights Act of 2008: Marsy's Law (Proposition 9 (2008)), through which the voters, 'to preserve and protect a victim's right to justice and due process,' constitutionally enshrined a victim's right '[t]o be heard, upon request, at any proceeding, … involving a post-arrest release decision, plea, sentencing, postconviction release decision, or any proceeding in which a right of the victim is at issue.'"[22] This concern was enough that the Assembly Committee on Public Safety amended the bill to instead require the courts to recall the sentence and resentence the defendant, incorporating much of the language found in

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[17] Penal Code section 1170.03 (As added by Stats. 2021, ch. 719, §3.1; later renumbered as section 1172.1).

[18] Statutes 2021, chapter 728, section 1.

[19] Exhibit E (4) Assembly Committee on Public Safety, Analysis of SB 483 as proposed to be amended in July 13, 2021 hearing, page 3.

[20] Exhibit E (1), SB 483 as amended March 3, 2021, sections 2(c) and 3(c).

[21] Exhibit E (3), Senate Committee on Appropriations, Analysis of SB 483 as amended March 3, 2023, page 3.

[22] Exhibit E (3), Senate Committee on Appropriations, Analysis of SB 483 as amended March 3, 2023, pages 3-4.

the other resentencing bill discussed above that was simultaneously making its way through the Legislature.[23]

The test claim statute added two new sections to the Penal Code, sections 1171 and 1171.1 (later renumbered as 1172.7 and 1172.75 by Stats. 2022, ch. 58), which expressly make the sentence enhancement changes identified above retroactive. Penal Code section 1171(a) says that "Any sentence enhancement that was imposed prior to January 1, 2018, pursuant to Section 11370.2 of the Health and Safety Code, except for any enhancement imposed for a prior conviction of violating or conspiring to violate Section 11380 of the Health and Safety Code is legally invalid."[24] Similarly, Penal Code section 1171.1(a) says that "Any sentence enhancement that was imposed prior to January 1, 2020, pursuant to subdivision (b) of Section 667.5, except for any enhancement imposed for a prior conviction for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code is legally invalid."[25]

The remaining subdivisions of Penal Code sections 1171 and 1171.1 proceed identically, so the following discussion is of the plain language for both sections 1171 and 1171.1.

Subdivision (b) outlines how the state and local government will identify people currently serving prison sentences that include the legally invalid sentence enhancements to correct their invalid sentences, by saying that "The Secretary of the Department of Corrections and Rehabilitation and the county correctional administrator of each county[26] shall identify those persons in their custody currently serving a term for a judgment that includes an enhancement described in subdivision (a) and shall provide the name of each person, along with the person's date of birth and the relevant case number or docket number, to the sentencing court that imposed the enhancement."[27] The CDCR Secretary and county correctional administrators are required to provide this information to the courts by March 1, 2022 "for individuals who have served their base term and any other enhancements and are currently serving a sentence based on the enhancement. For purposes of this paragraph, all other enhancements shall be

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[23] Exhibit E (2) SB 483 as amended July 15, 2021, sections 2(d) and 3(d); see also Exhibit E (4) Assembly Committee on Public Safety, Analysis of SB 483 as proposed to be amended in July 13, 2021 hearing.

[24] Penal Code section 1171(a) as added by Statutes 2021, Chapter 728 (renumbered as 1172.7(a)).

[25] Penal Code section 1171.1(a) as added by Statutes 2021, Chapter 728 (renumbered as 1172.75(a)).

[26] "County correctional administrator" is not defined in the test claim statute, however, elsewhere in the Penal Code, "correctional administrator" is defined as "the sheriff, probation officer, or director of the county department of corrections." See Penal Code sections 1203.016(g) and 1203.018(j)(1).

[27] Penal Code sections 1171(b) and 1171.1(b) as added by Statutes 2021, Chapter 728 (renumbered as 1172.7(b) and 1172.75(b)).

considered to have been served first."[28] All other individuals must be identified to the courts by July 1, 2022.[29]

Subdivision (c) requires the courts to confirm that identified individuals' judgments included the legally invalid sentence enhancements and to recall the sentence and hold a resentencing after verifying this. It specifically says that "Upon receiving the information described in subdivision (b), the court shall review the judgment and verify that the current judgment includes a sentencing enhancement described in subdivision (a). If the court determines that the current judgment includes an enhancement described in subdivision (a), the court shall recall the sentence and resentence the defendant."[30] The court must complete the recall and resentencing "by October 1, 2022, for individuals who have served their base term and any other enhancement and are currently serving a sentence based on the enhancement," and "by December 31, 2023, for all other individuals."[31]

Subdivision (d) lays out the requirements for how a court goes about resentencing a person under the test claim statute and what information the courts are allowed to consider:

> (1) Resentencing pursuant to this section shall result in a lesser sentence than the one originally imposed as a result of the elimination of the repealed enhancement, unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety. Resentencing pursuant to this section shall not result in a longer sentence than the one originally imposed.
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> (2) The court shall apply the sentencing rules of the Judicial Council and apply any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing.
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> (3) The court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice.

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[28] Penal Code sections 1171(b)(1) and 1171.1(b)(1) as added by Statutes 2021, Chapter 728 (renumbered as 1172.7(b)(1) and 1172.75(b)(1)).

[29] Penal Code sections 1171(b)(2) and 1171.1(b)(2) as added by Statutes 2021, Chapter 728 (renumbered as 1172.7(b)(2) and 1172.75(b)(2)).

[30] Penal Code sections 1171(c) and 1171.1(c) as added by Statutes 2021, Chapter 728 (renumbered as 1172.7(c) and 1172.75(c)).

[31] Penal Code sections 1171(c)(1)-(2); 1171.1(c)(1)-(2) as added by Statutes 2021, Chapter 728 (renumbered as 1172.7(c)(1)-(2) and 1172.75(c)(1)-(2)).

(4) Unless the court originally imposed the upper term, the court may not impose a sentence exceeding the middle term unless there are circumstances in aggravation that justify the imposition of a term of imprisonment exceeding the middle term, and those facts have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial.

(5) The court shall appoint counsel.[32]

Lastly, subdivision (e) says that the parties may choose to waive the resentencing hearing, and if the hearing is not waived, the resentencing hearing may be conducted remotely through the use of remote technology, if the defendant agrees to it.[33]

III. Positions of the Parties

A. County of San Diego

The claimant alleges that Penal Code sections 1172.7(b)-(e) and 1172.75(b)-(e), as added by the test claim statute and later renumbered, impose state mandated activities on public defenders and district attorneys. The mandated activities are specifically identified as:

> (1) identify and review incarcerated individuals' records; (2) act as appointed counsel for individuals; and (3) represent individuals and the State of California regarding the validity of sentence enhancements, the applicability of post-conviction changes in law, and all "post-conviction factors," including but not limited to the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice.[34]

The Test Claim notes that the activity of identifying and reviewing incarcerated individuals' records was performed by San Diego County's Public Defenders' Office.[35] The claimant alleges that local governments do not have any discretion on whether to perform these activities, and under prior law, local governments were not required to

[32] Penal Code sections 1171(d) and 1171.1(d) as added by Statutes 2021, Chapter 728 (renumbered as 1172.7(d) and 1172.75(d)).

[33] Penal Code sections 1171(e) and 1171.1(e) as added by Statutes 2021, Chapter 728 (renumbered as 1172.7(e) and 1172.75(e)).

[34] Exhibit A, Test Claim, filed December 28, 2022, page 11.

[35] Exhibit A, Test Claim, filed December 28, 2022, pages 12, 24 (Declaration of Matthew Justin Wechter, Deputy Public Defender IV, County of San Diego Public Defenders' Office, para. 8).

proactively identify individuals or gather and present evidence regarding those individuals at resentencing hearings.[36]

The claimant provided two declarations from its Public Defenders' Office, one declaring information about the activities performed by the Public Defenders' Office to implement the test claim statute, the other alleging the office incurred $192,059 performing mandated activities between July 1, 2022 and December 15, 2022.[37] Based on anticipated staffing levels necessary to see the mandated activities through to the test claim statute's deadlines, the declarations allege an additional $787,026 in increased costs between December 16, 2022, and December 31, 2023.[38] Based on San Diego County's percentage of the statewide population of incarcerated individuals, the claimant estimates statewide costs of $9,528,162.[39]

The claimant alleges the mandated activities both provide a governmental service to the public, and have been uniquely imposed on local governments, making this a new program or higher level of service within the meaning of article XIII B, section 6.[40]

Regarding exceptions to the subvention requirement, the claimant asserts that the mandated activities do not implement any pre-existing federal constitutional or statutory scheme, and that local governments lack fee authority or other funding sources.[41]

Regarding the applicability of Government Code section 17556(g), the claimant alleges that the portions of the test claim statute that impose the mandated activities "do not directly penalize a defendant or relate to the 'duration or conditions of punishment.'"[42] The claimant looks at two prior Commission Decisions, *Domestic Violence Treatment Services – Authorization and Case Management (DVTS-ACM)*, CSM-9628101 and

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[36] Exhibit A, Test Claim, filed December 28, 2022, pages 12, 14.

[37] Exhibit A, Test Claim, filed December 28, 2022, pages 24 (Declaration of Matthew Justin Wechter, Deputy Public Defender IV, County of San Diego Public Defenders' Office, para. 8), 26 (Declaration of Miwa Pumpelly, Chief, Departmental Administrative Services, County of San Diego Public Defenders' Office, para. 5).

[38] Exhibit A, Test Claim, filed December 28, 2022, page 27 (Declaration of Miwa Pumpelly, Chief, Departmental Administrative Services, County of San Diego Public Defenders' Office, para. 6).

[39] Exhibit A, Test Claim, filed December 28, 2022, page 28 (Declaration of Miwa Pumpelly, Chief, Departmental Administrative Services, County of San Diego Public Defenders' Office, para. 12).

[40] Exhibit A, Test Claim, filed December 28, 2022, pages 15-17.

[41] Exhibit A, Test Claim, filed December 28, 2022, pages 17-18.

[42] Exhibit A, Test Claim, filed December 28, 2022, page 18, quoting Exhibit E (7), Commission on State Mandates, Test Claim Decision on *State Authorized Risk Assessment Tool for Sex Offenders (SARATSO)*, 08-TC-03, adopted January 24, 2014, https://csm.ca.gov/decisions/SARATSO_SODadopt012414.pdf (accessed May 30, 2023), page 30.

State Authorized Risk Assessment Tool for Sex Offenders (SARATSO), 08-TC-03, where the Commission previously found the test claim statute changed the penalty for a crime, but at least some of the activities did not directly relate to enforcing the crime, and therefore were not excluded from reimbursement under Government Code section 17556(g). In *DVTS-ACM* the Commission found that assessing a defendant's probability of committing a future murder did not directly relate to enforcing the crime because doing so did not directly penalize the defendant.[43] In *SARATSO*, the Commission found that requirements for probation departments to include the results of a SARATSO test in presentencing reports to the courts and reports to CDCR were administrative in nature, and did not of themselves change the penalty for the underlying crime.[44]

> As in *DVTS-ACM* and *SARATSO*, the Mandated Activities here are procedural (i.e., administrative) in nature because they involve evidence gathering and presentation.[45] The Mandated Activities are almost identical to the investigation, reporting, and filing activities in *SARATSO*, which did not "directly penalize a defendant" or "relate directly to the enforcement of a crime" for purposes of Section 6, even though they could impact the duration or conditions of post-conviction sentence. Further, unlike the portions of the test claim statutes at issue in those cases, the Mandated Activities do not involve monitoring a defendant who has been released on parole, requesting hearings if parole is violated, or ensuring intensive and specialized supervision for parolees.[46] Thus, even if some portions of SB 483 could be read as changing the penalty for a crime,

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[43] Exhibit E (6), Commission on State Mandates, Test Claim Decision on *Domestic Violence Treatment Services – Authorization and Case Management (DVTS-ACM)*, CSM-9628101, adopted April 24, 1998, https://csm.ca.gov/decisions/213.pdf (accessed May 30, 2023), page 10-11.

[44] Exhibit E (7), Commission on State Mandates, Test Claim Decision on *State Authorized Risk Assessment Tool for Sex Offenders (SARATSO)*, 08-TC-03, adopted January 24, 2014, https://csm.ca.gov/decisions/SARATSO_SODadopt012414.pdf (accessed May 30, 2023), page 30.

[45] Citing *People v. Delgado* (2022) 78 Cal.App.5th 95, 98.

[46] Citing Exhibit E (6), Commission on State Mandates, Test Claim Decision on *Domestic Violence Treatment Services – Authorization and Case Management (DVTS-ACM)*, CSM-9628101, adopted April 24, 1998, https://csm.ca.gov/decisions/213.pdf (accessed May 30, 2023), page 8-9; Exhibit E (7) Commission on State Mandates, Test Claim Decision on *State Authorized Risk Assessment Tool for Sex Offenders (SARATSO)*, 08-TC-03, adopted January 24, 2014, https://csm.ca.gov/decisions/SARATSO_SODadopt012414.pdf (accessed May 30, 2023), page 32-33.

> Section 17556(g) would only exempt from subvention those activities that directly penalize a defendant, which the Mandated Activities do not do.[47]

The claimant also argues that Penal Code sections 1171 and 1171.1 as added by the test claim statute (and later renumbered as sections 1172.7 and 1172.75) are codified in Part 2 of the Penal Code, which is titled "Of Criminal Procedure," which further demonstrates the mandated activities are procedural, and therefore the test claim statute does not relate directly to the enforcement of the crime or infraction.[48]

In its rebuttal to Finance's comments, the claimant argues that Government Code section 17556(g) does not apply to the mandated activities because the subdivisions that impose mandated activities on local governments are found in a different portion of the test claim statute from the subdivisions where the test claim statute changed the penalty for a crime.

> To the extent Senate Bill 483 changed the penalty for a crime, only [newly added Penal Code sections 1171(a) and 1171.1(a)] affected that change in penalty, by declaring "[a]ny sentence enhancement that was imposed …. legally invalid." This test claim does not seek reimbursement for [Penal Code sections 1171(a) and 1171.1(a)]. This test claim seeks reimbursement for costs incurred to comply with [Penal Code sections 1171(b)-(e) and 1171.1(b)-(e)]. These sections go beyond changing the penalty for a crime and require Claimant to undertake additional non-enforcement related activities.[49]

As a final point to the claimant's rebuttal, the claimant asserts that *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 175, finds that any exceptions to the subvention requirement must be narrowly construed to give effect to the voter intent behind section 6. The exception to the subvention requirement found in Government Code section 17556(g) should therefore be narrowly construed, while the limitation to the exception found in the "but only" portion of 17556(g) should be broadly construed. "[T]o the extent there is any uncertainty regarding whether the Mandated Activities relate directly to the enforcement of a crime, *Long Beach Unified School District* requires Section 17556(g) to be applied in a constitutional manner – that is, by honoring voter intent to limit exceptions to the State's subvention obligation."[50]

The claimant did not file comments on the Draft Proposed Decision.

B. Department of Finance

Finance asserts that the claim should be denied because any costs incurred in relation to the test claim statute are not reimbursable pursuant to Government Code section 17556(g). Finance explained that "SB 483 created a new process to apply the sentence

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[47] Exhibit A, Test Claim, filed December 28, 2022, page 19.

[48] Exhibit C, Claimant's Rebuttal Comments, filed May 25, 2023, page 2.

[49] Exhibit C, Claimant's Rebuttal Comments, filed May 25, 2023, page 2.

[50] Exhibit C, Claimant's Rebuttal Comments, filed May 25, 2023, pages 2-3.

enhancement repeals [from SB 180 and SB 136] retroactively by resentencing certain persons currently serving a sentence that is comprised, at least in part, of a type of sentence enhancement that was repealed in either 2018 or 2020."[51] Section 17556(g) says that the Commission shall not find reimbursable costs mandated by the state in a test claim that changes the penalty for a crime or infraction. "The sentencing changes mandated by SB 483 clearly change the penalty for a crime or infraction, and these changes relate directly to the enforcement of the crime or infraction."[52] Therefore, Finance concluded the Commission should deny the Test Claim in its entirety.

Finance did not file comments on the Draft Proposed Decision.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service…

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[53] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[54]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[55]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or

[51] Exhibit B, Finance's Comments on the Test Claim, filed April 28, 2023, page 1.

[52] Exhibit B, Finance's Comments on the Test Claim, filed April 28, 2023, page 2.

[53] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[54] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[55] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[56]

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[57]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[58]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[59] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[60] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[61]

A. The Test Claim Was Timely Filed, with a Potential Period for Reimbursement Beginning January 1, 2022.

Test claims must be filed within 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of the statute or executive order, whichever is later.[62] A test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year.[63]

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[56] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[57] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

[58] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[59] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 335.

[60] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[61] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

[62] Government Code section 17551(c).

[63] Government Code section 17557(e).

The test claim statute's effective date was January 1, 2022, and the claimant filed the Test Claim on December 28, 2022, within 12 months of the effective date and, therefore, the Test Claim was timely filed. The filing date establishes reimbursement eligibility for fiscal year 2021-2022, but the statute has a later effective date of January 1, 2022. Therefore, the potential period of reimbursement begins on January 1, 2022.

B. The Test Claim Statute Creates a State-Mandated Program that Imposes New Activities on County Correctional Administrators, Public Defenders, and District Attorneys.

1. The Test Claim Statute Mandates that County Correctional Administrators Shall Identify Persons with Legally Invalid Sentence Enhancements.

The first step of the procedure outlined in the test claim statute is that the county correctional administrators "shall identify those persons in their custody currently serving a term for a judgment that includes" one of the subject sentence enhancements, "and shall provide the name of each person, along with the person's date of birth and the relevant case number or docket number, to the sentencing court that imposed the enhancement."[64] The county correctional administrators must review the records of people currently in their custody to identify those whose judgments included the invalid sentence enhancement, and provide the courts with the names, birthdates, and case number or docket number of the individuals who have already served their base term and any other sentence enhancements and are currently serving a sentence based on the enhancement, by March 1, 2022, and for all other individuals whose judgments included the invalid sentence enhancements by July 1, 2022.[65] These are clearly stated requirements that the county correctional administrators must complete by set deadlines, and the requirements are mandated by the state.

2. The Test Claim Statute Mandates that Public Defenders Shall Represent Indigent Defendants During Resentencing.

When the courts resentence a defendant under the test claim statute, the courts "shall appoint counsel."[66] It is the duty of public defenders to defend, "upon order of the court… any person who is not financially able to employ counsel and who is charged with the commission of any contempt or offense triable in the superior courts at all stages of the proceedings."[67] A resentencing, when a court is obligated to resentence

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[64] Penal Code section 1171(b) and 1171.1(b) (renumbered as 1172.7(b) and 1172.75(b)).

[65] Penal Code section 1171(b)(1)-(2) and 1171.1(b)(1)-(2) (renumbered as 1172.7(b)(1)-(2) and 1172.75(b)(1)-(2)).

[66] Penal Code sections 1171(d)(5) and 1171.1(d)(5) (renumbered as 1172.7(d)(5) and 1172.75(d)(5)).

[67] Government Code section 27706(a).

the defendant, is a critical stage of the criminal proceeding.[68] During a resentencing under the test claim statute, the courts must appoint legal counsel to represent indigent defendants, and the duty of serving as appointed counsel falls to public defenders. The test claim statute therefore mandates that public defenders serve as appointed counsel for defendants, and argue in favor of any changes in law or post-conviction factors that would warrant the court impose a lesser sentence on the defendant.[69]

3. Although the Test Claim Statute Does Not Explicitly Mention District Attorneys, District Attorneys Are Required by Law to Participate in the Mandated Resentencing Activities.

District attorneys are not referenced anywhere in the plain language of the test claim statute itself. However, the legislative history shows a clear expectation that district attorneys would be involved in a mandated resentencing. As originally proposed, the test claim statute didn't require resentencing; instead courts were directed to administratively amend the person's sentence, removing the legally invalid sentence enhancements without a hearing.[70] The Assembly Committee on Public Safety amended SB 483 to require the courts resentence the defendants instead of administratively amend their sentences.[71] In making this change, the Assembly Appropriations Committee noted that the proposed bill presented possible reimbursable costs to the counties "for county prosecutors and public defenders to litigate re-sentencing hearings."[72] This acknowledgement demonstrates the Legislature knew that a resentencing hearing requires not just public defenders to represent indigent defendants, but district attorneys to represent the People.

District attorneys serve as public prosecutors, and are required to represent the public in criminal proceedings.[73] "Sentencing is a critical stage in the criminal process within the meaning of the Sixth Amendment."[74] Courts have applied similar importance to resentencing when a court finds it must resentence the defendant.[75] "[T]he People have an interest in being heard throughout the course of a criminal prosecution, and it is

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[68] *People v. Rouse* (2016) 245 Cal.App.5th 292, 300.

[69] Penal Code sections 1171(d)(2)-(3) and 1171.1(d)(2)-(3) (renumbered as 1172.7(d)(2)-(3) and 1172.75(d)(2)-(3)).

[70] Exhibit E (1), SB 483 as amended March 3, 2021, sections 2(c) and 3(c), as amended March 3, 2021.

[71] Exhibit E (2), SB 483 as amended July 15, 2021, sections 2(d) and 3(d); see also Exhibit E (4), Assembly Committee on Public Safety, Analysis of SB 483 as proposed to be amended at July 13, 2021 hearing.

[72] Exhibit E (5), Assembly Committee on Appropriations, Analysis of SB 483 as amended July 15, 2021, page 2.

[73] Government Code section 26500

[74] *People v. Rouse* (2016) 245 Cal.App.5th 292, 297.

[75] *People v. Rouse* (2016) 245 Cal.App.5th 292, 300.

the district attorney's duty to advocate on the People's behalf in an effort to achieve a fair and just result."[76]

Under this test claim statute, a court must recall a sentence and resentence the defendant once it confirms that the defendant's judgment included the now legally invalid sentence enhancements. During resentencing, the court also considers whether imposing a lesser sentence would endanger public safety. Because the resentencing is a critical stage in the criminal procedure, and district attorneys are required by law to represent the People in the proceedings, district attorneys are mandated by the state to participate in the resentencing under the test claim statute.

4. The Mandated Activities in the Test Claim Statute Constitute a New Program or Higher Level of Service.

For a test claim statute to be subject to subvention under article XIII B, section 6 of the California Constitution, the statute must impose a new program or higher level of service. A mandated activity is new when it is new in comparison to what was legally required immediately before the test claim statute or executive order.[77] Newly mandated activities impose a new program or higher level of service when the activities carry out the governmental function of providing services to the public or impose a unique requirement on local governments that does not apply to all residents and entities within the state.[78]

Here, the state-mandated requirements are new. Prior to the test claim statute, a person whose sentence was made final before the prior changes in law went into effect could not benefit from the changes in law, and the county administrators, public defenders, and district attorneys were not required to perform the activities described above.[79] In addition, the activities carry out unique governmental functions in providing public safety and ensuring fairness in the criminal legal system. The mandated activities therefore constitute a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

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[76] *People v. Dehle* (2008) 166 Cal.App.4th 1380, 1388 (finding the district attorney must serve as prosecutor and represent the People at a sentencing hearing).

[77] See *Lucia Mar Unified School Dist. v. State of California* (1988) 44 Cal.3d 830, 835.

[78] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521; *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538

[79] Penal Code section 3, "No part of it is retroactive, unless expressly so declared." See *People v. Stamps* (2020) 9 Cal.5th 685, 699.

C. The New Mandated Activities Do Not Result in Increased Costs Mandated by the State.

1. There Is Not Substantial Evidence in the Record for Increased Costs Mandated by the State for County Correctional Administrators or Public Defenders to Identify Inmates with Legally Invalid Sentence Enhancements, or for District Attorneys to Represent the People During Resentencing.

The final element that must be met for reimbursement to be required under article XIII B, section 6 of the California Constitution is that the mandated activities must result in a local agency incurring increased costs mandated by the state within the meaning of Government Code section 17514. That section defines "costs mandated by the state" as "any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Substantial evidence in the record is required to support a finding that the mandated activities result in costs mandated by the state.[80] While the claimant has filed sufficient evidence supporting the increased costs incurred by the Public Defender's Office beginning in July 2022, the claimant has not filed any evidence to support the allegation that the activity of identifying inmates with legally invalid sentence enhancements, or the activities performed by the District Attorney's Office, result in increased costs mandated by the state.

The claimant filed one declaration to support the allegation that the Public Defenders' Office incurred $192,059 of actual increased costs for support staff and attorney time between July 1 and December 15, 2022, and estimates that the Public Defenders' Office will incur an additional $787,027 in support staff and attorney costs to complete all resentencing by December 31, 2023.[81] While this is sufficient to support increased costs for public defenders representing defendants during resentencing, the claimant has not filed any declarations alleging increased costs for the activities required to be performed by county correctional administrators or district attorneys. In the Test Claim, the claimant alleges that the Public Defenders' Office did the work to identify inmates with invalid sentence enhancements.[82] The test claim statute directed this activity to county correctional administrators, which as stated previously, has been defined in the Penal Code to mean "the sheriff, probation officer, or director of the county department

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[80] Government Code section 17559(b).

[81] Exhibit A, Test Claim, filed December 28, 2022, page 26-27 (Declaration of Miwa Pumpelly, Chief, Departmental Administrative Services, County of San Diego Public Defender's Office, para. 5-6). This declaration satisfies the requirement in Government Code section 17564(a) that the Test Claim exceed one thousand dollars.

[82] Exhibit A, Test Claim, filed December 28, 2022, page 24 (Declaration of Matthew Justin Wechter, Deputy Public Defender IV for the County of San Diego, para. 8).

of corrections."[83] The Assembly Appropriations Committee acknowledged the statute imposed possible reimbursable costs for "county jail staff to review inmate records and identify inmates eligible for referral to the sentencing court," further demonstrating it was not the Legislature's intention for public defenders to perform these activities.[84] Even assuming that it was proper for the public defenders to perform activities mandated to the county correctional administrator, the public defenders' declarations only demonstrate actual increased costs incurred *after* the deadlines to identify inmates with legally invalid sentence enhancements.[85]

Similarly, there is no evidence of increased costs mandated by the state for the activities performed by the District Attorney's Office.

Accordingly, there is not substantial evidence in the record supporting a finding of increased costs mandated by the state for county correctional administrators or Public Defenders to identify inmates with legally invalid sentence enhancements, or for the activities performed by the District Attorney's Office.

2. Even if Substantial Evidence of Costs Were Filed for All the Mandated Activities, there Are No Costs Mandated by the State Because the Test Claim Statute Changes the Penalty for a Crime Pursuant to Government Code Section 17556(g).

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds… The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."[86]

The test claim statute retroactively applies changes in law that eliminated sentence enhancements that used to be added to a person's term of judgment to reduce convicted persons' sentences, clearly changing the penalties for crimes that were originally imposed at sentencing. Although the prior changes to Health and Safety Code section 11370.2 and Penal Code section 667.5(b) are what ended the use of these sentence enhancements, the test claim statute actually changed the penalties for

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[83] See Penal Code sections 1203.016(g) and 1203.018(j)(1).

[84] Exhibit E (5), Assembly Committee on Appropriations, Analysis of SB 483 as amended July 15, 2021, page 2.

[85] Exhibit A, Test Claim, filed December 28, 2022, page 26-27 (Declaration of Miwa Pumpelly, Chief, Departmental Administrative Services, County of San Diego Public Defender's Office, para. 5-6), showing increased costs between July 1, 2022 and December 15, 2022, and anticipated increased costs between December 16, 2022 and December 31, 2023, all of which were incurred after the March 31 and July 1, 2022 statutory deadlines to identify inmates with legally invalid sentence enhancements. (Penal Code sections 1171(b)(1)-(2) and 1171.1(b)(1)-(2) (renumbered as section 1172.7(b)(1)-(2) and 1172.75(b)(1)-(2)).

[86] Government Code section 17556(g).

people who were convicted and sentenced for their crimes before these changes in law.[87] The Legislature gave the prior changes in law retroactive effect because it found that the sentence enhancements were ineffective at reducing crime, longer prison sentences are demonstrably injurious to families in minority communities, and that retroactively applying sentence reductions has no measurable impact on recidivism rates.[88] A resentencing pursuant to the test claim statute is required to result in a lesser sentence by virtue of eliminating the invalid sentence enhancements, "unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety."[89] In addition, the test claim statute requires "a full resentencing, not merely that the trial court strike the newly 'invalid' enhancements."[90] Because the test claim statute requires a full resentencing, the court may also find that changes in law or post-conviction factors warrant reducing the sentence even further.[91] It is indisputable that the purpose of the test claim statute is to change and reduce the penalty for convicted persons' crimes.

The next question under section 17556(g) is whether the mandated activities are part of "that portion of the statute relating directly to the enforcement of the crime or infraction." The Fourth District Court of Appeal recently held that a mandated activity directly relates to enforcement of the crime or infraction when "it plays an indispensable role" in the scheme that changed the penalty for a crime.[92]

Here, the mandated activities all play an indispensable role in the scheme that changed the penalty for a crime. Identifying individuals with invalid sentence enhancements is an indispensable part of the resentencing scheme outlined by the test claim statute. Without the county correctional administrators providing information to the courts about the people in their custody with invalid sentence enhancements, the courts would not be able to recall and resentence defendants.[93] Moreover, as originally proposed, the test

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[87] *People v. Burgess* (2022) 86 Cal.App.5th 461, 382.

[88] Exhibit E (4) Assembly Committee on Public Safety, Analysis of SB 483 as proposed to be amended in July 13, 2021 hearing, page 3.

[89] Penal Code section 1171(d)(1) and 1171.1(d)(1) (renumbered as 1172.7(d)(1) and 1172.75(d)(1)).

[90] *People v. Monroe* (2022) 85 Cal.App.5th 393, 402.

[91] Penal Code section 1171(d)(2)-(3) and 1171.1(d)(2)-(3) (renumbered as 1172.7(d)(2)-(3) and 1172.75(d)(2)-(3)).

[92] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 643.

[93] See *People v. Burgess* (2022) 86 Cal.App.5th 375, 381 (finding the courts lacked jurisdiction to resentence a defendant under Penal Code section 1172.75 outside of the mandated procedure); see also Penal Code section 1172.1(a) (Resentencing procedure only allows courts to resentence a defendant on its own motion within 120 days of sentencing, otherwise it must be at the recommendation of either the CDCR Secretary,

claim statute would have required the courts to administratively amend the defendant's sentence, but this was changed to instead require the court properly resentence the defendant because administratively amending the sentence would violate victims' rights to be heard in post-conviction sentencing and release decisions.[94] As explained earlier, resentencing is a critical stage of the criminal process.[95] Public defenders have a stated duty imposed by the test claim statute to represent defendants during resentencing, and district attorneys are likewise obligated to represent the People during resentencing.[96] The activities of public defenders and district attorneys are therefore indispensable to resentencing under the test claim statute. The test claim statute changes the penalty for a crime, and the mandated activities are indispensable to the scheme used to change the penalty for the crime, and therefore are directly related to enforcing the crime or infraction within the meaning of Government Code section 17556(g).

The claimant, however, raises four arguments for why Government Code section 17556(g) does not apply. First, the claimant alleges that the mandated activities are merely procedural or administrative in nature, as was the case in prior test claims that found at least some mandated activities did not directly relate to enforcing a crime and were therefore reimbursable.[97] Second, the claimant argues that according to the prior test claim decisions it relies on, mandated activities can only directly relate to enforcing a crime if they directly penalize a defendant or relate to the duration or conditions of a punishment.[98] Third, the claimant argues that the mandated activities in Penal Code sections 1171 and 1171.1 are in different subdivisions from where the test claim statute actually changed the penalty for a crime, and therefore do not directly relate to enforcing the crime.[99] Lastly, the claimant argues that to the extent there is any uncertainty regarding whether the mandated activities directly relate to enforcing a crime, *Long*

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the Board of Parole Hearings, county correctional administrator, district attorney or Attorney General).

[94] Exhibit E (3), Senate Committee on Appropriations, Analysis of SB 483 as amended March 3, 2023, page 3.

[95] *People v. Rouse* (2016) 245 Cal.App.5th 292, 300.

[96] *People v. Dehle* (2008) 166 Cal.App.4th 1380, 1388 (finding the district attorney must serve as prosecutor and represent the People at a sentencing hearing).

[97] Exhibit A, Test Claim, filed December 28, 2022, pages 18-19, citing to the Commission's Decisions in *Domestic Violence Treatment Services – Authorization and Case Management (DVTM-ACM)*, CSM-9628101 and *State Authorized Risk Assessment Tool for Sex Offenders (SARATSO)*, 08-TC-03.

[98] Exhibit A, Test Claim, filed December 28, 2022, page 19, citing to the Commission's Decisions in *Domestic Violence Treatment Services – Authorization and Case Management (DVTM-ACM)*, CSM-9628101 and *State Authorized Risk Assessment Tool for Sex Offenders, (SARATSO)*, 08-TC-03.

[99] Exhibit C, Claimant's Rebuttal Comments, filed May 25, 2023, page 2.

Beach Unified School District requires any exceptions to the subvention requirement to be narrowly construed to honor voter intent in enacting article 6.[100]

The law does not support the claimant's arguments.

The claimant cites to *People v. Delgado* (2022) 78 Cal.App.5th 95, 98 *(Delgado)* in support of its claim the mandated activities are merely procedural or administrative and not directly related to enforcing a crime. *Delgado* does not discuss whether resentencing is a procedural or administrative activity; it addresses whether a defendant had a right to a special type of court proceeding used to preserve evidence to be considered in future parole hearings called a *Franklin* proceeding. In a footnote, the *Delgado* court explained the difference between a proceeding, where the court does not render a final determination or make any findings of fact, and a hearing involving issues of law and fact to be determined, stating:

> A hearing generally involves definitive issues of law or fact to be determined with a decision rendered based on that determination. A proceeding is a broader term describing the form or manner of conducting judicial business before a court. While a judicial officer presides over a Franklin proceeding and regulates its conduct, the officer is not called upon to make findings of fact or render any final determination at the proceeding's conclusion.[101]

However, *Delgado* refutes the claimant's position that the mandated activities are merely procedural or administrative, rather than supports it. Unlike the *Franklin* proceeding discussed in *Delgado*, there are issues of law and fact that must be considered during a resentencing under the test claim statute. A resentencing under the test claim statute is a full resentencing, not just the removal of invalid sentence enhancements.[102] Pursuant to Penal Code sections 1171(d)(2) and 1171.1(d)(2), "[t]he court shall apply the sentencing rules of the Judicial Council and apply any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing." The court is also required by Penal Code sections 1171(d)(1) and 1171.1(d)(1) to impose a lesser sentence than the one originally imposed as a result of the elimination of the repealed enhancement, "unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety." Thus, *Delgado* does not support claimant's assertions that the mandated activities are administrative or procedural.

Furthermore, recent case law considered the applicability of Government Code section 17556(g) on activities the claimant alleged were merely procedural or administrative. In *County of San Diego v. Commission on State Mandates*, the claimant asserted that a statute that required the State Parole Board hold youth offender parole hearings for defendants who were under 26 years old at the time of their offense created a state

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[100] Exhibit C, Claimant's Rebuttal Comments, filed May 25, 2023, pages 2-3.

[101] *People v. Delgado* (2022) 78 Cal.App.5th 95, 98 (fn. 1).

[102] *People v. Monroe* (2022) 85 Cal.App.5th 393, 402.

mandate requiring district attorneys and public defenders to first participate in *Franklin* proceedings to preserve evidence of the youth-related factors to be considered at the future parole hearings. The appellant in that case raised the same argument that the claimant raises here; that the mandated activities implemented procedural and administrative changes, and therefore did not directly relate to enforcing the crime.[103] The court found this claim to be without merit, and explained that:

> Parole is not a mere "procedural" or "administrative" facet of the criminal justice system. "[P]arole is punishment." [citation omitted] In fact, "parole is a mandatory component of any prison sentence. 'A sentence resulting in imprisonment in the state prison ... shall include a period of parole supervision or postrelease community supervision, unless waived ....' [citation omitted] Thus, a prison sentence 'contemplates a period of parole, which in that respect is related to the sentence.' " [citation omitted] By guaranteeing parole eligibility for all qualified youth offenders, the Test Claim Statutes altered the substantive punishments, i.e., the penalties, for the offenses perpetrated by those offenders.[104]

Just as parole is not a mere "procedural" or "administrative" facet of the criminal justice system, but is part of the defendant's punishment, so too are all the steps required by the test claim statute to recall and resentence a person whose term of judgment contains the legally invalid sentence enhancements. When the courts find a defendant is entitled to resentencing, the resentencing has the same importance as sentencing.[105] "The purpose of sentencing is public safety achieved through *punishment*, rehabilitation, and restorative justice."[106] Thus, by requiring the county to identify convicted persons whose terms of judgment contain the legally invalid enhancements, and then requiring courts to recall and resentence convicted persons to remove legally invalid sentence enhancements, apply any other changes in law that would reduce sentences or allow for judicial discretion, and consider postconviction factors and evidence that reflect a convicted person's reduced risk for future violence or that continued incarceration is no longer in the interest of justice, the test claim statute has substantively changed the penalty for the crimes. Accordingly, the mandated activities are not merely administrative or procedural facets of the criminal justice system, but rather all play an indispensable role in the enforcement of the crime and the resulting reduction in the penalty imposed.[107]

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[103] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 642.

[104] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 642.

[105] *People v. Rouse* (2016) 245 Cal.App.5th 292, 300.

[106] Penal Code section 1170(a) (Emphasis added).

[107] The claimant also argues as its second point that the Commission's prior decisions show that only mandated activities that directly relate to enforcement of a crime are those that either directly penalize the defendant or relate to the duration or conditions of

County of San Diego also addresses the claimant's third argument that the mandated activities are located in a different subdivision from where the test claim statute actually changed the penalty for a crime.[108] In that case, the County of San Diego argued that Penal Code section 3051(f) created mandated activities for public defenders and district attorneys to preserve evidence of the youth-related factors to be considered at the future parole hearings, while the portions of the test claim statute that obligated the State Parole Board to hold parole hearings resulting in the actual change of penalty for a crime were located in Penal Code sections 3046 and 3051(b) and (e) and, thus, Government Code section 17556(g) does not apply. The court found this argument unpersuasive, and found that preserving the evidence identified in section 3051(f) played an indispensable role in the State Parole Board's determination, and was directly related to the change in penalty and enforcement of crime.

> Penal Code section 3051, subdivision (f), identifies the evidence that may be introduced and considered when the Board assesses a parole candidate's growth, maturity, and overall parole suitability. (Pen. Code, § 3051, subd. (f)(1), (2).) Because it dictates the evidence and information the Board may, or must, assess when determining a candidate's parole suitability, it plays an indispensable role in the youth offender parole hearing scheme. Indeed, in practice, it very well may be determinative as to whether a given youth offender will be released on parole. Further, there can be no dispute that parole flows directly from the parolee's underlying crime. [citation omitted] Because Penal Code section 3051, subdivision (f), plays a pivotal role in the Board's parole determination, and parole is a direct consequence of a criminal conviction, we conclude section 3051, subdivision (f)—like the other statutory components that

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punishment. (Exhibit A, Test Claim, filed December 28, 2022, pages 18-19, citing to the Commission's Decisions in *State Authorized Risk Assessment Tools for Sex Offenders (SARATSO)*, 08-TC-03 and *Domestic Violence Treatment Services – Authorization and Case Management (DVTS-ACM)*, CSM-96-281-01.) As described above, all the mandated activities in this case relate to the criminal sentences and thus, all relate to conditions of punishment. Therefore, this case is distinguishable from those prior test claims that were partially approved.

Moreover, the Commission does not designate its past decisions as precedential pursuant to Government Code section 11425.60, and due process permits administrative agencies substantial deviation from the principle of stare decisis. (*Weiss v. Board of Equalization* (1953) 40 Cal.2d 772, 776) What *is* legal precedent is the Fourth District Court of Appeal's finding that a mandated activity directly relates to enforcement of the crime or infraction pursuant to Government Code section 17556(g) when "it plays an indispensable role" in the scheme that changed the penalty for a crime." (*County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 643.)

[108] Exhibit C, Claimant's Rebuttal Comments, filed May 25, 2023, page 2.

> make up the Test Claim Statutes—directly relates to the enforcement of the crimes perpetrated by eligible youth offenders.[109]

Just as in *County of San Diego*, the claimant's assertion that the mandated activities are located in a different subdivision of the test claim statute from where it changes the penalty for a crime is not relevant. The dispositive issue is whether the mandated activities are indispensable to the scheme through which the Legislature implemented the change to the penalty for a crime, and as stated above, all of the mandated activities are indispensable to the recall of the original sentence required by the test claim statute to remove the legally invalid sentence enhancements and the subsequent resentencing requirement that results in a reduced penalty.

Finally, there is the claimant's argument that "to the extent there is any uncertainty regarding whether the mandated activities relate directly to enforcing a crime, *Long Beach Unified School District* requires section 17556(g) to be applied in a constitutional manner – that is, by honoring voter intent to limit exceptions to the State's subvention obligation."[110] There is no uncertainty here as to whether the mandated activities relate directly to enforcing a crime. Mandated activities directly relate to enforcing a crime when they "[play] an indispensable role" in the scheme through which the Legislature has changed the penalty for a crime.[111] As explained above, the mandated activities of identifying defendants with legally invalid sentence enhancements, and then representing those defendants and the State in resentencings to redetermine the defendants' sentences, are indispensable to the scheme through which the Legislature has removed the invalid sentence enhancements and changed the defendants' penalties for their crimes. It is therefore not inconsistent with *Long Beach Unified School District* to find that the mandated activities directly relate to enforcing the crime.

Accordingly, the Commission finds that the test claim statute does not result in costs mandated by the state because the test claim statute changes the penalty for a crime pursuant to Government Code section 17556(g).

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim.

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[109] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 643.

[110] Exhibit C, Claimant's Rebuttal Comments, filed May 25, 2023, pages 2-3.

[111] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 643.

BEFORE THE

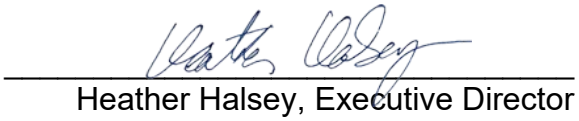
COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Penal Code Section 290.5, as Amended by Statutes 2017, Chapter 541, Section 12 (SB 384) Effective Date January 1, 2018, Operative Date July 1, 2021 Filed on June 29, 2022 County of Los Angeles, Claimant	Case No.: 21-TC-03 *Sex Offenders Registration: Petitions for Termination* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted October 27, 2023*) (*Served October 27, 2023*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on October 27, 2023.



Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Penal Code Section 290.5, as Amended by Statutes 2017, Chapter 541, Section 12 (SB 384) Effective Date January 1, 2018, Operative Date July 1, 2021 Filed on June 29, 2022 County of Los Angeles, Claimant	Case No.: 21-TC-03 *Sex Offenders Registration: Petitions for Termination* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted October 27, 2023*) (*Served October 27, 2023*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 22, 2023, and October 27, 2023. Fernando Lemus appeared as the representative of and Lucia Gonzalez and Dylan Ford appeared as witnesses for the County of Los Angeles (claimant). Chris Hill appeared on behalf of the Department of Finance (Finance).

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 4-3, as follows:

Member	**Vote**
Lee Adams, County Supervisor	No
Regina Evans, Representative of the State Controller, Vice Chairperson	Yes
Jennifer Holman, Representative of the Director of the Office of Planning and Research	Yes
Renee Nash, School District Board Member	No
Sarah Olsen, Public Member	No
Joe Stephenshaw, Director of the Department of Finance, Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

Summary of the Findings

The test claim statute amended the Sex Offender Registration Act to create a three-tiered system for classifying sex offenders based on the severity of the offense and the individual's likelihood for reoffending. Primarily at issue is a new procedure in Penal Code section 290.5, as amended by the test claim statute, which allows tier one or tier two sex offenders to petition the superior court in the county where they currently reside to terminate their duty to register as a sex offender after completing a mandatory minimum registration period. Under prior law, the duty to register as a sex offender persisted for life with rare exceptions,[1] but now a duty to register may be terminated 10 or 20 years after release from incarceration, placement, commitment or release on probation or other supervision.[2]

The petition to terminate the duty to register as a sex offender is served on the law enforcement agency and district attorney of the county where the petitioner currently resides, as well as the law enforcement agency and district attorney of the county where the petitioner was convicted for their registering offense if different from their county of residence. The law enforcement agencies of both counties (assuming the conviction was in a county other than the county of residence) determine whether the petitioner has satisfied their mandatory minimum registration period, and report their findings to the court and district attorney of the county where the petitioner resides, as well as to the Department of Justice if it is discovered that previously unknown registerable convictions occurred outside the state. The district attorney of the county where the petitioner resides may request the court hold a hearing on the petition if the petitioner did not complete the minimum mandatory registration period or if community safety would be significantly enhanced by the petitioner's continued registration. The district attorney is entitled to present evidence at the hearing as to why community safety would be significantly enhanced by the petitioner's continued registration. If the district attorney does not request a hearing, the court may either approve or summarily deny the petition based on whether the petitioner meets all the statutory requirements for approval and service and filing requirements. If the petition is denied, the court must set a time period of a minimum one year but not to exceed five years before the petitioner is allowed to petition again.

The Commission finds that the Test Claim was timely filed.

The Commission further finds that the test claim statute imposes state-mandated activities on law enforcement agencies and on district attorneys, but not on public defenders, who are not specifically required by the test claim statute to represent petitioners in this post-conviction civil proceeding. Law enforcement agencies must determine whether a petitioner has actually completed their mandatory minimum registration period, and are required to report their findings to the court, the registering county's district attorney, and the Department of Justice as necessary. District

[1] Former Penal Code section 290(b), as added by Statutes 2007, chapter 579, and last amended by Proposition 35, section 9, approved November 6, 2012.

[2] Penal Code section 290(d), as added by Statutes 2017, chapter 541.

attorneys are authorized by the statute to challenge a petition by requesting the court hold a hearing and presenting evidence at the hearing, if the mandatory minimum registration period was not met or if community safety would be significantly enhanced by the petitioner's continued registration, and have a duty to exercise this ability to protect public safety.[3] Although the test claim statute phrases the district attorney's activities permissively with language like "may request a hearing" or "be entitled to present evidence," case law suggests that a local decision is not truly voluntary for the purposes of article XIII B, section 6 if it is, as a practical matter, constrained by duty.[4] In contrast, the test claim statute imposes no duties on public defenders, there is no constitutional right to the effective assistance of counsel in state post-conviction proceedings, and there is no evidence in the record or support in the law to suggest that counsel is required to be appointed in these cases.[5]

The Commission further finds that the mandated activities imposed on law enforcement agencies and district attorneys are new in comparison to prior law, and constitute a new program or higher level of service. The ability to petition to terminate a duty to register as a sex offender after completing a mandatory minimum registration period did not exist under prior law and, thus, the required activities are new. The activities required of law enforcement agencies and district attorneys serve the functional purpose of ensuring that registration continues when appropriate for individual sex offenders who still pose a risk to community safety. This carries out a governmental function of protecting and enhancing community safety, and provides a governmental service to the public. Moreover, the duties are unique to local government.

However, the Commission finds these state-mandated activities do not impose costs mandated by the state because the test claim statute eliminates a crime within the meaning of article XIII B, section 6 and Government Code section 17556(g). Government Code section 17556(g) provides that the Commission "shall not find costs mandated by the state" when "the statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction." The Sex Offender Registration Act is enforced by Penal Code section 290.018, which makes it either a misdemeanor or felony to fail to register as required by the Act, depending on whether the person's original offense that requires registration was itself a misdemeanor or felony. For each day that the offender fails to register, it is considered a continuing

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[3] See *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1367-1368.

[4] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1367-1368.

[5] See *Pennsylvania v. Finley*, (1987) 481 U.S. 551, 555; *People v. Delgadillo*, (2022) 14 Cal.5th 216, 226; and *People v. Mary H.* (2016) 5 Cal.App.5th 246, 263 (finding that a right to appointed counsel generally has been recognized to exist only where the litigant's physical liberty is in jeopardy).

offense: "A defendant does not commit the crime only at the particular moment the obligation arises, but every day it remains unsatisfied."[6]

Under prior law, the requirement to register annually and any time the offender moved existed for life.[7] But as a direct result of the test claim statute, a sex offender is no longer required to register under the Act once the offender has successfully petitioned to terminate their duty to register, as early as ten or 20 years after release. This means that once the duty to register is terminated, the offender is no longer subject to the requirements of the Sex Offender Registration Act, and any criminal penalties under Penal Code section 290.018 for failing to register or to otherwise comply for life are eliminated.

This finding is consistent with the recent published decision of the Fourth District Court of Appeal in *County of San Diego v. Commission on State Mandates*, which addressed the Commission's Decision denying the *Youth Offender Parole Hearings,* 17-TC-29 Test Claim based on Government Code section 17556(g). There, the court found that Government Code section 17556(g) applied because "as a direct result" of the test claim statutes, penalties of the crimes were changed - most youth offenders are now statutorily eligible for parole years earlier than their original sentence.[8] The court rejected arguments from the County that the test claim statutes do not change the penalties for crimes under section 17556(g) because they do not vacate the youth offender's original sentence, but simply implement procedural and administrative changes.[9] This argument is similar to the claimant's argument here, that the test claim statute does not eliminate a crime within the meaning of Government Code section 17556(g) since Penal Code section 290.018, which makes it a crime for failing to register, still exists, and the statute simply implements a procedure.[10] The crime for failing to register does still exist in statute, but that does not mean that the test claim statute effects no change.[11] As a direct result of the test claim statute, a successful

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[6] *Wright v. Superior Court* (1997) 15 Cal.4th 521, 528.

[7] Former Penal Code section 290(b), as added by Statutes 2007, chapter 579, and last amended by Proposition 35, section 9, approved November 6, 2012; Penal Code section 290.012, as originally enacted by Statutes 2007, chapter 579, and as last amended by Statutes 2016, chapter 772; and Penal Code section 290.015 as originally enacted by Statutes 2007, chapter 579, and as last amended by Statutes 2016, chapter 772.

[8] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 640.

[9] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 642.

[10] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

[11] See, *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641, where the court agreed that the original sentences imposed on the juvenile offenders in the *Youth Offender Parole Hearings* program still exist, "[b]ut these facts do

petition to terminate registration, just like a successful youth offender following a parole hearing, means that the offender is no longer subject to the requirements of the Sex Offender Registration Act, and any criminal penalties under Penal Code section 290.018 for failing to register or to otherwise comply for life are eliminated.

Thus, the test claim statute has eliminated a crime within the meaning of Government Code section 17556(g), and, therefore, there are no costs mandated by the state.

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/01/2018 Statutes 2017, chapter 541 became effective.

07/01/2021 Section 12 of Statutes 2017, chapter 541, which amended Penal Code section 290.5, became operative.

06/29/2022 The claimant filed the Test Claim.[12]

11/09/2022 Commission staff issued the Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date.

11/30/2022 The Department of Finance (Finance) requested and was granted an extension to file comments.

01/06/2023 Finance filed comments on the Test Claim.[13]

01/30/2023 The claimant filed rebuttal comments.[14]

03/17/2023 Commission staff issued the Draft Proposed Decision.[15]

03/23/2023 The claimant requested and was granted an extension to file comments for good cause.

05/08/2023 The claimant filed comments on the Draft Proposed Decision.[16]

09/22/2023 The Commission heard this matter. No action was taken.

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not mean the Test Claim Statutes effect no change on the penalties suffered by youth offenders."

[12] Exhibit A, Test Claim, filed June 29, 2022.

[13] Exhibit B, Finance's Comments on the Test Claim, filed January 6, 2023.

[14] Exhibit C, Claimant's Rebuttal Comments, filed January 30, 2023.

[15] Exhibit D, Draft Proposed Decision, issued March 17, 2023.

[16] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023.

II. Background

A. California's Sex Offender Registry

California was the first state to enact sex offender registration laws in 1947.[17] Before the enactment of the test claim statute, the Sex Offender Registration Act[18] required any person living in California who had been convicted of one of several enumerated sexual offenses in California, another state, or by a federal or military court, after July 1, 1944, "for the rest of his or her life while residing in California," to register with law enforcement as follows:

> Every person described in subdivision (c), for the rest of his or her life while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act.[19]

Registration is required upon release from incarceration, placement, commitment, or probation.[20] Beginning on the first birthday following registration, the person is required to register annually using the Department of Justice's annual update form within five days of the registrant's birthday, whenever the sex offender moves residences within the jurisdiction, and people who are living as transients or were convicted as Sexually Violent Predators are additionally required to update their registration every 30 or 90 days respectively.[21]

The Act is enforced by Penal Code section 290.018, which states that a person required to register under the Act who willfully violates any requirement of the Act (including the failure to provide the information required to register), is guilty of a misdemeanor punishable by up to a year imprisonment in county jail if the registering offense was a

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[17] Statutes 1947, chapter 1124.

[18] Penal Code section 290, et seq.

[19] Former Penal Code section 290(b), as added by Statutes 2007, chapter 579, and last amended by Proposition 35, section 9, approved November 6, 2012.

[20] Penal Code section 290.015, as originally enacted by Statutes 2007, chapter 579, and as last amended by Statutes 2016, chapter 772.

[21] Penal Code section 290.012, as originally enacted by Statutes 2007, chapter 579, and as last amended by Statutes 2016, chapter 772.

misdemeanor, or a felony punishable by up to three years imprisonment in state prison if the registering offense was a felony.[22]

The Sex Offender Registration Act "is intended to promote the "state interest in controlling crime and preventing recidivism in sex offenders."[23] The Act "serves an important and vital public purpose by compelling registration of many serious and violent sex offenders who require continued public surveillance."[24]

Over time, the Act grew to cover additional offenses and impose new requirements on sex offenders and the local and state government agencies that manage the registry, but one thing was consistent: with rare exceptions, if a person was convicted for an offense that created a duty to register as a sex offender, that duty existed for life, so long as they lived in California.[25] Up until the test claim statute went into effect, California was one of only four states that required all sex offenders register for life, the other three being Florida, South Carolina, and Alabama.[26] One other state required all its sex offenders register for a finite duration, while the remaining 45 states used some type of tiered system where registration duration is determined by either the sex

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[22] Penal Code section 290.018(a), (b), as added by Statutes 2007, chapter 579, and amended by Statutes 2016, chapter 772. Penal Code section 290.015 requires the offender to provide the following information on registration: (1) A statement in writing signed by the person, giving information as shall be required by the Department of Justice and giving the name and address of the person's employer, and the address of the person's place of employment if that is different from the employer's main address; (2) fingerprints and a current photograph; (3) license plate number of any vehicle owned by, regularly driven by, or registered in the name of the person; (4) list of all Internet identifiers actually used by the person, as required by Section 290.024; (5) a statement in writing, signed by the person, acknowledging that the person is required to register and update the information required by this chapter; and (6) copies of adequate proof of residence, "which shall be limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing that person's name and address, or any other information that the registering official believes is reliable. If the person has no residence and no reasonable expectation of obtaining a residence in the foreseeable future, the person shall so advise the registering official and shall sign a statement provided by the registering official stating that fact."

[23] *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 874, 877.

[24] *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 877; see also, *People v. Thai* (2023) 90 Cal.App.5th 427, 432. ["The purpose of section 290 is to ensure police can surveil sex offenders at all times because they pose a 'continuing threat to society.'"]

[25] Former Penal Code section 290(b), as added by Statutes 2007, chapter 579, and amended by Proposition 35, section 9, approved November 6, 2012.

[26] Exhibit F (4), Senate Rules Committee, Office of Senate Floor Analysis, Unfinished Business on SB 384, as amended September 8, 2017, page 5.

offender's risk for re-offense, the severity of the offense, or both.[27] Requiring all sex offenders register for life resulted in California not only having the oldest sex offender registry in the United States, but the largest too.[28] By the time the test claim statute was enacted in 2017, there were over 100,000 registered sex offenders living in California.[29] Many of these were for misdemeanor convictions or people found to have a low risk of re-offense.[30]

In 2010 the California Sex Offender Management Board (CASOMB) published its recommended policies for future legislation regarding sex offenders.[31] It found that requiring lifetime registration for all sex offenders resulted in law enforcement agencies and the public having no way of differentiating high risk and low risk sex offenders.[32] Law enforcement agencies were unable to concentrate their limited resources on closely supervising the most dangerous sex offenders and those with a higher risk of re-offense.[33] It determined that imposing lifetime registration for all sex offenders was not necessary to safeguard the public, and recommended implementing a risk-based system with differentiated registration requirements.[34] As proposed by CASOMB, this would be a three-tiered system with registration durations of 10 years, 20 years, or lifetime, and the criteria for determining a person's tier would take into consideration the seriousness of the offender's criminal history, the empirically assessed risk level of the offender, and whether the offender is a recidivist or has violated California's sex offender registration law.[35]

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[27] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 53-54.

[28] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 50.

[29] Exhibit F (3), Senate Rules Committee, Office of Senate Analysis, Third Reading Analysis of SB 384, as amended September 8, 2017, page 12.

[30] Exhibit F (3), Senate Rules Committee, Office of Senate Analysis, Third Reading Analysis of SB 384, as amended September 8, 2017, page 12.

[31] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010).

[32] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 50.

[33] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 50.

[34] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 51.

[35] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 96.

B. Federal Law –The Adam Walsh Act

The Adam Walsh Child Protection and Safety Act of 2006 is a federal law amending the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act that requires each state to maintain its own jurisdiction-wide sex offender registry.[36] The Adam Walsh Act recommends a three-tiered system in which tier 1 sex offenders are required to keep their registration current for 15 years, tier 2 sex offenders register for 25 years, and tier 3 sex offenders register for life.[37] A jurisdiction that fails to substantially implement the requirements of the Act is subject to a ten percent reduction in the funding it would otherwise receive under the Omnibus Crime Control and Safe Street Act of 1968.[38]

Although the legislative history of the test claim statute does note conforming with the Adam Walsh Act as one reason for moving to a tiered system,[39] the existing sex offender registry with its lifetime registration requirement was found by the U.S. Department of Justice to substantially conform to the Adam Walsh Act, meaning there was no actual risk of defunding that demanded implementing this change.[40] Additionally, the Adam Walsh Act does not require sex offenders actively petition to be removed from the registry at the end of the registration period, or dictate any other procedure to relieve sex offenders of their duty to register at the end of a registration period. This makes the entire petition and hearing process outlined in the test claim statute an activity that was not mandated by federal law, even if the tiered registration system were mandated by federal law.

C. Certificates of Rehabilitation

Under prior law, the only way a person could be relieved of their duty to register as a sex offender in California was by receiving a certificate of rehabilitation.[41] Former Penal Code section 290.5, as last amended in 2014, provided that "A person required to register under Section 290 for an offense not listed in paragraph (2), upon obtaining a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3, shall be relieved of any further duty to register under Section 290 if he or she is not in custody, on parole, or on probation."[42]

A certificate of rehabilitation is proof that a person has been successfully rehabilitated in the eyes of the law and restores several civil rights. For example, a person who has

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[36] United States Code, title 34, section 20911 et seq.

[37] United States Code, title 34, section 20915.

[38] United States Code, title 34, section 20927.

[39] Exhibit F (2), Assembly Committee on Public Safety, Analysis of SB 421, as amended May 26, 2017, page 14.

[40] Exhibit F (2), Assembly Committee on Public Safety, Analysis of SB 421, as amended May 26, 2017, page 14.

[41] Penal Code section 4852.01 et seq., as last amended by Statutes 2015, chapter 378.

[42] Former Penal Code section 290.5, as last amended by Statutes 2014, chapter 280.

received a certificate of rehabilitation cannot be denied a business license based on their criminal history.[43] Neither can a person's criminal history be used to discredit them as a witness when testifying in a trial.[44] Being granted a certificate of rehabilitation also is treated as an automatic application to the governor for a pardon, which can be granted without any additional investigation.[45]

Prior to 1996, Penal Code section 290.5 said that anyone granted a certificate of rehabilitation would be relieved of their duty to register as a sex offender. However, in 1996, the Legislature amended section 290.5 to severely limit this ability by stating that a certificate of rehabilitation would not relieve a duty to register for several stated offenses unless the offender also received a full pardon from the governor.[46]

Today, sex offenders are only able to receive a certificate of rehabilitation if they were convicted of misdemeanor sexual offenses, or felony sex offenses where the person was granted probation, and the accusatory pleading was dismissed pursuant to Penal Code section 1203.4, "if the petitioner has not been incarcerated in a prison, jail, detention facility, or other penal institution or agency since the dismissal of the accusatory pleading, is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years' residence in this state prior to the filing of the petition."[47]

Although the test claim statute made amendments so that a certificate of rehabilitation will no longer relieve a person of their duty to register as a sex offender, the certificate of rehabilitation procedure still exists. A person who was eligible under prior law to have their registration requirement terminated through a certificate of rehabilitation can petition for both a certificate of rehabilitation and to be terminated from the registry under current law, and would have good reasons to seek both for the different types of relief each grants.

D. Statute 2017, Chapter 541 (SB 384): the Test Claim Statute

Statutes 2017, chapter 541 became effective on January 1, 2018, with an operative date of July 1, 2021 to allow the Department of Justice adequate time to implement a

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[43] Business and Professions Code section 480(b).

[44] Evidence Code section 788.

[45] Penal Code section 4852.16(a).

[46] Former Penal Code section 290.5, as amended by Statutes 1996, chapter 461.

[47] Penal Code section 4852.01(a), (b), as amended by Statutes 2022, chapter 776, section 1, effective January 1, 2023. Section 4852.01(c) further states the following: "This chapter does not apply to persons serving a mandatory life parole, persons committed under death sentences, persons convicted of a violation of Section 269, subdivision (c) of Section 286, subdivision (c) of Section 287, Section 288, Section 288.5, Section 288.7, subdivision (j) of Section 289, or subdivision (c) of former Section 288a, or persons in military service."

new system.[48] The test claim statute established a three-tiered system for categorizing sex offenders, and created a process through which people registered in lower tiers may terminate their duty to register after completing a mandated minimum registration period. The claimant pleads Penal Code section 290.5, as amended by the test claim statute (Stats 2017, ch. 541, sec. 12), but there are a few other Penal Code sections amended by the test claim statute that are relevant to the analysis and are described below, though the Commission does not take jurisdiction over them since they were not pled.

1. Amendments to Penal Code Section 290.

Statutes 2017, chapter 541 amended section 290,[49] and subdivision (b) now states, with amendments in underline:

> (b) Every person described in subdivision (c), <u>for the period specified in subdivision (d)</u> while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall register thereafter in accordance with the Act, <u>unless the duty to register is terminated pursuant to Section 290.5 or as otherwise provided by law.</u>

Section 290(c) lists all the offenses that require registering under the act, and was unchanged by the test claim statute.

Section 290(d) was added by the test claim statute and requires a tier one sex offender to register for a minimum 10 years "following a conviction and release from incarceration, placement, commitment, or release on probation or other supervision," tier two sex offenders register for a minimum 20 years "following a conviction and release from incarceration, placement, commitment, or release on probation or other supervision," and tier three sex offenders register for life. It also states the criteria for determining a sex offender's tier based on the specific offense committed and certain enhancing factors such as subsequent convictions for registerable offenses or the person's risk level on the static risk assessment instrument for sex offenders (SARATSO).

[48] Exhibit F (1) Senate Committee on Appropriations, Analysis of SB 421, as introduced April 17, 2017, page 2.

[49] Statutes 2017, Chapter 541, sections 1 through 2.5.

The test claim statute also added section 290(e) to define when the minimum time period for the completion of the required registration period begins, and ways that the registration period can be extended or restarted, as follows:

> (e) The minimum time period for the completion of the required registration period in tier one or two commences on the date of release from incarceration, placement, or commitment, including any related civil commitment on the registerable offense. The minimum time for the completion of the required registration period for a designated tier is tolled during any period of subsequent incarceration, placement, or commitment, including any subsequent civil commitment, except that arrests not resulting in conviction, adjudication, or revocation of probation or parole shall not toll the required registration period. The minimum time period shall be extended by one year for each misdemeanor conviction of failing to register under this act, and by three years for each felony conviction of failing to register under this act, without regard to the actual time served in custody for the conviction. If a registrant is subsequently convicted of another offense requiring registration pursuant to the Act, a new minimum time period for the completion of the registration requirement for the applicable tier shall commence upon that person's release from incarceration, placement, or commitment, including any related civil commitment. If the subsequent conviction requiring registration pursuant to the Act occurs prior to an order to terminate the registrant from the registry after completion of a tier associated with the first conviction for a registerable offense, the applicable tier shall be the highest tier associated with the convictions.

Lastly, section 290(f) was added to note that a ward of the juvenile court is not required to register under this statute, except as provided by section 290.008.

2. Amendments to Penal Code Section 290.5

The test claim statute amended Penal Code section 290.5,[50] which under prior law simply acknowledged that a Certificate of Rehabilitation would relieve a person of their duty to register.[51]

The amended section now: (1) grants tier one or two offenders the ability to petition the court to be terminated from the sex offender registry after completing their mandated minimum registration period; (2) requires law enforcement agencies to determine whether the petitioner has met their mandatory minimum registration period, grants district attorneys the authority to request a hearing on the petition, and grants courts the authority to approve or deny the petition without a hearing if the district attorney did not request one; (3) authorizes district attorneys to present evidence that a petitioner has not fulfilled the minimum period for the completion of the required registration period, or that community safety would be significantly enhanced by the person's continued

[50] Statutes of 2017, chapter 541, sections 11 and 12.

[51] Former Penal Code section 290.5, as last amended by Statutes 2014, chapter 280.

registration, and states the factors courts should consider when determining whether or not to approve a petition at a hearing; (4) requires courts to set a time period before a petitioner is allowed to petition again if their petition is denied; and (5) requires courts to notify the Department of Justice of the outcome of the petition. As amended, Penal Code section 290.5(a) now states:

> (a)(1) A person who is required to register pursuant to Section 290 and who is a tier one or tier two offender may file a petition in the superior court in the county in which he or she is registered for termination from the sex offender registry at the expiration of his or her mandated minimum registration period, or if the person is required to register pursuant to Section 290.008, he or she may file the petition in juvenile court on or after his or her birthday following the expiration of the mandated minimum registration period. The petition shall contain proof of the person's current registration as a sex offender.
>
> (2) The petition shall be served on the registering law enforcement agency and the district attorney in the county where the petition is filed and on the law enforcement agency and the district attorney of the county of conviction of a registerable offense if different than the county where the petition is filed. The registering law enforcement agency and the law enforcement agency of the county of conviction of a registerable offense if different than the county where the petition is filed shall, within 60 days of receipt of the petition, report to the district attorney and the superior or juvenile court in which the petition is filed regarding whether the person has met the requirements for termination pursuant to subdivision (e) of Section 290. If an offense which may require registration pursuant to Section 290.005 is identified by the registering law enforcement agency which has not previously been assessed by the Department of Justice, the registering law enforcement agency shall refer that conviction to the department for assessment and determination of whether the conviction changes the tier designation assigned by the department to the offender. If the newly discovered offense changes the tier designation for that person, the department shall change the tier designation pursuant to subdivision (d) of Section 290 within three months of receipt of the request by the registering law enforcement agency and notify the registering law enforcement agency. If more time is required to obtain the documents needed to make the assessment, the department shall notify the registering law enforcement agency of the reason that an extension of time is necessary to complete the tier designation. The registering law enforcement agency shall report to the district attorney and the court that the department has requested an extension of time to determine the person's tier designation based on the newly discovered offense, the reason for the request, and the estimated time needed to complete the tier designation. The district attorney in the county where the petition is filed may, within 60 days of receipt of the report from either the registering law enforcement agency, the law enforcement agency of the county of

conviction of a registerable offense if different than the county where the petition is filed, or the district attorney of the county of conviction of a registerable offense, request a hearing on the petition if the petitioner has not fulfilled the requirement described in subdivision (e) of Section 290, or if community safety would be significantly enhanced by the person's continued registration. If no hearing is requested, the petition for termination shall be granted if the court finds the required proof of current registration is presented in the petition, provided that the registering agency reported that the person met the requirement for termination pursuant to subdivision (e) of Section 290, there are no pending charges against the person which could extend the time to complete the registration requirements of the tier or change the person's tier status, and the person is not in custody or on parole, probation, or supervised release.

(3) If the district attorney requests a hearing, he or she shall be entitled to present evidence regarding whether community safety would be significantly enhanced by requiring continued registration. In determining whether to order continued registration, the court shall consider: the nature and facts of the registerable offense; the age and number of victims; whether any victim was a stranger at the time of the offense (known to the offender for less than 24 hours); criminal and relevant noncriminal behavior before and after conviction for the registerable offense; the time period during which the person has not reoffended; successful completion, if any, of a Sex Offender Management Board-certified sex offender treatment program; and the person's current risk of sexual or violent reoffense, including the person's risk levels on SARATSO static, dynamic, and violence risk assessment instruments, if available. Any judicial determination made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is reliable, material, and relevant.

(4) If termination from the registry is denied, the court shall set the time period after which the person can repetition for termination, which shall be at least one year from the date of the denial, but not to exceed five years, based on facts presented at the hearing. The court shall state on the record the reason for its determination setting the time period after which the person may repetition.

(5) The court shall notify the Department of Justice, California Sex Offender Registry, when a petition for termination from the registry is granted or denied. If the petition is denied, the court shall also notify the Department of Justice, California Sex Offender Registry, of the time period after which the person can file a new petition for termination.

As amended, section 290.5(b) allows certain tier two and tier three offenders to petition to be terminated from the registry earlier than is normally permitted, and now states:

(b)(1) A person required to register as a tier two offender, pursuant to paragraph (2) of subdivision (d) of Section 290, may petition the superior court for termination from the registry after 10 years from release from custody on the registerable offense if all of the following apply: (A) the registerable offense involved no more than one victim 14 to 17 years of age, inclusive; (B) the offender was under 21 years of age at the time of the offense; (C) the registerable offense is not specified in subdivision (c) of Section 667.5, except subdivision (a) of Section 288; and (D) the registerable offense is not specified in Section 236.1.

(2) A tier two offender described in paragraph (1) of subdivision (b) may file a petition with the superior court for termination from the registry only if he or she has not been convicted of a new offense requiring sex offender registration or an offense described in subdivision (c) of Section 667.5 since the person was released from custody on the offense requiring registration pursuant to Section 290, and has registered for 10 years pursuant to subdivision (e) of Section 290. The court shall determine whether community safety would be significantly enhanced by requiring continued registration and may consider the following factors: whether the victim was a stranger (known less than 24 hours) at the time of the offense; the nature of the registerable offense, including whether the offender took advantage of a position of trust; criminal and relevant noncriminal behavior before and after the conviction for the registerable offense; whether the offender has successfully completed a Sex Offender Management Board-certified sex offender treatment program; whether the offender initiated a relationship for the purpose of facilitating the offense; and the person's current risk of sexual or violent reoffense, including the person's risk levels on SARATSO static, dynamic, and violence risk assessment instruments, if known. If the petition is denied, the person may not repetition for termination for at least one year.

(3) A person required to register as a tier three offender based solely on his or her risk level, pursuant to subparagraph (D) of paragraph (3) of subdivision (d) of Section 290, may petition the court for termination from the registry after 20 years from release from custody on the registerable offense, if the person (A) has not been convicted of a new offense requiring sex offender registration or an offense described in subdivision (c) of Section 667.5 since the person was released from custody on the offense requiring registration pursuant to Section 290, and (B) has registered for 20 years pursuant to subdivision (e) of Section 290; except that a person required to register for a conviction pursuant to Section 288 or an offense listed in subdivision (c) of Section 1192.7 who is a tier three offender based on his or her risk level, pursuant to subparagraph (D) of paragraph (3) of subdivision (d) of Section 290, shall not be permitted to petition for removal from the registry. The court shall determine whether community safety would be significantly enhanced by requiring continued registration and may consider the following factors: whether the victim was

a stranger (known less than 24 hours) at the time of the offense; the nature of the registerable offense, including whether the offender took advantage of a position of trust; criminal and relevant noncriminal behavior before and after the conviction for the registerable offense; whether the offender has successfully completed a Sex Offender Management Board-certified sex offender treatment program; whether the offender initiated a relationship for the purpose of facilitating the offense; and the person's current risk of sexual or violent reoffense, including the person's risk levels on SARATSO static, dynamic, and violence risk assessment instruments, if known. If the petition is denied, the person may not repetition for termination for at least three years. [52]

Section 290.5(c) sets the section's operative date as July 1, 2021.

3. Amendments to Penal Code Section 4852.03

Penal Code section 4852.03 provides the requirements to be eligible for a certificate of rehabilitation. The test claim statute amended Penal Code section 4852.03(a)(2), to specifically state that a certificate of rehabilitation issued after July 1, 2021, does not relieve a person of the obligation to register as a sex offender, unless the person complies with Penal Code section 290.5, and the specific amended subparagraphs provide as follows (in strikeout and underline):

> (2) (A) An additional five years in the case of a person convicted of committing an offense or attempted offense for which sex offender registration is required pursuant to Sections 290 to 290.024, inclusive., ~~except that in the case of a person convicted of a violation of subdivision (b), (c), or (d) of Section 311.2, or of Section 311.3, 311.10, or 314, an additional two years.~~
>
> (B) A certificate of rehabilitation issued on or after July 1, 2021, does not relieve a person of the obligation to register as a sex offender unless the person obtains relief granted under Section 290.5.

E. Prior Commission Decisions Addressing the Sex Offender Registration Act

On August 23, 2001, the Commission adopted a Decision in *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, which addressed Penal Code sections 290 and 290.4, as amended in 1996 and 1997. The Commission denied reimbursement for any activity related to new crimes added by the Legislature, the conviction of which

[52] Penal Code section 290.5 has been subsequently amended by Statutes 2020 Chapter 29 (SB 118), to require all petitioners to wait until their first birthday after July 1, 2021 and after completing the mandatory registration period before filing a petition; to require law enforcement agencies to report receiving a petition to the Department of Justice; to clarify that courts have the authority to approve or summarily deny petitions if the district attorney did not request a hearing; to require the court to clearly state the reason for summarily denying a petition; and to make other non-substantive grammatical changes.

required the registration of the offender, based on Government Code section 17556(g). The Commission reasoned as follows:

> As stated above, if these convicted sex offenders fail to register as a sex offender, they will now be guilty of a misdemeanor, felony and/or a continuing offense; whereas before the test claim legislation, they would not have been guilty of a crime. Accordingly, the Commission finds that this portion of the test claim legislation creates a new crime.[53]

The Commission approved reimbursement for various notice, record-keeping, and communication activities with the Department of Justice.[54]

On September 27, 2005, the Commission adopted its Decision on *Reconsideration of Sex Offenders Disclosure by Law Enforcement Officers*, 04-RL-9715-06, as directed by Statutes 2004, chapter 316 (AB 2851), which required the Commission to reconsider the Test Claim "in light of federal statutes enacted and federal and state court decisions rendered" since the test claim statutes were enacted.[55] The Commission found that three previously approved activities were enacted because of the federal Megan's Law sex offender registration program that existed at the time, and were determined to be part and parcel of that federal law.

On January 24, 2014, the Commission adopted its Decision in *State Authorized Risk Assessment Tool for Sex Offenders (SARATSO)*, 08-TC-03, partially approving the Test Claim. The Commission denied the activities that changed the penalty for a crime or infraction within the meaning of Government Code section 17556(g), and approved the remaining new administrative requirements, including the requirements to use SARATSO to assess those persons previously convicted of a sex offense and to include that information in certain reports for the Department of Corrections and Rehabilitation.[56]

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[53] Exhibit F (5), Commission on State Mandates, Test Claim Decision on *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, adopted on August 23, 2001, https://csm.ca.gov/decisions/sod502.pdf (accessed on January 31, 2023) page 6.

[54] Exhibit F (5), Commission on State Mandates, Test Claim Decision on *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, adopted on August 23, 2001, https://csm.ca.gov/decisions/sod502.pdf (accessed on January 31, 2023) pages 9-25.

[55] Statutes 2004, chapter 316, section 3(a); Exhibit F (6), Commission on State Mandates, Test Claim Decision on *Reconsideration of Sex Offenders Disclosure by Law Enforcement Officers*, 04-RL-9715-06, adopted September 27, 2005, https://www.csm.ca.gov/decisions/doc87.pdf (accessed September 6, 2023).

[56] Exhibit F (7), Commission on State Mandates, Test Claim Decision on *State Authorized Risk Assessment Tool for Sex Offenders (SARATSO)*, 08-TC-03, adopted January 24, 2014, https://csm.ca.gov/decisions/SARATSO_SODadopt012414.pdf (accessed on February 28, 2023).

III. Positions of the Parties

A. County of Los Angeles

The claimant, County of Los Angeles, alleges that the test claim statute imposes a reimbursable state mandated program under article XIII B, section 6 of the California Constitution. The claimant asserts that Statutes 2017, chapter 541, section 12 amends Penal Code section 290.5(a)(2) to create newly mandated activities for public defenders, law enforcement agencies, and district attorneys, and amends Penal Code section 290.5(a)(3) to create newly mandated activities for district attorneys and public defenders.

The claimant alleges that to comply with the requirements of section 290.5(a)(2), public defenders must "gather records, conduct necessary research, assess the petitioner's eligibility, and prepare and file the petition. The PD's office must comply with PC § 290.5(a)(2) and serve copies of the petition on the superior or juvenile court, the registering agency, and the DA's office."[57]

The claimant alleges that to comply with the requirements of section 290.5(a)(2), the Los Angeles County Sheriff Department (LASD) "must thoroughly review each petition, which includes conducting local and national records checks to identify criminal convictions, post-conviction time spent in custody, and calculate convictions and time served pursuant to PC § 290."[58]

The claimant alleges that to prepare for being served petitions under section 290.5(a)(2), the district attorney's office "created a system accommodation in their Prosecutorial Information Management System (PIMS) in order to handle petitions. Additionally, the DA created an Excel spreadsheet and a shared drive capable of tracking petitions. Further, the petition and all accompanying documents must be scanned and entered into PIMS."[59] The claimant further asserts that, to determine whether to exercise the authority granted to district attorneys under section 290.5(a)(2) to request a hearing on a petition, the district attorneys "must retrieve court records (local and out of county) and review case documents and risk assessment tools to determine whether the petitioner is eligible and appropriate for removal from the registry in relation to public safety. The DA must submit a California Judicial Council Form to the court and defense counsel."[60]

For section 290.5(a)(3), the claimant alleges:

> PC § 290.5(a)(3) states that any judicial determination made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties, which is reliable, material, and relevant. As a result of this new hearing process,

[57] Exhibit A, Test Claim, filed June 29, 2022, page 14.

[58] Exhibit A, Test Claim, filed June 29, 2022, page 14.

[59] Exhibit A, Test Claim, filed June 29, 2022, page 15.

[60] Exhibit A, Test Claim, filed June 29, 2022, page 15.

> the DA and PD must collect affidavits, declarations, police reports, and any other relevant evidence for consideration by the court. A petitioner must be represented at this hearing by an attorney who understands the law, court process, and rules of evidence.

Regarding the alleged activities of public defenders, the claimant does not cite any provision of the test claim statute that specifically says public defenders must perform an action, and acknowledges that "once a PD client is sentenced, the PD's duties cease with respect to that client except in limited circumstances," giving civil commitment hearings under the Sexually Violent Predator Act as an example of one such limited circumstance.[61] The claimant, however, contends that the test claim statute imposes mandated duties on the public defender and asserts that "[t]he legislatively created post-conviction process in Penal Code section 290.5 would violate due process if a lawyer were not provided in this legal, evidentiary, and adversarial proceeding."[62]

In response to the Draft Proposed Decision, the claimant insists that indigent petitioners under Section 290.5 are entitled to the assistance of legal counsel once they have presented a prima facie showing that they are entitled to relief under the statute.[63] By complying with the sex offender registration time requirements, providing proof of current registration, and serving the petition on the court, district attorneys, and relevant law enforcement agencies, the petitioners have made the prima facie showing that they are entitled to relief under the statute. When a district attorney chooses to challenge the petition by requesting a hearing, the court will consider evidentiary factors presented by the district attorney and petitioner. "Permitting a petitioner who is not familiar with cross examination, subpoenaing witnesses or documents, hiring experts, and the rules of evidence would cause a breakdown in the process of meaningful adversarial testing that is central to our system of justice."[64] The claimant therefore concludes that the test claim statute mandates that public defenders represent indigent petitioners in hearings regarding contested petitions to be terminated from the sex offender registry.

The claimant alleges it has incurred increased costs of $316,299 in the 2021-2022 fiscal year to comply with the test claim statute.[65] Specifically, it alleges $27,407 in increased costs from the Los Angeles County Sheriff's Department associated with receiving and reviewing petitions under section 290.5, $198,835 in increased costs incurred by the District Attorney's Office for reviewing and processing petitions, and $90,057 in

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[61] Exhibit A, Test Claim, filed June 29, 2022, page 14.

[62] Exhibit A, Test Claim, filed June 29, 2022, page 34.

[63] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 3-4 (citing *In re Clark* (1993) 5 Cal.4th 750, 780; *People v. Shipman* (1965) 62 Cal.2d 226, 232; *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 980-981; and *People v. Rouse* (2016) 245 Cal.App.4th 292, 299).

[64] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 4.

[65] Exhibit A, Test Claim, filed June 29, 2022, page 17.

increased costs incurred by the Public Defender's Office associated with training on section 290.5 and filing petitions.[66]

The claimant estimates it will incur $610,693 in increased costs in the 2022-2023 fiscal year for complying with the requirements of section 290.5,[67] and estimates annual statewide costs of $4,506,187.[68]

Finally, the claimant asserts that the test claim statute does not change the penalty for a crime within the meaning of Government Code section 17556(g), as asserted by the Department of Finance, because both the U.S. and California Supreme Courts have found that requiring a person to register as a sex offender is not a punishment for the offense, but is instead considered civil, nonpunitive, and regulatory in nature.[69] Because the sex offender registry is not considered a punishment, the test claim statute did not change the penalty for a crime. The claimant therefore requests that the Commission reject Finance's conclusion that the test claim be denied on the grounds of Government Code section 17556(g).

The claimant further asserts that since the test claim statute does not eliminate the crime of failing to register or remove any crimes from the list of registerable offenses, but instead creates a procedure by which convicted sex offenders may petition the court to be removed from the sex offender registry, Government Code section 17556(g) does not apply.[70] Failing to register is still a crime. The claimant therefore argues that the test claim statute should be distinguishable from the Commission's prior Decisions in *Sex Offenders Disclosure by Law Enforcement Officers* and *Accomplice Liability for Felony Murder*.[71] The claimant also contends that the language in Government Code

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[66] Exhibit A, Test Claim, filed June 29, 2022, page 25, (Declaration of Daniel Stanley); page 31, (Declaration of Tony Sereno); page 45, (Declaration of Sung Lee).

[67] Exhibit A, Test Claim, filed June 29, 2022, page 17.

[68] Exhibit A, Test Claim, filed June 29, 2022, page 17; page 25, (Declaration of Daniel Stanley); page 31, (Declaration of Tony Sereno); page 45, (Declaration of Sung Lee).

[69] Exhibit C, Claimant's Rebuttal Comments, filed January 30, 2023, page 2; citing *Smith v. Doe* (2003) 538 U.S. 84, 85-87, which found that the Alaska State Legislature intended to enact a civil program, and that registration of sex offenders was not a punishment for the crime.; and *In re Alva* (2004) 33 Cal.4th 254, 262, which found as follows: "[W]e conclude that California's law requiring the mere registration of convicted sex offenders is not a punitive measure subject to either state or federal proscriptions against punishment that is "cruel" and/or "unusual." However, the court also noted that "[o]ne who violates a registration requirement that is based on a misdemeanor conviction is guilty of a misdemeanor [citations omitted], and a "willful[ ]" violation is a continuing offense [citations omitted.]." (*In re Alva* (2004) 33 Cal.4th 254, 265.)

[70] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

[71] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

section 17556(g) that says "but only for that portion of the statute relating directly to the enforcement of the crime or infraction," needs to be applied to all of section 17556(g) to avoid the denial of reimbursement where reimbursement is constitutionally required.[72] Otherwise, the interpretation is similar to the "'reasonably within the scope of" language in former versions of 17556(f) that was found to be impermissibly broad in *California School Board Association v. State of California* (2009) 171 Cal.App.4th 1183, 1215."[73]

B. Department of Finance

Finance asserts that any costs incurred by the claimant are not state-reimbursable pursuant to Government Code section 17556(g), which states the Commission shall not find reimbursable costs mandated by the state when "The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."[74] Finance believes this section applies because the test claim statute, "made changes to the statutes governing the penalties for persons convicted of specified sex offenses. Prior to the enactment of SB 384, Penal Code (PC) Section 290 required that persons convicted of specified sex offenses register with the police department or the sheriff's department in whose jurisdiction they resided, and that this registration be maintained for the rest of their life or until they moved from California."[75] Finance reasons that the lifetime registration requirement was one of the penalties for committing a registerable offense, because the intent of the sex offender registry was

> to prevent the offenders from recommitting the same or similar offenses by making their presence known to law enforcement and to the broader community. The preventative effect of this penalty is enhanced by PC Section 290.46, which requires the California Department of Justice to make available on a public internet website specified identifying information, including the name, photograph, and address or community of residence and Zip Code, of sex offenders required to register pursuant to PC Section 290. That the registration requirement is a penalty for the triggering offenses is substantiated by the fact that the registration requirement only applies to a person who committed those offenses.[76]

Finance argues that the changes made to the sex offender registry system by the test claim statute change the penalty for a crime or infraction, and that the changes made relate directly to enforcing the crime or infraction. Therefore, Finance concludes that

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[72] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 3.

[73] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 3.

[74] Government Code section 17556(g).

[75] Exhibit B, Finance's Comments on the Test Claim, filed January 6, 2023, page 1.

[76] Exhibit B, Finance's Comments on the Test Claim, filed January 6, 2023, page 1.

Government Code 17556(g) requires the Commission to deny the test claim in its entirety.

Finance did not file comments on the Draft Proposed Decision.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service…

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[77] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[78]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[79]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[80]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or

[77] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[78] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[79] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[80] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

executive order and it increases the level of service provided to the public.[81]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[82]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[83] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[84] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[85]

A. The Test Claim Was Timely Filed.

Government Code section 17551(c) states that test claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Section 1183.1(c) of the Commission's regulations defines 12 months as 365 days.[86]

Here, the test claim statute went into effect on January 1, 2018, but to give the Department of Justice lead-up time to prepare the new system and sort existing registered sex offenders into the three new tiers, the statutes did not become operative until three years later.[87] Penal Code section 290.5, as amended by the test claim statute, became operative on July 1, 2021.[88] This was the earliest date that a sex offender could petition to terminate their duty to register pursuant to the test claim

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[81] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[82] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[83] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 335.

[84] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[85] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

[86] California Code of Regulations, title 2, section 1183.1(c).

[87] Statutes 2017, chapter 541.

[88] Statutes 2017, chapter 541, section 12.

statute, and that is the earliest date that claimant alleges it incurred costs.[89] The claimant filed the Test Claim on June 29, 2022, within 365 days of the test claim statute's operative date.[90] Thus, the Test Claim was timely filed within 12 months of first incurring costs.

B. The Test Claim Statute Imposes State-Mandated Activities on County Law Enforcement Agencies and District Attorneys, But Not on Public Defenders.

1. Penal Code Section 290.5, as Amended by Statutes 2017, Chapter 541, Imposes State-Mandated Activities on Law Enforcement Agencies and District Attorneys.

To be reimbursable under article XIII B, section 6 of the California Constitution, the requirements must be mandated by the state; or ordered, commanded, or legally compelled by state law.[91] "Legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey."[92] Generally, a requirement is not mandated by the state if it is triggered by a local voluntary decision.[93] However, the courts have recognized the possibility that a state-mandated program may exist when that decision is not truly voluntary, i.e., when local government is compelled as a practical matter to perform the requirements.[94]

The activities required of law enforcement agencies by the test claim statute are mandated by the state. After being served a petition to terminate a duty to register, the registering law enforcement agency and the law enforcement agency of the county of conviction of a registerable offense if different than the county where the petition is filed "shall, within 60 days of receipt of the petition, report to the district attorney and the superior or juvenile court in which the petition is filed regarding whether the person has

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[89] Exhibit A, Test Claim, filed June 29, 2022, page 29 (Declaration of Daniel Stanley, para. 6), and page 31 (Declaration of Tony Sereno, para. 7).

[90] Exhibit A, Test Claim, filed June 29, 2022, page 1.

[91] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 741.

[92] *Coast Community College District v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

[93] *Coast Community College District v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815; see e.g. *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 107; see also *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[94] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 744, 754. This form of compulsion is also referred to as "nonlegal compulsion." (See e.g. *Coast Community College District v. Commission on State Mandates* (2022) 13 Cal.5th 800, 821-822.)

met the requirements for termination pursuant to subdivision (e) of Section 290."[95] As indicated above, Penal Code section 290(e) defines the minimum time period for the completion of the required registration period, and ways that the registration period can be extended or restarted. If the registering law enforcement agency identifies a conviction that was not previously assessed by the Department of Justice, but which requires registration pursuant to the requirements of Penal Code section 290.005 regarding out-of-state, federal, or military court convictions, the registering law enforcement agency "shall" refer that conviction to the Department of Justice for assessment and determination of whether the conviction changes the tier designation assigned by the Department to the offender.[96] If the Department of Justice needs more time to obtain the documents to make the assessment, the Department of Justice is required to notify the registering law enforcement agency of the reason that an extension of time is necessary to complete the tier designation. The registering law enforcement agency "shall" then report to the district attorney and the court that the Department of Justice has requested an extension of time to determine the person's tier designation based on the newly discovered offense, the reason for the request, and the estimated time needed to complete the tier designation.[97] Based on the plain language of the test claim statute, these activities are mandated by the state.

The test claim statute imposes activities on district attorneys which are mandated by the state. Within 60 days of receiving reports from the law enforcement agencies or the district attorney of the county of conviction of the registerable offense, the registering county's district attorney "may" request the court hold a hearing on the petition if the petitioner has not fulfilled the requirements described in Penal Code section 290(e) to meet their mandatory minimum registration period, or if community safety would be significantly enhanced by the petitioner's continued registration.[98] If the district attorney requests a hearing, the district attorney "shall be entitled to present evidence" showing why community safety would be significantly enhanced by the petitioner's continued registration.[99] Penal Code section 290.5(a)(3) describes the evidence considered by the court:

> The court shall consider: the nature and facts of the registerable offense; the age and number of victims; whether any victim was a stranger at the time of the offense (known to the offender for less than 24 hours); criminal and relevant noncriminal behavior before and after conviction for the registerable offense; the time period during which the person has not reoffended; successful completion, if any, of a Sex Offender Management Board-certified sex offender treatment program; and the person's current risk of sexual or violent reoffense, including the person's risk levels on

[95] Penal Code section 290.5(a)(2).

[96] Penal Code section 290.5(a)(2).

[97] Penal Code section 290.5(a)(2).

[98] Penal Code section 290.5(a)(2).

[99] Penal Code section 290.5(a)(3).

> SARATSO static, dynamic, and violence risk assessment instruments, if available. Any judicial determination made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is reliable, material, and relevant.

The Court of Appeal recently explained the statutory phrase "if community safety would be significantly enhanced" by petitioner's continued registration, as follows:

> Section 290.5 does not define the phrase "community safety would be significantly enhanced." The purpose of section 290 is to ensure police can surveil sex offenders at all times because they pose a " ' " 'continuing threat to society.' " ' " (Citation omitted.) In the absence of a statutory definition, words should be given their usual and ordinary meanings. [Citation omitted.] "Significant" is defined as "having or likely to have influence or effect: deserving to be considered: important, weighty, notable." [Citation omitted.] "Enhanced" is defined as to raise or lift. [Citation omitted.] Thus, the prosecution must produce evidence establishing that requiring continued registration appreciably increased society's safety.[100]

The court further held that the district attorney has the burden to produce evidence that shows the petitioner *currently* presents a danger to the community (based on the factors identified in test claim statute), and not just evidence of the underlying offense.[101]

Although the test claim statute phrases the district attorney's activities permissively with language like "may request a hearing" or "be entitled to present evidence," case law suggests that a local decision is not truly voluntary for the purposes of article XIII B, section 6 if it is, as a practical matter, constrained by duty. In *San Diego Unified School Dist.*, the California Supreme Court suggested that a local discretionary action should not be considered voluntary if, as a practical matter, it must inevitably occur.[102] In that case, the Court was faced with statutory hearing requirements triggered by two types of school expulsions: "mandatory" expulsions, which state law required school principals to recommend whenever a student was found to be in possession of a firearm at school or at a school activity off school grounds, and "discretionary" expulsions, which state law granted school principals the authority to recommend for other conduct.[103] Although the Court confidently concluded that costs for the hearing requirements triggered by

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[100] *People v. Thai* (2023) 90 Cal.App.5th 427, 432.

[101] *People v. Thai* (2023) 90 Cal.App.5th 427, 433.

[102] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888; see *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[103] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 869-870.

"mandatory" expulsions were reimbursable state mandated costs,[104] it hesitated to apply that same logic to deny reimbursement for the "discretionary" expulsions.[105] However, it cautioned in dicta that strictly denying reimbursement whenever a requirement was triggered by a technically discretionary local action may well contravene both the intent underlying article XIII B, section 6 and past holdings,[106] stating:

> Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley*, supra, 190 Cal.App.3d 521, 234 Cal.Rptr. 795, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (Id., at pp. 537–538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. *Yet, under a strict application of the rule gleaned from City of Merced, supra, 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this*

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[104] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 881-882.

[105] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

[106] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

case, an application of the rule of City of Merced that might lead to such a result.[107]

In *Department of Finance v. Commission on State Mandates (POBRA)*, the Third District Court of Appeal suggested that duty is the dividing line between truly voluntary and technically discretionary decisions.[108] In that case, the court was tasked with determining whether the Public Safety Officers Procedural Bill of Rights Act (POBRA), which granted procedural protections to state and local peace officers subject to investigation, interrogation, or discipline, imposed a reimbursable state mandated program on school districts and community college districts that employ peace officers.[109] The court held that because those protections were triggered by a local discretionary decision, that statute did not impose a reimbursable state mandated program on those districts.[110] However, the court also clarified that this discretionary decision was *not* the district's decision to investigate, interrogate, or discipline its peace officers, but rather the district's decision to employ peace officers in the first place.[111] It explained that since counties and cities had a basic and mandatory duty to provide policing services,[112] their administration of this duty, as a practical matter, necessarily included actions such as investigating, interrogating, or disciplining its peace officers. Thus, those actions and the downstream requirements imposed by the POBRA statutes could not reasonably be considered "truly voluntary" when performed by counties and cities.[113]

The same analysis applies here. Although the test claim statute authorizes the district attorney to request a hearing when the petitioner has not met the requirements for termination or if the petitioner continues to present a threat to community safety, the decision of the district attorney to request a hearing under these circumstances is not truly voluntary. It is a district attorney's duty as a public prosecutor to "attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all

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[107] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888, footnote omitted and emphasis added.

[108] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[109] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1358.

[110] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[111] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[112] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[113] See *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

prosecutions for public offenses."[114] It would be a gross dereliction of a district attorney's duty to the people of the state to elect not to appear in a serious felony case.[115] The sex offender registry's purpose is to make law enforcement and the public aware of potentially dangerous individuals, so there is a strong public policy interest in requiring a sex offender's continued registration if there is reason to believe the petitioner still poses a potential threat to community safety.[116] Therefore, if the district attorney determines that keeping a sex offender on the registry is in the interest of significantly enhancing community safety, it is not a discretionary action within the meaning of article XIII B, section 6 to exercise the authority granted by the test claim statute to request the court hold a hearing and to present evidence in the hearing.

Therefore, Penal Code section 290.5, as amended by the test claim statute, imposes state-mandated requirements on county law enforcement and district attorneys' offices.

2. The Test Claim Statute Does Not Impose Any State-Mandated Requirements on County Public Defenders.

Unlike with law enforcement agencies or district attorneys however, the plain language of Penal Code section 290.5, as amended by the test claim statute, makes no mention of public defenders or petitioners having a right to counsel in the procedure to terminate a sex offender registration requirement. Nor do the other provisions of the Sex Offender Registration Act impose any requirements on public defenders. Looking at the test claim statute's legislative history, there was no discussion of public defenders representing petitioners that suggests intent that public defenders play a role in the petitioning process, or a general understanding that they would be inherently involved.[117]

Despite the test claim statute not specifically requiring anything of public defenders, the claimant asserts that "the legislatively created post-conviction process in Penal Code section 290.5 would violate due process if a lawyer were not provided in this legal, evidentiary, and adversarial proceeding."[118] The claimant cites no statutes or case law in the Test Claim that supports this, except to note that there are some limited circumstances where a public defender's duties to their client continue to civil matters after sentencing, using civil commitment hearings under the Sexually Violent Predator

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[114] Government Code section 26500.

[115] *People ex rel. Kottlneier v. Municipal Court* (1990) 220 Cal.App.3d 602, 609.

[116] See, *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 874, 877.

[117] Exhibit F (1) Senate Committee on Appropriations, Analysis of SB 421, as introduced April 17, 2017; Exhibit F (2) Assembly Committee on Public Safety, Analysis of SB 421, as amended May 26, 2017; Exhibit F (3) Senate Rules Committee, Office of Senate Analysis, Third Reading Analysis of SB 384, as amended September 8, 2017; Exhibit F (4) Senate Rules Committee, Office of Senate Floor Analysis, Unfinished Business on SB 384, as amended September 8, 2017.

[118] Exhibit A, Test Claim, filed June 29, 2022, page 34 (Declaration of Debra Werbel, para. 12).

Act as an example.[119] But the Sexually Violent Predator Act does specifically grant the right to counsel for those civil commitment hearings.[120] Petitions for a certificate of rehabilitation also are granted a right to counsel.[121] There are no similar provisions in the test claim statute.

The claimant also points to the fact that informational literature provided by the Department of Justice to registered sex offenders about the new tiered registration system directs them to seek assistance from public defenders as evidence of the public defenders' duty to represent petitioners.[122] Specifically, the Department of Justice said "The CA DOJ cannot provide legal assistance. If assistance is required, a registrant may contact a local public defender's office or a private attorney."[123] But that direction is not an executive order or legislative act that would create a reimbursable state mandate.

In its response to the Draft Proposed Decision, claimant acknowledges there is no federal right to counsel in post-conviction matters,[124] but insists that indigent petitioners under Penal Code section 290.5 are entitled to the assistance of legal counsel under the state's due process law once they have presented a prima facie showing that they are entitled to relief under the statute.[125] The claimant argues that by complying with the sex offender registration time requirements, providing proof of current registration, and serving the petition on the court, district attorneys, and relevant law enforcement agencies, the petitioners have made the prima facie showing that they are entitled to terminate their duty to register under the statute. When a district attorney chooses to challenge the petition by requesting a hearing, the court will consider evidentiary factors presented by the district attorney and petitioner. "Permitting a petitioner who is not familiar with cross examination, subpoenaing witnesses or documents, hiring experts, and the rules of evidence would cause a breakdown in the process of meaningful

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[119] Exhibit A, Test Claim, filed June 29, 2022, page 14.

[120] Welfare and Institutions Code Section 6602.

[121] Penal Code section 4852.08.

[122] Exhibit A, Test Claim, filed June 29, 2022, page 41 (Declaration of Debra Werbel, Exhibit A, California Department of Justice Frequently Asked Questions, page 6).

[123] Exhibit A, Test Claim, filed June 29, 2022, page 41 (Declaration of Debra Werbel, Exhibit A, California Department of Justice Frequently Asked Questions, page 6).

[124] See, for example, *Pennsylvania v. Finley*, (1987) 481 U.S. 551, 555; *People v. Delgadillo*, (2022) 14 Cal.5th 216, 226, where the courts hold there is no constitutional right to the effective assistance of counsel in state post-conviction proceedings.

[125] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 3-4 (citing *In re Clark* (1993) 5 Cal.4th 750, 780; *People v. Shipman* (1965) 62 Cal.2d 226, 232; *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 980-981; and *People v. Rouse* (2016) 245 Cal.App.4th 292, 299).

adversarial testing that is central to our system of justice."[126] The claimant therefore concludes that the test claim statute mandates that public defenders represent petitioners during hearings for contested petitions.

It is not clear from the case law cited by the claimant that the law requires the appointment of counsel to defend a petitioner when seeking to terminate his or her sex offender registration. The cases relied upon by the claimant all address convicted defendants challenging the validity of their conviction or sentence.[127] In those cases, when a prima facie case has been made to challenge a judgment of conviction, the indigent petitioner has the right to appointed counsel.[128]

However, the courts have also held that the right to appointed counsel does not apply under due process principles when the matter does *not* involve a deprivation of the person's liberty interests; in other words, there is no possibility that the petitioner may lose his or her physical liberty if litigation is lost. Such was the case in *People v. Mary H*., where the petitioner, who had been banned from owning a firearm after being taken into custody for psychiatric evaluation and treatment under the Lanterman-Petris-Short Act, requested an order lifting the firearm prohibition.[129] The court held that the petitioner did not have the right to appointed counsel as follows:

> . . . while procedural due process "has been held to include the right ... to appointed counsel under certain circumstances, regardless of whether the action is labelled criminal or civil" (citation omitted), because such a right generally "has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation" (citation omitted), "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel" (citation omitted). "[W]hether [one] has a personal liberty interest that requires appointment of counsel ... must be determined on a case-by-case basis ... by applying a two prong-test." (Citation omitted.) First, the court conducts the three-factor "fundamental fairness" balancing test. (Citation omitted.) Second, the "net weight" of these factors are "set ... against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his

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[126] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 4.

[127] *In re Clark* (1993) 5 Cal.4th 750, (sought to overturn a death sentence); *People v. Shipman* (1965) 62 Cal.2d 226, (petition to vacate a judgment on the grounds defendant had been insane both at the time of the offense and at pleading); *People v. Fryhaat* (2019) 35 Cal.App.5th 969, (motion to vacate guilty plea on the grounds ineffective counsel failed to advise the defendant of a guilty plea's effect on his immigration status); and *People v. Rouse* (2016) 245 Cal.App.4th 292, (petition for resentencing under statute that reclassified several of defendant's offenses as misdemeanors).

[128] *In re Clark* (1993) 5 Cal.4th 750, 779; *People v. Shipman* (1965) 62 Cal.2d 226, 231; *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 981.

[129] *People v. Mary H.* (2016) 5 Cal.App.5th 246.

> personal freedom." (Citation omitted.) "The dispositive question ... is whether the three ['fundamental fairness'] factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel...." (Citation omitted.) Given our earlier analysis under the "fundamental fairness" balancing test (see *ante*, at pp. 40–43) and this matter does not involve the deprivation of Mary's physical liberty, we cannot conclude procedural due process requires appointment of counsel.[130]

Here, a petition to be terminated from the sex offender registry is not a post-conviction challenge to the petitioner's conviction or sentence. It is a petition to terminate the registration requirements filed decades after release from custody and after the petitioner has satisfied the minimum mandatory registration period for their respective tier. The petition does not question the validity of the conviction that created the duty to register in the first place. Moreover, if the petitioner loses the petition, he or she must continue to register as a sex offender for one to five more years, which is considered non-punitive and civil in nature, and does not result in a person's loss of physical liberty.[131]

Thus, without any law or evidence showing that the appointment of counsel is required in these cases, the Commission cannot find that the test claim statute mandates any duties of the county public defenders' offices.

C. The Mandated Activities Constitute a New Program or Higher Level of Service.

For a state-mandated activity to constitute a new program or higher level of service, it must be new when compared with the legal requirements in effect immediately before the enactment of the test claim statute and increase the level of service provided to the public.[132] In addition, the requirement must either carry out the governmental function of providing a service to the public, or impose unique requirements on local agencies or school districts that do not apply generally to all residents and entities in the state.[133]

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[130] *People v. Mary H.* (2016) 5 Cal.App.5th 246, 263.

[131] *People v. Castellanos* (1999) 21 Cal.4th 785, 796; *In re Alva* (2004) 33 Cal.4th 254, 292; see generally *People v. Mosley* (2015) 60 Cal.4th 1044, 1054.

[132] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[133] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56); *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.).

1. The Mandated Activities Are New in Comparison to What Was Required Under Prior Law.

The activities required of law enforcement agencies and district attorneys by the test claim statute are new in comparison to prior law, as under prior law the entire procedure of petitioning to be relieved of a duty to register after completing a mandatory minimum registration period did not exist. Under prior law, the only means of being relieved from the duty to register was through a certificate of rehabilitation.[134] The certificate of rehabilitation process has not been eliminated and is still available to eligible sex offenders who may wish to see their other rights restored, meaning petitioning to be terminated from the sex offender registry is a new process that exists alongside, rather than replaces the certificate of rehabilitation process.

Thus, the mandated activities are new when compared to prior law.

2. The Mandated Activities Carry Out the Governmental Function of Providing a Service to the Public, and Impose Unique Requirements on Counties that Do Not Apply Generally to All Residents and Entities in the State.

The activities required of law enforcement agencies and district attorneys serve the functional purpose of ensuring that registration continues when appropriate for individual sex offenders with a high risk of re-offense.[135] This carries out a governmental function of protecting and enhancing community safety, and provides a service to the public. In addition, the requirements are uniquely imposed on county law enforcement and district attorneys.

Thus, the mandated activities impose a new program or higher level of service.

D. There Are No Costs Mandated by the State Because the Test Claim Statute Falls Within the Government Code Section 17556(g) Exception for Statutes that "Eliminate a Crime or Infraction."

The final element that must be met for reimbursement to be required under article XIII B, section 6 of the California Constitution is that the mandated activities must result in a local agency incurring increased costs mandated by the state within the meaning of Government Code section 17514. That section defines "costs mandated by the state" as "any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Government Code section 17564 also provides that "[n]o claim shall be made pursuant to Sections 17551, . . ., nor shall any payment be made on claims submitted pursuant to Sections 17551 or 17561, . . . , unless these claims exceed one thousand dollars ($1,000)." Even if the

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[134] Former Penal Code section 290.5, as last amended by Statutes 2014, chapter 280.

[135] Exhibit F (3), Senate Rules Committee, Office of Senate Analysis, Third Reading Analysis of SB 384, as amended September 8, 2017, page 13.

claims exceed $1,000, however, the claimed costs are not reimbursable if an exception identified in Government Code section 17556 applies.

Here, there is substantial evidence that the claimant incurred over $1,000 in complying with the test claim statute, as required by Government Code section 17564.[136]

However, article XIII B, section 6 of the California Constitution does not require subvention for the enforcement or elimination of crime, or when the Legislature changes the penalty for a crime. Government Code section 17556(g) provides that the Commission "shall not find costs mandated by the state" when "the statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."[137]

Finance argued that this claim should be denied because of Government Code section 17556(g), but asserted that the test claim statute changed the penalty for a crime or infraction.[138] The claimant responded, and the Commission agrees, that the requirement to register as a sex offender is not historically considered a punishment by either the courts or the Legislature.[139] Rather, the requirement to register as a sex offender is considered non-punitive and civil in nature.[140] The stated legislative purpose behind the sex offender registry is to deter offenders from committing future crimes, provide law enforcement with an additional investigative tool, and increase public protection.[141] Courts have frequently found that the sex offender registry is not a punishment at least with respect to whether the registration requirement violates an individual's constitutional rights against ex post facto laws or cruel and unusual punishments.[142] Both its purpose and effect are considered regulatory in nature because section 290 is meant to make sex offenders "readily available for police surveillance at all times because the legislature deemed them likely to commit similar offenses in the future."[143] The obligation to register is not part of the sentence, instead

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[136] Exhibit A, Test Claim, filed June 29, 2022, page 17; page 25, (Declaration of Daniel Stanley); page 31, (Declaration of Tony Sereno); alleging increased costs in fiscal year 2021-2022 of $27,407 for the Los Angeles County Sheriff's Department and $198,835 for the Los Angeles County District Attorney's Office.

[137] Government Code section 17556(g).

[138] Exhibit B, Finance's Comments on the Test Claim, filed January 6, 2023, page 1-2.

[139] Exhibit C, Claimant's Rebuttal Comments, filed January 30, 2023, page 1; *People v. Castellanos* (1999) 21 Cal.4th 785, 796.

[140] *People v. Castellanos* (1999) 21 Cal.4th 785, 796; *In re Alva* (2004) 33 Cal.4th 254, 292; see generally *People v. Mosley* (2015) 60 Cal.4th 1044, 1054.

[141] *Wright vs. Superior Court* (1997) 15 Cal.4th 521, 526.

[142] *People v. Castellanos* (1999) 21 Cal.4th 785, 796; *In re Alva* (2004) 33 Cal.4th 254, 292; see generally *People v. Mosley* (2015) 60 Cal.4th 1044, 1054.

[143] *In re Alva* (2004) 33 Cal.4th 254, 264.

"the obligation is a separate consequence of [a sex offense conviction] automatically imposed as a matter of law."[144] The burdens caused by requiring convicted sex offenders continuously register are incidental to a legitimate government regulatory purpose, and being a registered sex offender does not impose affirmative restrictions that have a punitive effect. Despite being triggered by a person's conviction for a sexual offense, the requirement to register as a sex offender is not itself a punishment. Therefore the test claim statute did not change the penalty for a crime or infraction.

The claimant also alleges that the test claim statute does not eliminate the crime of failing to register or remove any crimes from the list of registerable offense, but instead created a procedure by which convicted sex offenders may petition the court to be removed from the sex offender registry and, thus, Government Code section 17556(g) does not apply. The claimant argues that the test claim statute should therefore be distinguishable from the Commission's prior Decisions in *Sex Offenders Disclosure by Law Enforcement Officers* and *Accomplice Liability for Felony Murder*.[145]

The Commission finds, however, that Government Code section 17556(g) still applies because the test claim statute eliminates a crime. The requirement to register as a sex offender is enforced by Penal Code section 290.018, which provides that a person who willfully violates any requirement under the Sex Offender Registration Act is guilty of a misdemeanor punishable by up to a year imprisonment if the original conviction that triggered the registration requirement was a misdemeanor, or guilty of a felony punishable by up to three years imprisonment if the original conviction was a felony.[146] For each day that the offender fails to register, it is considered a continuing offense: "A defendant does not commit the crime only at the particular moment the obligation arises, but every day it remains unsatisfied."[147]

Under prior law, the requirement to register annually and any time the offender moved existed for life.[148] But the test claim statute eliminates the requirement for a sex offender to register under the Act once the offender has successfully petitioned to terminate their duty to register, as early as 10 or 20 years after release. Although the test claim statute made no changes to the language in section 290.018 regarding the criminal penalties, it did amend section 290 to note that every person described in the section has a duty to register under the Act "*unless the duty to register is terminated*

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[144] *People v. Picklesimer* (2010) 48 Cal.4th 330, 338.

[145] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

[146] Penal Code section 290.018(a), (b).

[147] *Wright v. Superior Court* (1997) 15 Cal.4th 521, 528.

[148] Former Penal Code section 290(b), as last amended by Proposition 35, section 9, approved November 6, 2012; Penal Code section 290.012, as added by Statutes 2007, chapter 579, and last amended by Statutes 2016, chapter 772; and Penal Code section 290.015 as added by Statutes 2007, chapter 579, and last amended by Statutes 2016, chapter 772.

pursuant to Section 290.5 . . . ."[149] This means that once the duty to register is terminated, the offender is no longer subject to the requirements of the Sex Offender Registration Act, and any criminal penalties under Penal Code section 290.018 for failing to register or to otherwise comply for life are eliminated. Thus, the test claim statute has eliminated the crime within the meaning of Government Code section 17556(g), and, therefore, there are no costs mandated by the state.

This finding is consistent with the recent published decision issued by the Fourth District Court of Appeal in *County of San Diego v. Commission on State Mandates*, which addressed the Commission's Decision denying the *Youth Offender Parole Hearings* (17-TC-09) test claim based on Government Code section 17556(g). The court found that Government Code section 17556(g) applied because "as a direct result" of the test claim statutes, penalties of the crimes were changed - most youth offenders are now statutorily eligible for parole years earlier than their original sentence:

> Now, as a direct result of the Test Claim Statutes, most youth offenders are statutorily eligible for parole at a youth offender parole hearing conducted during the 15th, 20th, or 25th year of incarceration, depending on the term of incarceration included within the youth offender's original sentence. (Pen. Code, §§ 3046, subd. (c), 3051, subds. (b), (d), 4801, subd. (c).) In practice, this parole eligibility ensures that some youth offenders will be released from prison years earlier, and perhaps even decades earlier, than they otherwise would have been but-for the Test Claim Statutes.
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> Thus, the Test Claim Statutes, and the youth offender parole hearing system established thereunder, "superseded the statutorily mandated sentences of inmates who ... committed their controlling offense" when they were under the age of 26. (Citation omitted.) Stated differently, the laws "effectively reform[ed] the parole eligibility date of a [youth] offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years." (Citations omitted.) By guaranteeing parole eligibility for most youth offenders, and overriding those offenders' original sentences, the Test Claim Statutes change the penalties for crimes within the meaning of Government Code section 17556, subdivision (g).[150]

The court also rejected arguments from the County that the test claim statutes do not change the penalties for crimes under section 17556(g) because they do not vacate the youth offender's original sentence, but simply implement procedural and administrative changes.[151] The court agreed that the original sentences imposed on the juvenile

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[149] Penal Code section 290(b), emphasis added.

[150] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 640-641.

[151] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 642.

offenders in the *Youth Offender Parole Hearings* program still exist, "[b]ut these facts do not mean the Test Claim Statutes effect no change on the penalties suffered by youth offenders."[152] This argument is similar to the claimant's argument here, that the test claim statute does not eliminate a crime within the meaning of Government Code section 17556(g) since Penal Code section 290.018, which makes it a crime for failing to register, still exists.[153] The crime for failing to register still exists in statute, but that does not mean that the test claim statute effects no change. As a direct result of the test claim statute, a successful petition to terminate registration, just like a successful youth offender following a parole hearing, means that the offender is no longer subject to the requirements of the Sex Offender Registration Act, and any criminal penalties under Penal Code section 290.018 for failing to register or to otherwise comply for life are eliminated. The claimant also relies on the "but only" language in Government Code section 17556(g) to suggest that the "crime elimination" exception to reimbursement should be narrowly interpreted and, when viewed narrowly, the exception does not apply to the procedure required by the test claim statute here.[154] However, the "longstanding rule of statutory construction—the 'last antecedent rule'—provides that "qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote."[155] Government Code section 17556(g) says that the Commission shall not find costs mandated by the state when "[t]he statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction." Under the last antecedent rule, the "but only" clause modifies only the third phrase: "changed the penalty for a crime or infraction." This application is in accordance with legislative intent and the rules of construction. It would not make sense for the "but only" clause to modify the first phrase, "created a new crime or infraction," because that exception to reimbursement is already provided for in article

[152] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641.

[153] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

[154] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 3.

[155] *White v. County of Sacramento* (1982) 31 Cal.3d 676, 679-680. In that case, the statute defined "punitive action" as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer *for purposes of punishment*." (Emphasis added.) The court held that under the last antecedent rule, the phrase "for purposes of punishment" must be read only with the word "transfer" and not the words "dismissal," "demotion," "suspension," "reduction in salary," and "written reprimand."

XIII B, section 6(b), of the California Constitution without the "but only" language.[156] Similarly, it would not make sense for the "but only" clause to modify the second phrase, "eliminated a crime or infraction," because an eliminated crime cannot be enforced. Thus, the "but only" language applies only to a statute that changes the penalty for a crime or infraction.

Finally, although the Commission's past decisions on prior test claims are *not* precedential, this interpretation is consistent with the Commission's prior decisions regarding the "eliminate a crime or infraction" language in Gov. Code section 17556(g). In *Accomplice Liability for Felony Murder*, 19-TC-02, the claimant sought reimbursement for costs associated with statutes that changed the felony murder rule and natural and probable causes doctrine to require either an intent to kill or that the defendant was a major participant in a crime who acted with reckless indifference towards human life, and allowed people convicted for murder under the felony murder rule or natural and probable causes doctrine prior to the change in law to petition to have their murder conviction vacated if they lacked the requisite state of mind.[157] Local agency interested parties argued this did not eliminate a crime because the test claim statute did not eliminate felony murder or murder under the natural and probable causes doctrine as crimes as a whole; the test claim statute only changed the element of malice required to find a person liable for the offenses.[158] The Commission was not convinced by this argument, noting that "The test claim statute and the court cases make it clear, however, that the crime of murder has been eliminated for those persons who lack intent to kill while committing other felonies, or who are not major participants acting with reckless indifference to human life, as they may no longer be found guilty of murder."[159] Similarly, even though the test claim statute does not stop failure to register from being a crime as a whole, the test claim statute here makes it clear that those who have successfully petitioned the courts under section 290.5 no longer have a duty to register as a sex offender. This means they can no longer be found guilty under section

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[156] "[T]he Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (b) Legislation defining a new crime or changing an existing definition of a crime."

[157] Exhibit F (8), Commission on State Mandates, Test Claim Decision on *Accomplice Liability for Felony Murder*, 19-TC-02, adopted December 4, 2020, https://csm.ca.gov/decisions/19-tc-01-120920.pdf (accessed on January 31, 2023), page 29-30.

[158] Exhibit F (8), Commission on State Mandates, Test Claim Decision on *Accomplice Liability for Felony Murder*, 19-TC-02, adopted on December 4, 2020, https://csm.ca.gov/decisions/19-tc-01-120920.pdf (accessed on January 31, 2023), page 30-31

[159] Exhibit F (8), Commission on State Mandates, Test Claim Decision on *Accomplice Liability for Felony Murder*, 19-TC-02, adopted on December 4, 2020, https://csm.ca.gov/decisions/19-tc-01-120920.pdf (accessed on January 31, 2023), page 32.

290.018 for failing to register, and thus the test claim statute eliminates a crime with respect to the people who are granted petitions under section 290.5.

Additionally, *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15 is another prior Commission Decision dealing with the sex offender registry.[160] In that case, the test claim statute expanded the list of registerable offenses. The claimants argued that adding additional crimes to the list of registerable offenses did not create a new crime or change the definition of any crime.[161] The Commission found this interpretation lacking, and explained that if a person convicted of any of the newly added offenses does not register as a sex offender, they are now guilty of a misdemeanor or felony, whereas prior to the test claim statute, they would not have been guilty of a crime.[162] Although the prior test claim deals in the creation of a new crime rather than the elimination of a crime, the same principle applies here. Under prior law, everyone who has been convicted of a registerable offense was guilty of a misdemeanor or felony if they do not register as a sex offender. But going from a system in which all registrants were expected to register for life to a tiered system that gives a clear path to be relieved of the duty to register eliminates a crime, because it is no longer a crime for a person to not register as a sex offender once they have successfully petitioned to have their registration requirement terminated.

Accordingly, the Commission finds that the test claim statute does not result in costs mandated by the state.

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the test claim statutes do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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[160] Exhibit F (5), Commission on State Mandates, Test Claim Decision on *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, adopted on August 23, 2001, https://csm.ca.gov/decisions/sod502.pdf (accessed on January 31, 2023), page 4-6.

[161] Exhibit F (5), Commission on State Mandates, Test Claim Decision on *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, adopted on August 23, 2001, https://csm.ca.gov/decisions/sod502.pdf (accessed on January 31, 2023), page 6.

[162] Exhibit F (5), Commission on State Mandates, Test Claim Decision on *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, adopted on August 23, 2001, https://csm.ca.gov/decisions/sod502.pdf (accessed on January 31, 2023), page 6.

BEFORE THE

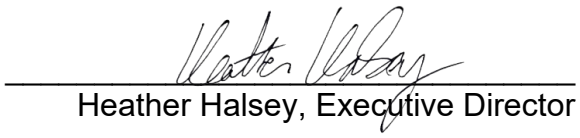
COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON REMAND Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017 Filed on January 11, 2018 City of San Diego, Claimant Notice of Entry of Judgement and Writ of Mandate Remanding the Matter for Reconsideration, served December 1, 2022	Case No.: 17-TC-03-R *Lead Sampling in Schools: Public Water System No. 3710020* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 On Remand from *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS (*Adopted December 1, 2023*) (*Served December 6, 2023*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on December 1, 2023.



Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON REMAND Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017 Filed on January 11, 2018 City of San Diego, Claimant Notice of Entry of Judgement and Writ of Mandate Remanding the Matter for Reconsideration, served December 1, 2022	Case No.: 17-TC-03-R *Lead Sampling in Schools: Public Water System No. 3710020* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 On Remand from *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS (*Adopted December 1, 2023*) (*Served December 6, 2023*)

DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on December 1, 2023. Kevin King, Lisa Celaya, and Adam Jones appeared on behalf of the claimant, Marilyn Munoz appeared on behalf of the Department of Finance, and David Rice appeared on behalf of the State Water Resources Control Board.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 4-2 with one abstention, as follows:

Member	**Vote**
Lee Adams, County Supervisor	No
Jennifer Holman, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes

Member	Vote
Renee Nash, School District Board Member	No
Sarah Olsen, Public Member	Abstain
David Oppenheim, Representative of the State Controller, Vice Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

Summary of the Findings

This Test Claim alleges new state-mandated activities and costs arising from a permit amendment issued by the State Water Resources Control Board (State Board) to the City of San Diego's public water system, Order No. 2017PA-SCHOOLS. The test claim order is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned public water systems, *which is applicable to the City of San Diego only*.[1, 2]

The test claim order newly requires the claimant's public water system, beginning January 18, 2017, to submit to the State Board's Division of Drinking Water a list of all public and private K-12 schools it serves and to sample and test drinking water in any K-12 school it serves for the presence of lead, upon the request of a school representative made prior to November 1, 2019 with the following limitation: Beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227, and not by the test claim order.[3]

On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800, finding that the test claim order imposes a new program or higher level of service in that "the provision of drinking water to schools is a peculiarly

[1] This is unusual in that, generally, a test claim functions similarly to a class action and there are approximately 1,200 public water systems subject to the same exact requirements in separate amendments to their own permits, but no test claims were filed on those other permits. This decision applies only to the San Diego permit.

[2] These systems are also known as "community water systems" which are public water systems that supply water to the same population year-round. (See Health and Safety Code section 116275(i).) The reader may find these two terms used interchangeably in some of the supporting documentation in the record.

[3] Beginning January 1, 2018, Health and Safety Code section 116277 required a community water system, which includes the claimant's public water system, serving any public school constructed or modernized *before* January 1, 2010, that did not previously request lead testing, to test for lead in the school's potable water system by July 1, 2019. Section 116277 does not require a school to first submit a written request to trigger the duty to test a school's drinking water for lead.

governmental function and the mandated testing of this water for lead is plainly a service to the public."[4] The Court directed the Commission to set aside its original Decision and to issue a new Decision consistent with its ruling, and remanded the claim back to the Commission to determine the remaining mandate issues.

The Commission finds that the test order does not impose a reimbursable state-mandated program pursuant to article XIII B, section 6. Although a test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[5]

The claimant is not legally compelled to comply with the test claim order since the claimant's participation in the underlying program to provide water service is not mandated by state law.[6] Under Article XI, section 9(a) of the California Constitution, a "municipal corporation" *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.[7] The courts have interpreted article XI, section 9 (previously section 19) as granting authority rather than imposing a duty.[8] Government Code section 38742 also provides that the legislative body of any city "may" contract for supplying the city with water for municipal purposes; or "may" "[a]cquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes of the city."

The courts have acknowledged the possibility that a state mandate may be found in the absence of legal compulsion when a statute or executive order induces compliance through the imposition of certain and severe, or other draconian consequences that leave the local entity no reasonable alternative but to comply.[9] The claimant argues

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[4] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 13.

[5] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731.

[6] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10 ("the City is not legally obligated to provide water service under State law"); Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 2 ("the City is not legally compelled to comply with the lead testing requirements in [the test claim order]").

[7] California Constitution, article XI, section 9(a).

[8] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274.

[9] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; see also *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 754; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367.

that it is practically compelled and, thus, mandated by the state to comply with the test claim order for the following reasons:

- The claimant cannot take back a decision made more than 120 years ago to provide water because "[c]ities must provide for the health, safety, and welfare of their residents, and simply put, people cannot survive without water."
- If the claimant ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars.
- If the claimant fails to comply with the test claim order, the State Board could suspend or revoke its operating permit, which would prevent the claimant from operating its water system and leave 1.3 million residents without water service.[10]

The Commission finds that the record does *not* contain substantial evidence showing that the claimant will face certain and severe penalties or other draconian consequences, as is required for a finding of practical compulsion, if it decides not to participate in the underlying program and provide water service to City residents. While a long history of operating a public water system is a factor that supports a finding of practical compulsion under *City of Sacramento v. State of California*, the duration of participation in a voluntary program is just one factor and is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.[11]

Moreover, the record does not support the claimant's assertion that if it ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars. In *Kern High School Dist*., the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[12] The penalties in that case, double taxation on all of the State's businesses, were immediate

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[10] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 9-11; Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[11] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76 (a finding of practical compulsion "must depend on such factors as the nature and purpose of the…program; whether its design suggests an intent to coerce; *when state and/or local participation began*; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal," emphasis added). See also, *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[12] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 749 (internal quotation marks omitted).

and "draconian," that "the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses.[13]

The evidence does not support that finding here. As explained in this Decision, the claimant is not the debt-holder on the bond funds, and the funds received from the bonds and the Drinking Water State Revolving Fund loans for the improvements to its water system are paid from the Water Utility Fund and, thus, the claimant's general fund is generally not at risk.[14] In the event of default, the principal amount of the debt owing *may* come immediately due, but that is not certain to occur.[15] The State, as the holder of the senior debt from the Drinking Water State Revolving Fund, has priority over the bond debt holders, and is not required to make such a demand. And the bond debt holders have discretion whether to vote collectively to have the debt declared immediately due and payable.[16] Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.[17]

And finally, while Health and Safety Code section 116625 gives the State Board the authority to suspend or revoke the claimant's operating permit for noncompliance with the test claim order, the statute is permissive not mandatory, meaning that the State Board is authorized but not required to enforce a permit violation.

Accordingly, the Commission finds that the test claim order does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and denies the Test Claim.

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[13] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 74.

[14] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 111-114, 118, 121, 190 (Official Statement), 672 (Master Agreement, section 5.02); Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 12, 13, 36, 38.

[15] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 684 (Master Agreement); Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 15, 31-32.

[16] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 684-685.

[17] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 678 (Master Agreement).

COMMISSION FINDINGS

I. Chronology

01/18/2017	Permit Amendment No. 2017PA-SCHOOLS for City of San Diego PWS 3710020 was adopted by the State Board's Division of Drinking Water.[18]
01/11/2018	The claimant filed the Test Claim.[19]
08/13/2018	The State Board filed comments on the Test Claim.[20]
08/13/2018	Finance filed comments on the Test Claim.[21]
11/09/2018	The claimant filed its rebuttal comments.[22]
12/21/2018	Commission staff issued the Draft Proposed Decision.[23]
01/11/2019	The State Board filed comments on the Draft Proposed Decision.[24]
01/11/2019	The claimant filed comments on the Draft Proposed Decision.[25]
03/22/2019	The Commission heard the Test Claim and voted 6-1 to deny the claim.
06/20/2019	The claimant filed a petition for writ of mandate in Sacramento County Superior Court.
07/30/2020	Sacramento County Superior Court denied the claimant's petition for writ of mandate.
09/25/2020	The claimant appealed the denial of its petition for writ of mandate to the Third District Court of Appeal.
04/29/2022	The Third District Court of Appeal reversed the judgment issued by Sacramento County Superior Court.
11/16/2022	Sacramento County Superior Court issued a judgment and writ commanding the Commission to set aside its March 22, 2019 Decision and to consider in the first instance whether reimbursement is required.

[18] Exhibit A, Test Claim, filed January 11, 2018, page 14.

[19] Exhibit A, Test Claim, filed January 11, 2018.

[20] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018.

[21] Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018.

[22] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018.

[23] Exhibit E, Draft Proposed Decision, issued December 21, 2018.

[24] Exhibit F, State Water Resources Control Board's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019.

[25] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019.

01/27/2023 The Commission issued the Order setting aside its March 22, 2019 Decision.

03/23/2023 Commission staff issued the Draft Proposed Decision for the May 26, 2023 Commission hearing.[26]

04/07/2023 The State Board filed a request for an extension of time to file comments on the Draft Proposed Decision and postponement of the hearing until July 28, 2023, which was approved for good cause.

04/11/2023 Finance filed a request for extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.

04/12/2023 The claimant filed a request for extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.

05/04/2023 The claimant and the State Board filed comments on the Draft Proposed Decision.[27]

06/21/2023 The Commission cancelled the July 28, 2023 Commission Meeting and set a new hearing date of September 22, 2023.

09/06/2023 Commission staff issued the Proposed Decision.

09/08/2023 The claimant filed a request for extension of time to file comments on the Proposed Decision and postponement of hearing.

09/12/2023 The Commission denied the claimant's request for extension of time to file comments on the Proposed Decision and granted the request for postponement of hearing, setting the hearing for December 1, 2023.

II. Background

The test claim order is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned "public water systems," and requires the claimant, beginning January 11, 2017, to test for lead in the drinking water connections of every K-12 school that it serves, upon the request of an authorized representative of the school made prior to November 1, 2019, at no charge to the school.

A. Lead as an Environmental Health Risk

Lead is toxic and has "no known value to the human body."[28] Young children "are at particular risk for lead exposure because they have frequent hand-to-mouth activity and

[26] Exhibit H, Draft Proposed Decision, issued March 23, 2023.

[27] Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023; Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023.

[28] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed

absorb lead more easily than do adults."[29] No safe blood lead level has been determined; lead damages almost every organ and system in the body, including and especially the brain and nervous system.[30] Low levels of lead exposure can lead to reduced IQ and attention span, learning disabilities, poor classroom performance, hyperactivity, behavioral problems, impaired growth and hearing loss.[31] Higher lead levels can cause severe neurological problems and ultimately death.[32]

Though a naturally occurring metal found all over the Earth, "[e]nvironmental levels of lead have increased more than 1,000-fold over the past three centuries as a result of human activity."[33] Because lead is "widespread, easy to extract and easy to work with, lead has been used in a wide variety of products," including paints, ceramics, plumbing, solder, gasoline, batteries, and cosmetics.[34] In 1984, burning leaded gasoline was the largest source of lead emissions in the air, and so the Environmental Protection Agency (EPA) phased out and eventually banned leaded gasoline.[35] U.S. EPA and other agencies have "taken steps over the past several decades to dramatically reduce new

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August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[29] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[30] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[31] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[32] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[33] Exhibit K (9), U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, *Public Health Statement: Lead, CAS #: 7439-92-1*, August 2007, page 2.

[34] Exhibit K (7), National Institute of Environmental Health Sciences, Lead Information Home Page, https://www.niehs.nih.gov/health/topics/agents/lead/index.cfm (accessed on September 26, 2018), page 1.

[35] Exhibit K (9), U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, *Public Health Statement: Lead, CAS #: 7439-92-1*, August 2007, page 4.

sources of lead in the environment; according to the U.S. EPA, "[t]oday, the greatest contributions of lead to the environment stem from past human activities."[36] Sources include: lead-based paint; lead in the air from industrial emissions; lead in the soil around roadways and streets from past emissions by automobiles using leaded gasoline, and from deposits of lead dust from paints; industrial lead byproducts; consumer products, including imported dishes, toys, jewelry and plastics; and lead in drinking water leaching from corrosion of plumbing products containing lead.[37]

Lead exposure in drinking water results from either lead being present in the source water, such as from contaminated runoff; or through the interaction of water with plumbing materials containing lead.[38] Although "very little lead is found in lakes, rivers, or groundwater used to supply the public with drinking water," the drinking water in older houses and communities with lead service lines or lead plumbing can contain lead, "especially if the water is acidic or 'soft.'"[39] The concern with lead plumbing and fixtures is lead leaching into the water that runs through them, but "as buildings age, mineral deposits form a coating on the inside of the water pipes that insulates the water from lead in the pipe or solder, thus reducing the amount of lead that can leach into the water."[40] Those stabilizing mineral deposits, however, can be upset by acidity in the water supply: "Acidic water makes it easier for the lead found in pipes, leaded solder, and brass faucets to be dissolved and to enter the water we drink."[41] Accordingly, the primary regulatory approach, as discussed below, is to require water systems to

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[36] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[37] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, pages 163-164 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[38] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 164 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[39] Exhibit K (9), U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, *Public Health Statement: Lead, CAS #: 7439-92-1*, August 2007, pages 3-4.

[40] Exhibit K (9), U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, *Public Health Statement: Lead, CAS #: 7439-92-1*, August 2007, page 4.

[41] Exhibit K (9), U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, *Public Health Statement: Lead, CAS #: 7439-92-1*, August 2007, page 4.

prioritize monitoring, and to implement and maintain corrosion control treatment to minimize toxic metals leaching into water supplies.

To potentially close some of the gaps in lead exposure prevention, the California Legislature in 1992 enacted the Lead-Safe Schools Protection Act,[42] which acknowledged the potential dangers of lead exposure, especially in children, and required the State Department of Health Services to assess the risk factors of schools and "determine the likely extent and distribution of lead exposure to children from paint on the school, soil in play areas at the school, drinking water at the tap, and other potential sources identified by the department for this purpose.[43] The Act did not specifically require testing of drinking water, but only required the Department to assess risk factors, of which drinking water was one.

B. Prior Law on Drinking Water

1. Federal Law

In 1974 Congress passed the federal Safe Drinking Water Act, authorizing U.S. EPA to set health-based standards for drinking water supplies, which U.S. EPA, the states, and drinking water systems work together to meet.[44] The Safe Drinking Water Act applies to all "public water systems," which may be privately owned or governmental and, which are defined as "a system for the provision to the public of water for human consumption" that has at least 15 service connections and serves at least 25 people per day for at least 60 days out of the year.[45] U.S. EPA states that there are over 170,000 public water systems providing drinking water to Americans, to which the Act applies.[46]

Under authority provided in the federal Act, U.S. EPA promulgated health-based standards for lead and copper in drinking water, known as the federal Lead and Copper Rule (LCR).[47] The federal action level "is exceeded if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period…is greater than 0.015 mg/L [15 ppb]."[48] The number of samples required depends on the size of

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[42] Education Code section 32240 et seq.

[43] Education Code section 32242.

[44] Exhibit K (13), U.S. EPA, Office of Water, *Understanding the Safe Drinking Water Act*, June 2004, https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf (accessed on February 21, 2023), page 1.

[45] 42 U.S.C. § 300f(4).

[46] Exhibit K (13), U.S. EPA, Office of Water, *Understanding the Safe Drinking Water Act*, June 2004, https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf (accessed on February 21, 2023), page 2.

[47] Title 40, Code of Federal Regulations, section 141.80 et seq.

[48] Title 40, Code of Federal Regulations, section 141.80(c).

the drinking water system, and any history of prior exceedances.[49] The primary mechanisms described in the LCR to control and minimize lead in drinking water are "optimal corrosion control treatment," which includes monitoring and adjusting the chemistry of drinking water supplies to prevent or minimize corrosion of lead or copper plumbing materials; source water treatment; replacement of lead service lines; and public education.[50] The LCR also includes monitoring and reporting requirements for public water systems.[51]

2. California Law

The California Safe Drinking Water Act addresses drinking water quality specifically and states the policy that "[e]very resident of California has the right to pure and safe drinking water," and that "[i]t is the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that, when present in drinking water, may cause cancer, birth defects, and other chronic diseases."[52] These provisions do not provide a right to the delivery of water, but merely provide that drinking water delivered by a public water system must be of a certain quality, and reasonably free of pollutants, to the extent feasible. The Act goes on to state:

> (e) This chapter is intended to ensure that the water delivered by public water systems of this state shall at all times be pure, wholesome, and potable. This chapter provides the means to accomplish this objective.
>
> (f) It is the intent of the Legislature to improve laws governing drinking water quality, to improve upon the minimum requirements of the federal Safe Drinking Water Act Amendments of 1996, to establish primary drinking water standards that are at least as stringent as those established under the federal Safe Drinking Water Act, and to establish a program under this chapter that is more protective of public health than the minimum federal requirements.
>
> (g) It is further the intent of the Legislature to establish a drinking water regulatory program within the state board to provide for the orderly and efficient delivery of safe drinking water within the state and to give the establishment of drinking water standards and public health goals greater emphasis and visibility within the state.[53]

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[49] See Exhibit K (6), U.S. EPA, *Lead and Copper Rule: A Quick Reference Guide*, June 2008, page 1 (Chart showing the number of sample sites required under standard sampling or reduced sampling, according to the size of the drinking water system).

[50] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 6; Title 40, Code of Federal Regulations, section 141.80(d-g).

[51] Title 40, Code of Federal Regulations, sections 141.86 – 141.91.

[52] Health and Safety Code section 116270.

[53] Health and Safety Code section 116270.

Article XI, section 9 of the California Constitution makes clear that drinking water may be provided either by a municipal corporation, or by another person or corporate entity.[54] The State Board issues drinking water supply permits to all California "public water systems," which may be privately or government owned and which are defined the same as under the federal Act as "a system for the provision of water for human consumption through pipes or other constructed conveyances that has 15 or more service connections or regularly serves at least 25 individuals daily at least 60 days out of the year."[55]

The courts have called the California Safe Drinking Water Act "a remedial act intended to protect the public from contamination of its drinking water."[56] Accordingly, the Act does not create affirmative rights, including rights to the delivery of water: the only mandatory duty on local government is to review on a monthly basis water quality monitoring data submitted to the local government by water suppliers within its jurisdiction in order to detect exceedances of water quality standards.[57] Nothing in the Act requires state or local government to assume responsibility to ensure that every resident of California receives water from a public water system, or to test or monitor the public water systems within its jurisdiction, or take corrective or enforcement actions when pollutants are detected. The focus of the Act is "to ensure that the water *delivered* by public water systems of this state shall at all times be pure, wholesome, and potable,"[58] and the monitoring and corrosion control requirements are aimed at the water systems themselves, whether publicly or privately owned.

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[54] California Constitution, article XI, section 9. Article XI, section 9(a) provides that "[a] municipal corporation *may* establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication." Article XI, section 9(b) also provides that "[p]ersons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the city may prescribe under its organic law." Article XII asserts government regulatory authority, via the Public Utilities Commission, over "private corporations or persons that own, operate, control, of manage a line, plant, or system for …the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public…" However, nothing in article XI or XII creates or implies a right to the delivery of any such services, or any mandatory duty on local government to provide such services.

[55] Health and Safety Code sections 116525, 116271(k) (Before July 1, 2014, the Department of Public Health issued such permits; however, Statutes 2014, chapter 35 transferred those duties to the SWRCB, effective July 1, 2014); "Public Water Systems" are defined in Health and Safety Code section 116275(h) and 42 U.S.C. § 300f(4).

[56] *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 704.

[57] *Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, 989.

[58] Health and Safety Code section 116270(e), emphasis added.

The State has also adopted a Lead and Copper Rule, substantially similar to the federal rule, which requires all operators of drinking water systems to monitor and sample at a number of sample sites determined by the size of the system, primarily residential sample sites.[59] If lead levels above 0.015 mg/L (15 ppb) are detected, the water system is expected to take corrective action, beginning with corrosion control treatment measures, then source water treatment, lead service line replacement, and public education.[60] Approximately 500 schools within California are themselves permitted as a "public water system," because they have their own water supply, such as a well.[61] Those entities also are required to test their taps for lead and copper under the LCR; however, most schools are served by community water systems that are not required to test for lead specifically at the school's taps.[62]

C. The Test Claim Permit Amendment

Both the federal and state law have long required drinking water systems to monitor their customers' water supplies for exceedances and to take corrective action as necessary. However, that monitoring has been mostly limited to residential service connections, as a proxy for the presence of lead within the greater drinking water system.[63]

In September 2015, the Legislature passed SB 334 as a potential solution to the gap in regulation, which would have, had it been enacted, required school districts with water sources or drinking water supplies that do not meet U.S. EPA standards to close access to those drinking water sources; provide alternative drinking water sources if the school did not have the minimum number of drinking fountains required by law; and provide access to free, fresh, and clean drinking water during meal times in the food service

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[59] See California Code of Regulations, title 22, section 64670 et seq.; Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, pages 5-6; California Code of Regulations, title 22, section 64676 (Sample Site Selection).

[60] See, e.g., California Code of Regulations, title 22, section 64673 (Describing monitoring and corrosion control measures to be taken if an elevated lead level is detected).

[61] Exhibit A, Test Claim, filed January 11, 2018, page 118 (State Water Resources Control Board's *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

[62] Exhibit A, Test Claim, filed January 11, 2018, page 118 (State Water Resources Control Board's *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

[63] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 6 ("Together, the sampling sites provide an overall picture of lead levels in the water customers are consuming – the assumption being that the houses and other facilities near sampling sites will have similar plumbing characteristics and, therefore, similar amounts of lead in tap water").

areas of the schools under its jurisdiction.[64] SB 334 was vetoed by then-Governor Brown, whose veto message expressed concern that the bill could create a very expensive reimbursable state mandate.[65] The veto message instead directed the State Board to examine the scope of the potential problem by incorporating water quality testing in schools as part of the state's LCR.[66]

Accordingly, the State Board adopted the Permit Amendment (the test claim order) at issue here, as well as over 1,100 other nearly identical (but for the individual public water system information) permit amendments for other drinking water systems serving K-12 schools. Specifically, beginning January 18, 2017, the test claim order requires the claimant to submit to the Division of Drinking Water (DDW) a list of all K-12 schools served water through a utility meter; and then, if requested by any school within its service area by November 1, 2019, the drinking water system shall:

- Respond in writing within 60 days and schedule a meeting;
- Finalize a sampling plan and complete initial sampling within 90 days, or develop an alternative time schedule if necessary;
- Collect one to five samples from drinking fountains, cafeteria/food preparation areas, or reusable bottle filling stations;
- Collect samples on a Tuesday, Wednesday, Thursday, or Friday on a day when school is in session;
- Submit samples to an ELAP certified laboratory;
- Within two business days of a result that shows an exceedance of 15 parts per billion (ppb), notify the school of the sample result;
- If an initial sample shows an exceedance of 15 ppb:
    - Collect an additional sample within 10 business days, unless the sample site is removed from service by the school;
    - Collect a third sample within 10 business days if the resample is less than or equal to 15 ppb;
    - Collect at least one more sample at a site where the school has completed some corrective action;

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[64] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 148 (SB 334, Legislative Counsel's Digest).

[65] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 145 (Governor's Veto Message).

[66] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 145 (Governor's Veto Message).

- Ensure the water system receives the results of repeat samples no more than 10 business days after the date of collection;
- Do not release lead sampling data to the public for 60 days, unless in compliance with a Public Records Act request;
- Discuss the results with the school prior to releasing the results to the public.[67]

The order further states that the water system may not use any lead samples collected under the order to satisfy federal or state LCR requirements; the water system must keep records of all schools requesting testing or lead-related assistance and provide those records to DDW upon request; and the water system's annual Consumer Confidence Report shall include a statement summarizing the number of schools requesting lead sampling.[68]

The order requires the claimant to provide testing to both private and public K-12 schools, upon request of the school. Under the order, the claimant's public water system must assist those schools to which it serves drinking water with "at least one or more of grades Kindergarten through 12th grade," when a request for one-time assistance is made in writing by an authorized school representative.[69] "Authorized school representative" is defined as "the superintendent or designee of a school, governing board or designee of a charter school, or administrator or designee of a private school."[70]

The State Board explained, in its frequently asked questions documents regarding the lead sampling program, that the "schools" which can request lead sampling include all K-12 schools in the water system's service area that are listed in the California School Directory, including both private and public K-12 schools.

> **Which schools can request lead testing of their drinking water?**
>
> The DDW permit action requires community water systems to assist any school in their service area that is listed in the California School Directory. This directory includes schools for grades K-12, including private, charter, magnet and non-public schools. The directory does *not* include preschools, daycare centers, or postsecondary schools.[71]

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[67] Exhibit A, Test Claim, filed January 11, 2018, pages 105-107 (test claim order).

[68] Exhibit A, Test Claim, filed January 11, 2018, page 108 (test claim order).

[69] Exhibit A, Test Claim, filed January 11, 2018, pages 105-106 (test claim order).

[70] Exhibit A, Test Claim, filed January 11, 2018, pages 105-106 (test claim order).

[71] Exhibit A, Test Claim, filed January 11, 2018, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*), emphasis in original.

D. Health and Safety Code Section 116277 (AB 746)

Effective January 1, 2018 (almost one year after the effective date of the test claim order), Health and Safety Code section 116277 (AB 746) required community water systems[72] serving a public school constructed before January 1, 2010, and that did not previously request lead testing, to affirmatively test for lead in those schools' potable water system by July 1, 2019.[73] The section became inoperative July 1, 2019, and was repealed effective January 1, 2020.[74] Section 116277 states in its entirety as follows:

> (a)(1) A community water system that serves a schoolsite of a local educational agency with a building constructed before January 1, 2010, on that schoolsite shall test for lead in the potable water system of the schoolsite on or before July 1, 2019.
>
> (2) The community water system shall report its findings to the schoolsite within 10 business days after the community water system receives the results from the testing laboratory or within two business days if it is found that the schoolsite's lead level exceeds 15 parts per billion.
>
> (3) If the lead level exceeds 15 parts per billion, the community water system shall also test a water sample from the point in which the schoolsite connects to the community water system's supply network to determine the lead level of the water entering the schoolsite from the community water system's water supply network.
>
> (b)(1) A local educational agency shall allow the community water system access to each of the local educational agency's schoolsites that are subject to subdivision (a) to conduct testing.
>
> (2) If the lead level exceeds 15 parts per billion, the local educational agency shall notify the parents and guardians of the pupils who attend the schoolsite or preschool where the elevated lead levels are found.
>
> (c)(1) If lead levels exceed 15 parts per billion, the local educational agency shall take immediate steps to make inoperable and shut down from use all fountains and faucets where the excess lead levels may exist.

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[72] "Community water systems" are public water systems that supply water to the same population year-round. (See Health and Safety Code section 116275(i).)

[73] Exhibit K (5), Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) (AB 746).

[74] Exhibit K (5), Health and Safety Code section 116277(g) (as added by Stats. 2017, ch. 746) (AB 746).

Additional testing may be required to determine if all or just some of the school's fountains and faucets are required to be shut down.

(2) Each local educational agency shall work with the schoolsites within its service area to ensure that a potable source of drinking water is provided for students at each schoolsite where fountains or faucets have been shut down due to elevated lead levels. Providing a potable source of drinking water may include, but is not limited to, replacing any pipes or fixtures that are contributing to the elevated lead levels, providing onsite water filtration, or providing bottled water as a short-term remedy.

(d) Each community water system, in cooperation with the appropriate corresponding local educational agency, shall prepare a sampling plan for each schoolsite where lead sampling is required under subdivision (a). The community water system and the local educational agency may request assistance from the state board or any local health agency responsible for regulating community water systems in developing the plan.

(e) This section shall not apply to a schoolsite that is subject to any of the following:

(1) The schoolsite was constructed or modernized after January 1, 2010.

(2) The local educational agency of the schoolsite is currently permitted as a public water system and is currently required to test for lead in the potable water system.

(3) The local educational agency completed lead testing of the potable water system after January 1, 2009, and posts information about the lead testing on the local educational agency's public Internet Web site, including, at a minimum, identifying any schoolsite where the level of lead in drinking water exceeds 15 parts per billion.

(4) The local educational agency has requested testing from its community water system consistent with the requirements of this section.

(f) For purposes of this section, the following definitions apply:

(1) “Local educational agency” means a school district, county office of education, or charter school located in a public facility.

(2) “Potable water system” means water fountains and faucets used for drinking or preparing food.

> (g) This section shall become inoperative on July 1, 2019, and, as of January 1, 2020, is repealed.[75]

Thus, AB 746 requires preparation of a sampling plan, repeat testing when lead levels exceed 15 ppb, notification procedures based on sampling results, and requires the local educational agency to take action if lead levels exceed 15 ppb.[76] AB 746 does not require testing in the following situations: (1) The schoolsite was constructed or modernized after January 1, 2010; (2) The local educational agency of the schoolsite is currently permitted as a public water system and is currently required to test for lead; (3) The local educational agency completed lead testing after January 1, 2009, and posts this information on its website; (4) The local educational agency has requested testing from its community water system consistent with the requirements of AB 746.[77]

The State Board describes the requirements of AB 746 as follows:

> As of July 1, 2019, the Division of Drinking Water (DDW), in collaboration with the California Department of Education, has completed the initiative to test for lead in drinking water at all public K-12 schools. California Assembly Bill 746 (AB 746) published on October 12, 2017, effective January 1, 2018, *required community water systems to test lead levels, by July 1, 2019, in drinking water at all California public, K-12 school sites that were constructed before January 1, 2010*.
>
> Prior to the passage of AB 746, in early 2017, the DDW and Local Primacy Agencies issued amendments to the domestic water supply permits of approximately 1,200 community water systems so that schools that are served by a public water system could request assistance from their public water system to conduct water sampling for lead and receive technical assistance if an elevated lead sample was found. These amendments allowed the private schools to continue to request sampling and assistance after the passage of AB 746.[78]

According to a legislative analysis of AB 746, events in early 2017 raised concerns about the issue of lead in public school drinking water.

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[75] Exhibit K (5), Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) (AB 746).

[76] Exhibit K (5), Health and Safety Code section 116277(a) – (d) (as added by Stats. 2017, ch. 746) (AB 746); see also Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 7.

[77] Exhibit K (5), Health and Safety Code section 116277(e) (as added by Stats. 2017, ch. 746) (AB 746); see also Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 7.

[78] Exhibit K (8), State Water Resources Control Board, *Lead Sampling in Schools*, https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/leadsamplinginschools.html (accessed on January 30, 2023), page 1.

> In February 2017, the safety of drinking water was questioned after elevated levels of lead, copper, and bacteria were discovered at three campuses in the San Ysidro School District. In addition, Folsom Cordova Unified started testing water last year at schools built before 1960 that have galvanized steel pipes. The testing was prompted by elevated levels of copper, iron, and lead in water coming from a classroom tap in 2015 at Cordova Lane Center, which serves preschoolers and special education students.
>
> Because testing drinking water at schools is not mandatory, it is unknown whether these are isolated incidents or roughly representative of school districts around the state. Conducting sample tests at each schoolsite is one way to determine the scope of the problem.[79]

The same legislative analysis describes lead testing provided under the test claim order and the other substantially similar permit amendments as "more limited in scope compared to the bill's requirements."[80]

III. Positions of the Parties[81]

A. City of San Diego

The claimant alleges that the test claim order required the claimant's public water system to perform lead testing, at no charge, on the property of all schools that receive water from their system, upon request.[82] The claimant provides a detailed description of each of the new activities it was required to perform under the test claim order, which are not in dispute.[83] The claimant asserts that no prior federal or state law requires the activities described, and that the claimant does not receive any dedicated state or federal funds, or any other non-local agency funds dedicated to this program.[84]

The claimant provides argument and evidence that the City's operation of a public water system is not discretionary, in large part due to its long history of doing so, and because of the substantial investment that would be lost and substantial bond liability that would

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[79] Exhibit K (3), Concurrence in Senate Amendments, Analysis of AB 746, as amended September 8, 2017, page 3.

[80] Exhibit K (3), Concurrence in Senate Amendments, Analysis of AB 746, as amended September 8, 2017, page 2.

[81] Because the Commission finds that the test claim order does not impose a state-mandated program on the claimant, the Commission makes no findings on whether the test claim order results in increased costs mandated by the state or the applicability of Government Code section 17556(d). For further discussion of the parties' positions on those issues, refer to the two Draft Proposed Decisions, (Exhibits E and H).

[82] Exhibit A, Test Claim, filed January 11, 2018, page 14.

[83] Exhibit A, Test Claim, filed January 11, 2018, pages 18-50.

[84] Exhibit A, Test Claim, filed January 11, 2018, pages 16-17; 52-53.

immediately come due if the City elected to discontinue such service.[85] The claimant asserts that these facts constitute practical compulsion within the meaning of *Department of Finance v. Commission* (*Kern High School Dist.*) (2003) 30 Cal.4th 727.[86]

The claimant asserts that the test claim order imposes a new program or higher level of service, that it has incurred increased costs mandated by the state, and that the exceptions in Government Code section 17556 do not apply.[87]

The claimant filed comments on the Draft Proposed Decision agreeing with the draft proposed finding that the claimant is practically compelled to comply with the test claim order because if it failed to comply, "then the State Water Board could suspend or revoke its operating permit, which would have dire consequences…its 1.3 million residents would be left without water service."[88] Furthermore, if the claimant discontinued water service, the claimant would face "severe financial consequences," namely "a default on the City's approximately $890 million debt from bonds and other financing."[89]

At the December 1, 2023 hearing, the Commission heard from Deputy City Attorney Kevin King and two witnesses for the claimant, Adam Jones and Lisa Celaya. Mr. King stated that the claimant's witnesses would provide testimony on the penalties and legal and practical consequences of noncompliance with the test claim order and why selling the public water system is not an option, factors which Mr. King argued weigh in favor of finding practical compulsion here. Mr. King also argued that there is no requirement that the consequences of noncompliance be certain and that the Proposed Decision incorrectly added an immediacy requirement to the practical compulsion standard. Mr. Jones, Deputy Director of Finance for the claimant's Public Utilities Department, provided testimony on the potential consequences of the City defaulting on its outstanding water system debt, including the City needing to liquidate and sell assets funded by both the Water Utility Fund and the City's General Fund due to insufficient funds to repay the debt; the likelihood that the water system would have to be sold piecemeal and the challenges the City would face in operating portions of such a system; and the risk to the City's financial ratings and ability to issue bonds in the future.

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[85] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 8-11.

[86] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10.

[87] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, pages 2-9, 58. The claimant alleges its total costs for fiscal year 2016-2017 to be $351,577.26, and for fiscal year 2017-2018, $47,815.67.

[88] Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[89] Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 2.

Ms. Celaya, Executive Assistant Director for the claimant's Public Utilities Department, testified that the claimant cannot sell the public water system because it would be impossible for the City to find a buyer in light of the water system's size, complexity, and its interconnectedness with a water project that involves the City's wastewater treatment system (Pure Water San Diego project).

B. Department of Finance

Finance asserts that reimbursement is not required under article XIII B, section 6.[90] The test claim order does not result in increased costs mandated by the state because the order does not impose a new program or higher level of service and the claimants have fee authority sufficient to cover the alleged mandated costs of the claimed activities.[91] Finance did not comment on the whether the test claim order imposes a state-mandated program on the claimant under a theory of legal or practical compulsion.

C. State Water Resources Control Board

The State Board contends that the test claim order is not an unfunded state mandate.[92] The State Board argues that the test claim order does not impose a state-mandated program on the claimant and challenges the finding in the Draft Proposed Decision that the claimant is practically compelled to comply with the test claim order.[93] The State Board argues that *City of Sacramento v. State of California*, *Coast Community College Dist. v. Commission on State Mandates*, and *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) do not support a finding of practical compulsion here and that "[b]y finding that the City is practically compelled to comply with the test claim order, the Commission creates new law in an area where the Supreme Court has expressed caution."[94] The State Board contends that because the claimant is not required to operate a public water system, "the severe consequences and penalties the City claims will occur…may be avoided by transferring its public water system to another entity," and the claimant "has provided no evidence that an appropriate financing package could not be created" to address the claimant's outstanding bond debt.[95] Unlike the local agencies in *City of Sacramento*, who could not avoid the federal unemployment insurance requirements, the voluntary nature of

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[90] Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018, page 2.

[91] Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018, page 2.

[92] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 8.

[93] Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[94] Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, pages 1-2.

[95] Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 3.

operating a public water system means that the claimant has "a true choice" and is therefore not practically compelled to comply with the test claim order.[96]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service…

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[97] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[98]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

- A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[99]
- The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[100]

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[96] Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 3.

[97] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[98] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[99] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[100] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

- The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order.[101]
- The mandated activity results in the local agency or school district incurring increased costs mandated by the state within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[102]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[103] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[104] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[105]

A. This Test Claim Is Timely Filed Pursuant to Government Code Section 17551 and has a Potential Period of Reimbursement Beginning January 18, 2017.

Government Code section 17551(c) states that test claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[106] The effective date of the order is January 18, 2017.[107] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[108] Therefore, the Test Claim is timely filed.

Government Code section 17557(e) requires a test claim to be "submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." Because the Test Claim was filed on January 11, 2018, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2016.

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[101] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal3d 830, 835.

[102] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[103] *Kinlaw v. State of California* (1991) 53 Cal.3d 326, 335.

[104] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[105] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 (citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817).

[106] Government Code section 17551(c).

[107] Exhibit A, Test Claim, filed January 11, 2018, page 104 (test claim order).

[108] Exhibit A, Test Claim, filed January 11, 2018, page 1.

However, since the test claim order has a later effective date, the potential period of reimbursement for this claim begins on the permit's effective date, or January 18, 2017.

B. The Test Claim Order Does Not Impose a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the claimant's public water system permit adopted by the State Board, Order No. 2017PA-SCHOOLS for the City of San Diego PWS No. 3710020. The test claim order requires the claimant, as the operator of a "public water system" that serves a number of K-12 schools, to perform lead sampling upon request of a school at no cost to the school.[109] Under the order, upon request, the claimant must take samples to perform lead sampling, at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school's property, process those results at a certified laboratory, maintain records of the requests and the results, and provide the results, and if necessary, information to the school regarding possible remediation or other solutions if lead is detected in the fixtures above 15 parts per billion (ppb).

On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in *City of San Diego v. Commission on State Mandates*, finding that the test claim order imposes a new program or higher level of service in that "the provision of drinking water to schools is a peculiarly governmental function and the mandated testing of this water for lead is plainly a service to the public" and remanded the claim back to the Commission to determine the remaining issues.[110] The court interpreted "peculiar" to

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[109] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order) states that the water system is responsible for the following costs:

> a. Laboratory fees for all lead samples and reporting of the results to DDW and the school, and all laboratory coordination and instruction.
>
> b. All water system staff time dedicated to the tasks required by the provisions in this permit amendment.

[110] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 13. The Court stated as follows:

> On the City's appeal, we reverse. For reasons we will cover below, we conclude that the State Board's new condition requires local governments to support "a new program" within the meaning of article XIII B, section 6. But because the City's showing that the State Board's permit condition establishes a "new program" is a necessary, though not sufficient, showing for reimbursement, we stop short of holding that the state must reimburse the City for the costs of compliance. We leave it to the Commission to consider in the first instance whether reimbursement is appropriate on these facts following remand.

mean “particularly” but not “exclusively” associated with government, and explained that a function can be “peculiar to” government even if it is not exclusive to government. The court used as an example *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, where the Second District Court of Appeal “found that ‘the installation and maintenance of trash receptacles at transit stops’ is a ‘governmental function that provides services to the public,’ even though it acknowledged that ‘collecting trash at transit stops’ is ‘typically,’ but not exclusively, ‘within the purview of government agencies.’”[111] The court did not decide the separate issue of whether the *Lead Sampling in Schools* program is mandated by the State.[112] Accordingly, the Commission finds that the test claim order imposes a new program or higher level of service.

Nonetheless, for the reasons discussed below, the Commission finds that the test claim order does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

1. The Test Claim Order Imposes New Requirements on the City of San Diego.

a. <u>The new requirements imposed by the test claim order beginning January 1, 2017.</u>

The plain language of the test claim order requires the claimant, as a public water system, to:

Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 2.

[111] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), pages 9-10.

[112] Whether a statute or executive order imposes a state mandate is a separate required element to reimbursement. *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874. The Commission’s March 22, 2019 decision did not address the state mandate element. While the court of appeal’s decision uses the term “mandated” to describe the lead sampling activities required by the test claim order (“the provision of drinking water to schools is a peculiarly governmental function and the mandated testing of this water for lead is plainly a service to the public” [Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 13, emphasis added]), the sole issue before that court was whether the lead sampling requirements in the test claim order constituted a new program or higher level of service. Because the court did not have jurisdiction over and therefore did not decide the separate issue of whether the *Lead Sampling in Schools* program is mandated by the State, the court’s decision does not prevent the Commission from now exercising its sole and exclusive authority to make a finding on the separate required element of whether the test claim order imposes a state mandate. *Kinlaw v. State of California* (1991) 53 Cal.3d 326, 335; Government Code section 17551, 17552.

1. Submit to the State Board's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools served water through a utility meter [by the claimant] by July 1, 2017;[113]
2. If a school representative requests lead sampling assistance in writing by November 1, 2019:[114]
    a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[115]
    b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[116]
    c. Collect one to five samples at each school, from regularly used drinking fountains, cafeteria or food preparation areas, or reusable bottle filling stations, selected according to the sampling plan, and using the sampling guidance provided in Appendix A;[117]
    d. Collect lead samples during the school year, on a Tuesday, Wednesday, Thursday, or Friday on a day that school is in session and has been in session for at least one day prior to the day of sampling;[118]
    e. Ensure samples are collected by an adequately trained water system representative;[119]
    f. Submit the samples to an ELAP certified laboratory for analysis;[120]
    g. Require the laboratory to submit the data electronically to DDW;[121]
    h. Provide a copy of the results to the school representative;[122]
    i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[123]
    j. If an initial sample shows an exceedance of 15 ppb:

[113] Exhibit A, Test Claim, filed January 11, 2018, page 105 (test claim order).

[114] Exhibit A, Test Claim, filed January 11, 2018, page 105 (test claim order).

[115] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[116] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[117] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[118] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[119] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[120] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[121] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[122] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[123] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

- Collect an additional sample within 10 days if the sample site remains in service;[124]
- Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[125]
- Collect at least one more lead sample at a sample site where the school has completed some corrective action following an initial lead sample result over 15 ppb;[126]

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[127]

l. Do not release the lead sampling data to the public for 60 days following receipt of the initial lead sampling results unless in compliance with a Public Records Act request for specific results;[128]

m. Discuss the lead sample results with the school prior to releasing the sample results to the public, and within 10 days of receiving the results from the laboratory;[129]

n. Communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential corrective actions if the results confirm lead levels above 15 ppb.[130] ***The water system is not responsible for the costs of any corrective action or maintenance***;[131]

o. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[132]

p. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[133]

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[124] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[125] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[126] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order).

[127] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order).

[128] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order).

[129] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order).

[130] Exhibit A, Test Claim, filed January 11, 2018, page 108 (test claim order).

[131] Exhibit A, Test Claim, filed January 11, 2018, page 108 (test claim order).

[132] Exhibit A, Test Claim, filed January 11, 2018, page 108 (test claim order).

[133] Exhibit A, Test Claim, filed January 11, 2018, page 108 (test claim order).

Both the claimant and the State Board agree that these requirements are new, as compared against prior law.[134]

The Commission finds that the requirements imposed by the test claim order are new. Prior law, under the federal and state Safe Drinking Water Act and the federal and state Lead and Copper Rule, all address, in some manner, the existence of lead in drinking water. But none of those provisions specifically requires local government to assist schools with lead sampling at drinking water fountains and other fixtures. As noted, schools that operate their own water systems or that receive water from groundwater wells were already subject to some mixture of lead sampling requirements and control measures under existing law. The requirements of the test claim order for the claimant, City of San Diego, as a public water system that supplies water to K-12 schools, to sample one to five drinking water fixtures on school property upon request of the school, are new. Furthermore, while the test claim order is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned public water systems, the test claim order is issued only to the claimant, the City of San Diego. Therefore, the new requirements imposed by the test claim order are imposed solely on the City of San Diego.

b. <u>However, beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227 and not by the test claim order.</u>

Under the test claim order, the claimant's public water system must assist those schools to which it serves drinking water with "at least one or more of grades Kindergarten through 12th grade," when a request for one-time assistance is made in writing by an authorized school representative by November 1, 2019.[135] "Authorized school representative" is defined as "the superintendent or designee of a school, governing board or designee of a charter school, or administrator or designee of a private school."[136]

The State Board explained in its frequently asked questions documents regarding the lead sampling program that the "schools" which can request lead sampling include all K-

[134] See Exhibit A, Test Claim, filed January 11, 2018, pages 16-17 ("The City's existing Permit and its prior amendments do not require [the claimant] to perform lead testing at K-12 schools."); Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, pages 5-7 (Explaining that under prior federal and state regulations community water systems, such as operated by the claimant, were required to monitor and sample for lead throughout their systems, but mostly by sampling private residences).

[135] Exhibit A, Test Claim, filed January 11, 2018, pages 105-106 (test claim order).

[136] Exhibit A, Test Claim, filed January 11, 2018, pages 105-106 (test claim order).

12 schools in the water system's service area that are listed in the California School Directory, including both private and public K-12 schools.

> **Which schools can request lead testing of their drinking water?**
>
> The DDW permit action requires community water systems to assist any school in their service area that is listed in the California School Directory. This directory includes schools for grades K-12, including private, charter, magnet and non-public schools. The directory does *not* include preschools, daycare centers, or postsecondary schools.[137]

From January 1, 2018 through July 1, 2019, however, Health and Safety Code section 116277 required a community water system[138] serving any public school constructed or modernized prior to January 1, 2010, to test for lead in the school's potable water system[139] by July 1, 2019, except for schools exempted from the requirement. There is no requirement in section 116277 that a school first make a request for testing.

The requirements imposed on a public water system under Health and Safety Code section 116277 are substantially similar to those required by the test claim order. Both require a public water system to work collaboratively with the school to prepare a sampling plan; to test for lead in the school's drinking water system; to conduct additional testing if lead levels exceed 15 ppb; and to share test results with the school.

In addition, by its plain language, Health and Safety Code section 116277 applies only to "schoolsite[s] of a local educational agency with a building constructed or modernized before January 1, 2010"[140] and does *not* apply if the "schoolsite was constructed or modernized after January 1, 2010."[141] Section 116277 defines "local educational agency" as "a school district, county office of education, or charter school located in a

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[137] Exhibit A, Test Claim, filed January 11, 2018, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*), emphasis in original.

[138] "Community water system" is a public water system that supplies water to the same population year-round, and would include the claimant. (See Health and Safety Code section 116275(i).)

[139] Exhibit K (5), Health and Safety Code section 116277(f)(2) (as added by Stats. 2017, ch. 746) (AB 746), which defines "potable water system" as "water fountains and faucets used for drinking or preparing food," which is substantially similar to the test claim order's requirement that samples be collected at "regularly used drinking fountains, cafeteria or food preparation areas, or reusable bottle filling stations." Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[140] Exhibit K (5), Health and Safety Code section 116277(a)(1) (as added by Stats. 2017, ch. 746) (AB 746).

[141] Exhibit K (5), Health and Safety Code section 116277(e)(1) (as added by Stats. 2017, ch. 746) (AB 746).

public facility."[142] Thus, section 116277 applies to all public schools constructed or modernized before January 1, 2010, but does *not* apply to those public schools constructed or modernized after January 1, 2010, or to private schools. As indicated in the Background, the State Board's summary of Health and Safety Code section 116227 agrees that the requirements of section 116227 apply only to public schools.[143] Moreover, of those public schools constructed or modernized before January 1, 2010, only those that already completed lead testing before January 1, 2009, or requested lead testing before the enactment of section 116227 (i.e. those that requested testing under the test claim order before January 1, 2018) are exempt from the requirements of section 116227.[144]

Therefore, even in the absence of the test claim order, beginning January 1, 2018, the claimant is required by Health and Safety Code section 116227 to conduct lead testing on all public schools constructed or modernized before January 1, 2010 (except those that previously requested lead testing), and complete that testing by July 1, 2019. No written request by a school is required to trigger this duty.

Finally, the test claim order requires the claimant to submit to the State Board's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools to which it serves water by July 1, 2017, which is *prior* to the effective date of Health and Safety Code section 116277.[145] Section 116277 was not effective until January 1, 2018 and contains no similar requirement. Thus, this requirement is imposed solely by the test claim order.

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[142] Exhibit K (5), Health and Safety Code section 116277(f)(1) (as added by Stats. 2017, ch. 746) (AB 746).

[143] Exhibit K (8), State Water Resources Control Board, *Lead Sampling in Schools*, https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/leadsamplinginschools.html (accessed on January 30, 2023), page 1 ("As of July 1, 2019, the Division of Drinking Water (DDW), in collaboration with the California Department of Education, has completed the initiative to test for lead in drinking water at all public K-12 schools. California Assembly Bill 746 (AB 746) published on October 12, 2017, effective January 1, 2018, required community water systems to test lead levels, by July 1, 2019, in drinking water at all California public, K-12 school sites that were constructed before January 1, 2010.").

[144] Exhibit K (5), Health and Safety Code section 116277(e) (as added by Stats. 2017, ch. 746) (AB 746). Section 116277(e) also exempts those schools whose local educational agency is currently permitted as a public water system and is currently required to test for lead in the potable water system. The claimant would not have to provide lead testing services to these schools under the test claim order either, since the water is supplied by the local educational agency and not the claimant.

[145] Exhibit A, Test Claim, filed January 11, 2018, page 105 (test claim order). The effective date of Health and Safety Code section 116277 is January 1, 2018.

Accordingly, beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227, and not by the test claim order.

2. The Test Claim Order Does Not Impose a State-Mandated Program on the Claimant.

The courts have explained that even though the test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[146] When local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required.[147]

The courts have identified two distinct theories for determining whether a program is compelled, or mandated by the state: legal compulsion and practical compulsion.[148] Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6.[149] In the recent case of *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815, the California Supreme Court reiterated the legal standards applicable to these two theories of mandate:

> Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service… Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.

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[146] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731.

[147] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 743.

[148] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807, 815.

[149] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1366.

> Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.[150]
>
> * * *
>
> "[P]ractical compulsion," [is] a theory of mandate that arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply.[151]

The Draft Proposed Decision found that while the claimant was not legally compelled to comply with the test claim order, the claimant was "practically compelled" and therefore mandated by the state to comply with the new requirements imposed by the test claim order. This finding was based on the fact that the claimant has provided water continuously for over 120 years to its now more than 1.3 million residents, with its six largest consumers being federal, state, and local agencies. The Draft Proposed Decision further found that "the claimant incorporated its municipal water 'agency' on July 21, 1901, when the voters approved the issuance of bonds to purchase the distribution system from a private water company, [fn. omitted] and that subsequent 'bonds and other financing secured over the years to maintain the water system in good working order,' totaling approximately $890 million as of November 2018, would immediately come due if the claimant sought to discontinue service [fn. omitted]."[152]

After further review and consideration, the Commission finds that the record does not contain substantial evidence showing that the claimant will face certain and severe penalties or other draconian consequences, as is required for a finding of practical compulsion, if it decides not to participate in the underlying program and provide water service to City residents. While a long history of operating a public water system is a factor that supports a showing of practical compulsion under *City of Sacramento v. State of California*, the duration of participation in a voluntary program is just one factor and is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.[153]

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[150] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815 (internal quotation marks and citations omitted).

[151] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[152] Exhibit H, Draft Proposed Decision, issued March 23, 2023, page 52.

[153] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76 (a finding of practical compulsion "must depend on such factors as the nature and purpose of the…program; whether its design suggests an intent to coerce; *when state and/or local participation began*; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of

Moreover, the record does not support the claimant's assertion that if it ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars. In *Kern High School Dist*., the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[154] The evidence does not support that finding here. As explained below, the California Constitution provides authority, but does not require local government to become a public water supplier. The claimant is not the debt-holder on the bond funds, and the funds received from the bonds and the Drinking Water State Revolving Fund loans for the improvements to its water system are paid from the Water Utility Fund and, thus, the claimant's general fund is generally not at risk. In the event of default, the principal amount of the debt owing *may* come immediately due, but that's not certain to occur. The State, as the holder of the senior debt from the Drinking Water State Revolving Fund, has priority over the bond debt holders, and is not required to make such a demand. And the bond debt holders have discretion whether to vote collectively to have the debt declared immediately due and payable. Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.

And finally, while Health and Safety Code section 116625 gives the State Board the authority to suspend or revoke the claimant's operating permit for noncompliance with the test claim order, the statute is permissive not mandatory, meaning that the State Board is authorized but not required to enforce a permit violation.

Thus, the Commission finds that the test claim order does not impose a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

a. Because a local government agency is permitted but not required to operate a water system, the claimant is not legally compelled to comply with the test claim order.

The parties agree that the claimant is not legally compelled to comply with the test claim order since the claimant's participation in the underlying program to provide water service is not mandated by state law.[155] Under Article XI, section 9(a) of the California

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nonparticipation, noncompliance, or withdrawal," emphasis added). See also, *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[154] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 749 (internal quotation marks omitted).

[155] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10 ("the City is not legally obligated to provide water service under State law"); Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 2 ("the City is not legally compelled to comply with the lead testing requirements in [the test claim order]").

Constitution, a "municipal corporation" *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.[156] The courts have interpreted article XI, section 9 (previously section 19) as granting authority rather than imposing a duty.[157] Government Code section 38742 also provides that the legislative body of any city "may" contract for supplying the city with water for municipal purposes; or "may" "[a]cquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes of the city." When interpreting statutes and constitutional provisions, "shall" is mandatory, and "may" is permissive.[158]

The test claim order is one of over 1,100 nearly identical permit amendments issued to both privately- and publicly-owned public water systems serving K-12 schools. Because state law authorizes, but does not require, the claimant to provide water services or to operate a public water system, the requirements imposed by the test claim order result from the claimant's "voluntary or discretionary decision to undertake an activity" and therefore are not legally compelled.[159]

b. <u>The record does not contain substantial evidence that the claimant will face certain and severe penalties or other draconian consequences for failure to comply with the test claim permit such that it has no reasonable alternative but to comply.</u>

The courts have acknowledged the possibility that a state mandate may be found in the absence of legal compulsion "when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply."[160] Indeed, case precedent establishes that where the plain language of the test claim order falls short of legal compulsion, practical compulsion may be found if there is a clear showing in the law or substantial evidence in the record that a failure to perform the program activities will result in certain and severe penalties or other draconian

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[156] California Constitution, article XI, section 9(a).

[157] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274.

[158] Government Code section 14.

[159] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

[160] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; see also *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 754 (where no "legal" compulsion exists, "practical" compulsion may be found if the local agency faces "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences if they fail to comply with the statute); *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1365-1367 (practical compulsion requires a "concrete showing" that a failure to engage in the activities at issue will result in "severe adverse consequences").

consequences, such that the local government agency has no true alternative but to comply.[161] However, where a local government agency participates "voluntarily," i.e., without legal or practical compulsion, in a program with a rule requiring increased costs, the program cannot be said to be mandated by the state.[162]

In *Coast Community College Dist.* (2022)*,* the Supreme Court reaffirmed the viability of practical compulsion as a theory of state mandate when it specifically directed the Court of Appeal to consider on remand whether community college districts were practically compelled to comply with the funding entitlement regulations at issue.[163] The Commission had denied reimbursement, finding that the regulations were not mandated by the state, and the trial court agreed. However, the Court of Appeal concluded that the districts were legally compelled to comply with the regulations on the basis that the they applied to the districts' underlying core functions, which state law compelled the districts to perform.[164] The Supreme Court reversed, holding that the standards set forth in the regulations were insufficient to legally compel the districts to adopt them.[165] The court explained that because the districts were not legally required to adopt the standards described in the regulations, and instead faced the risk of "potentially severe financial consequences" if they elected not to do so, legal compulsion was inapplicable. The court characterized the appellate court's ruling as premised upon a determination that the districts had no "true choice" but to comply with the regulations at issue, which the court explained "sound in *practical*, rather than *legal*, compulsion."[166] In drawing this distinction and remanding the case to the Court of Appeal to consider in the first instance whether the districts established practical compulsion, the court relied upon *City of Sacramento* for the proposition that practical compulsion exists where ""[t]he

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[161] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76; Government Code section 17559.

[162] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365–1366.

[163] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 822 ("Having now rejected the Court of Appeal's conclusion regarding legal compulsion, we find it 'appropriate to remand for the [court] to resolve ... in the first instance' whether the districts may be entitled to reimbursement under a theory of nonlegal compulsion").

[164] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 819.

[165] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807.

[166] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807, emphasis in original.

alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards".)[167]

In *City of Sacramento v. State of California* (1990), the Supreme Court addressed practical compulsion in the context of a 1976 federal law requiring states, for the first time, to provide unemployment insurance to public employees, characterized as employing "a 'carrot and stick' to induce state compliance."[168] The state could comply with federal law and obtain a federal tax credit and administrative subsidy — a carrot — or not comply and allow its businesses to face double unemployment taxation by both state and federal governments — a stick.[169] California passed a law conforming to the requirements of the federal law. The City of Sacramento and the County of Los Angeles challenged the state law asserting that it was a reimbursable state mandate.[170] The state opposed the request for reimbursement on the ground that the legislation imposed a federal mandate and, thus, reimbursement was not required.[171] The state argued that strict legal compulsion was not required to find a federal mandate and that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic discretion to refuse.[172] The court agreed and found that the immediate penalty of double taxation for not complying with the federal law was "draconian," that "the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses," and that "[t]he alternatives were "so far beyond the realm of practical reality[,] that they left the state 'without discretion' to depart from federal standards."[173]

> As the drafters and adopters of article XIII B must have understood, certain regulatory standards imposed by the federal government under "cooperative federalism" schemes are coercive on the states and localities in every practical sense. The instant facts amply illustrate the point. Joint federal-state operation of a system of unemployment compensation has been a fundamental aspect of our political fabric since the Great Depression. California had afforded federally "certified" unemployment insurance protection to its workers for over 40 years by the time Public Law 94-566, chapter 2/78, and article XIII B were adopted. Every other state also operated such a system. If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and

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[167] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807.

[168] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 72.

[169] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.

[170] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58.

[171] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 65-66, 71.

[172] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 71.

[173] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 74.

> federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.
>
> Plaintiffs and their amici curiae suggest California could have chosen to terminate its own unemployment insurance system, thus leaving the state's employers faced only with the federal tax. However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends.
>
> Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B.[174]

Thus, the court concluded that the state acted in response to a federal mandate for purposes of article XIII B, section 6, and reimbursement was not required.

The court further explained that the practical compulsion determination "must depend on such factors as the nature and purpose of the…program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal."[175]

In *Kern High School Dist.*, the California Supreme Court addressed an amendment to state open meeting laws to require school site councils and advisory bodies formed under state and federal grant programs to post a notice and an agenda of their meetings.[176] The court rejected the school districts' "assertion that they have been legally compelled to incur notice and agenda costs, and hence entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, without regard to whether claimant's participation in the underlying program is voluntary or compelled."[177] The court determined that school districts elected to participate in the school site council programs to receive funding associated with the programs and, thus, were not legally compelled to incur the notice

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[174] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 73-74.

[175] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76.

[176] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 730.

[177] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 731.

and agenda costs.[178] The court stated that it would "not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds."[179] However, the circumstances in *Kern High School Dist.* did not rise to the level of practical compulsion, since a school district that elects to discontinue participation in the grant programs does not face certain and severe penalties, such as double taxation or other draconian consequences, but simply must adjust to the withdrawal of grant money.[180]

In *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, the court determined that the Peace Officers Procedural Bill of Rights Act (POBRA), which imposed requirements on all law enforcement agencies, did not constitute a state-mandated program on school districts. The court found that because school districts are authorized, but not required, by state law to hire peace officers, there was no legal compulsion to comply with POBRA.[181] In considering whether the districts were practically compelled to comply, the court found that it was "not manifest on the face of the statutes cited nor is there any showing in the record that hiring its own peace officers, rather than relying upon the county or city in which it is embedded, is the only way as a practical matter to comply."[182] The court emphasized that practical compulsion requires a *concrete* showing that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences, leaving the districts no choice but to comply.[183]

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[178] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 744-745.

[179] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 752.

[180] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754.

[181] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[182] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367.

[183] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367 ("The Commission submits that this case should be distinguished from *City of Merced* and *Kern High School Dist.* because the districts "employ peace officers when necessary to carry out the essential obligations and functions established by law." However, the "necessity" that is required is facing " 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences."…That cannot be established in this case without a *concrete showing* that reliance upon the general law enforcement resources of cities and counties will result in such severe adverse consequences"). Emphasis added.

Here, the claimant argues that it "has no practical alternative but to comply" with the test claim order,[184] based on the following factual allegations:

- The claimant cannot "take back a decision" made more than 120 years ago and stop providing water to its residents because "[c]ities must provide for the health, safety, and welfare of their residents, and simply put, people cannot survive without water."[185]
- If the claimant ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars.[186]
- If the claimant fails to comply with the test claim order, the State Board could suspend or revoke its operating permit, which would prevent the claimant from operating its water system and leave 1.3 million residents without water service.[187]

These arguments are addressed below.

i. The claimant's long history of operating a public water system is one factor, but is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.

In alleging that it is practically compelled and, thus, mandated by the state to comply with the new requirements imposed by the test claim order, the claimant relies on the fact that "[t]he City "decided" to become a municipal water agency on July 21, 1901, when San Diego voters approved the issuance of bonds to purchase the water distribution system from a private water company."[188] In support, the claimant cites to a 1908 publication entitled *History of San Diego, 1542-1908*, which states, as alleged, "the system of [water] distribution within the city limits became the property of the

[184] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 9-11; see also Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[185] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 9.

[186] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 10-11.

[187] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10; Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[188] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 9.

municipality, a bond issue of $600,000 having been voted for its acquisition."[189] The claimant argues that because it began providing water to the City's residents prior to the 1911 Constitutional amendment specifically authorizing municipalities to provide water service,[190] "the City started providing water service *likely* before there was even a requirement to obtain a permit from the State to operate a municipal water system."[191] The City asserts that it "cannot take back a decision made almost 120 years ago and stop providing water to its [1.3 million] residents [including federal, state, and local agencies]."[192]

Indeed, the Third District Court of Appeal noted in its unpublished decision in this matter that "[m]unicipal authorities in San Diego, similarly, began supplying residents with water as early as 1834 when the Mexican government established the Pueblo of San Diego. (*City of San Diego v. Cuyamaca Water Co.* (1930) 209 Cal. 105, 111, 115 [" 'during the entire term of its existence,' " the " 'Pueblo of San Diego and the inhabitants thereof . . . enjoyed, asserted and exercised a preference or prior right to the use of the waters of [the] San Diego River for the benefit of said pueblo and the inhabitants thereof' "].).[193]

In *City of Sacramento*, the Supreme Court determined that a finding of practical compulsion *depends on a number of factors* to determine if practical compulsion applies, and not just when participation began. These factors include:

> the nature and purpose of the…program; whether its design suggests an intent to coerce; *when state and/or local participation began*; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.[194]

In this respect, the State Board contends that even if the City has been providing water for a long time, there is no evidence of practical compulsion (certain and severe penalties or other draconian consequences) will occur if the claimant stopped providing

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[189] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 89 (William E. Smythe, *History of San Diego, 1542-1908*, Part Four, Chapter 4: Water Development (1908)).

[190] The 1911 constitutional amendment refers to what is now article XI, section 9 of the California Constitution.

[191] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 9, emphasis added.

[192] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 9.

[193] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 11.

[194] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76, emphasis added.

water service since the City can transfer its public water system to another entity. The State Board urges the Commission to *not* find a state mandate as follows:

> Moreover, and this underscores the challenge in applying the practical compulsion theory to state mandates under article XIII B, section 6, the severe consequences and penalties the City claims will occur following noncompliance with the test claim order requirements may be avoided by transferring its public water system to another entity. As has been established, the City has no obligation to operate a public water system, regardless of how large or complex the public water system has become. Indeed, just as no federal or state law requires the City to operate a public water system, no federal or state law prohibits the City from transferring its public water system to another public or private entity. By transferring ownership of the water system, the customers would continue to receive drinking water and the City would avoid any penalties imposed by the State Water Board. In terms of the bond debt that may come due, the City has provided no evidence that an appropriate financing package could not be created to address any outstanding debt as part of a large commercial transaction.[195]

Thus, while the record shows that the claimant has a long history of providing water service to the residents of the City of San Diego, dating back to before the California Constitution was amended in 1911 to specify that both private and public entities are authorized to provide water service, that factor, alone, is not determinative.[196]

ii. The claimant has not provided substantial evidence showing with any certainty that it would face immediate repayment of its debt or other certain and severe consequences if it stopped operating its water system.

The claimant asserts it has no practical alternative to continuing to operate its public water system because if it discontinues water service, it will face severe financial consequences in the form of immediate repayment of nearly one billion dollars in debt incurred to maintain the water system.[197] The claimant offers the following facts and evidence in support:

1. As of November 15, 2018, the cumulative amount of water system financing debt was approximately $890 million, consisting of $78 million in senior obligations

[195] Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 3.

[196] The California Constitution was amended in 1911 to add what is now article XI, section 9.

[197] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 11.

and $812 million in subordinate obligations.[198] Evidence cited: Official Statement, City of San Diego Subordinated Water Revenue Bonds, Series 2018A (Official Statement), page 5.[199]

2. Repayment of the water system financing debt is scheduled to run through 2050.[200] Evidence cited: Official Statement, City of San Diego Subordinated Water Revenue Bonds, Series 2018A, Debt Service Schedule, page 24.[201]
3. As a condition of receiving the water system financing, the claimant is required to operate and maintain its water system and dedicate net system revenues towards paying back the borrowed money plus interest.[202] Evidence cited: Official Statement, City of San Diego Subordinated Water Revenue Bonds, Series 2018A, pages 13-14; 2009 Amended and Restated Master Installment Purchase Agreement, sections 5.01, 6.07.[203]
4. Discontinuing water service would be considered an "Event of Default," upon which owners of 25 percent or more of the outstanding principal amount can "declare the entire unpaid principal amount thereof and the accrued interest thereon to be due and payable immediately," amounting to nearly one billion dollars.[204] Evidence cited: 2009 Amended and Restated Master Installment Purchase Agreement, sections 8.01(b), 8.01(d).[205]

The Series 2018A bonds referenced above are Subordinated Water Revenue Bonds issued in 2018 by the Public Facilities Financing Authority, a joint powers agency formed by the claimant and others to finance public capital improvements, including

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[198] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 10-11.

[199] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 96-324 (Official Statement).

[200] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 11.

[201] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 96-324 (Official Statement).

[202] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 11.

[203] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 96-324 (Official Statement), 648-716 (Master Agreement).

[204] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 11.

[205] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 648-716 (2009 Amended and Restated Master Installment Purchase Agreement (MIPA)).

improvements to the claimant's water system.[206] The official statement shows that as of November 15, 2018, the outstanding principal bond debt was $812,654,000, consisting of bonds issued by the Authority in 2012 and 2016, which are subordinate to senior obligations.[207] The City also has "senior obligations" of $78,332,490 in loans from the Drinking Water State Revolving Fund (the "Senior SRF Loans").[208] Thus, the total water system financing debt was approximately $890 million as of November 2018.

However, as explained below, the claimant's assertion that it "would face *immediate* repayment of bonds and other financing" in the amount of roughly $890 million is unsupported by the evidence.

With respect to the bond debt, the official notice for the 2018 bonds explains that the Public Facilities Financing Authority was established pursuant to the Third Amended and Restated Joint Exercise of Powers Agreement dated as of January 1, 2013.[209] That agreement provides that the bonds issued by the Authority, together with the interest and premium, if any, "shall not be deemed to constitute a debt of the City."[210] The Bonds shall be only special obligations of the Authority, and the Authority "shall under no circumstances be obligated to pay the Bonds or the respective project costs except from revenues and other funds pledged therefor."[211] In addition, neither the City nor the Authority "shall be obligated to pay the principal of, premium, if any, or interest on the Bonds, or other costs incidental thereto, except from the revenues and funds pledged therefor . . ."[212] This language is consistent with the following statement in the 2018 bond package:

> The 2018 Bonds are limited obligations of the Authority payable solely from and secured solely by the Subordinated Revenues pledged therefor and amounts on deposit in the Subordinated Bonds Payment Fund established under the Indenture. The obligation of the City to make 2018

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[206] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 114; see also Gov. Code, § 6500 et seq.; *San Diegans for Open Government v. Public Facilities* (2021) 63 Cal.App.5th 168, 173.

[207] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 112, 190 (Official Statement).

[208] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 112, 190 (Official Statement).

[209] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 114 (Official Statement).

[210] Exhibit K (12), Third Amended and Restated Joint Exercise of Powers Agreement Creating the Public Facilities Financing Authority of the City of San Diego, pages 7-8.

[211] Exhibit K (12), Third Amended and Restated Joint Exercise of Powers Agreement Creating the Public Facilities Financing Authority of the City of San Diego, pages 7-8.

[212] Exhibit K (12), Third Amended and Restated Joint Exercise of Powers Agreement Creating the Public Facilities Financing Authority of the City of San Diego, page 8.

> Subordinated Installment Payments under the 2018 Supplement does not constitute an obligation of the City for which the City is obligated to levy or pledge any form of taxation or for which the City has levied or pledged any form of taxation. Neither the full faith and credit of the Authority, the City, the County of San Diego (the "County"), the State of California (the "State"), or any political subdivision of the State nor the taxing power of the City, the County, the State, or any political subdivision of the State is pledged to the payment of the principal of or interest on the 2018 Bonds. The Authority has no taxing power. *Neither the 2018 Bonds nor the obligation of the City to make 2018 Subordinated Installment Payments constitutes an indebtedness of* the Authority, *the City*, the County, the State, or any political subdivision of the State within the meaning of any constitutional or statutory debt limitation or restriction.[213]

This type of transaction is authorized by the Joint Exercise of Powers Act (Government Code section 6500 et seq.), and has been upheld by the courts, including for the City of San Diego and the Public Facilities Financing Authority, as follows:[214]

> The Supreme Court in *Rider* and this court in *San Diegans* previously approved the type of financial transaction at issue here. (Citations omitted.) The Supreme Court explained that a joint powers agency, like the Financing Authority, has the power under state law to issue bonds in its own name. (Citations omitted.) It therefore need not comply with the limitations that would apply to City-issued bonds, such as voter approval: "[W]hen the Financing Authority issues bonds, it does so independently of any common powers delegated in the joint powers agreement, and therefore it is not subject to the limitations that would apply to the City, including the two-thirds vote requirements in the [California] Constitution and the City's charter." (Citation omitted.) "[T]he Financing Authority is a separate legal entity from the City [citation], and the Financing Authority's debts are not the City's debts [citation]." (Citations omitted.)
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> In *San Diegans*, this court followed *Rider* even where, as here, the Financing Authority is under the control of the City. We explained, "*Rider* made clear that for purposes of the debt limitation provisions, when a financing authority created to issue bonds 'has a genuine separate existence from the City,' 'it does not matter whether or not the City "essentially controls" the [f]inancing [a]uthority.' " (Citations omitted.) "Under the Joint Exercise of Powers Act, the Financing Authority has a genuine separate existence from the City. [Citation.] The Successor

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[213] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 111, 118 (Official Statement).

[214] See *Rider v. City of San Diego* (1998) 18 Cal.4th 1035, 1040; *San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2021) 63 Cal.App.5th 168, 175.

> Agency and the Housing Authority also have genuine separate existences from the City. [Citations.] In recognition of the separate status, the [Financing Authority's governing document] specifies that bonds are not a debt of the City, the Successor Agency, or the Housing Authority, and are only special obligations of the Financing Authority to be paid from revenues and other funds pledged therefor. This arrangement comports with *Rider.*" (Citation omitted.)
>
> Along with its approval, the Supreme Court noted, "We are not naive about the character of this transaction. If the City had issued bonds ..., the two-thirds vote requirement would have applied. Here, the City and the Port District have created a financing mechanism that matches as closely as possible (in practical effect, if not in form) a City-financed project, but avoids the two-thirds vote requirement. Nevertheless, the law permits what the City and the Port District have done. Plaintiffs are correct that this conclusion allows local governments to burden taxpayers with potentially high costs that voters have not approved, but local governments impose similar burdens on taxpayers every time they enter into long-term leases involving property of substantial value. We have long held that the two-thirds vote requirement does not apply to these leases so long as the obligation to pay rent is contingent on continued use of the leased property." (Citations omitted.)[215]

Although the debt to the bond holder is that of the Authority's to be paid from "revenues and other funds pledged therefor," the 2018 bond package explains that the "revenues and other funds pledged therefor" are from the rates and charges for the City's water service (the Water Utility Fund), which are paid to the Authority pursuant to a Master Installment Purchase Agreement (Master Agreement).[216] The Master Agreement is between the City of San Diego and the San Diego Facilities and Equipment Leasing Corporation and relates to installment payments from the net system revenues from the claimant's Water Utility Fund.[217] The San Diego Facilities and Equipment Leasing Corporation "is a nonprofit charitable corporation duly organized and existing under and by virtue of the laws of the State. The Corporation was organized to acquire, lease, and/or sell to the City real and personal property to be used in the municipal operations of the City. The Corporation was formed at the request of the City to assist in financings

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[215] *San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2021) 63 Cal.App.5th 168, 175-176, citing to *Rider v. City of San Diego* (1998) 18 Cal.4th 1035 and *San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416.

[216] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 111, 118, 121 (Official Statement).

[217] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 651 (Master Agreement).

such as the installment purchase financing described [in the Official Statement] and is governed by its own Board of Directors."[218]

Under the Master Agreement, "the City agrees and covenants that all System Revenues shall be received by the City in trust and shall be deposited when and as received in the Water Utility Fund, which fund the City agrees and covenants to maintain so long as any Installment Payment Obligations remain unpaid, and all moneys in the Water Utility Fund shall be so held in trust and applied and used solely as provided herein."[219] Payments from the City for the bond debt are made to the nonprofit corporation, which then assigns its right to receive the installment payments to the Authority.[220] According to the 2018 bond package, the "City has covenanted to ensure that net revenues [from the Water Utility Fund] are equal to at least 1.1 times maximum annual debt service on all Obligations in each Fiscal Year."[221] In addition, the City agreed "to make Installment Payments solely from Net System Revenues [i.e. the Water Utility Fund] until such time as the Purchase Price for any Components has been paid in full (or provision for the payment thereof has been made pursuant to the Master Installment Purchase Agreement)."[222] Thus, since the revenues come solely from Water Utility Fund, the claimant's general fund revenues are not at risk.

The remaining $78,332,490 in outstanding indebtedness pertains to loans from the Drinking Water State Revolving Fund (DWSRF).[223] The claimant has not provided evidence explaining the nature of these funds. The DWSRF program was established by a 1996 amendment to the federal Safe Drinking Water Act.[224] As of July 1, 2014, the State Board implements the DWSRF program, which provides low-interest loans and other financial assistance to public water systems for infrastructure improvements using

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[218] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 113 (Official Statement).

[219] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 672 (Master Agreement, section 5.02).

[220] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 113-114 (Official Statement).

[221] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 111 (Official Statement).

[222] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 121 (Official Statement).

[223] As of November 15, 2018, there was $78,332,490 in senior obligations for loans from the Drinking Water State Revolving Fund. Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 112 (Official Statement).

[224] Exhibit K (4), Excerpt from State Water Resources Control Board, Policy for Implementing the Drinking Water State Revolving Fund: https://www.waterboards.ca.gov/drinking_water/services/funding/documents/srf/dwsrf_policy/dwsrf_policy_final.pdf (accessed on June 16, 2023), amended December 3, 2019, page 3.

federal and state funds.[225] A publicly available DWSRF Funding Agreement between the State and the City of San Diego (Funding Agreement) shows that the claimant received a direct loan from the State for $18 million in DWSRF funds.[226] The Funding Agreement specifies that the DWSRF loan constitutes a "parity obligation" under the Master Installment Purchase Agreement, and thus, is considered a senior obligation to the bond debt.[227] Additionally, under the terms of the Funding Agreement, the claimant agreed "to repay the entire Principal Amount of the Loan, together with all interest thereon, as set forth in this Agreement, from Water Enterprise Fund rates, charges and assessments, and financing proceeds, and Supplier hereby pledges said Water Enterprise Fund rates, charges and assessments, and financing proceeds as collateral

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[225] Exhibit K (4), Excerpt from State Water Resources Control Board, Policy for Implementing the Drinking Water State Revolving Fund: https://www.waterboards.ca.gov/drinking_water/services/funding/documents/srf/dwsrf_policy/dwsrf_policy_final.pdf (accessed on June 16, 2023), amended December 3, 2019, page 3. The statutory basis for the DWSRF is established in Health and Safety Code sections 116760 through 116762.60.

[226] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 12 ("This Agreement constitutes funding in the form of a loan and a grant made by State to Supplier [defined herein as City of San Diego] under the provisions of California Safe Drinking Water State Revolving Fund Law of 1997, Part 12, Chapter 4.5 (commencing with Section 116760), of Division 104 of Health and Safety Code"), 13 (Section 4, showing the loan amount is $18,000,000 and Section 4, showing the grant amount is $0).

[227] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 36 ("Supplier agrees that it shall not incur any additional indebtedness having any priority in payment over Supplier's obligations to State under this Agreement"), 38 ("The Loan, secured by the Collateral, shall constitute a "Parity Obligation" as defined in that certain Master Installment Purchase Agreement dated as of August 1, 1998, by and between Supplier and the San Diego Facilities and Equipment Leasing Corporation, as amended from time to time"). The Master Agreement defines "parity obligations" as "(a) Parity Installment Obligations, (b) Obligations, the principal of and interest on which are payable on a parity with Parity Installment Obligations, and (c) Reserve Fund Obligations." Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 663 (Master Agreement), 673 (Master Agreement ["the City may not create any Obligations, the payments of which are senior or prior in right to the payment by the City of Parity Obligations"]); Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 112, 190 (Official Statement [""As of November 15, 2018, Senior Obligations consisted of $78,332,490 principal amount of loans from the Drinking Water State Revolving Fund (the "Senior SRF Loans"). There are no Outstanding Senior Bonds"]).

(the "Collateral") to secure repayment of the Loan."[228] Therefore, similar to the bond debt discussed above, the revenues used to repay the DWSRF loans come solely from the Water Utility [or Enterprise] Fund, and the claimant's general fund revenues are not at risk.

Under the terms of the Master Agreement, in the event of a default of a "parity obligation" or a default "in the performance of *any* of the agreements or covenants required herein to be performed by" the City, then the entire unpaid principal amount owing on the bond funds and the accrued interest on the debt *may* be due and payable immediately *if* there is a vote by a certain percentage of parity debt owners:

> SECTION 8.01. Events of Default and Acceleration of Maturities. If one or more of the following Events of Default shall happen, that is to say…
>
> (a) if default shall be made in the due and punctual payment of or on account of any *Parity Obligation* as the same shall become due and payable;
>
> (b) *if default shall be made by the City in the performance of any of the agreements or covenants required herein to be performed by it*…and such default shall have continued for a period of 60 days after the City shall have been given notice in writing of such default by the Corporation or any Trustee;
>
> [¶]…[¶]
>
> then, and in each and every such case during the continuance of such Event of Default, the Corporation shall upon the written request of the Owners of 25% or more of the *aggregate principal amount of all Series of Parity Installment Obligations Outstanding*, voting collectively as a single class, by notice in writing to the City, *declare the entire unpaid principal amount thereof and the accrued interest thereon to be due and payable immediately, and upon any such declaration the same shall become immediately due and payable*.[229]

Thus, under the terms of the Master Agreement, if the claimant defaults in performing any of its covenants, including payment and the covenant to operate and maintain its water system, the owners of 25 percent or more of "the aggregate principal amount of all Series of Parity Installment Obligations Outstanding" have the authority to have the debt declared immediately due and payable. As the Official Statement to the 2018 bond package explains, in an event of default, "the Holders…of 25% or more of the aggregate principal amount of all Series of Parity Installment Obligations Outstanding, or after all Parity Installment Obligations have been paid in full, the Holders…of 25% or more of the

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[228] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), page 36.

[229] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 684 (Master Agreement), emphasis added.

aggregate principal amount of all Series of Subordinated Obligations Outstanding (the "Required Holders"), voting collectively as a single class, by notice in writing to the City" have the ability to declare the outstanding debt due and payable immediately.[230] Put differently, "Holders of Parity Obligations will be entitled to receive payment thereof in full before the Holders of Subordinated Obligations are entitled to receive payment thereof."[231]

The Master Agreement's default and acceleration clause does not establish with any certainty that those funds will be due and payable immediately since the 25 percent or more owners have discretion whether to vote collectively to have the debt declared immediately due and payable, and no evidence has been submitted showing why that outcome is "certain" to occur.[232] Furthermore, the Official Statement's description of the potential outcomes following an event of default demonstrate not only the discretion of the debt holders in seeking immediate repayment, but the uncertainty of obtaining adequate remedies.

> The Indenture[233] provides that, upon and during the continuance of an Event of Default thereunder, the Trustee *may*, subject to certain conditions, declare the principal of all Senior Bonds then Outstanding and the interest accrued thereon to be due and payable immediately. *So long as any Senior Bonds remain outstanding under the Indenture, no Owners of Subordinated Bonds shall have the right to declare an Event of Default, to declare any Subordinated Bonds immediately due and payable or to direct the Trustee or waive any Event of Default.* The foregoing notwithstanding, *the remedy of acceleration is subject to the limitations on legal remedies against public entities in the State, including a limitation on enforcement obligations against funds needed to serve the public welfare and interest.* Also, any remedies available to the Owners of the 2018 Bonds upon the occurrence of an Event of Default under the Indenture are in many respects dependent upon judicial actions, which are often subject

[230] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 299 (Official Statement).

[231] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 300 (Official Statement).

[232] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 684 (Master Agreement).

[233] "Indenture" refers to the agreement by and between the Public Facilities Financing Authority of the City of San Diego (Authority) and U.S. Bank National Association (Trustee) under which the 2018 bonds are secured and constitutes a valid and binding obligation of the City of the San Diego. Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 101, 108, 210 (Official Statement).

> to discretion and delay and could prove both expensive and time consuming to obtain.
>
> Further, enforceability of the rights and remedies of the Owners of the 2018 Bonds, and the obligations incurred by the City, may become subject to the federal bankruptcy code and applicable bankruptcy, insolvency, receivership, reorganization, moratorium, or similar laws relating to or affecting the enforcement of creditor's rights generally, now or hereafter in effect, equity principles that may limit the specific enforcement under State law of certain remedies, the exercise by the United States of America of the powers delegated to it by the Constitution, the reasonable and necessary exercise, in certain exceptional situations, of the police powers inherent in the sovereignty of the State and its governmental bodies in the interest of serving a significant and legitimate public purpose, and the limitations on remedies against counties in the State. Bankruptcy proceedings, or the exercise of powers by the federal or State government, if initiated, could subject the Owners of the 2018 Bonds to judicial discretion and interpretation of their rights in bankruptcy or otherwise and consequently may entail risks of delay, limitation, or modification of their rights…
>
> If the City fails to comply with its covenants under the 2018 Supplement to pay the 2018 Subordinated Installment Payments, *there can be no assurance of the availability of remedies adequate to protect the interests of the holders of Senior Bonds and, accordingly, the Subordinated Bonds*.[234]

As the Official Statement makes clear, "there can be *no assurance* of the availability of remedies adequate to protect the interests" of the debt holders.[235]

Because the $78,332,490 in loans from the Drinking Water State Revolving Fund constitute senior obligations, then in the event of default, the State would have repayment priority over the bond debt holders.[236] The Funding Agreement does not

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[234] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 210 (Official Statement), emphasis added.

[235] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 210 (Official Statement), emphasis added.

[236] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 685 (Master Agreement ["Upon the occurrence and during the continuance of any Event of Default, Owners of Parity Obligations will be entitled to receive payment thereof in full before the Owners of Subordinated Obligations are entitled to receive payment thereof (except for any payment in respect of Subordinated Obligations from the Reserve Fund securing such Subordinated Obligations) and the Owners of the Subordinated Obligations will become subrogated to the rights of the Owners of Parity Obligations to receive payments with respect thereto"]).

specify any events that automatically trigger an event of default, instead giving the State discretion to make that determination. Failure to operate and maintain the project "*may*, at the option of State, be considered a material breach of this Agreement and may be treated as a default under Article A-27, hereof."[237] Article A-27 provides that when an event of default occurs, the State shall give notice of and a 30-day period to cure the default.[238] If the claimant fails to timely cure the default to the State's satisfaction, then the State *may* do any or all of the following:

> (1) Declare that the aggregate amount of all Disbursements made by State, including any portion of the Grant, shall be deemed the Loan, and shall be repaid to State in accordance with the terms of this Agreement;
>
> (2) Declare Supplier's [City of San Diego's] obligations immediately due and payable, with or without demand or notice to Supplier, which Supplier expressly waives;
>
> (3) Terminate any obligation of State to make further Disbursements;
>
> (4) Exercise all rights and remedies available to a secured creditor after default, including, but not limited to, the rights and remedies of secured creditors under the California Uniform Commercial Code;
>
> (5) Perform any of Supplier's obligations under this Agreement for Supplier's account;
>
> (6) Notwithstanding the provisions of Section 5, hereof, commencing from the date of each Disbursement, apply the Rate of Interest specified in Section 9, hereof, to all Disbursements made by State, including any portion of the Grant; and/or
>
> (7) Take any other action it deems necessary to protect its interests.[239]

Thus, if the claimant fails to operate and maintain that portion of the drinking water system funded by the DWSRF loan, the State has the authority, but not the obligation, to find an event of default and to declare the debt immediately due and payable. The Funding Agreement gives the State discretion at each phase of an event of default (finding breach, finding default, declaring immediate payment) and therefore does not

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[237] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), page 15 (Section 12). See also pages 14 (Section 11), 23-24 (Article A-7), 24 (Article A-8), 25 (Article A-10(b)), 27 (Article A-15), 33 (Article A-32), 35 (Article A-36).

[238] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), page 31 (Article A-27(b)).

[239] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 31-32 (Article A-27(b)(1)-(b)(7)).

establish with certainty that the DWSRF funds will be immediately due and payable if the claimant stops operating and maintaining its drinking water system.

Thus, the claimant cannot show it will face severe financial consequences "amounting to nearly one billion dollars"– with any *certainty*.

Moreover, the Master Agreement, in section 6.04(b)(2), allows the City, at its discretion, to dispose of the Water System if approved by City Council and upon receipt of the fair market value, the proceeds of which must be used to pay off parity and subordinated obligations as follows:

> (b) The City may dispose of any of the works, plant properties, facilities or other parts of the Water System, or any real or personal property comprising a part of the Water System, only upon the approval of the City Council and consistent with one or more of the following:
> [¶]
>
> (2) the City in its discretion may carry out such a disposition if the City receives from the acquiring party an amount equal to the fair market value of the portion of the Water System disposed of. As used in this clause (2), "fair market value" means the most probable price that the portion being disposed of should bring in a competitive and open market under all conditions requisite to a fair sale, the willing buyer and willing seller each acting prudently and knowledgeably, and assuming that the price is not affected by coercion or undue stimulus. The proceeds of the disposition shall be used *(A) first,* promptly to redeem, or irrevocably set aside for the redemption of, Parity Obligations, and *second,* promptly to redeem, or irrevocably set aside for the redemption of, Subordinated Obligations....[240]

In *Kern High School Dist*., the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[241]

The evidence does not support that finding here. Instead, the California Constitution provides authority, but does not require local government to become a public water supplier. The claimant is not the debt-holder on the bond funds, and the funds received from the bonds and the Drinking Water State Revolving Fund loans for the improvements to its water system are paid from the Water Utility Fund and, thus, its general fund is generally not at risk. In the event of default, the principal amount of the debt owing *may* come immediately due, but that's not certain to occur. The State, as the holder of the senior debt, has priority over the bond debt holders, and is not required to make such a demand. And the bond debt holders have discretion whether to vote

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[240] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 678 (Master Agreement).

[241] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 749 (internal quotation marks omitted).

collectively to have the debt declared immediately due and payable. Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.

Therefore, there is not substantial evidence in the record showing with any certainty that the claimant would face immediate repayment of its debt, or other certain and severe or draconian consequences if it stopped operating its water system.

iii. Although Health and Safety Code section 116625 gives the State Board the authority to suspend or revoke a permit issued under the Safe Drinking Water Act, the claimant has not presented substantial evidence showing that the state, with certainty, would have imposed a severe penalty if the claimant did not comply with the test claim order.

In alleging that failure to comply with the test claim order *could* result in the State Board suspending or revoking the claimant's water system operating permit, the claimant cites to Health and Safety Code section 116625, which provides that the State Board *may*, pursuant to due process, suspend or revoke any permit issued under the Safe Drinking Water Act if it determines that the permittee is in noncompliance with the permit or other applicable law.[242] Section 116625 also gives the State Board the authority to temporarily suspend any permit prior to hearing if necessary to prevent "an imminent or substantial danger to health."[243] The State Board agrees that the claimant "must comply with the Permit Amendment in order to provide drinking water within its service area" and that the "permit is *subject to* revocation for failure to comply."[244]

By the claimant's own admission, however, the claimant faces the *possibility*, but not certainty, of suspension or revocation of its operating permit for noncompliance with the test claim permit.[245] While Health and Safety Code section 116625 gives the State Board authority to suspend or revoke the claimant's operating permit for noncompliance with the test claim order, the statute is permissive not mandatory, meaning that the State Board is authorized but not required to enforce a permit violation.

Furthermore, even if suspension or revocation were certain, the claimant has not shown "severe or draconian consequences," as discussed in the section above. The claimant instead states axiomatically that its entire water system would cease to exist, and that

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[242] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10; Health and Safety Code section 116625(a).

[243] Health and Safety Code section 116625(b).

[244] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, pages 16-17 (emphasis added).

[245] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10 ("Failure to comply with a drinking water permit *can* result in suspension or revocation of the permit, which would prevent the City from operating its water system"). Emphasis added.

the residents, businesses, and public entities that rely upon it to supply safe drinking water would simply go without, thereby creating a health and safety crisis.[246]

Again, for practical compulsion to apply, there must be a clear showing in the law or substantial evidence in the record that the test claim order induces compliance through the imposition of certain and severe or other draconian consequences that leave the local entity no reasonable alternative but to comply.[247] In *Kern High School Dist.*, the court rejected the claimants' argument that "the absence of a reasonable alternative to participation is a de facto [reimbursable state] mandate" and reasoned that the claimants were free to decide whether to continue to participate in optional programs, even though doing so caused them to incur additional program-related costs.[248]

The Commission finds that claimant has failed to submit substantial evidence showing that it is practically compelled by state law to comply with the requirements imposed by the test claim order. Therefore, the Commission finds that the test claim order does not impose a state-mandated program on the claimant.

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[246] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 9 ("Cities must provide for the health, safety, and welfare of their residents, and simply put, people cannot survive without water. Many of the impacts of turning off the water for 1.3 million people are self-evident…The six largest water consumers in the City are federal (primarily military), state (university), and local agencies serving public purposes, with the City of San Diego being its own largest water customer. These public agencies could no longer function without water. Water is necessary for drinking, cooking, cleaning, firefighting and sanitation. Toilets cannot flush without water, and the absence of water would quickly lead to a health crisis. The City must continue to provide water service to protect the health, safety, and welfare of its residents").

[247] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816 ("'practical compulsion'…arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply"); *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754 (where no "legal" compulsion exists, "practical" compulsion may be found if the local agency faces "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences if they fail to comply with the statute); *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367 (practical compulsion requires a "concrete showing" that a failure to engage in the activities at issue will result in "severe adverse consequences").

[248] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 752-753.

Accordingly, the Commission makes no findings on whether the test claim order results in increased costs mandated by the state or the applicability of Government Code section 17556(d), as briefed by the parties.

V. Conclusion

Based on the forgoing analysis, the Commission finds that the test claim order does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and denies the Test Claim.