COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Water Code Sections 71265, 71266, and 71267; Statutes 2016, Chapter 401 (AB 1794) Filed on September 20, 2017 Central Basin Municipal Water District, Claimant	Case No.: 17-TC-02 *Central Basin Municipal Water District Governance Reform* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted March 22, 2019*) (*Served March 27, 2019*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on March 22, 2019. Kevin Hunt appeared on behalf of the Central Basin Municipal Water District (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 7-0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Keely Bosler, Director of the Department of Finance, Chairperson	Yes
Mark Hariri, Representative of the State Treasurer	Yes
Jeannie Lee, Representative of the Director of the Office of Planning and Research	Yes
Sarah Olsen, Public Member	Yes
Carmen Ramirez, City Council Member	Yes
Yvette Stowers, Representative of the State Controller, Vice Chairperson	Yes

Summary of the Findings

This Test Claim alleges reimbursable state-mandated activities and costs arising from Statutes 2016, chapter 401, which added sections 71265, 71266, and 71267 to the Water Code, effective January 1, 2017. The test claim statute requires the Central Basin Municipal Water District (claimant) to expand its board of directors from its current five members (also known as directors) to eight members, until the election of November 8, 2022, after which the board would be composed of seven members. The claimant's general manager is also required to notify the district's water purveyors (purveyors) and provide a 60-day period during which the purveyors may nominate individuals for appointment to the board. In addition, the statute establishes minimum qualifications for appointed board members and limits benefits provided to the board members. The goal of the test claim statute is to protect consumers and "improve the District's effectiveness as a water wholesaler by enhancing the technical knowledge of the Board and by encouraging the participation of the water retailers that are responsible for water delivery directly to the customers."[1] The claimant seeks reimbursement for the costs of the appointment process for the additional board members, capital improvements to its facilities, and increased overhead costs due to the required expansion of the governing board.

Prior to the enactment of the test claim statute, the claimant had been under increased scrutiny as news reports highlighted its misuse of public funds, inappropriate contracting and employment practices, and several pending lawsuits. The Bureau of State Audits proceeded to review various aspects of the claimant's operations between July 2010 and June 2015, and in December 2015, issued an audit report recommending special legislation to modify the claimant's governance structure so as to ensure the claimant's accountability to its customers.

This Test Claim was timely filed, pursuant to Government Code section 17551, on September 20, 2017 which is within 12 months of the January 1, 2017 effective date of the test claim statute.

To be eligible for reimbursement under article XIII B, section 6, a local agency must be subject to the taxing and spending limitations of articles XIII A and XIII B of the California Constitution. In this case, reimbursement is not required under article XIII B, section 6, however, because there is no evidence that the claimant receives any proceeds of taxes subject to the appropriations limit of article XIII B and, therefore, is not eligible to claim mandate reimbursement under section 6. Article XIII B, section 9(c) specifically provides that special districts that existed in 1977-78 and did not share in ad valorem property taxes, or were created later and are funded entirely by "other than the proceeds of taxes", which precisely describes the claimant, are not subject to the appropriations limit.

Although the claimant is theoretically able to impose special taxes pursuant to Article XIII C, section 2(a) of the California Constitution and certain provisions in the Municipal Water Act of 1911, there is no evidence in the record that it has ever done so. In fact, all evidence in the record indicates that the claimant's revenues derive solely from its authority to collect fees and

[1] Exhibit G, AB 1794 – Assembly Bill - Bill Analysis, August 19, 2016, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1794, accessed October 31, 2018, page 5.

assessments and grants.[2] Moreover, Proposition 218 does not convert claimant's fees, assessments, or charges into "proceeds of taxes" subject to the appropriations limit of article XIII B, section 8, nor do expenditures of fees imposed pursuant to Proposition 218 trigger the reimbursement requirements of article XIII B, section 6 as appropriations of such fees are not "appropriations subject to limitation." Therefore, there is no substantial evidence in the record to support a finding the claimant has eligibility for subvention of funds within the meaning of article XIII B, section 6.

Accordingly, based on this record, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/01/2017	Water Code sections 71265, 71266, and 71267, as added by Statutes 2016, chapter 401, become effective.
09/20/2017	The claimant filed the Test Claim.[3]
03/14/2018	Commission staff determined that the Test Claim was incomplete, because the claimant was not eligible for subvention, and returned it to the claimant.
03/27/2018	The claimant filed an appeal of the Executive Director's decision to deny jurisdiction over the Test Claim.[4]
03/30/2018	The Executive Director issued a Notice of Test Claim Filing, which mooted the appeal of the executive director's decision, requesting comments on the Test Claim and evidence that the claimant had ever collected taxes.[5]
04/27/2018	The Department of Finance (Finance) filed comments on the Test Claim.[6]
04/30/2018	The California Special Districts Association (CSDA) filed comments on the Test Claim.[7]

[2] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 19-20; Exhibit G, Central Basin Municipal Water District Adopted Operating Budget & Capital Improvement Projects/Grant Projects Budget, Fiscal Year 2016-17 (July 2016), https://forms.centralbasin.org/sites/default/files/finance/Adopted%20Budget%20for%20FY%202016-17_FINAL_0.pdf, accessed December 14, 2018, pages 10-13.

[3] Exhibit A, Test Claim.

[4] Exhibit B, Appeal of Executive Director's Decision.

[5] Exhibit C, Notice of Test Claim Filing.

[6] Exhibit D, Finance's Comments on Test Claim.

[7] Exhibit E, CSDA's Comments on Test Claim.

11/19/2018	Commission staff issued the Draft Proposed Decision.[8]
01/22/2019	The claimant filed a request for postponement of hearing and change in representation which was approved for good cause.

II. Background

This Test Claim alleges that Water Code sections 71265 through 71267, enacted by Statutes 2016, chapter 401 impose reimbursable state-mandated increased costs resulting from activities required of the claimant.

Prior to the enactment of the test claim statute, the claimant had been under increased scrutiny as news reports highlighted its misuse of public funds, inappropriate contracting and employment practices, and several pending lawsuits.[9] In October 2014, the County of Los Angeles Department of Public Works issued a report criticizing the district and exploring the steps necessary to dissolve it, though the report recommended an audit rather than dissolution.[10] At the request of the Joint Legislative Audit Committee, the Bureau of State Audits proceeded to review various aspects of the claimant's operations between July 2010 and June 2015, and in December 2015, issued an audit report recommending special legislation to:

> . . . preserve the district as an independent entity but modify the district's governance structure. In doing so, the Legislature should consider a governance structure that ensures the district remain accountable to those it serves; for example, the district's board could be changed from one elected by the public at large to one appointed by the district's customers.[11]

Generally, the test claim statute revises the composition of the claimant's board of directors, establishes minimum qualifications for appointed board members, and limits benefits provided to the board members.

To provide some context for how the test claim statute fits into the state's effort to improve the operations of the claimant, a brief discussion of the claimant's history follows.

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[8] Exhibit F, Draft Proposed Decision.

[9] Exhibit G, AB 1794 – Assembly Bill - Bill Analysis, August 19, 2016, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1794, accessed October 31, 2018, page 8.

[10] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 39-40.

[11] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, page 42.

A. The Creation and History of the Claimant.

The Municipal Water District Act of 1911 (1911 Act), Water Code sections 71000 et seq., authorized "the people of any county or counties, or of any portions thereof, whether such portions include unincorporated territory only or incorporated territory of any city or cities, or both such incorporated and unincorporated territory" to organize a municipal water district in order to "acquire, control, distribute, store, spread, sink, treat, purify, recycle, recapture, and salvage any water, including sewage and storm waters, for the beneficial use or uses of the district, its inhabitants, or the owners of rights to water in the district."[12] The 1911 Act authorized municipal water districts to levy property taxes, and to impose special taxes pursuant to Article 3.5 of the Government Code.[13] The authority to levy general purpose property taxes however, has since been eliminated by an amendment to California Constitution - Article XIII C, section 2(a), made by Proposition 218, which restricted the authority of special districts to impose taxes only to special taxes. Municipal water districts may also impose standby "assessments or availability charges" on land within their jurisdiction, in an amount not to exceed $10 per acre.[14]

In 1952, pursuant to the 1911 Act, the residents of southeastern Los Angeles County voted to establish the claimant, Central Basin Municipal Water District, to mitigate the overpumping of groundwater in the area.[15] In 1954, the claimant became a member agency of the Metropolitan Water District of Southern California (Metropolitan), an agency that was formed to bring imported water to the greater Los Angeles region.[16] The claimant "purchases imported water from Metropolitan for sale to retail water suppliers, including cities, other water districts, mutual water companies, investor-owned utilities, and private companies within the district's boundaries. Those water retailers in turn provide water to residents and businesses within their respective service areas."[17] In this manner, the claimant acts to secure water reliability for more

[12] Water Code, sections 71060, 71610(a).

[13] Water Code, sections 72090, 72090.5.

[14] Water Code, sections 71630, 71631.

[15] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, page 9.

[16] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, page 15.

[17] Exhibit G, Senate Committee on Appropriations Analysis of AB 1794, August 1, 2016, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1794, accessed November 1, 2018, pages 7, 15.

than 1.6 million people in Los Angeles County, spanning a range of 27 cities, three unincorporated areas, 40 water retailers, and one water wholesaler.[18]

The audit report issued by the Bureau of State Audits (BSA) states that in fiscal year 2014-2015, the claimant's total revenues were from the following sources: sales of imported water (81% of total revenues); sales of recycled water (7% of total revenues); revenues from standby charges, which are parcel assessments imposed on landowners and used by the claimant to pay its debt service costs on water recycling facilities and the purchase of its headquarters building (6% of total revenues); grant funding (5% of total revenues); and other revenues from deliveries of treated water, investment income, and other miscellaneous sources (1% of total revenues).[19] The claimant's operating budget for fiscal year 2016-2017 identifies the same revenue sources.[20]

Prior to the enactment of the test claim statute, the claimant's 227 square-mile service area was governed by a board of five publicly elected directors, with voters in each of the five divisions of the service area electing one director to serve a four-year term.[21] No limits existed on the number of terms a board member could serve.[22]

B. The Bureau of State Audits Found Numerous Failures by the District's Board of Directors to Provide for the Effective Management and Efficient Operation of the District.

The BSA reviewed various aspects of the claimant's operations between July 2010 and June 2015, and in its December 2015 audit report, made the following key findings regarding the claimant and its board:

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[18] Exhibit G, Central Basin Municipal Water District Adopted Operating Budget & Capital Improvement Projects/Grant Projects Budget, Fiscal Year 2016-17 (July 2016), https://forms.centralbasin.org/sites/default/files/finance/Adopted%20Budget%20for%20FY%202016-17_FINAL_0.pdf, accessed December 14, 2018, page 8.

[19] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 19-20.

[20] Exhibit G, Central Basin Municipal Water District Adopted Operating Budget & Capital Improvement Projects/Grant Projects Budget, Fiscal Year 2016-17 (July 2016), https://forms.centralbasin.org/sites/default/files/finance/Adopted%20Budget%20for%20FY%202016-17_FINAL_0.pdf, accessed December 14, 2018, pages 10-13, 43.

[21] Exhibit G, Central Basin Municipal Water District Adopted Operating Budget & Capital Improvement Projects/Grant Projects Budget, Fiscal Year 2016-17 (July 2016), https://forms.centralbasin.org/sites/default/files/finance/Adopted%20Budget%20for%20FY%202016-17_FINAL_0.pdf, accessed December 14, 2018, page 8.

[22] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, page 17.

- The board's poor leadership, decision-making and oversight hindered the district's ability to meet its responsibilities.[23]
    - Six different individuals had served as chief executive and five different individuals and one financial services firm have served as the finance director or an equivalent position.[24]
    - The board had an ineffective structure for investigating complaints regarding its members' or district staff's violations of laws and district codes related to ethics.[25]
    - Until recently, the board had not approved a strategic plan for several years and it did not require the district to create a long-term financial plan—the district had endured revenue shortfalls for years, had averaged a $2.9 million operating deficit in three of the past five fiscal years and had suffered two credit rating downgrades.[26]
    - Because of the board's inaction and poor decisions, the district was paying more for less general liability and employment practices liability insurance coverage.[27]
- The board violated state law by creating a legal trust fund without adequately disclosing it to the public. It also allowed its outside legal counsel to make

[23] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, page 21.

[24] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 22-25.

[25] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 25-28.

[26] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 28-35.

[27] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 35-38.

payments from this $2.75 million fund without ensuring funds were used appropriately.[28]

- The district inappropriately avoided competitively bidding 11 of the 20 contracts we reviewed and it used amendments to extend and expand contracts—over a three-year period, it executed a total of 134 amendments to 65 contracts, increasing the total cost of the associated contracts from roughly $14 million to nearly $30 million.[29]
- The district did not follow best practices in managing its contracts—most of the contracts reviewed lacked critical elements of a scope of work and the district paid certain consultants before the work was performed.[30]
- The district spent funds on purposes unrelated to its mission, such as lavish board member installation ceremonies, that likely constituted prohibited gifts of public funds.[31]
- The district hired some unqualified staff, created a new position without proper approval, and incurred unnecessary expenses. The audit noted four hires in which the district did not comply with its policies, two of which resulted in legal disputes and another caused the district to incur unnecessary expenses.[32]
- Some of the benefits given to board members may have been too generous—a $600 monthly automobile or transportation allowance, a $200 monthly allowance

[28] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 45-49.

[29] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 49-56.

[30] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 56-60.

[31] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 60-63.

[32] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 65-70.

> for personal communication devices, and up to $2,000 per month for health benefits, even though they were not full-time employees.[33]

The audit report also noted that because the board is publicly elected, it is not directly accountable to the district's customers – the various entities to which the district sells imported and recycled water.[34] The report recommended that the Legislature:

> [S]hould pass special legislation to preserve the district as an independent entity but modify the district's governance structure. In doing so, the Legislature should consider a governance structure that ensures the district remain accountable to those it serves; for example, the district's board could be changed from one elected by the public at large to one appointed by the district's customers.[35]

C. The Test Claim Statute

The test claim statute, Statutes 2016, chapter 401 (AB 1794) became effective on January 1, 2017, adding sections 71265, 71266, and 71267 to Division 20, Part 3 of the California Water Code, changing the composition of the district's board, establishing minimum qualifications for appointed directors, and limiting benefits of directors.

Section 71265 defines "large water purveyor" as "a public water system that is one of the top five purveyors of water as measured by total purchases of water from the CBMWD for the three prior fiscal years", and "relevant technical expertise" as "at least 5 years of experience in a position materially responsible for performing services relating to the management, operations, engineering, construction, financing, contracting, regulating, or resource management of a public water system." It also defines a small water purveyor as a public water system (as defined in the Health and Safety Code), and clarifies that sections 71265-71267 apply only to the claimant, the Central Basin Municipal Water District.

Section 71266 changes the composition of the claimant's board of directors. The board currently has five directors, each one popularly elected from their respective divisions inside the district, pursuant to Water Code section 71250. Section 71266 requires that three additional directors be added to the board, with these directors appointed by the district's water purveyors, in accordance with section 71267. The new eight-member board would then be responsible, before the election of November 8, 2022, to divide the district into four divisions, in a manner so as to

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[33] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 70-80.

[34] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, page 40.

[35] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, page 42.

equalize the population in each division, pursuant to Water Code section 71540 (in accordance with Section 22000 of Division 21 of the Elections Code.) The eight-member board would exist until the election of November 8, 2022, after which the board would consist of seven directors – the four elected ones, and the three appointed by the water purveyors. Section 72166 reads:

> (a) Except as provided in subdivision (c) and notwithstanding any other provision of this division, the board of directors of the district shall be composed of seven directors as follows:
>
> > (1) Four directors, one director elected for each division established pursuant to subdivision (d) by the voters of the division. Each director shall be a resident of the division from which he or she is elected. An election pursuant to this paragraph shall be in accordance with the Uniform District Election Law (Part 4 (commencing with Section 10500) of Division 10 of the Elections Code).
> >
> > (2) Three directors appointed by the water purveyors of the district in accordance with Section 71267.
>
> (b) The district shall be subject to Section 84308 of the Government Code.
>
> (c) Until the directors elected at the November 8, 2022, election take office, the board of directors shall be composed of eight directors as follows:
>
> > (1) Five directors in accordance with Section 71250.
> >
> > (2) Three directors appointed by the water purveyors of the district pursuant to Section 71267.
>
> (d) The board of directors shall divide the district into four divisions in a manner as to equalize, as nearly as practicable, the population in the respective divisions pursuant to Section 71540.

Section 71267 requires the claimant's general manager to notify all its water purveyors that the district is seeking three new appointed directors for the board, and provide a 60-day period during which nominations for such appointment will be accepted. All individuals nominated must possess "relevant technical expertise" as defined in section 71265. The three appointed directors shall be selected every four years – one by all large water purveyors from the nominees therefrom, one by all cities that are water purveyors of the district, from the nominees of the cities, and one by all the district's water purveyors, from any nominee. Section 71267 prohibits all three appointed directors from being employees or representatives of large water purveyors, cities, or small water purveyors. Each appointed director must live or work within the district, may not hold elected office, may not hold more than one-half percent ownership interest in any entity regulated by the Public Utilities Commission, and may not hold more than one consecutive term of office on the board. Appointed directors are eligible for compensation for up to ten meetings per month and certain benefits pursuant to the district's administrative code, but are not eligible for communication or car allowances. Section 71267 reads:

> (a) The general manager of the district shall notify each water purveyor of the district and provide a 60-day period during which the district will accept nominations for appointment of individuals to the board of directors.

(b) Individuals nominated for appointment to the board of directors shall demonstrate eligibility and relevant technical expertise.

(c)(1) The three directors appointed by the water purveyors shall be selected by the water purveyors of the district every four years as follows:

(A) One director shall be selected by all large water purveyors from the nominees of large water purveyors. Each large water purveyor shall have one vote.

(B) One director shall be selected by all cities that are water purveyors of the district from the nominees of cities. Each city shall have one vote.

(C) One director shall be selected by all of the water purveyors of the district from any nominee. The vote of each purveyor shall be weighted to reflect the number of service connections of that water purveyor within the district. If the selection of a director under this subparagraph would result in a violation of paragraph (2), the first eligible candidate receiving the next highest number of votes shall be selected.

(2) The appointment of directors pursuant to paragraph (1) shall not result in any of the following:

(A) The appointment of three directors that are all employed by or representatives of entities that are all large water purveyors.

(B) The appointment of three directors that are all employed by or representatives of entities that are all cities.

(C) The appointment of three directors that are all employed by or representatives of entities that are all small water purveyors.

(3) Each nominee for director who receives the highest number of votes cast for each office described in paragraph (1) is appointed as a director to the board of directors and shall take office in accordance with Section 71512. The general manager shall collect the votes and report the results to the water purveyors. Votes for an appointed director are public records.

(d) Each appointed director shall live or work within the district.

(e) In order to ensure continuity of knowledge, the directors appointed at the first purveyor selection shall classify themselves by lot so that two of them shall hold office until the selection of their successors at the first succeeding purveyor selection and one of them shall hold office until the selection of his or her successor at the second succeeding purveyor selection.

(f)(1) The term of a director appointed pursuant to subparagraph (A) of paragraph (1) of subdivision (c) is terminated if the appointed director no longer is employed by or a representative of a large water purveyor.

(2) The term of a director appointed pursuant to subparagraph (B) of paragraph (1) of subdivision (c) is terminated if the appointed director no longer is employed by or a representative of a city.

(3) The term of a director appointed pursuant to subparagraph (C) of paragraph (1) of subdivision (c) is terminated if the appointed director no longer is employed by or a representative of a water purveyor.

(g)(1) An appointed director shall not do any of the following:

(A) Hold an elected office.

(B) Hold more than 0.5 percent ownership in a company regulated by the Public Utilities Commission.

(C) Hold more than one consecutive term of office on the board.

(2) An appointed director shall be subject to all applicable conflict-of-interest and ethics provisions and shall recuse himself or herself from participating in a decision that could have a direct material benefit on the financial interests of the director.

(h) A vacancy in an office of appointed director shall be filled in accordance with the selection process described in subdivisions (a) to (c), inclusive.

(i)(1) An appointed director shall be eligible for all of the following:

(A) Reimbursement for travel and conference expenses pursuant to the Central Basin Municipal Water District Administrative Code.

(B) Compensation for up to 10 meetings per month at the per meeting rate provided by the Central Basin Municipal Water District Administrative Code.

(C) Health insurance benefits, if those benefits are not provided by the director's employer.

(2) An appointed director shall not be eligible to receive communication or car allowances. For purposes of this paragraph, "car allowances" does not include travel expenses incurred as described in paragraph (1).

(3) An appointed director may waive the reimbursement and compensation described in paragraph (1) and may be required to reimburse his or her employer for any compensation received.

III. Positions of the Parties and Interested Parties

A. Central Basin Municipal Water District

The claimant alleges that the addition of Water Code sections 71265 through 71267 resulted in reimbursable increased costs mandated by the state. The claimant alleges new activities and increased actual costs totaling $217,948 for fiscal year 2016-2017,[36] as follows:

1) Capital improvements to expand the district's board room dais from five to eight seats, and expand the parking lot.

[36] Exhibit A, Test Claim, page 10. However, on page 8, the claimant states that the actual increased costs for fiscal year 2016-2017 totaled $181,765.

2) Project management to oversee building improvements to the board room and parking lot.

3) Executive time and expenses in conducting the appointment process of three additional directors. The General Manager's time was spent on planning, directing, coordinating and overseeing the orientation, nomination and election of water purveyor representatives to the District's Board of Directors.

4) Obtaining legal services in the implementation and defense of AB 1794 in two lawsuits.

5) Meetings with the water purveyors responsible to appoint the three additional directors during a seven month period from September 2016 to March 2017. Costs were also incurred for meals provided during these meetings.

6) Staff time and expenses in conducting the appointment process of three additional directors. Staff members created a database of water purveyors, verified contact information and mailing addresses, drafted a memorandum and nomination forms, and mailed the information to the water purveyors. After the nomination process, staff prepared the ballots and mailed the information. Upon receiving the ballots, staff opened them and documented the results.

7) Additional staff time for the implementation of AB 1794. At the request of the Board of Directors, staff was asked to prepare a written report on the implementation process for the test claim statute.

8) Compensation, travel and administrative/office expenses (which included expenses for registration and dues, housing and accommodations, meals, photography services, office supplies, and miscellaneous expenses) for the three additional directors.[37]

The claimant also alleges estimated annual costs of $18,488 for compensation, travel, and administrative expenses for the three new directors, and $160,371 in legal fees and staff costs to write the election process in the claimant's Administrative Code and expenses incurred in two cases in litigation relating to the test claim statute.[38]

The claimant contends that it is eligible to claim reimbursement because it receives "proceeds of taxes" and is subject to the tax and spend limitations of articles XIII A and B. The claimant relies on documentation from the County of Los Angeles that shows the claimant will receive $3.3 million for standby charges consistent with the County of Los Angeles' property tax remittance schedule.[39]

The claimant further asserts that nothing in article XIII B, section 6 requires that a claimant must receive property tax revenue to be eligible to claim reimbursement. "In the decades since [*County of Fresno v. State of California*] was issued, not only has there been a complete turnover

[37] Exhibit A, Test Claim, pages 4-9.

[38] Exhibit A, Test Claim, pages 12-13.

[39] Exhibit A, Test Claim, pages 286, 290.

in the composition of the court but the landscape of local government financing has been changed by the passage of Proposition 218 in November of 1996 . . . ."[40]

In addition, the claimant states that the test claim statute did nothing to add a new service or to expand current services, and instead increased the overhead of the claimant by amending the governing board, as follows:

> The District, as a water wholesale agency, purchases both potable and recycled water, and sells it to retail agencies. The implementation of AB 1794 did nothing to add a new service to the services of the District or to expand its current services; the legislation increased the overhead of the District by amending the governing board. It is the expansion of the board and the express procedure for selecting the three new members that is the mandated new program, applicable only to this one water district. As such, the District should be reimbursed by way of approval of its SB 90 test claim.[41]

In its Appeal of Executive Director's Decision to reject the Test Claim filing finding claimant to be ineligible for subvention, the claimant asserts that article XIII B, section 6 of the California Constitution does not require that the district receive the proceeds of taxes in order to seek reimbursement for its expenses.[42] The claimant further asserts that section 2 of AB 1794 did not require that the district be a recipient of property taxes to seek reimbursement, and also that reimbursement appeared to be mandatory according to the language used therein.[43]

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

B. Department of Finance

Finance urges the Commission to deny this Test Claim.[44] Finance argues that the claimant is ineligible for reimbursement, as it is a local agency financed entirely by fees and other non-tax revenue, and is not subject to the taxing and spending limitations of article XIII B, section 6.[45] Finance further contends that even if the claimant were eligible to claim reimbursement, the activities it performed pursuant to the test claim statute do not qualify for reimbursement, as they do not constitute a new program or higher level of service.[46] Lastly, Finance notes that many of the activities for which the claimant seeks reimbursement were not required by the test claim statute, such as expenses for meals at the installation ceremony for the three new directors

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[40] Exhibit A, Test Claim, page 287.

[41] Exhibit A, Test Claim, page 288. Note that SB 90 refers to a long obsolete Revenue and Tax Code system for providing mandate reimbursement, which was quasi-legislative in nature. We presume that claimant actually intends to seek subvention pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17500 et seq.

[42] Exhibit B, Appeal of Executive Director's Decision, page 1.

[43] Exhibit B, Appeal of Executive Director's Decision, page 2.

[44] Exhibit D, Finance's Comments on the Test Claim.

[45] Exhibit D, Finance's Comments on the Test Claim, pages 1-2.

[46] Exhibit D, Finance's Comments on the Test Claim, page 2.

($411.53), photographic prints of the new directors ($211.68), and lunch meetings with the district's water purveyors regarding the nomination of the three new directors ($1,623.23).[47]

Finance did not file comments on the Draft Proposed Decision.

C. California Special Districts Association

The CSDA, as an interested person under the Commission's regulations,[48] submitted comments on the Test Claim on April 30, 2018.[49] CSDA argues that "reasonable public policy warrants approval" of the Test Claim.[50] CSDA contends that past Commission interpretation of article XIII B, section 6 to protect only tax revenues and not the expenses that are recoverable from sources other than taxes, "fails to account for the ever-increasing series of constraints on the funding available to administer these services."[51] CSDA identifies the following constraints: Proposition 13, which drastically cut property tax revenue by nearly 50 percent, creating a funding deficit for local agencies; and Proposition 218, which imposed restrictions on special districts' authority to collect or increase fees and assessments. CSDA asserts that article XIII B, section 6 is designed "to protect local governments with constitutional funding limitations from shouldering the financial burden of the Legislature's preferred programs."[52] CSDA further asserts that the exclusion of local governments that do not receive property taxes or "proceeds of taxes" is contrary to the plain language of article XIII B, section 6, which provides subvention for all local governments. "The denial for subvention in the case of Central Basin Municipal Water District, and other enterprise special districts, results in the creation of a class of local governments and their citizens that must always bear the cost of state mandates through increased fees, even before clearing the uncertain Proposition 218 voter authorization hurdle for said fee increases, while others deemed as eligible under the current interpretation will see no fee increases."[53]

CSDA 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…

[47] Exhibit D, Finance's Comments on the Test Claim, pages 2-3.

[48] California Code of Regulations, title 2, section 1181.2(j).

[49] Exhibit E, CSDA's Comments on the Test Claim.

[50] Exhibit E, CSDA's Comments on the Test Claim, page 1.

[51] Exhibit E, CSDA's Comments on the Test Claim, page 1.

[52] Exhibit E, CSDA's Comments on the Test Claim, page 2.

[53] Exhibit E, CSDA's Comments on Test Claim, page 2.

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."[54] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[55]

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.[56]
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.[57]
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.[58]
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.[59]

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.[60] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[61] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an

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

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

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

[57] *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).

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

[59] *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.

[60] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333.

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

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[62]

A. This Test Claim was Timely Filed Pursuant to Government Code section 17551.

Government Code section 17551(c) provides that a test claim must be filed "not later than 12 months after the effective date of the statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." This Test Claim was filed on September 20, 2017, and is therefore timely, as it was filed within 12 months of January 1, 2017, the effective date of the test claim statute.

B. The Claimant, a Special District, Is Not Eligible to Claim Reimbursement Under Article XIII B, Section 6, Because There Is No Evidence That the Claimant Receives Any Proceeds of Taxes Subject to the Appropriations Limit of Article XIII B.

1. To be eligible for reimbursement under section 6, a local agency must be subject to the taxing and spending limitations of articles XIII A and XIII B of the California Constitution.

The courts have made it clear that the reimbursement requirement in article XIII B, section 6 of the California Constitution must be interpreted in context with articles XIII A and XIII B, which "work in tandem, together restricting California governments' power both to levy and to spend taxes for public purposes."[63]

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A drastically reduced property tax revenue previously enjoyed by local governments by providing that "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property," and that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…"[64] In addition to limiting the property tax, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by voters.[65]

Article XIII B was adopted by the voters as Proposition 4 less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13."[66] While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the

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[62] *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].

[63] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486; *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763 [quoting *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81].

[64] California Constitution, article XIII A, section 1 (adopted June 6, 1978).

[65] California Constitution, article XIII A, section 1 (adopted June 6, 1978).

[66] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[67]

Article XIII B established an "appropriations limit," or spending limit for each "entity of local government" beginning in fiscal year 1980-1981.[68] Specifically, the appropriations limit provides as follows:

> The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.[69]

No "appropriations subject to limitation" may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.[70]

Article XIII B does not limit the ability to expend government funds collected from *all sources*; the appropriations limit is based on "appropriations subject to limitation," which means, pursuant to article XIII B, section 8, "any authorization to expend during a fiscal year the *proceeds of taxes* levied by or for that entity."[71] For local agencies, "proceeds of taxes" subject to the appropriations limit include all tax revenues; proceeds from regulatory charges and fees *to the extent such proceeds exceed the costs reasonably borne by government in providing the product or service*; the investment of tax revenue; and subventions received from the state (other than pursuant to section 6).[72]

However, no limitation is placed on the expenditure of those revenues that do not constitute "proceeds of taxes."[73] For example, appropriations subject to limitation do not include "local agency loan funds or indebtedness funds, investment (or authorizations to invest) funds of the state, or of an entity of local government in accounts at banks or savings and loan associations or

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[67] *County of Placer v. Corin* (1980), 113 Cal.App.3d 443, 446.

[68] California Constitution, article XIII B, section 8(h) (adopted Nov. 6, 1979; amended by Proposition 111, June 5, 1990).

[69] California Constitution, article XIII B, section 1 (adopted Nov. 6, 1979; amended by Proposition 111, June 5, 1990).

[70] California Constitution, article XIII B, section 2 (adopted Nov. 6, 1979; amended by Proposition 111, June 5, 1990).

[71] California Constitution, article XIII B, section 8 (adopted Nov. 6, 1979; amended by Proposition 111, June 5, 1990) [emphasis added].

[72] California Constitution, article XIII B, section 8; *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 448.

[73] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 447.

in liquid securities."[74] With respect to special districts, article XIII B, section 9 provides a specific exclusion from the appropriations limit as follows:

> "Appropriations subject to limitation' for each entity of government *shall not include*: [¶…¶] (c) Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 ½ cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by *other than the proceeds of taxes*."[75]

Thus, a special district that existed in 1977-78 and did not share in ad valorem property taxes, or one that was created later and is funded entirely by "other than the proceeds of taxes," is not subject to the appropriations limit.

In 1980, the year following the adoption of article XIII B, the Third District Court of Appeal, in *County of Placer v. Corin,* found that a local special assessment for the construction of public improvements was not included within the definition of "proceeds of taxes," and thus the proceeds of that assessment were not required to be included within the budgeted "appropriations subject to limitation."[76] The court explained that article XIII B's limitation on the expenditure of "proceeds of taxes" does not limit the ability to expend government funds from *all sources*, but contemplates only the expenditure of "impositions which raise general tax revenues for the entity" as follows:

> Under Article XIII B, with the exception of state subventions, the items that make up the scope of "proceeds of taxes" concern charges levied to raise general revenues for the local entity. "Proceeds of taxes," in addition to "all tax revenues" includes "proceeds …from … 'regulatory licenses, user charges, and user fees (only)' to the extent that such proceeds exceed the costs reasonably borne by such entity in providing the regulation, product or service…." (§ 8, subd. (c)) … Such "excess" regulatory or user fees are but taxes for the raising of general revenue for the entity. [Citations omitted.] Moreover, to the extent that

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[74] California Constitution, article XIII B, section 8(i) (adopted Nov. 6, 1979; amended by Proposition 111, June 5, 1990).

[75] California Constitution, article XIII B, section 9(c) (adopted Nov. 6, 1979; amended by Proposition 111, June 5, 1990); see also, Government Code section 7901(e), a statute which implements and defines terms used in article XIII B, including appropriations subject to limitation, which similarly provides the following: ""Local agency" means a city, county, city and county, special district, authority or other political subdivision of the state, except a school district… The term "special district" *shall not include* any district which (1) existed on January 1, 1978 and did not possess the power to levy a property tax at that time or did not levy or have levied on its behalf, an ad valorem property tax rate on all taxable property in the district on the secured roll in excess of 12 ½ cents per $100 of assessed value for the 1977-78 fiscal year, or (2) existed on January 1, 1978, or was thereafter created by a vote of the people, and is totally funded by revenues other than the proceeds of taxes as defined in subdivision (c) of Section 8 of Article XIII B of the California Constitution."

[76] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443.

> an assessment results in revenue above the cost of the improvement or is of general public benefit, it is no longer a special assessment but a tax. [Citation omitted.] We conclude "proceeds of taxes" generally contemplates only those impositions which raise general tax revenues for the entity.
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> . . . Special assessments are not taxes, and are not levied for general revenue purposes. We are unable to find anything in Article XIII B to indicate that "proceeds of taxes" were intended to include special assessment proceeds.[77]

In 1991, the California Supreme Court reiterated that article XIII B was not intended to reach beyond taxation:

> Article XIII B of the Constitution, however, *was not intended to reach beyond taxation*. That fact is *apparent from the language of the measure*. It is confirmed by its history. In his analysis, the Legislative Analyst declared that Proposition 4 "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue, including federal funds, bond funds, traffic fines, user fees based on reasonable costs, and income from gifts." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), analysis by Legislative Analyst, p. 16.)[78]

Section 6 was included in article XIII B to require that "[w]henever 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 that local government for the costs of the program or increased level of service…"[79] Article XIII B, section 6 was specifically designed to protect the *tax revenues* of local governments from state mandates that would require expenditure of tax revenues:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I*, *supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid*.; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.[80]

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[77] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 451-452.

[78] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[79] California Constitution article XIII B, section 6(a) (adopted Nov. 6, 1979).

[80] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 [emphasis in original].

The California Supreme Court most recently recognized that the purpose of section 6 was 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*."[81]

Thus, article XIII B, section 6 must be read in light of the tax and spend limitations imposed by articles XIII A and XIII B, and requires the state to provide reimbursement only when a local agency is mandated by the state to expend proceeds of taxes subject to the appropriations limit of article XIII B.

In this respect, not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement under article XIII B. Redevelopment agencies, for example, have been identified by the courts as being exempt from the restrictions of article XIII B. In *Bell Community Redevelopment Agency v. Woolsey*, the Second District Court of Appeal concluded that a redevelopment agency's power to issue bonds, and to repay those bonds with its tax increment, was not subject to the spending limit of article XIII B. The court reasoned that to construe tax increment payments as appropriations subject to limitation "would be directly contrary to the mandate of section 7," which provides that "[n]othing in this Article shall be construed to impair the ability of the state or of any local government to meet its obligations with respect to existing or future bonded indebtedness."[82] In addition, the court found that article XVI, section 16, addressing the funding of redevelopment agencies, was inconsistent with the limitations of article XIII B:

> Article XVI, section 16, provides that tax increment revenues "may be irrevocably pledged" to the payment of tax allocation bonds. If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit [*sic*], it is clear that tax allocation proceeds cannot be irrevocably pledged to the payment of the bonds. Annual bond payments would be contingent upon factors extraneous to the pledge. That is, bond payments would be revocable every year of their life to the extent that they conflicted with an annual appropriation limit. The untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds.[83]

The court therefore concluded that redevelopment agencies could not reasonably be subject to article XIII B, and therefore upheld Health and Safety Code section 33678, and ordered that the writ issue to compel Woolsey to publish the notice.[84]

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[81] *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763 [quoting *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81].

[82] *Bell Community Redevelopment Agency v. Woolsey* (1985) 169 Cal.App.3d 24, 31.

[83] *Bell Community Redevelopment Agency v. Woolsey* (1985) 169 Cal.App.3d 24, 31.

[84] *Bell Community Redevelopment Agency v. Woolsey* (1985) 169 Cal.App.3d 24, 33-34.

Similarly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,[85] the Fourth District Court of Appeal held that redevelopment agencies were not eligible to claim reimbursement because Health and Safety Code section 33678 exempted tax increment financing, their primary source of revenue, from the limitations of article XIII B:

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity." The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...
>
> For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limits also support denying reimbursement under section 6… [The] costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies' collection of tax revenues.[86]

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates*, affirmed the reasoning of the *Redevelopment Agency of San Marcos* decision, holding that a redevelopment agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[87]

Thus, the courts, with these cases, have drawn a straight line from an agency's primary sources of funding being exempt from the appropriations limit, to that same agency being ineligible to claim mandate reimbursement under section 6.

Accordingly, to be eligible for reimbursement under article XIII B, section 6, a local agency must be subject to the taxing and spending limitations of articles XIII A and XIII B of the California Constitution and be capable of being forced to expend "appropriations subject to limitation."

2. The limitations imposed by Proposition 218 on the local authority to increase assessments, fees, or charges, does not make those revenues "proceeds of taxes" subject to the appropriations limit of article XIII B, or trigger the reimbursement requirements of article XIII B, section 6.

Despite the analysis above, the claimant and CSDA urge the Commission to consider the restrictions placed on special districts' authority to impose assessments, fees, or charges by Proposition 218 to be part of the "increasingly limited revenue sources" that subvention under

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[85] *Redevelopment Agency of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976).

[86] *Redevelopment Agency of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987.

[87] *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282.

section 6 was intended to protect. The claimant and CSDA would have the Commission broadly interpret and extend the subvention requirement and treat fee authority subject to Proposition 218 as proceeds of taxes, to advance the goal of precluding the state from shifting financial responsibility for carrying out governmental functions onto local entities that are ill equipped to handle the task.

Proposition 218 added article XIII D to the California Constitution in 1996 to place additional limits on the authority of local government to impose or increase assessments, fees, and charges, by imposing voter approval and public notice requirements before raising property-related fees or assessments, and allows for majority written protests to invalidate such fees.

However, nothing in the express language of Proposition 218 expands the scope of article XIII B or draws any direct comparison to the relationship between articles XIII A or XIII B. Had the voters that adopted Proposition 218 intended to link article XIII D with article XIII B, or to broaden the scope of article XIII B to include fees and assessments limited by article XIII D, or to provide relief within article XIII B, section 6 because of the limitations imposed on fees and assessments, they could have expressly provided for such a link. Instead, the voters on Proposition 218 were warned of "[s]hort-term local revenue losses of more than $100 million annually" and "[l]ong-term local government revenue losses of potentially hundreds of millions of dollars annually."[88] The proponents of Proposition 218 also noted:

> There are now over 5,000 local districts which can impose fees and assessments without the consent of local voters. Special districts have increased assessments by over 2400% over 15 years. Likewise, cities have increased utility taxes 415% and raised benefit assessments 976%, a tenfold increase.[89]

There is no indication in the ballot materials that state mandate reimbursement was intended to supplement or replace the potential revenue lost by imposing public hearing requirements and allowing for written protests to invalidate new or increased water service fees imposed by special districts.

The voters that adopted article XIII B, on the other hand, clearly intended to impose an appropriations limit *only* on tax revenues; they expressed no intention to limit the expenditure of fee or assessment revenues, or to require mandate reimbursement for expenditures that are not "proceeds of taxes." Indeed, the voters that adopted article XIII B were told explicitly that "[t]he initiative would not restrict the growth in appropriations financed from *other sources of*

[88] Exhibit G, Ballot Pamphlet, General Election (Nov. 5, 1996) Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact of Proposition 218, https://repository.uchastings.edu/ca_ballot_props/1138/, accessed November 19, 2018 page 72.

[89] Exhibit G, Ballot Pamphlet, General Election (Nov. 5, 1996) Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact of Proposition 218, https://repository.uchastings.edu/ca_ballot_props/1138/, accessed November 19, 2018, page 76.

revenue…"[90] In addition, voters were told that article XIII B "WILL NOT prevent state and local governments from providing essential services…[¶…¶ and] WILL NOT favor one group of taxpayers over another."[91] Therefore, the voters who adopted article XIII B clearly envisioned user fees and local special assessments would continue to provide funding for essential services, including those only benefiting a small group of property owners or residents.[92] A subsequent decision by the voters to provide a check on the use of fees and assessments does not of itself alter the original intent of article XIII B.

It may be, as the claimant and CSDA assert, that raising additional fee or assessment revenue is made more difficult, both procedurally and substantively, by Proposition 218. But nothing in Proposition 218, either expressly or by implication, broadens the scope and applicability of article XIII B, including section 6, to compel mandate reimbursement for the revenue sources that some speculate Proposition 218 could curtail. To now revise the scope of article XIII B (without Constitutional amendment or legislation) to require mandate reimbursement for expenditures from revenues other than proceeds of taxes would violate the intent of the voters that adopted article XIII B, and the plain language of article XIII B, section 9(c) and Government Code 7901(e), which specifically excludes from the definition of "special district" for purposes of the appropriations limit in article XIII B, a district which is totally funded by revenues other than proceeds of taxes.

Article XIII B is clear. A local agency that is funding by assessment, fees, and charges, or any combination of revenues "other than the proceeds of taxes" is an agency that is not subject to the appropriations limit, and therefore not entitled to subvention. This interpretation is supported by decades of mandates precedent and is consistent with the purpose of article XIII B. As discussed above, "Section 6 was included in article XIII B in recognition that article XIII A…severely restricted the taxing powers of local governments."[93] Article XIII B "was not intended to reach beyond taxation…" and "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue…"[94]

Accordingly, the limitations imposed by Proposition 218 on the local authority to increase assessments, fees, or charges, does not make those revenues "proceeds of taxes" subject to the

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[90] Exhibit G, Ballot Pamphlet, General Election (Nov. 7, 1979), Proposition 4, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1863&context=ca_ballot_props, accessed November 19, 2018 [emphasis added].

[91] Exhibit G, Ballot Pamphlet, General Election (Nov. 7, 1979), Proposition 4, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1863&context=ca_ballot_props, accessed November 19, 2018.

[92] See, *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 453; *County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974, 981 [Broad reading of appropriations limit creates "Hobson's choice of spending general tax funds either for expenditures to benefit the public at large or for projects to benefit certain individual property owners by funding improvements such as the construction of streets, sidewalks, gutters and sewers."].

[93] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[94] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

appropriations limit of article XIII B, or trigger the reimbursement requirements of article XIII B, section 6.

3. There is no evidence in the record that the claimant receives any proceeds of taxes subject to the appropriations limit of article XIII B and, therefore, claimant is not eligible to claim reimbursement under section 6.

As indicated above, article XIII B, section 6 requires the state to provide reimbursement only when a local agency is mandated by the state to expend funds subject to the appropriations limit of article XIII B. And, article XIII B, section 9(c) specifically provides that special districts that existed in 1977-78 and did not share in ad valorem property taxes, or were created later and are funded entirely by "other than the proceeds of taxes," are not subject to the appropriations limit.

The claimant, having been established in 1952, clearly existed on January 1, 1978. Although the claimant is theoretically able to impose special taxes pursuant to Article XIII C, section 2(a) of the California Constitution and certain provisions in the 1911 Act,[95] there is no evidence in the record that it has ever done so. In fact, all evidence in the record indicates that the claimant's revenues derive solely from its fee authority and grant funds. The 2015 audit report issued by the Bureau of State Audits and the claimant's operating budget for fiscal year 2016-2017 identify revenues from sales of imported water, sales of recycled water, revenues from standby charges, grant funding, and other revenues from deliveries of treated water, investment income, and other miscellaneous sources.[96] These documents do not identify the receipt of any "proceeds of taxes" as defined in article XIII B, section 8. Although the standby charges are collected with a landowner's property taxes,[97] the standby charges are not converted to property taxes. Standby charges are, by definition, assessments.[98]

Moreover, special districts are required by law to annually submit financial transaction reports to the State Controller's Office, which "shall include the appropriations limits and the total annual

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[95] Water Code, sections 72090 and 72090.5.

[96] Exhibit G, Bureau of State Audits (BSA) Audit Report 2015-102 (Dec. 2015), "Central Basin Municipal Water District – Its Board of Directors Has Failed to Provide the Leadership Necessary for It to Effectively Fulfill its Responsibilities," https://www.auditor.ca.gov/pdfs/reports/2015-102.pdf, accessed October 8, 2018, pages 19-20; Exhibit G, Central Basin Municipal Water District Adopted Operating Budget & Capital Improvement Projects/Grant Projects Budget, Fiscal Year 2016-17 (July 2016), https://forms.centralbasin.org/sites/default/files/finance/Adopted%20Budget%20for%20FY%202016-17_FINAL_0.pdf, accessed December 14, 2018, pages 10-13, 43.

[97] Exhibit A, Test Claim, page 290.

[98] Water Code section 71630, which states the following: "The district by ordinance may, pursuant to the notice, protest, and hearing procedures in Section 53753 of the Government Code, fix on or before the third Monday of August, in each fiscal year, a water standby *assessment* or availability charge in the district, in any portion thereof, or in any improvement district, to which water is made available by the district, whether the water is actually used or not."

appropriations subject to limitation."[99] The Controller's Last Special District Annual Report showed that claimant had no appropriations subject to limitation.[100] The Controller's open data site no longer provides information regarding special districts' reporting on appropriations limits. However, the claimant has neither asserted nor provided any evidence to show that it has reported to the Controller's Office any appropriations subject to limitation.

Accordingly, the Commission finds that there is no evidence in the record that the claimant receives any proceeds of taxes subject to the appropriations limit of article XIII B and, therefore, is not eligible to claim mandate reimbursement under section 6.

With this conclusion, the Commission does not reach the issues of whether the test claim statute mandates a new program or higher level of service, or results in increased costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

V. Conclusion

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

[99] Government Code section 12463.

[100] Exhibit G, Excerpt from the State Controller's Special District Annual Report 2011-2012, https://www.sco.ca.gov/Files-ARD-Local/LocRep/1112_special_districts.pdf, accessed November 19, 2018.

STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

RE: **Decision**

Central Basin Municipal Water District Governance Reform, 17-TC-02
Water Code Sections 71265, 71266, and 71267;
Statutes 2016, Chapter 401 (AB 1794)
Central Basin Municipal Water District, Claimant

On March 22, 2019, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Dated: March 27, 2019

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM 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	Case No.: 17-TC-03 *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. (*Adopted March 22, 2019*) (*Served March 27, 2019*)

DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on March 22, 2019. Raymond Palmucci and Tom Zeleny appeared on behalf of the City of San Diego (claimant). David Rice and Kurt Souza appeared on behalf of the State Water Resources Control Board (SWRCB). 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 6-1, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Keely Bosler, Director of the Department of Finance, Chairperson	Yes
Mark Hariri, Representative of the State Treasurer	Yes
Jeannie Lee, Representative of the Director of the Office of Planning and Research	Yes
Sarah Olsen, Public Member	No
Carmen Ramirez, City Council Member	Yes
Yvette Stowers, Representative of the State Controller, Vice Chairperson	Yes

Summary of the Findings

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the City of San Diego's (claimant's) public water system (PWS) permit adopted by the State Water Resources Control Board (SWRCB), Order No. 2017PA-SCHOOLS. The test claim order requires the claimant, as the operator of a "public water system"[1] that serves a number of K-12 schools, to perform lead sampling, upon request from a school it serves. A PWS may be a private company or a governmental entity.[2] Specifically, a PWS is 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.[3] Under the order, upon request from a school, the PWS must take samples at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school's property, process those results with 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).

The Commission finds that the Test Claim is timely filed.

The Commission further finds that the activities required by the order are new, as compared against prior state and federal law. However, the requirements of the test claim order do not impose a new program or higher level of service, within the meaning of article XIII B, section 6. The requirements are not uniquely imposed on local government, because the test claim order is one of over 1,100 PWS permits amended simultaneously with identical requirements, approximately 450 of which were issued to privately-owned and operated drinking water suppliers. Moreover, water service is not a *governmental* function of providing services to the public because providing water service is not required by state or federal law and is not a core function of government. The test claim order here relates to the provision of drinking water

[1] These systems are also known as "community water systems" which are PWSs 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.

[2] 42 United States Code, section 300f(4): "The term "public water system" means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals." (Emphasis added.) Also, "the term "supplier of water" means any person who owns or operates a public water system." (42 United States Code, section 300f(5).) Further, "the term "person" means an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency)." (42 United States Code, section 300f(12).) California law is consistent: '"Public water system" means 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." (Health and Safety Code 116275(h).)

[3] Health and Safety Code section 116275(h).

through a PWS, which is fundamentally distinct from the essential and peculiarly governmental functions determined by the courts: providing water service for a fee – traditionally a proprietary function – to ratepayers is far different from a city or county providing police or fire protection, or school districts providing a free and appropriate public education, to all residents of the jurisdiction regardless of their ability to pay. For these reasons, the Commission finds that the test claim order does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, and denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/18/2017	Permit Amendment No. 2017PA-SCHOOLS for City of San Diego PWS 3710020 was adopted by SWRCB, Division of Drinking Water.[4]
01/11/2018	The claimant filed the Test Claim.[5]
04/13/2018	The Test Claim was deemed complete and issued for comment, along with a request that SWRCB provide a copy of its administrative record for the adoption of the permit amendment.
04/23/2018	SWRCB requested an extension of time to file comments and to provide its administrative record.
05/11/2018	The Department of Finance (Finance) requested an extension of time to comment.
06/11/2018	SWRCB requested a second extension of time to file comments and to provide its administrative record, and a postponement of the hearing.
06/25/2018	Finance requested a second extension of time to comment.
08/13/2018	SWRCB filed comments on the Test Claim and provided its administrative record.[6]
08/13/2018	Finance filed comments on the Test Claim.[7]
08/29/2018	The claimant requested an extension of time to file rebuttal comments.
10/18/2018	The claimant requested a second extension of time to file rebuttal comments.
11/09/2018	The claimant filed its rebuttal comments.[8]

[4] Exhibit A, Test Claim, page 14.

[5] Exhibit A, Test Claim.

[6] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS; Exhibit C, SWRCB's Comments on the Test Claim.

[7] Exhibit D, Finance's Comments on the Test Claim.

[8] Exhibit E, Claimant's Rebuttal Comments.

12/21/2018	Commission staff issued the Draft Proposed Decision.[9]
01/11/2019	SWRCB filed comments on the Draft Proposed Decision.[10]
01/11/2019	The claimant filed comments on the Draft Proposed Decision.[11]

II. Background

The test claim order is one of over 1,100 permit amendments simultaneously issued to privately and publicly owned "public water systems," (PWSs) requiring each to test for lead in the drinking water connections of every K-12 school that it serves and that requests testing at no charge to the school from January 11, 2017 until November 1, 2019.

A. Lead as an Environmental Health Risk

Lead is toxic and has "no known value to the human body."[12] Young children "are at particular risk for lead exposure because they have frequent hand-to-mouth activity and absorb lead more easily than do adults."[13] 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.[14] 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.[15] Higher lead levels can cause severe neurological problems and ultimately death.[16]

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."[17] 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,

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[9] Exhibit F, Draft Proposed Decision.

[10] Exhibit G, SWRCB's Comments on the Draft Proposed Decision.

[11] Exhibit H, Claimant's Comments on the Draft Proposed Decision.

[12] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[13] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[14] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[15] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[16] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[17] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 2.

batteries, and cosmetics.[18] 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.[19] U.S. EPA and other agencies have "taken steps over the past several decades to dramatically reduce new 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."[20] 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.[21]

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.[22] 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.'"[23] 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."[24] 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."[25] Accordingly, the primary regulatory approach, as discussed below, is to require water systems to prioritize monitoring, and to implement and maintain corrosion control treatment to minimize toxic metals leaching into water supplies.

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[18] Exhibit I, National Institutes of Health, Lead Information Home Page, page 1.

[19] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

[20] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[21] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, pages 163-164 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, pp. 6-7].

[22] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 164 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 7].

[23] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, pages 3-4.

[24] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

[25] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

To potentially close some of the gaps in lead exposure prevention, the California Legislature in 1992 enacted the Lead-Safe Schools Protection Act,[26] 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.[27] 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 (SDWA), 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.[28] 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.[29] U.S. EPA states that there are over 170,000 public water systems providing drinking water to Americans, to which the Act applies.[30]

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).[31] 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]."[32] The number of samples required depends on the size of the drinking water system, and any history of prior exceedances.[33] 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

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[26] Education Code section 32240 et seq.

[27] Education Code section 32242.

[28] Exhibit I, *Understanding the Safe Drinking Water Act*, EPA publication, June 2004, page 1 (available at https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf).

[29] 42 U.S.C. § 300f(4).

[30] Exhibit I, *Understanding the Safe Drinking Water Act*, EPA publication, June 2004, page 2 (available at https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf).

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

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

[33] See Exhibit I, Lead and Copper Rule: A Quick Reference Guide, U.S. EPA publication 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].

copper plumbing materials; source water treatment; replacement of lead service lines; and public education.[34] The LCR also includes monitoring and reporting requirements for public water systems.[35]

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."[36] These provisions do not provide a right to the delivery of water, but merely provide that drinking water delivered by a PWS 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.[37]

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.[38] SWRCB

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[34] Exhibit C, SWRCB's Comments on the Test Claim, page 6; Title 40, Code of Federal Regulations, section 141.80(d-g).

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

[36] Health and Safety Code section 116270.

[37] Health and Safety Code section 116270.

[38] 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

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."[39]

The courts have called the California SDWA "a remedial act intended to protect the public from contamination of its drinking water."[40] 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.[41] 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,"[42] and the monitoring and corrosion control requirements are aimed at the water systems themselves, whether publicly or privately owned.

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.[43] 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.[44] Approximately 500 schools within California are themselves permitted as a "public water system," because they have their own water supply,

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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].

[39] 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).

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

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

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

[43] See California Code of Regulations, title 22, section 64670 et seq.; Exhibit C, SWRCB's Comments on the Test Claim, pages 5-6; California Code of Regulations, title 22, section 64676 [Sample Site Selection].

[44] 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].

such as a well.[45] 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.[46]

C. The Test Claim Permit Amendment

Both the federal and state law and regulations have long required drinking water systems to monitor a sample of 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.[47]

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 areas of the schools under its jurisdiction.[48] SB 334 was vetoed by then-Governor Brown, whose veto message expressed concern that the bill could create a very expensive reimbursable state mandate.[49] The veto message instead directed the SWRCB to examine the scope of the potential problem by incorporating water quality testing in schools as part of the state's LCR.[50]

Accordingly, SWRCB adopted the Permit Amendment (the test claim order) at issue here, as well as over 1,100 nearly identical (but for the individual PWS information) permit amendments for other drinking water systems serving K-12 schools. Specifically, 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, the drinking water system shall:

- Respond in writing within 60 days and schedule a meeting;

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[45] Exhibit I, *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*, California Water Boards, March 30, 3018, page 2.

[46] Exhibit I, *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*, California Water Boards, March 30, 3018, page 2.

[47] Exhibit C, SWRCB's Comments on the Test Claim, 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"].

[48] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 148 [SB 334, Legislative Counsel's Digest].

[49] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 [Governor's Veto Message].

[50] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 [Governor's Veto Message].

- 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;
- 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.[51]

Finally, the order 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.[52]

III. Positions of the Parties

A. City of San Diego

The claimant alleges that the test claim order required the claimant to perform lead testing, at no charge, on the property of all schools that receive water from the claimant's public water system, upon request.[53]

[51] Exhibit A, Test Claim, pages 105-107 [Permit Amendment No. 2017-PASCHOOLS, pp. 2-4].

[52] Exhibit A, Test Claim, pages 108 [Permit Amendment No. 2017-PASCHOOLS, p. 5].

[53] Exhibit A, Test Claim, page 14.

Specifically, the claimant alleges initial costs to develop a plan and begin responding to testing requests from schools;[54] as well as costs to compile a list of schools within the claimant's service area;[55] and costs and activities surrounding the actual response to testing requests.[56] The claimant further alleges for each sampling request received, it was required to:

(a) Prepare and send a response to the request;

(b) Submit a copy of the request to the state;

(c) Communicate with the school to schedule training meetings;

(d) Communicate school request status with the water system's management;

(e) Create and maintain a tracking spreadsheet; and

(f) Create sampling plans for each school (the claimant alleges 25 plans per week were required to be completed in order to meet the deadline in the order).[57]

The claimant also states that for each sampling request, and to complete each sampling plan, the claimant was required to collect one to five samples at each school from "regularly used drinking fountains, cafeteria/food preparation areas, or reusable bottle water filling stations selected according to the lead sampling plan…"[58] The claimant asserts that this sampling could only be done before the start of the school day, because the order required sampling after water had been sitting in plumbing and fixtures for at least six hours; and, the claimant asserts that sampling was only permitted to be conducted Tuesday through Friday, or on Saturdays in specific cases with approval from SWRCB.[59] The claimant states that 1,115 samples were taken and analyzed by the claimant in fiscal year 2017, excluding quality control samples.[60] The claimant further states that it developed a reporting template for tracking samples and the schools and fixtures from which they originated; and, based on the requirements of the order, the claimant consulted with schools after testing, aiding in the interpretation of results.[61] For school fixtures with lead sampling results over 15 ppb, schools had the option to resample, remediate, or remove the fixture. In cases where the school chose remediation, follow-up samples were taken and new reports provided to the school.[62]

[54] Exhibit A, Test Claim, page 21.

[55] Exhibit A, Test Claim, pages 22-23.

[56] Exhibit A, Test Claim, pages 26-27.

[57] Exhibit A, Test Claim, pages 28-30.

[58] Exhibit A, Test Claim, page 30.

[59] Exhibit A, Test Claim, pages 31-32.

[60] Exhibit A, Test Claim, page 32.

[61] Exhibit A, Test Claim, page 32.

[62] Exhibit A, Test Claim, pages 32-33.

The claimant states that it used its own laboratory, which contains a mass spectrometer, to analyze the samples. The samples were analyzed independently, and not combined with other regulatory or special project samples, by a trained chemist.[63] The results of the sampling were required to be uploaded to DDW's database, which, the claimant asserts, required the claimant to develop a method to convert and upload the information all at once, rather than generate and upload 1,115 separate reports.[64]

The claimant further states that it was required to provide the results to the school representative, and in the case of an exceedance of 15 ppb, notify the school within two business days.[65] Also in the case of an exceedance, claimant states that it was required to collect and additional sample within 10 days, and a third sample within 10 days if the resample is less than or equal to 15 ppb.[66] An additional sample is also required after remediation.[67]

Though the order prohibits releasing the sampling results to the public for 60 days unless the water system releases the data in compliance with the Public Records Act, the claimant asserts that the Environmental Committee of the City Council also requested updates on the progress of lead testing on May 25, 2017 and June 20, 2017, for which the claimant prepared a presentation.[68] And, the order required the claimant to discuss lead sampling results with the school prior to release to the public, and to discuss results within 10 business days of receiving laboratory results.[69]

Finally, the claimant states that the order required the claimant to keep records of all requests from schools for lead sampling, and provide those records to DDW, upon request.[70]

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.[71]

The claimant's rebuttal comments also assert that the test claim order imposes a new program or higher level of service. The claimant argues that the lead sampling requirements are a statewide policy or program;[72] which "furthers two governmental functions of providing services to the

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[63] Exhibit A, Test Claim, pages 36-37.

[64] Exhibit A, Test Claim, page 38.

[65] Exhibit A, Test Claim, pages 39-41.

[66] Exhibit A, Test Claim, page 42.

[67] Exhibit A, Test Claim, page 43.

[68] Exhibit A, Test Claim, pages 44-45.

[69] Exhibit A, Test Claim, page 46.

[70] Exhibit A, Test Claim, page 49.

[71] Exhibit A, Test Claim, pages 16-17; 52-53.

[72] Exhibit E, Claimant's Rebuttal Comments, page 2.

public," namely providing water service, and ensuring a safe environment for school children;[73] and that the Permit Amendment "applies uniquely to the City as a local water agency."[74] The claimant also notes that the case law, beginning with *County of Los Angeles*, articulates and applies two alternative tests.[75] The California Supreme Court decision in *County of Los Angeles* states that:

> The concern which prompted the inclusion of section 6 in article XIIIB was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public.[76]

The claimant argues: "This is precisely what the Permit Amendment is doing: creating a new lead testing program for schools and transferring the cost and administration of the program to the City."[77] The claimant states that it has "approximately 281,000 retail water connections," and the city council approves rates and charges for water service.[78] The claimant also argues that the City's charter "imposes a legal obligation and responsibility on the City to provide water service."[79] Accordingly, the claimant argues that providing water service is a function of the City's government. In addition, the claimant argues that the provision of water service is a governmental function "because it is predominantly provided by public agencies," and in particular, "[l]ead testing of drinking water at schools is a service to the public."[80] The claimant reasons, therefore that the test claim order is a new program eligible for reimbursement under *County of Los Angeles*.[81]

Alternatively, the claimant argues that the test claim order constitutes a local program subject to mandate reimbursement because the lead sampling requirements carry out a governmental

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[73] Exhibit E, Claimant's Rebuttal Comments, page 3.

[74] Exhibit E, Claimant's Rebuttal Comments, page 3.

[75] Exhibit E, Claimant's Rebuttal Comments, page 3 [Citing *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 ("In [*County of Los Angeles v.*] *State of California*, the Court concluded that the term 'program' has two alternative meanings…")]. See also, *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876 [Citing and discussing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 ("We again applied the alternative tests set forth in *County of Los Angeles*…"].

[76] Exhibit E, Claimant's Rebuttal Comments, page 6 [quoting *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56].

[77] Exhibit E, Claimant's Rebuttal Comments, page 6.

[78] Exhibit E, Claimant's Rebuttal Comments, page 4.

[79] Exhibit E, Claimant's Rebuttal Comments, page 4.

[80] Exhibit E, Claimant's Rebuttal Comments, page 6.

[81] Exhibit E, Claimant's Rebuttal Comments, page 6.

function related to the safety of schools: "Schools are obligated to provide free drinking water to students, or to adopt a resolution explaining why fiscal constraints or health and safety concerns prevent it."[82] The claimant argues that the "history of the Permit Amendment demonstrates its purpose is to provide safe schools, a governmental function, while shifting financial responsibility to local water agencies."[83] The claimant references failed SB 334, vetoed in October 2015: "Instead of signing the bill, the Governor directed SWRCB to implement lead testing at schools through local water agencies as part of the Lead and Copper Rule."[84] The claimant argues that the reason SB 334 was vetoed was to avoid a reimbursable state mandate, but "[l]ead testing at schools does not lose its characterization as a 'governmental function of providing services to the public' under the Supreme Court's test, merely because the obligation is transferred from schools to water agencies."[85]

The claimant also argues that the test claim order imposes a unique requirement on the claimant that does not apply generally to all residents and entities in the State:

> The Permit Amendment applies specifically to the City. It does not apply generally to all residents and entities in the State. Even collectively considering all 1,100 permit amendments issued by SWRCB, they only apply to local water agencies with schools in their service areas, not to everyone in the State. The Permit Amendment does not require lead testing be performed for all state residents and entities either, only for schools. Collectively, the permit amendments apply uniquely to water agencies in the same way the Court found the requirement for fire protective gear applied uniquely to public and private fire protection agencies. The permit amendments do not need to exclusively apply to publicly-owned water agencies to satisfy the uniqueness element of the second test.
>
> Under the second test, examples of laws that apply generally to all residents and entities in the state include requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. Subvention was denied in these cases because the requirements applied to everyone, not just to local government. Unlike these examples, though, the Permit Amendment only applies to the City. Those in the State who do not provide water service do not have to comply with the Permit Amendment.[86]

[82] Exhibit E, Claimant's Rebuttal Comments, page 6 [citing Educ. Code § 38086].

[83] Exhibit E, Claimant's Rebuttal Comments, page 7.

[84] Exhibit E, Claimant's Rebuttal Comments, page 7.

[85] Exhibit E, Claimant's Rebuttal Comments, page 7.

[86] Exhibit E, Claimant's Rebuttal Comments, page 8.

The claimant therefore concludes that the test claim order implements a state policy, and imposes unique requirements on the claimant that do not apply generally to all persons and entities in the state.[87]

The claimant also disputes the arguments of the SWRCB and the Department of Finance. First, the claimant argues that the SWRCB's reliance on the concept of a service "peculiar" to government is not supported in the case law:

> SWRCB argues that the City is ineligible for reimbursement because water service is not a function "peculiar" to government, and therefore not a governmental function. But the first test established by the California Supreme Court does not require that the function be "peculiar" to government, only that the program "carry out the governmental function of providing services to the public." The word "peculiar" is not in the test. The Supreme Court used the term "peculiar" only to distinguish programs that are forced on local government from laws that apply generally to all state residents and entities. The opinion of *Carmel Valley Fire Protection District v. State of California* cited by SWRCB, certainly found that "fire protection is a peculiarly governmental function" in satisfying the first test, despite the fact that private sector fire fighters provide the same service. The opinion does not say, however, that the first test can only be satisfied if the governmental function is peculiar to government, as SWRCB suggests.
>
> The first test only requires that the governmental function be that "of providing services to the public." SWRCB does not cite a published opinion where the government was providing a public service, but subvention was denied because the government function was not peculiar to government. Instead, instances where the first test was not satisfied involved situations where the new requirements did not increase the level of service provided to the public, such as requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. These requirements only increased the government's incidental cost of providing existing public services rather than requiring new services or programs.[88]

The claimant also argues that SWRCB's reliance on "a 100-year-old line of cases on sovereign immunity" is inapplicable, and irrelevant. The claimant argues that more recently "Courts have determined '[t]he labels "governmental function" and "proprietary function" are of dubious value in terms of legal analysis in any context.'"[89] The claimant argues that Proposition 218 weakens the analogy to corporate or proprietary activities: "Water service provided by public

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[87] Exhibit E, Claimant's Rebuttal Comments, page 8.

[88] Exhibit E, Claimant's Rebuttal Comments, page 4.

[89] Exhibit E, Claimant's Rebuttal Comments, page 5 [citing *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands*, (1977) 75 Cal. App.3d 957, 968].

agencies no longer carries the indicia of a proprietary function or private enterprise due to Proposition 218 (discussed below), which eliminates profit from water service charges."[90]

And, the claimant argues that "SWRCB's reliance on the Service Duplication Law is confusing."[91] The claimant asserts that the Service Duplication Law, which was adopted in 1965, "recognizes that water service was transitioning from a private to a predominantly governmental function by providing compensation to private utilities for lost business."[92] The claimant maintains that "[n]ow, over 50 years later, that transition is substantially complete."[93]

Further, the claimant disputes the characterization by SWRCB and Finance that water service is largely a private enterprise. The claimant notes that even though SWRCB provides evidence that approximately 75 percent of drinking water systems are private entities, "the same tables show that 81% of the population served by drinking water systems statewide, or 33.8 million of 41.6 million people, receive their water service from public entities."[94] The claimant argues that "[s]uch a large percentage of the State population receiving water service from public entities is strong evidence that water service is a governmental function, more persuasive than the fact that small, privately owned water systems outnumber large, publicly owned systems."[95]

The claimant also asserts that it has incurred increased costs mandated by the state, and that the exceptions in Government Code section 17556 do not apply. 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.[96] The order expressly provides that the claimant must conduct the lead sampling at no charge to the schools in its service area. The claimant concludes on this basis, and pursuant to article XIII C of the California Constitution, which prohibits a fee or charge that exceeds the proportional cost of service attributable to a parcel, that the claimant is unable to recoup the costs of the alleged mandate through fees for water service, because it cannot impose or increase fees on the schools

[90] Exhibit E, Claimant's Rebuttal Comments, page 5 [Proposition 218 added articles XIII C and XIII D to the California Constitution, which generally require assessments, as well as fees or charges for property-related services, to be proportional to the benefit received by the payor, and to be limited to the amount necessary to provide the service or special benefit. As a general rule, any revenues received in excess of the proportional benefit or burden are deemed to be taxes, and thus are illegally collected absent a two-thirds voter approval].

[91] Exhibit E, Claimant's Rebuttal Comments, page 5.

[92] Exhibit E, Claimant's Rebuttal Comments, page 5.

[93] Exhibit E, Claimant's Rebuttal Comments, page 5.

[94] Exhibit E, Claimant's Rebuttal Comments, page 5 [citing Exhibit C, SWRCB's Comments on the Test Claim, Attachment 101, pp. 406-409].

[95] Exhibit E, Claimant's Rebuttal Comments, page 5.

[96] Exhibit A, Test Claim, page 58.

in which it conducts lead testing, and it is legally proscribed from imposing or increasing fees on other water users.[97]

The claimant states in its rebuttal comments that the test claim order results in increased costs mandated by the state: "By mandating that the City perform lead testing for free, the Permit Amendment has ensnared the City in [a] constitutional web of fees and charges, where the only ways out are to spend local tax revenue or to seek reimbursement through this Commission."[98] The claimant argues that because the express language of the test claim order prohibits charging schools for the costs of sampling, "the cost of the new service is being absorbed by all City ratepayers."[99] The "constitutional web" the claimant is referring to is the substantive limitations on new fees or charges imposed by Proposition 218; article XIII D imposes a proportionality requirement, a prohibition on excessive fees, and a prohibition on new fees or charges for any service "unless that service is actually used by, or immediately available to, the owner of the property in question."[100] And although the "SWRCB believes that the Permit Amendment confers a direct benefit on all water ratepayers, not just the schools, in the form of increased property values and ensuring the City's water does not contain lead,"[101] the claimant argues that the benefits are not sufficiently direct:

> First, raising water rates to cover the cost of the Permit Amendment would ultimately violate the Permit Amendment itself. The City is legally obligated by Proposition 218 to apportion the cost of service based on the relative benefits received by its customers. Proposition 218 further prohibits the City from charging customers for services that are not immediately available to them. The schools, as the exclusive and direct recipients of lead testing under the Permit Amendment, benefit the most in that the testing assesses school pipes and fixtures for sources of lead. Lead testing is not available to the rest of the City's water ratepayers under the Permit Amendment, so they do not receive the benefit of having their own properties evaluated. The benefits of higher property values and testing of City water that SWRCB says are direct benefits to all ratepayers, are really collateral or incidental benefits. Any water rate increase apportioning the cost of lead testing among City ratepayers would fall primarily on schools, the direct and primary beneficiary of the lead testing. The Permit Amendment, however, prohibits charging a school for lead testing. A school is being charged for lead testing whether the City sends the school an invoice when the testing is done, or passes on the cost of lead testing to a school through a water rate increase.

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[97] Exhibit A, Test Claim, page 54.

[98] Exhibit E, Claimant's Rebuttal Comments, page 9.

[99] Exhibit E, Claimant's Rebuttal Comments, page 9.

[100] Exhibit E, Claimant's Rebuttal Comments, page 10 [citing Cal. Const. art. XIII D, § 6].

[101] Exhibit E, Claimant's Rebuttal Comments, page 10.

> Second, even assuming there is a plausible connection between lead testing at schools and higher property values in the surrounding neighborhoods, higher property values do not benefit all water ratepayers. Water ratepayers are both homeowners and renters. While a homeowner may benefit from a higher resale value of a home, a tenant will not. Higher property values cannot justify charging all water ratepayers for a service they are not receiving.[102]

Moreover, the claimant argues that any fees that might be imposed for lead testing are not imposed as an incident of property ownership, on an ongoing basis.[103] Accordingly, the claimant argues that Proposition 26 controls:

> Proposition 26 further tightened the restrictions on local government revenue imposed by Propositions 13 and 218 by defining a tax as "any levy, charge, or exaction of any kind imposed by a local government, except the following:"
>
> > (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
> >
> > (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
> >
> > (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
> >
> > (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
> >
> > (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
> >
> > (6) A charge imposed as a condition of property development.
> >
> > (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.
>
> A fee or charge is a tax that must be approved by the voters unless the fee or charge meets one of these seven exceptions. [Citing to Cal. Const., art. XIII C, § 2.] The last of the seven exceptions is for property-related fees and charges under Proposition 218, but because lead testing performed under the Permit Amendment is not provided as an incident of property ownership (discussed above), the City

[102] Exhibit E, Claimant's Rebuttal Comments, page 11.

[103] Exhibit E, Claimant's Rebuttal Comments, page 12.

> cannot avail itself of that exception to raise water rates without voter approval. The third through sixth exceptions are inapplicable to a fee for lead testing because the City is not acting as a regulator in performing the service, the City is not charging the schools to enter City property, the City is not fining the schools for violating the law, and the City is not imposing a development fee, respectively. The first exception for "a specific benefit conferred or privilege granted directly to the payor" does not apply either, because the City is not issuing a school a permit or a license to engage in any activity.
>
> This leaves only the second exception, which would ordinarily give the City sufficient fee authority in situations like this: "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." [Citing to Cal. Const., art. XIII C, § 1(e)(2).] The City is providing lead testing services on school property at the request of each school, for which the City could ordinarily charge each school an amount equivalent to the cost of providing the service. The problem is the Permit Amendment prohibits the City from charging the schools, even though the schools are receiving the government service. The school is not the "payor," so the second exception does not apply. Therefore, by default, the City's water ratepayers become the "payor" even though they are not requesting or receiving the service. Without any applicable exceptions, charging water ratepayers for lead testing provided to schools for free is a tax subject to voter approval under Proposition 26.[104]

Accordingly, the claimant asserts that the test claim order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

In response to the Draft Proposed Decision, the claimant provides additional argument and evidence that the City's operation of a PWS 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 immediately come due if the City elected to discontinue such service.[105] The claimant asserts that these facts constitute practical compulsion within the meaning of *Department of Finance v. Commission* (*Kern*).[106]

In addition, the claimant continues to assert that the test claim order imposes a new program or higher level of service, in that water service is an essential function of government, and that even if providing water service is not a governmental function and a public service, providing free lead testing in schools is a service to the public.[107]

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[104] Exhibit E, Claimant's Rebuttal Comments, pages 12-13.

[105] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 8-11.

[106] (2003) 30 Cal.4th 727.

[107] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 2-8.

B. Department of Finance

Finance argues that "[w]hile water service is a local governmental function in some jurisdictions, it is not a function unique to local governments."[108] Finance bases this conclusion on SWRCB's statement that 450 of the 1,100 "public water systems" affected by permit amendments identical to the test claim order are privately owned and operated.[109]

Finance also argues that "claimants do have fee authority undiminished by Propositions 218 or 26."[110] Finance states that "Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes."[111] Finance maintains that the alleged mandate "involves the provision of water services and the fee authority is subject at most to the majority protest provision under article XIII D, section 6(a)."[112] Finance further asserts that "as the State Board makes clear in its comments on this test claim, lead testing in K-12 schools provides a direct benefit to all water systems and each ratepayer, and the City may therefore set water rates sufficient to pay for the costs of compliance with the permit amendment."[113]

C. State Water Resources Control Board

SWRCB asserts that the test claim order is not subject to state mandate reimbursement because the order does not constitute a "new program or higher level of service" since it does not provide a peculiarly governmental service and is not unique to government. Additionally, and in the alternative, the claimant has fee authority sufficient to cover the costs of any required activities despite Proposition 218.

Specifically, SWRCB argues that the claimant's operation of a PWS subject to the order "is not a function of service peculiar to government because public water systems are operated by both private and governmental entities."[114] And, SWRCB argues that the order "imposes no unique requirements on the City because the State Water Board imposed the exact same lead testing in school requirements on over 1,100 publicly and privately owned water systems."[115]

SWRCB acknowledges that the Safe Drinking Water Act, which SWRCB is responsible for implementing, makes it the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that may cause cancer, birth defects, or other chronic illness. And, SWRCB recognizes that it is the policy of the state to establish standards at least as

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[108] Exhibit D, Finance's Comments on the Test Claim, page 2.

[109] Exhibit D, Finance's Comments on the Test Claim, page 2.

[110] Exhibit D, Finance's Comments on the Test Claim, page 2.

[111] Exhibit D, Finance's Comments on the Test Claim, page 2.

[112] Exhibit D, Finance's Comments on the Test Claim, page 2.

[113] Exhibit D, Finance's Comments on the Test Claim, page 2.

[114] Exhibit C, SWRCB's Comments on the Test Claim, page 8.

[115] Exhibit C, SWRCB's Comments on the Test Claim, pages 8-9.

stringent as the federal Safe Drinking Water Act, and to protect public health and "establish a drinking water regulatory program that provides for the orderly and efficient delivery of safe drinking water throughout the state."[116]

However, in doing so, SWRCB argues that this order, one of 1,100 simultaneously adopted permit amendments, does not impose a state-mandated new program or higher level of service because the requirements of sampling for lead in K-12 schools apply to a variety of public and private entities, the only common characteristic of which is that the subject water systems are all PWSs that serve at least one K-12 school. SWRCB argues that the alleged mandate "relates to the City's provision of drinking water as a public water system."[117] SWRCB argues that the provision of drinking water, in this context, is not a service that is "peculiar to government," in the sense discussed in *County of Los Angeles v. State of California*.[118]

The term "public water system," SWRCB explains, does not mean only those drinking water systems that are publicly owned; instead, "[a] public water system is defined as a system that provides water for human consumption to at least 15 or more connections or that regularly serves 25 or more people daily."[119] And, SWRCB notes, "[o]f the 6,970 water systems currently operating in California, 5,314 are private entities and 1,656 are public entities."[120] More importantly, SWRCB argues that the courts have found that reimbursement is only required for "programs" that are essential and basic to government, "peculiar" to government, or "traditional" governmental services.[121] SWRCB argues that the provision of water, though sometimes a service provided by a governmental entity is not a traditional or essential service of government.

SWRCB argues that the rules developed by the courts are also consistent with a line of cases involving tort claims against local governments, prior to the adoption of the Government Claims Act. A threshold issue in each of those tort claims was whether sovereign immunity barred an action against the local government, and the courts distinguished cases in which sovereign immunity was available or not by characterizing the activity giving rise to the action as either "governmental" or "public," or more in the nature of "corporate" or "private."[122] SWRCB asserts that municipal activities providing utilities or other "facilities of urban life," are generally

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[116] Exhibit C, SWRCB's Comments on the Test Claim, page 4.

[117] Exhibit C, SWRCB's Comments on the Test Claim, page 10.

[118] Exhibit C, SWRCB's Comments on the Test Claim, pages 9-10 [citing *County of Los Angeles v. State* (1987) 43 Cal.3d 46].

[119] Exhibit C, SWRCB's Comments on the Test Claim, page 3 [citing Health and Safety Code § 116275(h)].

[120] Exhibit C, SWRCB's Comments on the Test Claim, page 2 [citing May 2018 Water System Report, Attachment 101 (Exhibit C, p. 455)].

[121] Exhibit C, SWRCB's Comments on the Test Claim, pages 10-11.

[122] Exhibit C, SWRCB's Comments on the Test Claim, page 12 [citing *Chafor v. City of Long Beach* (1917) 174 Cal. 478; *Plaza v. City of San Mateo* (1954) 123 Cal.App.2d 103; *City of Concord v. Tony Freitas* (1956) 144 Cal.App.2d 822].

considered more in the nature of "corporate" services, rather than "government" services.[123] SWRCB concludes "[a]lthough for the purposes of sovereign immunity, the distinction between the corporate and governmental functions of government is no longer relevant, this line of cases remains appropriate and persuasive authority for defining what constitutes a service peculiar to government."[124]

SWRCB also argues that this interpretation "is underscored by the Service Duplication Law, which requires a local government to compensate a private water supplier when the local government extends service into the service area of the private supplier.[125] SWRCB states that "[t]his statutory requirement for compensation…amounts to a legislative determination that water service is not a service that is or should be peculiar to local governments."[126]

SWRCB concludes on this issue that "simply put, the provision of drinking water is not a function or service which is peculiar to local government."[127] SWRCB states that "statewide, the overwhelming majority (over 75 percent) of drinking water systems are privately owned."[128] SWRCB asserts that no state or federal law requires a city or county to operate a drinking water system, and "[i]ndeed, many cities and counties do not provide potable water to their residents and, instead, rely on private companies to provide drinking water to city and county residents."[129] SWRCB argues that unlike the services at issue in *Carmel Valley* and *City of Sacramento*, "operating a public water system is not an 'essential,' 'basic,' 'classical' or 'traditional' governmental function."[130]

With respect to the alternative test, requirements "uniquely" imposed on local government, and not applicable generally to all residents or entities, SWRCB argues that the order must be considered in the context of the SWRCB's other permit amendments adopted simultaneously: "[w]hen viewed within this larger programmatic context, the Permit Amendment imposes no unique requirements on the City and is not a new program subject to subvention…"[131] SWRCB explains:

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[123] Exhibit C, SWRCB's Comments on the Test Claim, page 12 [citing *In re Bonds of Orosi Public Utility District v. McHuiag* (1925) 196 Cal. 43].

[124] Exhibit C, SWRCB's Comments on the Test Claim, page 12 [citing Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211, 219-220].

[125] Exhibit C, SWRCB's Comments on the Test Claim, page 13 [citing Public Utilities Code § 1501 et seq.].

[126] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[127] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[128] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[129] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[130] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[131] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

> [T]he City was one of more than 1,100 public water systems that received permit amendments substantially identical to the City's Permit Amendment. The State Water Board issued these permit amendments within a few days of each other. Collectively, these permit amendments, including the Permit Amendment at issue in this Test Claim, effectuate the statewide lead testing of drinking water in schools program. Of the over 1,100 public water systems that received the permit amendments, approximately 450 water systems are privately owned. Accordingly, the Permit Amendment, as part of the State Water Board's lead testing in schools program, imposed no unique requirements on the City that were not imposed on the privately owned water systems.[132]

SWRCB also notes that "[v]iewing each individual drinking water permit in a vacuum, and not relative to other similarly situated water systems, could result in a determination that each requirement was unique to that particular water system because the drinking water permit only applies to that entity."[133] SWRCB concludes that "[t]his cannot be the result the voters intended…"[134]

Finally, SWRCB argues that Proposition 218 does not prevent the claimant from imposing or increasing water rates to recoup the costs of the alleged mandate. SWRCB argues that the claimant interprets its authority post-Proposition 218 too narrowly. Broadly, Proposition 218 requires new or increased fees to be proportional to the benefit received or the burden imposed on the local government related to the governmental service at issue. However, SWRCB argues that the lead testing required under the Order confers a direct benefit on all water system users as a whole.[135] Additionally, SWRCB states that "[b]y requiring additional lead testing in schools, the Permit Amendment functionally extends the Lead and Copper rule by providing additional testing points which can inform the City about how the water chemistry in its distribution network may be impacting not only particular schools, but residences who obtain water from a common source or through a common delivery system."[136] SWRCB thus argues that "just as the testing of private residences under the Lead and Copper rule benefits the water system as a whole…the lead testing in K-12 schools provides a similar direct benefit to each ratepayer by providing additional testing inputs the City can use to optimize its water chemistry and quality…"[137]

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[132] Exhibit C, SWRCB's Comments on the Test Claim, page 14.

[133] Exhibit C, SWRCB's Comments on the Test Claim, page 14.

[134] Exhibit C, SWRCB's Comments on the Test Claim, page 14.

[135] Exhibit C, SWRCB's Comments on the Test Claim, page 15.

[136] Exhibit C, SWRCB's Comments on the Test Claim, page 16.

[137] Exhibit C, SWRCB's Comments on the Test Claim, page 16.

In addition, SWRCB argues that lead testing in schools will help to maintain and possibly improve property values; and that school facilities are often used for community meetings and generally provide a benefit to the entire community.[138]

Based on these arguments, SWRCB concludes that the activities alleged in the test claim order are not reimbursable.

In response to the Draft Proposed Decision, SWRCB states that it agrees that the permit amendment does not impose a reimbursable new program or higher level of service.[139] In addition, SWRCB asserts that if the Commission determines that the permit amendment constitutes a new program or higher level of service, "there are alternative grounds to find that the City has sufficient fee authority to comply with the Permit Amendment."[140]

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."[141] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[142]

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.[143]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or

[138] Exhibit C, SWRCB's Comments on the Test Claim, page 16.

[139] Exhibit G, SWRCB's Comments on the Draft Proposed Decision, page 1.

[140] Exhibit G, SWRCB's Comments on the Draft Proposed Decision, page 1.

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

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

[143] *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.[144]

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.[145]

4. 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.[146]

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.[147] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[148] 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."[149]

A. This Test Claim Is Timely Filed Pursuant to Government Code Section 17551.

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."[150]

[144] *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).

[145] *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.

[146] *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.

[147] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

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

[149] *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].

[150] Government Code section 17551(c).

The effective date of the order is January 18, 2017.[151] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[152] Therefore, the Test Claim is timely filed.

B. The Test Claim Order Does Not Impose a New Program or Higher Level of Service.

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the claimant's public water system permit adopted by SWRCB, Order No. 2017PA-SCHOOLS for the City of San Diego PWS No. 3710020, which 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. A PWS may be a private company or a governmental entity and is 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.[153] Under the order, upon request, the PWS 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).

The activities required by the order are new, as compared against prior state and federal law. However, as described below, the activities alleged do not constitute a new program or higher level of service subject to reimbursement under article XIII B, section 6 of the California Constitution.

1. The test claim order imposes new requirements on operators of public water systems.

The plain language of the test claim order requires the claimant, as a PWS, to:

- Submit to SWRCB'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];[154]
- If a school representative requests lead sampling assistance in writing:
    - Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[155]

[151] Exhibit A, Test Claim, page 104 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 1].

[152] Exhibit A, Test Claim, page 1.

[153] 42 United States Code, section 300f(4).

[154] Exhibit A, Test Claim, page 105 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 2].

[155] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

- Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[156]
- 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;[157]
- 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;[158]
- Ensure samples are collected by an adequately trained water system representative;[159]
- Submit the samples to an ELAP certified laboratory for analysis;[160]
- Require the laboratory to submit the data electronically to DDW;[161]
- Provide a copy of the results to the school representative;[162]
- Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[163]

- If an initial sample shows an exceedance of 15 ppb:

[156] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[157] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[158] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[159] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[160] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[161] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[162] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[163] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

    - Collect an additional sample within 10 days if the sample site remains in service;[164]
    - Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[165]
    - 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;[166]
- Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[167]
- 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;[168]
- 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;[169]
- 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;[170]
    - The water system is not responsible for the costs of any corrective action or maintenance;[171]

[164] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[165] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[166] Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

[167] Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

[168] Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

[169] Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

[170] Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

[171] Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

- Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[172]
- Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[173]

Both the claimant and SWRCB agree that these requirements are new, as compared against prior law.[174]

The Commission finds that the requirements imposed by the test claim order are new. Prior law, under the federal Safe Drinking Water Act, the California SDWA, 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, but the requirements of this order, for PWSs that supply water to K-12 schools to sample one to five drinking water fixtures on school property, upon request of the school, are new.

2. The new requirements of the test claim order do not constitute a new program or higher level of service, within the meaning of article XIII B, section 6 of the California Constitution.

State mandate reimbursement is not required for any and all costs that might be incurred by local government incident to a change in law. Mandate reimbursement is required only when all elements of article XIII B, section 6 are met: the statute or executive order must impose a state mandated program, must provide "new program or higher level of service," and must result in increased costs mandated by the state.[175] If any of these elements is not satisfied, then reimbursement is not required and the test claim must be denied.

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[172] Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

[173] Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

[174] See Exhibit A, Test Claim, 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 C, SWRCB's Comments on the Test Claim, 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.].

[175] California Constitution, article XIII B, section 6; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 and 109; Government Code sections 17514, 17556.

The Draft Proposed Decision relied on the *City of Merced* and *Department of Finance (Kern High School Dist., and POBRA)* cases,[176] to find that local government is not mandated by state or federal law to provide drinking water through operation of a PWS and, thus, is not mandated by the state to comply with the test claim order.[177] The analysis turned largely on the absence of any requirement in the California Constitution for local government to own or operate a PWS, and the express authority for private and public entities to do so.[178] The Draft Proposed Decision also noted that there was no evidence in the record that the claimant is practically compelled and would suffer "certain and severe penalties" or other draconian measures if the claimant decided to no longer provide water services to its residents or operate as a PWS.[179]

In its response to the Draft Proposed Decision, the claimant has provided additional argument and evidence that the City is practically compelled to continue providing water service as a PWS, both because of the long history of doing so, and because of the substantial bond liability it has incurred, which would immediately come due if it ceased operation of the PWS.[180] Specifically, the claimant asserts that it 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.[181] 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.[182] For these reasons, the claimant argues that it is practically compelled to continue to operate as a PWS.

The Commission, does not need to resolve the state-mandate issue to determine this case because, as explained below, the Commission finds that test claim order does not constitute a new program or higher level of service and, thus, reimbursement under article XIII B, section 6 is not required.

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[176] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777; *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355.

[177] Exhibit F, Draft Proposed Decision, pages 49-55.

[178] See Exhibit F, Draft Proposed Decision, pages 49-50 [citing California Constitution, article XI, section 9; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274].

[179] Exhibit F, Draft Proposed Decision, page 55. See also, *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 753-754. *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[180] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 8-11; 56-59 [Declaration of Raymond C. Palmucci, Deputy City Attorney designated to review and approve information pertaining to the City's Water Fund].

[181] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 9 [The claimant also points out that its six largest customers are federal, state, and local agencies, including the City itself, and that these agencies could not function if the City elected to discontinue water service].

[182] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 10-11; 112 [Financial Statement regarding Subordinated Water Revenue Bonds, Series 2018A].

a. The courts have defined a "new program or higher level of service" as a "program that carries out the governmental function of providing services to the public or laws, which, to implement a state policy, impose unique requirements on local government."

The California Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, that a new program or higher level of service means a program that carries out of the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state," as follows:

> Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term – *programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state*.[183]

The Court further held that "the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[184] The law at issue in the *County of Los Angeles* case addressed increased worker's compensation benefits for government employees, and the Court concluded that:

> …section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in worker's compensation benefits that employees of private individuals or organizations receive. Workers' compensation is *not* a program administered by local agencies to *provide service to the public*.[185]

The Court also concluded that the statute did not impose unique requirements on local government:

> Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services

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

[184] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57 (emphasis added).

[185] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 (emphasis added).

> incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. [Citation omitted.] Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[186]

In *City of Sacramento*, the Court considered whether a state law extending mandatory unemployment insurance coverage to include local government employees imposed a reimbursable state mandate.[187] The Court followed *County of Los Angeles*, holding that "[b]y requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased 'service to the public' at the local level…[nor] imposed a state policy 'uniquely' on local governments."[188] Rather, the Court observed that most employers were already required to provide unemployment protection to their employers, and "[e]xtension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies 'indistinguishable in this respect from private employers.'"[189]

A few other examples are instructive. In *Carmel Valley*, the claimants sought reimbursement from the state for protective clothing and equipment required by regulation, and the State argued that private sector firefighters were also subject to the regulations, and thus the regulations were not unique to government.[190] The court rejected that argument, finding that "police and fire protection are two of the most essential and basic functions of local government."[191] And since there was no evidence on that point in the trial court, the court held "we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classic governmental function."[192] Thus, the court found that the regulations requiring local agencies to provide protective clothing and equipment to firefighters carried out the

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[186] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 58.

[187] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[188] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67.

[189] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67. See also, *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 [Finding that statute eliminating local government exemption from liability for worker's compensation death benefits for public safety employees "simply puts local government employers on the same footing as all other nonexempt employers"].

[190] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.

[191] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537 [quoting *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107].

[192] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

governmental function of providing services to the public. The court also found that the requirements were uniquely imposed on government because:

> The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not generally apply to all residents and entities in the State but only to those involved in fire fighting.[193]

Later, in *County of Los Angeles II*, counties sought reimbursement for elevator fire and earthquake safety regulations that applied to all elevators, not just those that were publicly owned.[194] The court found that the regulations were plainly not unique to government.[195] The court also found that the regulations did not carry out the governmental function of providing a service to the public, despite declarations by the county that without those elevators, "no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County buildings . . . ."[196] The court held that the regulations did not constitute an increased or higher level of service, because "[t]he regulations at issue do not mandate elevator service; they simply establish safety measures."[197] The court continued:

> In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not "a governmental function of providing services to the public." [FN 5 This case is therefore unlike *Lucia Mar, supra*, 44 Cal.3d 830, in which the court found the education of handicapped children to be a governmental function (44 Cal.3d at p. 835) and *Carmel Valley, supra*, where the court reached a similar conclusion regarding fire protection services. (190 Cal.App.3d at p. 537.)[198]

As analyzed herein, the test claim order does not impose unique requirements on local government and does not impose a program that carries out the governmental function of providing services to the public.

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[193] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 538.

[194] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[195] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[196] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[197] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546.

[198] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546, Footnote 5.

b. The requirements of the test claim order are not uniquely imposed on government.

The claimant contends that the test claim order imposes unique requirements on the claimant that do not apply generally to all residents and entities in the State and, therefore constitutes a new program or higher level of service:

> The Permit Amendment applies specifically to the City. It does not apply generally to all residents and entities in the State. Even collectively considering all 1,100 permit amendments issued by SWRCB, they only apply to local water agencies with schools in their service areas, not to everyone in the State. The Permit Amendment does not require lead testing be performed for all state residents and entities either, only for schools. Collectively, the permit amendments apply uniquely to water agencies in the same way the Court found the requirement for fire protective gear applied uniquely to public and private fire protection agencies. The permit amendments do not need to exclusively apply to publicly-owned water agencies to satisfy the uniqueness element of the second test.
>
> Under the second test, examples of laws that apply generally to all residents and entities in the state include requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. Subvention was denied in these cases because the requirements applied to everyone, not just to local government. Unlike these examples, though, the Permit Amendment only applies to the City. Those in the State who do not provide water service do not have to comply with the Permit Amendment.
>
> The Permit Amendment satisfies all the elements of the second test. The Permit Amendment is implementing a State policy of providing safe drinking water to school students. The policy is implemented by obligating local water agencies to test for lead on school property. The obligation to test for lead does not apply generally to all residents and entities in the State, but uniquely to local water agencies. Therefore, the Permit Amendment is a new program eligible for reimbursement under the second test established by the Supreme Court.[199]

In response to the Draft Proposed Decision, the claimant continues to argue that "[t]he Permit Amendments do not generally apply to all residents and entities in the State, but only to those providing water service to schools, in the same manner that the requirements in Carmel Valley only applied to firefighting services."[200]

The Commission disagrees with the claimant and finds that the requirements of the test claim order are not uniquely imposed on local government.

First, it is correct that the test claim order pled is uniquely addressed to *a* local government entity (the City of San Diego, in its capacity as the operator of a PWS in this instance). However, it is but one of 1,128 permit amendments adopted near-simultaneously, more than a third of which

[199] Exhibit E, Claimant's Rebuttal Comments, page 8.

[200] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 8.

were issued to privately owned PWS's, with the same requirements to perform lead sampling upon request of a school within the service area. As instructed by the courts interpreting article XIII B, section 6 of the California Constitution, this test claim order cannot be considered in isolation; it must be construed in context with other similar permits issued by SWRCB to PWSs.[201] The test claim statute in *City of Sacramento* expressly extended unemployment insurance to public sector employees without altering the law applicable to private sector employees.[202] The California Supreme Court, however, considered the statute in context and held that the statute did not impose requirements unique to local government and, thus, did not impose a new program or higher level of service: "Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies 'indistinguishable in this respect from private employers.'"[203] The Court also observed that it would "have an anomalous result" if the State could "avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors at the same time," while "if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay."[204] Similarly, the test claim statute in *City of Richmond v. Commission on State Mandates* eliminated a statutory exemption from providing workers' compensation death benefits to local safety members, which put local government employers on the same footing as all other nonexempt employers, requiring that they provide the workers' compensation death benefit.[205] The court found that the statute did not impose a new program or higher level of service, even though the statute itself, considered in isolation, affected only local government.[206] Accordingly, here, the Commission must consider the permit amendment in context, and although the permit amendment pled in this test claim is directed to only one local government, it is one of many permits issued to PWS' and is therefore not *uniquely* imposed on the claimant.

The claimant, however, asserts that "[t]he obligation to test for lead does not apply generally to all residents and entities in the State, but uniquely to local water agencies,"[207] and therefore the test claim order is eligible for reimbursement under article XIII B, section 6. The claimant's statement is factually incorrect, and misuses and misapplies the words "generally" and "uniquely." The factual error inherent in the claimant's argument is that lead testing

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[201] See *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 [Elimination of a previous statutory exemption from part of worker's compensation law was not a new program, uniquely imposed on government, even though the statute itself, considered in isolation, affected only local government].

[202] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[203] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67 [quoting *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58].

[204] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 69.

[205] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[206] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197-1198.

[207] Exhibit E, Claimant's Rebuttal Comments, page 8.

requirements do not apply only to "local water agencies," a phrase which implies a group of *local government* entities,. The permit amendments issued apply "to *each public water system* that serves drinking water to at least one or more of grades [K-12]"[208] which is significantly more broad than "local water agencies" and includes both governmental and privately owed systems. Similarly, the SWRCB media release accompanying the permit amendments stated "[t]he Board is requiring *all community water systems* to test school drinking water upon request by the school's officials."[209]

As noted above, the term "public water system" does not mean a water system owned or operated by a governmental entity; California's SDWA defines a PWS 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.[210] In addition, the Act defines several other water systems that might deliver drinking water and would be regulated under the Act, including, but not limited to, a "community water system," defined as a public water system that serves yearlong residents; and a "state small water system," defined as a system that serves at least five but not more than 14 service connections and does not regularly serve at least 25 persons for more than 60 days out of the year.[211] The record indicates that permit amendments were issued to privately owned PWS's including mutual water companies organized under the Corporations Code;[212] and investor-owned utilities regulated under the Public Utilities Code.[213] Describing such entities as "local water agencies," or implying that the

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[208] Exhibit E, Claimant's Rebuttal Comments, page 21 [Permit Amendment No. 2017PA-SCHOOLS].

[209] Exhibit E, Claimant's Rebuttal Comments, page 34 [SWRCB Media Release, Jan. 17, 2017].

[210] Health and Safety Code 116275(h).

[211] See Health and Safety Code section 116275(h-k; n-o).

[212] Corporations Code section 14300 et seq.. See, e.g., Exhibit C, SWRCB's Comments on the Test Claim, Permit Amendments issued to entities described as "mutual water company" or "mutual water association": pages 897 [Ali Mutual Water Co.]; 1053 [Aromas Hills Mutual Water Association]; 1092 [Arrowhead Villas Mutual Service Co.]; 1139 [Atascadero Mutual Water Co.]; 1153 [Averydale Mutual Water Co.]; 1340 [Bedel Mutual Water Co.]; 1392 [Bellflower-Somerset MWC]; 1414 [Best Road Mutual Water Co.]; 1427 [Beverly Grand Mutual Water]; 1623 [Box Springs Mutual Water Co.].

[213] See, Exhibit I, List of Regulated Water and Sewer Utilities, California Public Utilities Commission, August 17, 2018. See, e.g., Exhibit C, SWRCB's Comments on the Test Claim, Permit Amendments issued to investor-owned utilities regulated by PUC: pages 1265 [Bakman Water Co.]; 1292 [Bass Lake Water Co.]; 1455 [Big Basin Water Co.]; 1862-1939 [California Water Service Company: King City, Las Lomas, Oak Hills, Salinas Hills, Salinas, Stockton]; 1940 [California American Water, Coronado]; 2105 [California Water Service, Bear Gulch]; 2133-2177 [California Water Service: East Los Angeles, Hermosa/Redondo; Palos Verdes]; 2193-2220 [California Water Service: Westlake, Los Altos Suburban]; 2240 [California Water Service, South San Francisco]; 2380-2414 [Cal-Water Service Co.: Chico, Hamilton City, Marysville, Oroville, Willows]; 2508 [Canada Woods Water Co.]; 2661 [Cazadero Water Co.];

requirements of the test claim order apply only to "local water agencies" is misleading and factually inaccurate.

Moreover, as indicated above, the provision of water through a public water system, to a school or any other customer, is not an activity or service unique to government, and therefore additional requirements or costs imposed on that service are also not unique. Article XI, section 9 of the California Constitution provides that a municipal corporation, or a private person or corporation, may be established to operate public works to furnish water.[214] This provision was adopted by voter initiative to make clear that cities or other local entities had authority to organize to provide such services, which had previously been provided primarily by private entities.[215] SWRCB provides evidence that there are 6,970 water systems of various types currently operating in California, 5,314 of which (approximately 76 percent) are privately owned and operated, and 1,656 of which are public entities.[216]

More importantly, the claimant's assertion that the lead sampling requirements of the test claim order "do not apply generally to all residents and entities in the State, but uniquely to local water

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5956 [CWS Bakersfield]; 6034 [CWS Selma]; 6060-6098 [CWS: Visalia, Dixon, Livermore]; 6194-6214 [Del Oro Water Co.: Magalia, Paradise Pines, Stirling Bluffs]; 6481 [East Pasadena Water Co.]; 6541 [Easton Estates Water Co.]; 6725 [Erskine Creek Water Co.]; 7077 [Fruitridge Vista Water Co.]; 7192 [Golden State Water Co., Clearlake]; 7315 [Golden State Water Co., Wrightwood]; 7395 [Great Oaks Water Co.]; 7408 [Green Acres Mobile Home Estates]; 7880 [Havasu Water Co.]; 8078 [Hillview Water Co., Oakhurst/Sierra Lakes]; 8524 [Kenwood Village Water Co.]; 8866 [Lake Alpine Water Co.]; 9021 [Las Flores Water Co.]; 9270 Little Bear Water Co.]; 9426 Lukins Brothers Water Co.]; 9768 [Mesa Crest Water Co.]; 10082 [Mountain Mesa Water Co.]; 10217 Nacimiento Water Co.]; 10871 Penngrove Water Co.]; 10925 [Pierpoint Springs Water Co.]; 11066 [Point Arena Water Works]; 11478 [Rio Plaza Water Co.]; 11542 [Rolling Green Utilities]; 11803-11845 [San Gabriel Valley Water Co., El Monte, Montebello, Fontana]; 11915 [San Jose Water Co.]; 12959 [Southern California Edison Co., Santa Catalina]; 12975 [Spreckels Water Co.]; 13163-13213 [Suburban Water Systems, Covina, Glendora, La Mirada]; 14361 [Warring Water Service, Inc.]; 14411 [Weimar Water Co.]; 14426 [West San Martin Water Works, Inc.]; 14649 [Yerba Buena Water Co.].

[214] California Constitution, article XI, section 9(a-b).

[215] *In re Bonds of Orosi Public Utility Dist*. (1925) 196 Cal. 43, 55 ["The adoption of the amendment definitely settled and removed all doubt from the question of the right of cities and towns to own and operate the kind of public utilities designated by the Constitution"].

[216] Exhibit C, SWRCB's Comments on the Test Claim, pages 2; 455-457. However, the claimant argues, and SWRCB concedes, that the largest water systems are publicly owned, and therefore the majority of Californians are served by a publicly owned water system. (Exhibit C, SWRCB's Comments on the Test Claim, p. 2; Exhibit E, Claimant's Rebuttal Comments, p. 5.)

agencies,"[217] misconstrues the test.[218] The Court in *County of Los Angeles* reasoned that the "drafters and the electorate" that shaped and adopted article XIII B, section 6, intended to require mandate reimbursement for "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state."[219] The claimant's underlying argument is that because the test claim order applies only to PWSs, and not to "all residents and entities in the State," it should be considered "uniquely" imposed on local government.[220] This reasoning misinterprets and misapplies the words "generally" and "uniquely," which the Court used to illustrate the difference between a law that results indirectly, or incidentally, in costs to local government; and a law that specifically and directly imposes new "unique" requirements on local government.[221]

First, *general* does not mean *universal*: "The rule need not, however, apply universally; a rule applies generally so long as it declares *how a certain class of cases will be decided*."[222] Accordingly, the idea that a law would "apply generally to all residents and entities in the State" should not be taken to mean that a law must apply broadly to *all* persons and entities without limitation or caveat; laws may apply to a *class* of persons or entities, or to a defined set of *circumstances*, and still be considered to apply *generally*.[223] The permit amendment applies to the claimant because the claimant operates a PWS, which has K-12 schools within its service area.[224] These are the circumstances and class of entities upon which SWRCB *generally* imposed the lead testing requirements, and those circumstances are shared by a number of privately owned entities, in addition to governmental entities.

Moreover, a law that applies to a class of persons or entities whose members are both governmental and private cannot be said to apply *uniquely* to government, as the claimant asserts. Rather, the requirements of the test claim order are applicable to all PWS's that serve at

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[217] Exhibit E, Claimant's Rebuttal Comments, pages 8-9; Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 7-8.

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

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

[220] Exhibit E, Claimant's Rebuttal Comments, pages 8-9; Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 7-8.

[221] *County of Los Angeles v. State* (1987) 43 Cal.3d 46, 56-57.

[222] *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 571.

[223] *Ex parte Weisberg* (1932) 215 Cal. 624, 629 ["A law is general and uniform and affords equal protection in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided that such class is founded upon some natural or intrinsic or constitutional distinction between the persons composing it and others not embraced in it"].

[224] See Exhibit E, Claimant's Rebuttal Comments, page 34 [SWRCB Media Release, January 17, 2017].

least one K-12 school, and there is evidence in the record, absent in *Carmel Valley*,[225] that there are a substantial number of PWS's affected by the policy that are privately owned, as noted above. Thus, the requirements are not *unique* to government at all; rather, they apply to the claimant and similarly-situated local agencies by virtue of their decision to own or operate a PWS, but they also apply to PWSs that are *not* local government agencies: approximately 450 privately owned PWSs are subject to the same requirements.[226]

The claimant notes that in *City of Sacramento*,[227] *County of Los Angeles*,[228] and *County of Los Angeles II*,[229] "[s]ubvention was denied in these cases because the requirements applied to everyone, not just to local government."[230] And in its comments on the Draft Proposed Decision, the claimant insists that the permit amendments are analogous to "the requirements in *Carmel Valley* [that] only applied to firefighting agencies."[231] Again, this misconstrues the meaning of "generally" and "uniquely" and the effect of the test articulated by the courts: in each case the requirements applied based on a given set of limitations or circumstances. In *City of Sacramento* and *County of Los Angeles*, the requirements applied to the class of *employers*, which included both public and private entities.[232] In *County of Los Angeles II* the requirements applied to the owners or operators of both public and private buildings containing elevators.[233] Thus, the assertion that the test claim statutes in those cases applied to "everyone" is simply not accurate. In *Carmel Valley*, which the claimant asserts is controlling, the requirements applied only to firefighting organizations, but the court found those requirements *unique to government* because "fire fighting is overwhelmingly engaged in by local agencies."[234] In this case, however, the evidence in the record shows that that class includes a substantial population of private entities.[235]

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[225] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 ["Our record on this point is incomplete because the issue was not presented below. Nonetheless, we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classical governmental function."]

[226] Exhibit C, SWRCB's Comments on the Test Claim, page 6.

[227] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

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

[229] *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[230] Exhibit E, Claimant's Rebuttal Comments, page 8.

[231] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 8.

[232] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[233] *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[234] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 538.

[235] See Exhibit C, SWRCB's Comments on the Test Claim, pages 819 and following [Permit Amendments 2017PA-SCHOOLS, issued to all subject PWS's].

Therefore, this Test Claim is distinguishable from *Carmel Valley*, in which the court noted that it did not have evidence in the record of the existence or prevalence of private fire-fighting teams or private fire personnel, but accepted it as a matter of judicial notice that the overwhelming majority of fire fighters discharge a governmental service.[236] Here, the evidence shows that the test claim order is one permit of more than 1,100 issued to drinking water suppliers that serve at least one K-12 school, a substantial number of which are non-governmental entities.

This Test Claim most closely resembles *County of Los Angeles II*.[237] In that case, earthquake safety regulations applied to the owners or operators of buildings containing elevators, and affected the local government only insofar as the County operated buildings that contained working elevators.[238] Here, the test claim order affects the claimant *only because* the claimant provides drinking water through a PWS to K-12 schools within its service area, and those schools have requested testing, but it also affects a substantial number of private entities that meet the same criteria.

Accordingly, the requirements of the test claim order are not uniquely imposed on local government.

c. <u>The test claim order does not impose a program that carries out a governmental function of providing a service to the public within the meaning of article XIII B, section 6.</u>

The alternative test articulated by the Court to determine if a statute or executive order imposes a new program or higher level of service is whether the requirements of the statute or executive order constitute a "program[] that carr[ies] out the governmental function of providing services to the public."

The claimant asserts that the test claim order imposes a new program or higher level of service because *County of Los Angeles* and the cases following only require that a governmental function be a function of providing services to the public, not that the function at issue must be "peculiar" to government.[239] The claimant argues, based on a number of authorities cited that employ some variation of the phrase "governmental function," that anything a local government does pursuant to legal authority is a government function.[240] In comments on the Draft Proposed Decision, the claimant argues that the Draft Proposed Decision relies too heavily on the prevalence of privately owned PWS's, and ignores both United States Supreme Court and California Supreme Court authorities that describe water service as a governmental function.[241] The claimant states the following:

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[236] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[237] *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[238] *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[239] Exhibit E, Claimant's Rebuttal Comments, page 4.

[240] Exhibit E, Claimant's Rebuttal Comments, page 5.

[241] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 2-4.

> The Draft Proposed Decision determines the Permit Amendment does not impose unique requirements on local government because private companies received similar orders, and then concludes water service is not a peculiarly governmental function because private companies also provide water service. In other words, the fact that private companies provide water service defeats both tests. What this analysis fails to recognize is that private companies can perform governmental functions without turning the function into a proprietary one. For example, operating prisons is a governmental function even though both public entities and private companies perform the service. [Citation omitted.] Trash collection is also a governmental function even though public agencies and private firms both provide the service. [Citation omitted.] Governmental functions are not limited to functions performed *exclusively* by government. [Citation omitted.][242]

The claimant further asserts that even if providing water service through a PWS is not a governmental function, testing for lead in schools is a governmental function. The claimant alternatively argues that the "program" at issue is not providing water, but ensuring safe schools, which the courts have found to be a program within the meaning of article XIII B, section 6.[243]

In this case, the Commission finds that the provision of drinking water through the operation of a PWS is not an essential or peculiarly government function. Thus, the activities required of all PWSs to test for the presence of lead at drinking fountains and in food preparation areas at the request of any K-12 school in their service area does not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. The Commission further finds that the examples and analogies raised by both the claimant and SWRCB do not support an interpretion of "governmental function" that is more broad than relevant mandate case authorities suggest. And finally, the Commission finds that ensuring safe schools is the purview of schools, and not of a PWS.

i. A "governmental function" within the meaning of article XIII B, section 6 is limited to activities peculiar and essential to local governments such as providing police and fire protection, and public education.

The Court in *County of Los Angeles* elaborated upon its two part test for a "program" subject to article XIII B, section 6, referencing the ballot arguments that declared that section 6 "[w]ill not allow the state government to force programs on local governments without the state paying for them." The Court explained that "the phrase 'to force programs on local governments' confirms that the intent underlying section 6 was to require reimbursement to local agencies for the *costs involved in carrying out functions peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[244] On that basis, the Court reasoned that workers compensation was not a local governmental

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[242] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2.

[243] Exhibit E, Claimant's Rebuttal Comments, page 6 [citing *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 879].

[244] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57.

program at all, both because it is not administered by local government (it is administered by the State), and because, following enactment of the test claim statute, private and public employers have the same obligations under the law.[245]

In the years since, the courts have applied and interpreted this test to *confirm* the existence of a *governmental* program within the meaning of article XIII B, section 6 to include the following: protective clothing and equipment for firefighters;[246] education of "handicapped" children;[247] reducing racial or ethnic segregation in public schools;[248] providing due process in expulsion proceedings in public schools;[249] and providing due process in disciplinary proceedings for peace officers employed by cities and counties.[250] In *Carmel Valley*, addressing fire protective clothing and equipment, the court observed that the underlying government service at issue is a "peculiarly governmental function," and that police and fire protection are "two of the most essential and basic functions of local government."[251] The same was echoed in *POBRA*, relative to the due process procedures for city and county peace officer disciplinary proceedings.[252] *Lucia Mar*, *Long Beach*, and *San Diego Unified* all addressed alleged reimbursable mandates in the realm of education,[253] for which the governmental duty of a school district is clearly expressed in the California Constitution,[254] and for which the court in *Long Beach* expressly recognized that education is a "peculiarly governmental function," notwithstanding the existence of private schools.[255]

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[245] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58.

[246] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521.

[247] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830.

[248] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155.

[249] *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859.

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

[251] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 [citing *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Verreros v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107].

[252] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367 [An "ordinary, principal and mandatory duty" for cities and counties and some special districts to provide "policing services within their territorial jurisdiction."].

[253] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155; *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859.

[254] California Constitution, article IX, sections 2 [providing for a State Superintendent of Public Instruction]; 3 [providing for a Superintendent of Schools in each county]; 5 ["The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year."].

[255] See *Long Beach Unified School Dist.* v. *State of California* (1990) 225 Cal.App.3d 155, 172.

At the same time the courts have *rejected* mandate reimbursement in the following cases, finding that they did *not* involve a governmental function of providing a service to the public (and also were not uniquely imposed on local government): fire and earthquake safety features for elevators in buildings open to the public;[256] elimination of a government and nonprofit employer exemption from contributing to unemployment insurance;[257] awarding attorneys' fees against a local government under Code of Civil Procedure section 1021.5;[258] and the elimination of an exemption for local governments employing public safety workers from requirements to pay workers' compensation death benefits.[259] The cases disapproving reimbursement therefore involved either costs and activities related to local governments' capacity as an employer;[260] or generally-applicable laws that impacted local government by virtue of some other circumstance not relating to any identifiable *governmental* service (i.e., the award of attorneys' fees for litigants successful against local govenrment, and the applicability of elevator safety regulations in public buildings).[261]

Unlike *Carmel Valley*, *Lucia Mar*, *Long Beach*, *San Diego Unified*, and *POBRA*, the test claim order in this case does not involve an essential and *peculiarly governmental* function identified by the courts of this State.[262] The test claim order here relates to the provision of drinking water through a PWS, which is fundamentally distinct from the other examples discussed above: providing water service for a fee to ratepayers/customers, is far different from providing police or fire protection, or free and appropriate public education, to all residents of the jurisdiction regardless of their ability to pay, which are core, mandatory governmental functions, according to the case law discussed above. Water service, on the other hand, is not a mandatory duty of local government and can be, and often is, provided by a private entity. As noted in the Background, there is no legal requirement for local agencies to be involved in providing water, and historically the authority of local agencies to do so was in question. Article XI, section 9(a) of the California Constitution provides that a municipal corporation *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of

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[256] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[257] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[258] *County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340.

[259] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[260] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

[261] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538; *County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340.

[262] See, e.g., *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367; *Long Beach Unified School Dist.* v. *State of California* (1990) 225 Cal.App.3d 155, 172.

communication.[263] However, section 9(b) provides that *private persons or corporations* may also establish and operate works for those same purposes "upon conditions and under regulations that the city may prescribe…"[264] The courts have interpreted article XI, section 9 to provide *authority* to provide public utilities, but not a *duty*.[265]

Accordingly, SWRCB provides evidence that there are 6,970 water systems currently operating in California, 5,314 of which are privately owned and operated, and 1,656 of which are public entities.[266] And, as many as two million Californians "are served either by the estimated 250,000 to 600,000 private domestic wells, or by water systems serving fewer than 15 service connections.[267] Thus, the provision of drinking water through a PWS is not only not necessary in all cases and in all parts of the State, it is also an activity and function that, where necessary or expedient, can be fulfilled by a private person or corporation.[268] It bears repeating that the term "public water system" does not mean a water system owned or operated by a governmental entity; a "public water system" is defined only by the number of connections,[269] and is distinguished from a "community water system," a "noncommunity water system," a "nontransient noncommunity water system," a "state small water system," and a "transient noncommunity water system," by the size of each system.[270] Neither the California SDWA, nor the federal LCR, defines these entities any differently whether owned and operated by a public entity or by a private person or corporation.

The claimant challenges SWRCB's evidence that approximately 75 percent of water systems throughout the state, or 5,314 of 6,970, are privately owned or operated. The claimant states that while it "has no means to verify the accuracy of this data," the same data provided by SWRCB "demonstrate that public agencies serve 81% of people in the State who have drinking water service."[271] The claimant argues that the number of people statewide receiving drinking water from a publicly owned utility "is strong evidence that water service is a governmental function,

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

[264] California Constitution, article XI, section 9(b).

[265] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275.

[266] Exhibit C, SWRCB's Comments on the Test Claim, page 2. See also, Exhibit C, SWRCB's Comments on the Test Claim, pages 455; 457 [Listing the number of public and private water systems, respectively, governed by each county and water district].

[267] Exhibit I, *A Guide for Private Domestic Well Owners,* California State Water Resources Control Board Groundwater Ambient Monitoring and Assessment (GAMA) Program, March 2015, page 6.

[268] See California Constitution, article XI, section 9(b); Corporations Code section 14300 et seq.

[269] A public water system is defined as having 15 or more service connections, serving 25 or more persons at least 60 days out of the year.

[270] Health and Safety Code section 116275(h-k; n-o).

[271] Exhibit E, Claimant's Rebuttal Comments, page 5.

more persuasive than the fact that small, privately owned water systems outnumber large, publicly owned systems."[272]

However, the relative number of *persons* served by privately or publicly owned water systems is not persuasive evidence that water service is a governmental function; the majority of persons served by publicly owned water systems is merely a function of the size and capacity of the publicly owned systems, and presumably also a more dense and urbanized ratepayer/customer base.[273] In addition, as many as two million California residents still rely on private domestic wells or water systems with fewer than 15 service connections for their drinking water, rather than a PWS.[274] The specific requirements of this test claim order apply beyond local government entities; the requirements apply to any and every PWS that decides to supply water and serves at least one K-12 school. Subtantial evidence has been presented that as many as one-third of affected entities are privately held or operated.[275]

Thus, the Commission finds that the case law interpreting the *new program or higher level of service* requirement of article XIII B, section 6 does not support a finding that the provision of drinking water through the operation of a PWS is an essential or peculiarly governmental function.

The cases discussed above make findings on what activities of local government are or are not "governmental functions," within the meaning of article XIII B, section 6, but do not necessarily provide further guidance or definition to be applied in other circumstances. Accordingly, the dearth of case authority directly *defining* the concept of a "governmental function" specifically within the meaning of article XIII B, section 6 has led both the claimant and SWRCB to borrow from and analogize to other concepts in the law, and specifically has led the claimant to search for examples of courts using some variation of the phrase "governmental function," and to argue that those cases are binding on the Commission as statements of mandates law. As the analysis herein demonstrates, SWRCB's analogies and reasoning support the above findings, and are consistent with prior mandates cases, while the claimant's examples and analogies are not sufficient to support a finding that provision of drinking water through a PWS is a core and essential function of government, similar to police and fire protection, and education.

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[272] Exhibit E, Claimant's Rebuttal Comments, page 5.

[273] Exhibit C, SWRCB's Comments on the Test Claim, page 2.

[274] Exhibit C, SWRCB's Comments on the Test Claim, page 2; Exhibit I, *A Guide for Private Domestic Well Owners*, California State Water Resources Control Board Groundwater Ambient Monitoring and Assessment (GAMA) Program, March 2015, page 6.

[275] See Exhibit E, Claimant's Rebuttal Comments, pages 34-35 [SWRCB Media Release, January 17, 2017 ("The Board is requiring all community water systems to test school drinking water upon request by the school's officials.")]; Exhibit C, SWRCB's Comments on the Test Claim, page 2. See also, Exhibit C, SWRCB's Comments on the Test Claim, pages 455; 457 [Listing the number of public and private water systems, respectively, governed by each county and water district].

SWCRB asserts that a "line of cases decided prior to California's adoption of the Government Claims Act, and which involved tort claims for damages against local governments," is consistent with and reinforces the distinction between "governmental" functions or programs that may be the subject of mandate reimbursement, and those functions that are not "governmental" and are not subject to mandate reimbursement. Specifically, SWRCB asserts that local entities act in either a "governmental" or "public" capacity, or a "corporate" or "private" capacity, and that the same distinction used to determine whether sovereign immunity attached to a particular action is consistent with, and provides an analogy to, the concept of a governmental function or "program" in the mandates context.[276]

The "proprietary" versus "governmental" distinction traces back to the common law jurisprudence on the scope of sovereign immunity, prior to the adoption of the Government Claims Act. In order to resolve questions of government liability the courts were forced to draw a distinction between activities that are *governmental* in nature, and thus entitled to immunity, and those that are more "corporate" or "proprietary" and not so entitled.[277] The Court described a local government providing water, light, heat, or power as "not acting in its governmental capacity as a sovereign, but…in a proprietary capacity."[278] The Court later explained that it was "now a generally accepted proposition that," when a local government "undertakes to supply…utilities and facilities of urban life…it is, in fact, *engaging in business* upon municipal capital and for municipal purposes."[279]

The claimant argues, to the contrary, that essentially any service that a local government has authority to provide, or any activity that local government may engage in under its police power, is a local government function, and that the distinction between governmental and "proprietary" or "corporate" activity is no longer a useful determinant: "Water service provided by public agencies no longer carries the indicia of a proprietary function or private enterprise due to Proposition 218…, which eliminates profit from water service charges."[280] The claimant cites *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands*, where the court held that "[t]he labels 'governmental function' and 'proprietary function' are of

[276] Exhibit C, SWRCB's Comments on the Test Claim, page 12.

[277] Exhibit C, SWRCB's Comments on the Test Claim, page 12.

[278] Exhibit C, SWRCB's Comments on the Test Claim, page 12 [quoting *City of Pasadena v. Railroad Commission of California* (1920) 183 Cal. 526 (disapproved of on other grounds by *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154)].

[279] Exhibit C, SWRCB's Comments on the Test Claim, page 12 [quoting *In re Bonds of Orosi Public Utility District v. McHuaig* (1925) 196 Cal. 43]. See also, *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275 ["In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role."].

[280] Exhibit E, Claimant's Rebuttal Comments, page 5.

dubious value in terms of legal analysis in any context."[281] The court went on to say that the distinction, developed for and applied in government tort claims, was "manifestly unsatisfactory" and "operated both 'illogically' and 'inequitably.'"[282] In *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County*, also cited by the claimant, the court stated broadly that anything local government is authorized to do "constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur."[283]

The Commission disagrees that Proposition 218 has any bearing on whether water service is a "governmental" function. The claimant argues that the existence of Proposition 218 demonstrates that utility services such as water are "governmental," not "proprietary" functions, because a local government engaging in utility services does not have the ability to set its rates at a level that will maintain profitability. The claimant assumes, without analysis or evidence, that a private utility would be able to do so. However, the comparison is poor: a private utility entity is required by law to charge only rates that are just and reasonable, subject to the regulation and control of the Public Utilities Commission.[284] Thus, the limitations of Proposition 218 applicable to a publicly owned PWS, even to the extent they may be more stringent than the limitations applicable to a privately owned utility, do not alter the fundamental nature of the service or function being provided – in this case a function that the city is not required by law to perform– to provide water service.[285]

More importantly, while the cases cited by the claimant discount the value of the distinction between *governmental* and *proprietary* or *corporate* functions,[286] they do so on grounds other than the nature of the service provided, and therefore are not persuasive. In both cases cited, the court is weighing the rights of a utility to maintain its service lines along or under a public

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[281] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

[282] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

[283] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

[284] See Public Utilities Code 451; 454; 728 ["Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force."].

[285] See California Constitution, article XI, section 9.

[286] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

roadway, against the power of a public agency to force relocation of those service lines at the utility's expense.[287] This makes the applicability of the cited language to the mandates context suspect, at best. And, in each case, the claimant has selectively quoted language that undermines the *governmental* versus *proprietary* distinction, despite contrary language in the same opinion.[288] In addition, *neither* court finds the distinction to be dispositive of the issues in any event, and therefore the quoted language is dicta.[289]

In *Pacific Telephone and Telegraph Co.*, the company sought compensation from the City and the Redevelopment Agency for expenses resulting from the abandonment of a street that carried its service lines, which in turn necessitated relocation of the lines, under two theories including that "the city and the agency were acting in a proprietary capacity."[290] But the court held that "'[a] utility's right to compensation should depend, not on whether municipal activity is 'governmental' or 'proprietary,' but on whether compensation has been required by the Legislature [such as under the Community Redevelopment Law], or whether there has been a constitutionally compensable taking or damaging of a valuable property right."[291] The court also noted, in declining to consider *City of Los Angeles v. Los Angeles Gas & Electric Corp*.[292] and

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[287] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 961-961; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 318.

[288] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 969 ["Under traditional tests, such enterprises were uniformly treated as being proprietary in nature."]; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325 ["…as we have seen a district furnishing a domestic water supply is said to be performing a proprietary act."].

[289] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968 ["A utility's right to compensation should depend, not on whether municipal activity is 'governmental' or 'proprietary,' but on whether compensation has been required by the Legislature, or whether there has been a constitutionally compensable taking or damaging of a valuable property right."]; 970 ["PT&T's contention that it is entitled to compensation on the theory that the city and the agency were acting in a proprietary capacity is without merit."]; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325 [To maintain the 'governmental versus proprietary function' as a test in the determination of relocation cost allocation is no less specious."].

[290] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

[291] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

[292] 251 U.S. 32.

Postal-Tel.Co. v. San Francisco,[293] both of which addressed utilities compelled to relocate service lines to accommodate another utility, that "[u]nder traditional tests," utility businesses carried on by a municipality "*were uniformly treated as being proprietary in nature*."[294]

Northeast Sacramento County Sanitation Dist. addressed a dispute between a county water district and a county sanitation district, wherein the sanitation district constructed sewers in and under the same roads where water lines had already been laid, which required relocation of the water mains. Each asserted a "governmental" status granting them sovereign immunity against the other's merely "proprietary" interest: the sanitation district argued that it stood in the shoes of the County because the County Board of Supervisors also served as its Board of Directors; while the water district, the court observed, not only held a "favorable position in the area of eminent domain," but also had been given certain rights and privileges under the Water Code usually held by municipalities.[295] However, the court found that the language that the claimant cites, that "whatever local government is authorized to do constitutes a function of government…"[296] is, in context, an observation that between a water district and a sanitation district, "no statute gives a sanitation district superior rights over a water district *in the matter of relocation*."[297] The court concluded that "each district when performing the identical type of function – the laying of pipe lines in a public street – should pay its own way," and therefore since the water district's lines were first in time and the expansion benefited only the rate payers of the sanitation district, the sanitation district must pay for the necessary relocation.[298]

And, in 1967, the year after *Northeast Sacramento*, the Fourth District Court of Appeal decided *Glenbrook Development Co*.[299] As discussed above, the court in *Glenbrook Development Co.* found that cities have no legal duty to provide water to their citizens, and reiterated and again

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[293] 53 Cal.App. 188.

[294] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 969 [Declining to consider *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32 and *Postal Tel.-Cable Co. v. San Francisco*, 53 Cal.App. 188, because both involve utility relocations to accommodate another utility].

[295] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 322.

[296] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

[297] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 322.

[298] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325-326.

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

endorsed the view that "service of water by a city is a proprietary function."[300] Therefore, even though the case law on the "governmental" versus "proprietary" distinction is not directly on point with regard to state mandates, the weight of authority supports the finding above that providing water service is not a governmental function, unlike police or fire protection, or public education, which the courts have acknowledged are overwhelmingly governmental in nature.

In response to the Draft Proposed Decision, the claimant cites additional authority that it suggests supports a broad interpretation of "governmental function" as including water service. Specifically, the claimant cites *Brush v. Commissioner of Internal Revenue*,[301] and *City of San Diego v. Cuyamaca Water Company*.[302] In *Brush*, the United States Supreme Court was called upon to determine whether the City of New York's publicly owned water system was subject to federal taxes. The claimant cites a passage in which the Court observes that the City has made a determination its interests are best served by providing for its own water supply:

> We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions, and this conclusion is fortified by a consideration of the public uses to which the water is put. Without such a supply, public schools, public sewers so necessary to preserve health, fire departments, street sprinkling and cleaning, public buildings, parks, playgrounds, and public baths could not exist… It may be, as it is suggested, that private corporations would be able and willing to undertake to provide a supply of water for all purposes; but if the state and city of New York be of opinion, as they evidently are, that the service should not be intrusted [sic] to private hands, but should be rendered by the city itself as an appropriate means of discharging its duty to protect the health, safety, and lives of its inhabitants, we do not doubt that it may do so in the exercise of its essential governmental functions.[303]

In *City of San Diego v. Cuyamaca Water Company*,[304]the Court sought to resolve a dispute over the priority of water rights in the San Diego River, as between the City and upstream riparian users. From *City of San Diego*, the claimant relies on the following:

> It should at the outset be understood and stated that the pueblo rights, and hence the rights of its successor, the city of San Diego, to whatever of the waters of the San Diego river were from time to time required for the needs of the pueblo and of the city and of the inhabitants of each, were rights which were essentially 'governmental' in character, as much so in fact as were the rights of the ancient

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[300] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275 ["In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role."].

[301] (1936) 300 U.S. 352.

[302] (1930) 209 Cal. 105.

[303] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 370-371.

[304] (1930) 209 Cal. 105.

> pueblo and modern city to the public squares or streets, and that the term 'proprietary,' as employed with reference to certain commercialized uses made by municipalities and other public bodies, of water, light, and power, for example, has no application to the fundamental rights of the plaintiff herein to its ownership of its foregoing classes of property dedicated and devoted to public uses.[305]

Neither of these authorities is directly on point, and neither makes any express finding regarding the nature of water service as a municipal undertaking. *Brush* employs the phrase "essential governmental functions," but the analysis and findings turn on the City's exercise of its local authority, and ultimately the question to be resolved is only whether the municipal water system should be exempt from federal taxation: "The answer depends upon whether the water system of the city was created and is conducted in the *exercise of the city's governmental functions*."[306] The Court acknowledges that private corporations may be willing and able to provide water to the city, and that in the City's history, private entities had indeed done so.[307] But, the Court concludes, "if the state and city of New York be of opinion, as they evidently are, that [water] service should not be intrusted to private hands…*we do not doubt that it may do so in the exercise of its essential governmental functions*."[308]

City of San Diego, likewise, does not make any findings on the nature of the City's activities in providing water to its citizens; rather, the case seeks to resolve an issue of *priority of water rights*.[309] The Court finds that the City is the successor in priority of its water rights to the *pueblo* of San Diego, a political entity that predates the State of California itself.[310] The Court states that these rights "were essentially 'governmental' in character," and compares the water rights to the City's claim over the "public squares or streets."[311] Nevertheless, the Court finds that it is irrelevant to the question of that priority whether the City's use and distribution of those waters is considered a "proprietary" function, rather than a governmental one.[312] This is not a finding that the City's municipal utilities are engaged in a "governmental" service or function within the meaning of article XIII B, section 6, rather it is a finding that the successor government, City of San Diego, was successor to the water rights of the preceeding government, Pueblo of San Diego.[313]

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[305] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130.

[306] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 360.

[307] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 360; 371.

[308] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 371.

[309] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 131 ["[T]he subject matter of the action is the establishment of the priority of right…"].

[310] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130-131.

[311] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130.

[312] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 131.

[313] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130-131.

Next, the claimant compares providing water service to "operating prisons" and "trash collection," both of which it asserts are considered governmental functions that may be performed by private entities.[314] The claimant cites to case law describing those services as governmental in nature, but those authorities are no more on point than the cases discussed above: the courts use some variation of the phrase "governmental function," but there is nothing so unique and powerful about that phrase that it expands the scope of activities previously found to be essential and peculiarly governmental in nature for purposes of article XIII B, section 6.[315] The two cases cited that address garbage collection are cumulative to the reasoning already discussed with respect to water service: the courts acknowledge that trash collection is *within the police power* of municipalities, but also that such services may be provided by private entities under contract with the municipality, or in private contract with a group of residents.[316] Similarly, of the two cases addressing the operation of prisons, neither turns on the nature of operating a prison as a governmental function. *Pennsylvania Dept. of Corrections v. Yeskey* (1998) holds only that the Americans with Disabilities Act applies to the Department as a state entity,[317] while *Richardson v. McKnight* holds that employees of a private prison do not enjoy the qualified immunity from suit under federal civil rights statutes enjoyed by their publicly employed counterparts,[318] despite discharging what the claimant characterizes as a governmental function.[319] The Court in fact says that when deciding questions of immunity a "purely functional" test "bristles with difficulty, particularly since, in many areas, government and

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[314] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2.

[315] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2 [citing *Richardson v. McKnight* (1997) 521 U.S. 399; *Pennsylvania Dept. of Corrections v. Yeskey* (1998) 524 U.S. 206; *Davis v. City of Santa Ana* (1952) 108 Cal.App.2d 669; *Glass v. City of Fresno* (1936) 17 Cal.App.2d 555].

[316] *Davis v. City of Santa Ana* (1952) 108 Cal.App.2d 669, 676-677 ["The collection and disposal of garbage and trash by the city constitutes a valid exercise of police power and a governmental function which the city may exercise in all reasonable ways to guard the public health. It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract, or it may permit private collectors to make private contracts with private citizens. The gathering of garbage and trash is considered to be a matter which public agencies are authorized to pursue by the best means in their possession to protect the public health."]; *Glass v. City of Fresno* (1936) 17 Cal.App.2d 555, 558 ["[C]ollection and disposal of garbage are matters so intimately connected with the preservation of public health that the regulation thereof is the proper exercise of police power, and it would naturally follow as a corollary thereto that [the city] would have the right to dispose of garbage itself, and it has been so held."].

[317] *Pennsylvania Dept. of Corrections v. Yeskey* (1998) 524 U.S. 206, 209.

[318] *Richardson v. McKnight* (1997) 521 U.S. 399, 412 ["[W]e must conclude that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case."].

[319] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2.

private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery."[320] In other words, both of the cases cited turn on the nature of the entity and how the law applies to that entity, rather than the nature of the function being performed by the entity. Here, there is no argument that the City is not a governmental entity; the issue is whether the test claim order applies because the claimant is engaged in a governmental function.

The claimant also compares lead testing on school property to "the governmental function of building inspections on private property, where the City inspects private facilities that it neither owns nor operates, to confirm compliance with pre-established standards."[321] This analogy is not convincing, not least because building inspections are *exclusively* within the power of government, unlike the provision of utilities, which the above analysis establishes can be conducted by private entities.

Finally, the claimant argues that a finding that water service is a proprietary and not a governmental function categorically excludes municipal water agencies from state mandate reimbursement, and "[i]f there was legislative intent to make proprietary functions or municipal water service categorically ineligible for reimbursement, it would be found in the statutes that created this very Commission."[322] Setting aside for the moment the claimant's unfounded supposition that a categorical exclusion, if intended, would be expressly stated in Government Code section 17500 et seq., nothing in the above analysis categorically excludes municipal agencies from mandate reimbursement. This decision finds only that the requirements of the permit amendment are not reimbursable because they apply to the claimant as a result of its operation as a PWS, and as a result the requirements are neither uniquely imposed on local government, nor a "governmental function" within the meaning of article XIII B, section 6. Indeed, the above analysis makes no findings on any other program or statutory requirement that might be alleged to impose a mandate on the claimant based on its *existence* as a governmental entity.

Thus, the cases distinguishing between proprietary and governmental functions support the finding that the test claim order does not impose a governmental function of providing a service to the public within the meaning of article XIII B, section 6, and the cases and examples cited by the claimant are not relevant to the issue here.

In addition, the "Service Duplication Law," relied on by the SWRCB, supports (but is not essential to) the finding that the test claim order does not impose a governmental function of providing a service to the public within the meaning of article XIII B, section 6. The parties dispute the import of the Public Utilities Code provision known as the "Service Duplication Law," which requires a local government to compensate a privately owned drinking water

[320] *Richardson v. McKnight* (1997) 521 U.S. 399, 409.

[321] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 5.

[322] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 6.

supplier if the local entity extends service into the service area of the private supplier.[323] SWRCB argues that this compensation requirement "amounts to a legislative determination that water service is not a service that is or should be peculiar to local governments."[324] The claimant argues instead that "[i]f anything, the Service Duplication Law recognizes that water service was transitioning from a private to a predominantly governmental function by providing compensation to private utilities for lost business."[325] The claimant asserts that "[n]ow, over 50 years later, that transition is substantially complete."[326]

The the Service Duplication Law weighs against finding that water service is a governmental function. Public Utilities Code section 1501 provides as follows:

> The Legislature recognizes the substantial obligation undertaken by a privately owned public utility which is franchised under the Constitution or by a certificate of public convenience and necessity to provide water service in that the utility must provide facilities to meet the present and prospective needs of those in its service area who may request service. At the same time, the rates that may be charged for water service by a regulated utility are fixed by the Public Utilities Commission at levels which assume that the facilities so installed will remain used and useful in the operation of the utility for a period of time measured by the physical life of such facilities.
>
> The Legislature finds and declares that the potential loss of value of such facilities which may result from the construction and operation by a political subdivision of similar or duplicating facilities in the service area of such a private utility often deters such private utility from obtaining a certificate or extending its facilities to provide in many areas a water supply essential to the health and safety of the citizens thereof.
>
> The Legislature further finds and declares that it is necessary for the public health, safety, and welfare that privately owned public utilities regulated by the state be compensated for damages that they may suffer by reason of political subdivisions extending their facilities into the service areas of such privately owned public utilities.[327]

Sections 1503 and 1504 contain the operative provisions. In section 1503, the Legislature "finds and declares that whenever a political subdivision constructs facilities to provide or extend water service, or provides or extends such service, to any service area of a private utility with the same type of service, such an act constitutes a taking of the property of the private utility for a public

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[323] Exhibit C, SWRCB's Comments on the Test Claim, page 13 [citing Pub. Util. Code § 1501 et seq.].

[324] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[325] Exhibit E, Claimant's Rebuttal Comments, page 5.

[326] Exhibit E, Claimant's Rebuttal Comments, page 5.

[327] Public Utilities Code section 1501.

purpose to the extent that the private utility is injured by reason of any of its property employed in providing water service being made inoperative, reduced in value or rendered useless…"[328] Section 1504 requires the "political subdivision" to compensate for the taking: "Just compensation for the property so taken for public purposes shall be as may be mutually agreed by the political subdivision and the private utility or as ascertained and fixed by a court…"[329] Section 1504 further provides that if the compensation required is equal to the just compensation value of all the property of the private utility, the political subdivision may provide for the acquisition of all such property (i.e., condemn the property in eminent domain).[330]

As the Legislative intent language in section 1501 states, the Legislature "recognize[d] the substantial obligation undertaken by a privately owned public utility…" including facilities and equipment, and that the Public Utilities Commission limits the rates that may be charged by such utilities "at levels which assume that the facilities so installed will remain used and useful…" for the life of the equipment or facilities.[331] In addition, the Legislature recognized that "the potential loss of value of such facilities…often deters such private utility from…extending its facilities to provide in many areas a water supply essential to the health and safety of the citizens thereof."[332]

The intent language shows that the purpose of the Service Duplication Law was to provide a remedy to protect the investment of privately owned utilities providing water service, and to mitigate the chilling effect of local government potentially encroaching upon a private water supplier's service area and customers. And, while sections 1503 and 1504 of the Public Utilities Code may have become necessary due to a pattern of municipalities extending duplicative service in certain areas and thus undermining the value of privately owned facilities or equipment, there is no indication that the Legislature intended to convert the provision of water service to a governmental function, as the claimant seems to imply. And indeed the acknowledgement of a deterrent effect and the statutory requirement of compensation suggests that the Legislature believed that private utility companies serving water in areas of the State would continue to be necessary into the future, and for that reason their investments should be protected, lest private entities choose not to offer such services in the first instance. The courts have observed that this is especially important with respect to water utilities.[333] Without the Service Duplication Law, infringement on the service area of a private water utility, and the

[328] Public Utilities Code section 1503.

[329] Public Utilities Code section 1504.

[330] Public Utilities Code section 1504.

[331] Public Utilities Code section 1501.

[332] Public Utilities Code section 1501.

[333] *Cucamonga County Water Dist. v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 259 ["The special importance attached to efficient and economical use and distribution of water in the arid western states, and the provision of the California Constitution that the use of all water is subject to regulation by the State (Cal.Const. Art. XIV) justifies the classification under consideration here."].

potential loss of business, might not be compensable at all, unless the facilities and equipment were fully acquired by eminent domain.[334] The Service Duplication Law, in short, is a Legislative innovation designed to protect the viability of private water utilities, in recognition of their long term necessity to provide water in certain areas of the State.

Accordingly, the "Service Duplication Law," supports (but is not essential to) the finding that the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6.

ii. The test claim order does not impose a governmental function to ensure safe schools on PWSs, as asserted by the claimant; that governmental function remains with the schools who contact the PWS for lead testing.

Finally, the claimant argues that the "program" at issue in this Test Claim is not providing water through a PWS at all; rather "[t]he lead testing program in the Permit Amendment carries out a…governmental function of ensuring safe schools."[335] The claimant asserts that the history of the test claim order, including failed SB 334 and the associated veto message, "demonstrates [the order's] purpose is to provide safe schools, a governmental function, while shifting financial responsibility to local water agencies."[336] The claimant argues that "[h]ad SB 334 become law and schools had to test water for lead to confirm their students had safe, clean drinking water, the schools would have been performing a governmental function subject to reimbursement from the state."[337] The claimant concludes that the required testing "does not lose its characterization as a 'governmental function of providing services to the public' under the Supreme Court's test, merely because the obligation is transferred from schools to water agencies."[338]

The Commission disagrees. As noted in the Background, SB 334 proposed to amend the "Lead-Safe Schools Protection Act" in the Education Code to require 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 to provide access to free, fresh, and clean drinking water during meal times in the food service areas of the schools under its jurisdiction.[339] Then Governor Brown vetoed SB 334, believing that it would impose a reimbursable mandate of "uncertain but possibly very large magnitude."[340]

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[334] *Cucamonga County Water Dist. v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 259.

[335] Exhibit E, Claimant's Rebuttal Comments, page 6.

[336] Exhibit E, Claimant's Rebuttal Comments, page 7.

[337] Exhibit E, Claimant's Rebuttal Comments, page 7.

[338] Exhibit E, Claimant's Rebuttal Comments, page 7.

[339] Senate Bill 334 sought to amend Education Code sections 32242 and 38086, and add sections 32241.5, 32246, and 32249 to the Education Code. Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 148 [SB 334, Legislative Counsel's Digest].

[340] Exhibit E, Claimant's Rebuttal Comments, page 7 [quoting Governor's Veto Message, SB 334 (Oct. 9, 2015)].

There is no dispute that school districts, as part of the educational services they provide to students, have an existing affirmative duty to protect students and to keep the school premises safe and welcoming. The courts have found that:

> A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students. This affirmative duty arises, in part, based on the compulsory nature of education. (*Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 714-715; … see also Cal.Const., art. 1, § 28, subd. (c) [students have inalienable right to attend safe, secure, and peaceful campuses]; Ed. Code, § 48200 [children between 6 and 18 years subject to compulsory full-time education].) "The right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming." (*In re William G.* (1985) 40 Cal.3d 550, 563 …)[341]

In addition, existing law requires school districts to furnish and repair school property and to "keep the schoolhouses in repair during the time school is taught therein . . . ."[342]

The test claim order, and similar orders issued by the SWRCB, require a PWS to test for the presence of lead in drinking water fixtures on school property *upon request of a school in its service area*. A PWS has no duty to ensure safe schools, as alleged by the claimant; the schools maintain and exercise that duty with their request for lead testing. The claimant, and other public entities operating water systems that serve K-12 schools, are subject to the test claim order by virtue of their decision to provide water. Like maintaining elevators, providing water is not a *governmental* function, as explained in the above analysis.

Therefore, the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6 of the California Constitution.

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the test claim order does not impose a new program or higher level of service and, thus, does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Accordingly, no findings are made on the issue of whether the test claim order results in increased costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

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[341] *M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 517. (Exhibit D, Finance's Comments on the Test Claim.)

[342] Education Code sections 17565 and 17593.

STATE *of* CALIFORNIA
COMMISSION ON STATE MANDATES

RE: **Decision**

Lead Sampling in Schools: Public Water System No. 370020, 17-TC-03
Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017
City of San Diego, Claimant

On March 22, 2019, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Dated: March 27, 2019

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261); Statutes 2017, Chapter 675 (AB 1308); Statutes 2017, Chapter 684 (SB 394) Filed on June 29, 2018 County of San Diego, Claimant	Case No.: 17-TC-29 *Youth Offender Parole Hearings* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 27, 2019*) (*Served September 30, 2019*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 27, 2019. Stephanie Karnavas and Laura Arnold appeared on behalf of the County of San Diego (claimant). Susan Geanacou 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 Revised Proposed Decision to deny the Test Claim by a vote of 6-1, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Mark Hariri, Representative of the State Treasurer	Yes
Jeannie Lee, 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
Sarah Olsen, Public Member	Yes
Carmen Ramirez, City Council Member	No
Jacqueline Wong-Hernandez, Representative of the State Controller, Vice Chairperson	Yes

Summary of the Findings

The test claim statutes require, with specified exceptions, that the state Board of Parole Hearings (BPH) conduct a new type of parole hearing, a Youth Offender Parole Hearing (YOPH), to review the suitability for parole during the 15th, 20th, or 25th year of incarceration of any prisoner who was 25 or younger at the time of their controlling offense and was sentenced to 15 years or more, or who was sentenced to life in prison without the possibility of parole (LWOP) for an offense committed when the offender was under 18. At the YOPH, the BPH is required to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."[1] Youthful offenders "found suitable for parole pursuant to a youth offender parole hearing as described in Section 3051 shall be paroled regardless of the manner in which the board set release dates . . . ."[2]

The test claim statutes were enacted primarily in response to U.S. and California Supreme Court cases, which found that the Eighth Amendment to the U.S. Constitution, which prohibits cruel and unusual punishment, is violated when a juvenile offender commits a crime before reaching the age of 18 and receives a sentence of death, mandatory LWOP, or an equivalent mandatory sentence. The courts held that a state must instead provide these juvenile offenders, at sentencing, "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[3]

The Commission finds that this Test Claim was timely filed.

The Commission further finds, and the claimant agrees,[4] that the plain language of the test claim statutes does not impose any state-mandated activities on local agencies. All duties imposed by the test claim statutes are assigned to the BPH – a state agency. In addition, it is the BPH that is required to provide state-appointed counsel to inmates at YOPHs – not the local agency.[5]

The claimant, however, seeks reimbursement for costs associated with district attorneys and public defenders presenting evidence regarding the influence of youth-related factors at the sentencing hearings of criminal defendants eligible for eventual YOPH review before the BPH, pursuant to the California Supreme Court's decisions in *People v. Franklin* and *In re Cook*.[6] In *Franklin*, the court found that a juvenile offender, at sentencing, must have sufficient opportunity that he or she "may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile

[1] Penal Code sections 4801(c).

[2] Penal Code section 3046(c).

[3] *Miller v. Alabama* (2012) 567 U.S. 460, 479; *People v. Caballero* (2012) 55 Cal.4th 262, 268-269.

[4] Exhibit E, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2; Exhibit H, Claimant's Comments on the Proposed Decision, page 1.

[5] Penal Code section 3041.7; California Code of Regulations, title 15, section 2256(c).

[6] *People v. Franklin* (2016) 63 Cal.4th 261; *In re Cook* (2019) 7 Cal.5th 439.

offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors."[7] In addition, *Cook* found that the *Franklin* proceedings apply to offenders who are entitled to a YOPH, and whose judgment and sentence are already final.[8] The court in *Cook* explained that youthful offenders who are currently incarcerated and want to receive a *Franklin* proceeding can file a motion with the superior court under Penal Code section 1203.01, using the original caption and case number and citing the Supreme Court's decision in *Cook*.[9]

The Commission finds that the test claim statutes, including the resultant *Franklin* proceedings, do not impose a state-mandated program on local agencies. Article XIII B, section 6 requires reimbursement only for mandates imposed by the Legislature or any state agency. And, in this case, the court in *Cook* noted that the Legislature has *not* enacted any laws to specify what evidence-gathering procedures should be afforded to youth offenders who will be eligible for a YOPH, and explained that the Legislature still remains free to enact statutes governing the procedure.[10]

Even if a court were to agree with the claimant that the test claim statutes mandated activities with regard to the *Franklin* proceedings, the test claim statutes changed the penalty for crimes committed by all YOPH eligible offenders and, thus, the test claim statutes, including the resultant *Franklin* proceedings, do not impose "costs mandated by the state" pursuant to 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 or executive order 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 directly relating to the enforcement of the crime or infraction*."

Incarceration and parole are part of the penalty for the underlying crime.[11] Under the test claim statutes, some youthful offenders have received a reduction (sometimes by decades) in the minimum number of years of incarceration they must serve before becoming eligible for parole, and other such offenders who were ineligible for parole are now eligible. Thus, as stated in *Franklin*, the test claim statutes, by operation of law, "superseded the statutorily mandated sentences"[12] by capping the number of years the offender may be imprisoned before becoming eligible for release on parole:

> [S]ection 3051 has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be

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[7] *People v. Franklin* (2016) 63 Cal.4th 261, 286.

[8] *In re Cook* (2019) 7 Cal.5th 439, 447-552.

[9] *In re Cook* (2019) 7 Cal.5th 439, 457.

[10] *In re Cook* (2019) 7 Cal.5th 439, 459; see also, *People v. Franklin* (2016) 63 Cal.4th 261, 286, where the court noted that BPH had not yet adopted regulations applicable to a YOPH.

[11] *People v. Nuckles* (2013) 56 Cal.4th 601, 608 ("These competing arguments focus on the nature of parole and whether it constitutes part of the punishment for the underlying crime. It does."), and 610 ("The restraints on liberty and constructive custody status further demonstrate that service of parole is part of the punishment imposed following a defendant's conviction.")

[12] *People v. Franklin* (2016) 63 Cal.4th 261, 278.

> imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required.[13]

This reasoning is further confirmed by subsequent appellate court decisions interpreting *Franklin*, one of which holds that the test claim statute "has in effect abolished de facto life sentences" for juvenile offenders:

> Section 3051 specifically and sufficiently addresses these concerns regarding cruel and unusual punishment. *This is because section 3051 has in effect abolished de facto life sentences in California.* Section 3051 universally provides each juvenile offender convicted as an adult with a mandatory parole eligibility hearing on a legislatively specified schedule, and after no more than 25 years in prison. When the Legislature enacted section 3051, it followed precisely the urging of the *Caballero* court to provide this parole eligibility mechanism.[14]

Thus, the test claim statutes changed the penalty for crimes committed by all YOPH eligible offenders by capping the number of years the offender may be imprisoned before becoming eligible for release on parole, and all of the activities alleged in this case to comply with the test claim statutes, including the resultant *Franklin* proceedings, relate directly to the enforcement of the youthful offender's underlying crime. Therefore, there are no costs mandated by the state pursuant to Government Code section 17556(g).

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/01/2014 Effective date of Statutes 2013, chapter 312, adding Penal Code section 3051 and amending Penal Code sections 3041, 3046, and 4801.

01/01/2016 Effective date of Statutes 2015, chapter 471, amending Penal Code sections 3051 and 4801.

07/11/2016 The date the claimant first incurred costs to implement the test claim statutes.

01/01/2018 Effective date of Statutes 2017, chapter 684, amending Penal Code sections 3051 and 4801.[15]

06/29/2018 The claimant filed the Test Claim.[16]

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[13] *People v. Franklin* (2016) 63 Cal.4th 261, 279.

[14] *People v. Garcia* (2017) 7 Cal.App.5th 941, 950 (emphasis added).

[15] Statutes 2017, chapters 675 (AB 1308) and 684 (SB 394) both amended sections 3051 and 4801 of the Penal Code in the same manner, but, pursuant to Government Code section 9605(b), chapter 684 is the controlling legislation, due to being chaptered subsequent to chapter 675 – i.e., AB 1308 was "chaptered out" by SB 394.

[16] Exhibit A, Test Claim.

01/08/2019 The Department of Finance (Finance) requested an extension of time to file comments on the Test Claim, which was approved for good cause but limited to a period of 30 days.

01/09/2019 The County of Los Angeles filed comments on the Test Claim.[17]

03/13/2019 Finance filed late comments on the Test Claim.[18]

03/25/2019 Commission staff issued the Draft Proposed Decision.[19]

05/15/2019 The claimant filed rebuttal comments and comments on the Draft Proposed Decision.[20]

05/16/2019 The County of Los Angeles filed late comments on the Draft Proposed Decision.[21]

07/12/2019 Commission staff issued the Proposed Decision for the July 26, 2019 hearing.[22]

07/17/2019 The claimant requested postponement of the hearing and a comment period on the Proposed Decision

07/18/2019 The claimant's request was approved for good cause.

08/02/2019 The claimant filed comments on the Proposed Decision.[23]

II. Background

This Test Claim alleges that Penal Code sections 3041, 3046, 3051, and 4801, as added and amended by Statutes 2013, chapter 312; Statutes 2015, chapter 471; and Statutes 2017, chapter 684, impose a reimbursable state-mandated program on counties.

Generally, the test claim statutes require the state Board of Parole Hearings (BPH) to conduct a new type of parole hearing, a Youth Offender Parole Hearing (YOPH), for reviewing the suitability for parole of any prisoner who was 25 or younger at the time of their controlling offense, or who was sentenced to life in prison without the possibility of parole for an offense committed when the individual was under 18, during the 15th, 20th, or 25th year of incarceration. The test claim statutes also require that BPH meet with prison inmates, including those eligible for consideration at a YOPH, during the sixth year prior to their minimum eligible parole release date. At this meeting, referred to as a consultation, BPH is required to provide inmates with information about the parole hearing process, factors relevant to their suitability or unsuitability for parole, and individualized recommendations regarding their conduct and behavior. The test claim statutes exclude inmates sentenced pursuant to the state's Three Strikes

[17] Exhibit B, Interested Party's (County of Los Angeles's) Comments on the Test Claim.

[18] Exhibit C, Finance's Late Comments on the Test Claim.

[19] Exhibit D, Draft Proposed Decision.

[20] Exhibit E, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision.

[21] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision.

[22] Exhibit G, Proposed Decision.

[23] Exhibit H, Claimant's Comments on the Proposed Decision.

Law or One Strike Law (for certain sex offenses) from eligibility for a YOPH and the consultation process described above. The statutes also exclude from eligibility for a YOPH, inmates who committed an additional crime involving malice aforethought (such as murder) after reaching age 26, and those inmates who commit an additional crime for which a new life sentence was imposed after reaching age 26.

The goal of the test claim statutes is "to provide a judicial mechanism for reconsidering the sentences of adults who served a significant amount of time in state prison for the conviction of crimes they committed as children."[24] This mechanism "ensures that youth offenders will face severe punishment for their crimes, but it also gives them hope and the chance to work toward the possibility of parole."[25] The Legislature stated its intent:

> The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity. . . . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.[26]

The claimant seeks reimbursement for costs it alleges were incurred by county public defenders and prosecutors "as a result" of the test claim statutes.[27] The claimant does not identify any costs associated with the YOPH, but alleges costs incurred to defend and prosecute the youth offender at the sentencing hearing, in which the court considers the mitigating circumstances attendant in the youth's crime and life so that it can impose a time when the youth offender will be able to seek a YOPH.[28]

[24] Exhibit I, Senate Committee on Public Safety Analysis of SB 260, April 9, 2013, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB260 (accessed on January 16, 2019), page 4.

[25] Exhibit I, Senate Rules Committee Analysis of SB 394, as amended September 15, 2017, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB394 (accessed on January 16, 2019), page 6.

[26] Statutes 2013, chapter 312 (SB 260), section 1.

[27] Exhibit A, Test Claim, page 13.

[28] Exhibit A, Test Claim, pages 20-23.

A. The History of Juvenile Sentencing in California.

Under common law, any person aged 14 or older who was convicted of a crime was liable as an adult.[29] Those younger than seven were not subject to criminal prosecution.[30] For children between the ages of 7 and 14, the prosecution bore the burden to prove beyond a reasonable doubt that the child had the mental capacity to discern between good and evil.[31] In April 1850, the new California Legislature enacted statutes to the effect that a child under the age of 14 could not be punished for a crime, but could be found to have a sound mind manifesting a criminal intent if the child knew the distinction between good and evil.[32] However, a report by the California Prison Committee in 1859 showed that there were over 300 boys in San Quentin State Prison, some as young as 12, and that there were 600 children confined in adult jails statewide.[33]

During this time, no separate court existed in California for the processing of juvenile offenders, although several reform schools were constructed in an unsuccessful attempt to prevent juveniles from being housed in adult prisons.[34] In response to juvenile court statutes passed in Colorado,

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[29] Exhibit I, Charles E. Springer, Vice-Chief Justice, Supreme Court of Nevada, U. S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, "Justice for Juveniles" (1986), https://www.ncjrs.gov/pdffiles1/Digitization/103137NCJRS.pdf (accessed on February 6, 2019), pages 18-20; also see Exhibit I, Blackstone, *Commentaries on the Laws of England*, Book the Fourth, Chapter II, pages 21-25, https://oll.libertyfund.org/titles/2142#lf1387-02_label_2446 (accessed on February 6, 2019), pages 21-25.

[30] Exhibit I, Charles E. Springer, Vice-Chief Justice, Supreme Court of Nevada, U. S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, "Justice for Juveniles" (1986), https://www.ncjrs.gov/pdffiles1/Digitization/103137NCJRS.pdf (accessed on February 6, 2019), pages 18-20; also see Exhibit I, Blackstone, *Commentaries on the Laws of England*, Book the Fourth, Chapter II, pages 21-25, https://oll.libertyfund.org/titles/2142#lf1387-02_label_2446 (accessed on February 6, 2019), pages 21-25.

[31] Exhibit I, Charles E. Springer, Vice-Chief Justice, Supreme Court of Nevada, U. S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, "Justice for Juveniles" (1986), https://www.ncjrs.gov/pdffiles1/Digitization/103137NCJRS.pdf (accessed on February 6, 2019), pages 18-20; also see Exhibit I, Blackstone, *Commentaries on the Laws of England*, Book the Fourth, Chapter II, pages 21-25, https://oll.libertyfund.org/titles/2142#lf1387-02_label_2446 (accessed on February 6, 2019), pages 21-25.

[32] Statutes 1850, chapter 99, sections 3-4. See also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), page 4.

[33] Exhibit I, Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation* (2003), 7 U. C. Davis Journal of Juvenile Law & Policy, issue 1, https://jjlp.law.ucdavis.edu/archives/vol-7-no-1/SF_Industrial.pdf (accessed on February 1, 2019), page 24.

[34] Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5,

Illinois, and Washington D. C., California passed its own juvenile court law in 1903.[35] The 1903 act applied to children under the age of 16 who were not already inmates at any prison or reform school, and who violated any state or local law.[36] It required counties having more than one judge to designate a judge to hear all juvenile cases under the act, with such proceedings to be closed to the public.[37] Children under 16 who were arrested would be brought before a police judge or justice of the peace, who could allow the child to remain at home, assign them a probation officer, commit them to a reform school, or have a guardian appointed, though any order removing the child from the home would be certified to the designated juvenile case judge for hearing.[38] No child under 12 could be committed to a jail, prison, or police station.[39] A child

"From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), pages 6-10.

[35] Statutes 1903, chapter 43; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), pages 10-13.

[36] Statutes 1903, chapter 43, section 1; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), page 13.

[37] Statutes 1903, chapter 43, section 2; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), page 13.

[38] Statutes 1903, chapter 43, sections 7-8; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), page 13.

[39] Statutes 1903, chapter 43, section 9; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), page 13.

12 or older, but under 16 could be sentenced to a jail or prison where adults were confined, but could not be housed with adult inmates, or meet or be in the presence or sight of adult inmates.[40]

In 1909, the law was amended to include all children under the age of 18.[41] However, there were provisions allowing for a child under 18 to be prosecuted as an adult if the court found, after a hearing, that the child was unfit to be dealt with under the juvenile court law, as well as allowing a person over 18 but under 20 to be prosecuted as a juvenile if the court found this appropriate after a hearing.[42] A child under 14 charged with a felony could not be sentenced to adult prison unless they had first been sent to a state school and proven to be incorrigible.[43] Statutes 1911, chapter 133 amended the law to extended these protections to all persons under 21 not currently an inmate in a state institution.[44]

The Juvenile Court Law of 1915 repealed the 1909 act and the 1911 amendments thereto.[45] It applied to any person under 21, and made special provisions for determining whether offenders under 18 could be transferred to adult court, and for when offenders over 18 but under 21 could be treated as juvenile or regular offenders, allowing such offenders to request a trial in regular court, as juvenile court trials did not include the right to a trial by jury.[46] A child under 16 could, after conviction, (but not before) be sentenced to a jail or prison where adults were confined, but could not be housed with adult inmates, or meet or be in the presence or sight of adult inmates,

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[40] Statutes 1903, chapter 43, section 9; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), page 13.

[41] Statutes 1909, chapter 133, section 1; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), page 14.

[42] Statutes 1909, chapter 133, sections 17-18.

[43] Statutes 1909, chapter 133, section 20; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), page 14.

[44] Statutes 1911, chapter 369, section 1.

[45] Statutes 1915, chapter 631.

[46] Statutes 1915, chapter 631, sections 6-8; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), pages 16-17.

and any person sentenced to a reform school or other institution other than a state prison could be returned to court and committed to state prison upon a finding of incorrigibility.[47]

In 1937, the California Legislature enacted the Welfare and Institutions Code, which provided, among other things, for a new juvenile court law.[48] It applied to all persons under 21, and established detention homes and forestry camps as alternative facilities to the state schools for housing juvenile offenders; however, in other respects it was similar to the Juvenile Court Law of 1915.[49]

The Youth Correction Authority Act, enacted in 1941, added sections 1700 to 1783 to the Welfare and Institutions Code, and established what would become, in 1942, the California Youth Authority (CYA), and ultimately, the contemporary Division of Juvenile Justice (DJJ).[50] The 1941 Act allowed for offenders under 23 at the time of their apprehension to be committed to CYA facilities, as opposed to state prisons, unless sentenced to very long or short terms (death, life imprisonment, or not more than 90 days incarceration).[51] All offenders committed to the CYA by a juvenile court had to be discharged after either two years or reaching the age of 21, whichever was later.[52] Misdemeanor offenders committed to CYA had to be discharged after two years or upon turning 23, whichever was later.[53] Felons committed to CYA had to be discharged by the age of 25.[54] However, if any person committed to CYA was due to be discharged before the maximum term of incarceration allowed for their commitment offense, and

[47] Statutes 1915, chapter 631, sections 10 and 14.

[48] Statutes 1937, chapter 369, sections 550-911.

[49] Statutes 1937, chapter 369, sections 550-911; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), page 19.

[50] Statutes 1941, chapter 937; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), page 21; and Exhibit I, "The History of the Division of Juvenile Justice," https://www.cdcr.ca.gov/Juvenile_Justice/DJJ_History/index.html (accessed on February 7, 2019), pages 2-8.

[51] Statutes 1941, chapter 937, page 2526.

[52] Statutes 1941, chapter 937, page 2531.

[53] Statutes 1941, chapter 937, page 2531.

[54] Statutes 1941, chapter 937, page 2532.

if the CYA believed the person was still dangerous, the CYA could go to court and seek to have the person committed to state prison for such maximum term, less the time spent at CYA.[55]

In 1961, a new Juvenile Court Law was passed, codified at Welfare and Institutions Code sections 500-914, and became popularly known as the Arnold-Kennick Juvenile Court Law, which is the basis for current juvenile justice laws in California.[56] It prohibited detaining persons under 18 "in any jail or lockup" unless charged with a felony, and if so detained, contact with adults detained in the same facility was forbidden.[57] It categorically prohibited committing anyone under 16 to a state prison.[58] It provided that anyone under 21 could be prosecuted as a juvenile, upon a finding of suitability by the juvenile court.[59] In felony cases, the juvenile court had the power, for those 16 or older at the time of the offense, to determine whether the offender was more properly subject to prosecution in juvenile court, and, if the offender was found "not a fit and proper subject" for juvenile court, to direct the district attorney to prosecute the offender as an adult "under general law."[60] Lastly, juvenile offenders were given expanded notice rights, the right to counsel, and the right to proof of the allegations against them by a preponderance of the evidence.[61] This was later changed to a proof beyond a reasonable doubt standard, by the ruling of the United States Supreme Court.[62]

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[55] Statutes 1941, chapter 937, pages 2532-2533.

[56] Statutes 1961, chapter 1616; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), pages 25-26.

[57] Statutes 1961, chapter 1616, page 3461.

[58] Statutes 1961, chapter 1616, page 3462.

[59] Statutes 1961, chapter 1616, page 3472.

[60] Statutes 1961, chapter 1616, page 3485.

[61] Statutes 1961, chapter 1616, pages 3466-3482; see also Exhibit I, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, "From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961" (2004), http://www.courts.ca.gov/documents/JournalVol5.pdf (accessed on February 1, 2019), pages 25-26.

[62] *In re Winship* (1970) 397 U.S. 358. Before the Arnold-Kennick Juvenile Court Law, the juvenile court basically had essentially "unbridled discretion" to adjudicate a minor as a ward of the state, as the proceedings were not considered adversarial; rather, the state was proceeding as *parens patriae* (Latin for "parent of the country"), as a minor had rights not to liberty, but to custody, and state intervention did not require due process, as the state was merely providing the custody to which the minor was entitled, and which the parents had failed to provide. This did not deprive the minor of rights, for minors, who could be compelled, among other things, to go to school and to obey their parents, had no rights. (*In re Gault* (1967) 387 U.S. 1, 15-21.)

B. Juvenile Sentencing Statutes in Effect in California Immediately Prior to the Enactment of the Test Claim Statutes.

Immediately prior to the enactment of the test claim statutes,[63] juvenile offenders were processed pursuant to Welfare and Institutions Code section 602(a), which provided that anyone under 18 who committed a crime fell within the jurisdiction of the juvenile court and could be adjudged a ward thereof, unless they were 14 or older and were charged with special circumstances murder or specified sex offenses, in which case they had to be prosecuted "under the general law, in a court of criminal jurisdiction" (i.e., as adults).[64] Additionally, pursuant to Welfare and Institutions Code section 707(d)(1), prosecutors could "direct file" charges in adult criminal court (bypassing the juvenile court altogether) against juveniles 16 or older if they were accused of one of the 30 felonies described in Welfare and Institutions Code section 707(b), such as rape, robbery, child molestation, assault with a firearm, murder, attempted murder, and voluntary manslaughter.[65] Lastly, prosecutors could direct file against juveniles 14 or older for crimes or circumstances specified in Welfare and Institutions Code section 707(d)(2), such as personal use of a firearm during the commission of a felony, gang related offenses, or hate crimes.[66] As a result, numerous offenders were sentenced to terms in state prison for crimes committed when they were under 18. There were approximately 5,700 such persons incarcerated in state prisons as of August 14, 2013.[67]

C. The United States and California Supreme Court Decisions that Directly Led to the Enactment of the Test Claim Statutes.

Prior to the enactment of the test claim statutes, a series of rulings from the United States and California Supreme Courts found that imposition of the harshest penalties on offenders who were juveniles at the time of the offense, without considering such offenders' youth and attendant characteristics, violated the Constitution's Eighth Amendment prohibition against cruel and unusual punishment.[68] As described below, the sentences imposed on juvenile offenders that were found to violate the U.S. Constitution included the death penalty, mandatory sentences of life without the possibility of parole (LWOP), and life with the possibility of parole where the parole eligibility date falls outside the juvenile offender's natural life expectancy (LWOP equivalent). The courts found that although proper authorities may determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the

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[63] Statutes 2013, chapter 312, effective January 1, 2014 (SB 260).

[64] Former Welfare and Institutions Code section 602.

[65] Former Welfare and Institutions Code sections 707(a), 707(b), and 707(d)(1).

[66] Former Welfare and Institutions Code section 707(d)(2).

[67] Exhibit I, Assembly Committee on Appropriations – Analysis of SB 260, as amended August 13, 2013, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB260 (accessed on January 16, 2019), page 2.

[68] *Roper v. Simmons* (2005) 543 U.S. 551; *Graham v. Florida* (2010) 560 U.S. 48; *Miller v. Alabama* (2012) 567 U.S. 460; *People v. Caballero* (2012) 55 Cal.4th 262.

future. Thus, a sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including, but not limited to, his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole.[69]

The first of this series of decisions was *Roper v. Simmons*, the U. S. Supreme Court held that imposition of the death penalty on offenders who were under 18 (i.e., juveniles) at the time of committing their capital offenses violated the U. S. Constitution's Eighth Amendment prohibition against cruel and unusual punishment.[70] The Court reasoned that any conclusion that a juvenile falls among the worst offenders is suspect:

> The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." (Citation.) Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. (Citation.) The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[71]

In *Graham v. Florida*, the U.S. Supreme Court ruled that imposing a life sentence without the possibility of parole on a juvenile offender who had not committed a homicide violated the Eighth Amendment prohibition against cruel and unusual punishment.[72] The Court explained that *Roper* had established that "because juveniles have lessened culpability they are less deserving of the most severe punishments."[73] The Court continued that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."[74] The Court further reasoned "[h]ere, in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by

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[69] *Graham v. Florida* (2010) 560 U.S. 48; *Miller v. Alabama* (2012) 567 U.S. 460; *People v. Caballero* (2012) 55 Cal.4th 262; *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718].

[70] *Roper v. Simmons* (2005) 543 U.S. 551; 568, 578-579.

[71] *Roper v. Simmons* (2005) 543 U.S. 551, 570.

[72] *Graham v. Florida* (2010) 560 U.S. 48, 74-75.

[73] *Graham v. Florida* (2010) 560 U.S. 48, 68.

[74] *Graham v. Florida* (2010) 560 U.S. 48, 68.

life without parole is not enough to justify the sentence."[75] The Court held that "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[76]

The Court in *Graham* concluded that a state is not required to guarantee freedom to a juvenile offender, but must give defendants, at the outset, "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," as follows:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham *some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.* It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. *It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society*.[77]

Then, in *Miller v. Alabama*, the Court held that a mandatory life without parole sentence for a person who was under 18 at the time of their crime violated the Eighth Amendment prohibition on cruel and unusual punishment.[78] The defendants in *Miller* had been sentenced to LWOP after being convicted of murder, and given the nature of the conviction, the sentencing judges had no discretion to impose any other penalty.[79] The Court explained that "Such a scheme prevents those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change. . . ."[80] The Court continued that the characteristics that make juveniles less culpable than adults – "their immaturity, recklessness and impetuosity – make them less likely to consider potential punishment."[81] The Court reasoned that "the mandatory penalty schemes at issue here prevent the sentence from taking account of these central considerations. . . .[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[82]

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[75] *Graham v. Florida* (2010) 560 U.S. 48, 72.

[76] *Graham v. Florida* (2010) 560 U.S. 48, 76.

[77] *Graham v. Florida* (2010) 560 U.S. 48, 75 (emphasis added).

[78] *Miller v. Alabama* (2012) 567 U.S. 460, 465.

[79] *Miller v. Alabama* (2012) 567 U.S. 460, 465-469.

[80] *Miller v. Alabama* (2012) 567 U.S. 460, 465.

[81] *Miller v. Alabama* (2012) 567 U.S. 460, 472.

[82] *Miller v. Alabama* (2012) 567 U.S. 460, 474.

The Court reasoned as follows:

> To recap: Mandatory life without parole for a juvenile *precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.* It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. (Citations.) And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[83]

Thus, the Court in *Miller* concluded that the Eighth Amendment to the U.S. Constitution forbids a sentencing scheme that mandates LWOP on juvenile homicide offenders.[84] Rather, citing *Graham*, the court held that "a state must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[85] The Court concluded by stating the following:

> . . . we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished capacity and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (Citations.) Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.[86]

After the U.S. Supreme Court's decisions in *Graham* and *Miller*, the California Supreme Court held, in *People v. Caballero*, that the imposition on a 16 year old defendant of a sentence of life imprisonment with a minimum of 110 years before parole eligibility, for a nonhomicide offense (attempted murder with firearm and gang enhancements), violated the Eighth Amendment to the

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[83] *Miller v. Alabama* (2012) 567 U.S. 460, 477-478 (emphasis added).

[84] *Miller v. Alabama* (2012) 567 U.S. 460, 479.

[85] *Miller v. Alabama* (2012) 567 U.S. 460, 479.

[86] *Miller v. Alabama* (2012) 567 U.S. 460, 479-480.

U. S. Constitution and the U. S. Supreme Court's ruling in *Graham*.[87] The court recognized that Caballero "would have no opportunity to 'demonstrate growth and maturity' to try to secure his release, in contravention of *Graham's* dictate.[88] The Court held that the state may not deprive these juvenile offenders at sentencing of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, and "must consider all mitigating circumstances attendant in the juvenile's crime and life" as follows:

> [W]e conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, *the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under Graham's nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison "based on demonstrated maturity and rehabilitation."* (Citation.)[89]

The court also held that offenders whose LWOP or LWOP equivalent sentences were already final could file a petition for writ of habeas corpus in the trial court to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings, as follows:

> Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings. *Because every case will be different, we will not provide trial courts with a precise timeframe for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" under Graham's mandate*.[90]

In a footnote at the end of the *Caballero* decision, however, the court urged the Legislature "to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a

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[87] *People v. Caballero* (2012) 55 Cal.4th 262, 265.

[88] *People v. Caballero* (2012) 55 Cal.4th 262, 265.

[89] *People v. Caballero* (2012) 55 Cal.4th 262, 268-269 (emphasis added).

[90] *People v. Caballero* (2012) 55 Cal.4th 262, 269 (emphasis added).

de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity."[91]

On January 27, 2016, the U. S. Supreme Court issued its decision in *Montgomery v. Louisiana*.[92] The Court ruled that its decision in *Miller* (prohibiting mandatory LWOP sentences for offenders under 18) was retroactive, ordering the state of Louisiana to review for parole suitability the case of an inmate who had been given such a sentence at the age of 17, for a crime committed in 1963.[93] The court added that a state is not required to re-litigate the juvenile offender's sentence, but may remedy a *Miller* violation with parole considerations as follows:

> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. *A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.* See, e.g., Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity —and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.
>
> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.[94]

D. The Test Claim Statutes

1. Statutes 2013, Chapter 312 (SB 260) Was Enacted To Require the State Board of Parole Hearings (BPH) To Conduct Youth Offender Parole Hearings (YOPHs) To Consider the Suitability of Release on Parole for Those Individuals Who Are Eligible for a YOPH and Committed Their Controlling Offense Before Reaching Age 18.

In response to the above rulings by the courts in *Graham*, *Miller*, and *Caballero*, the Legislature enacted Statutes 2013, chapter 312 to establish a parole eligibility mechanism to require the BPH to assess the growth and maturity of youthful offenders and to provide the offenders a meaningful opportunity for release. Section 1 of the bill states the following:

> The Legislature finds and declares that, as stated by the United States Supreme Court in Miller v. Alabama (2012) 183 L.Ed.2d 407, "only a relatively small

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[91] *People v. Caballero* (2012) 55 Cal.4th 262, 274, fn. 5.

[92] *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718].

[93] *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718; 725-726, 734-736].

[94] *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718, 736] (emphasis added).

> proportion of adolescents" who engage in illegal activity "develop entrenched patterns of problem behavior," and that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including "parts of the brain involved in behavior control." The Legislature recognizes that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in People v. Caballero (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in Graham v. Florida (2010) 560 U.S. 48, and Miller v. Alabama (2012) 183 L.Ed.2d 407. Nothing in this act is intended to undermine the California Supreme Court's holdings in In re Shaputis (2011) 53 Cal.4th 192, In re Lawrence (2008) 44 Cal.4th 1181, and subsequent cases [addressing the decisions of the executive branch whether or not to grant parole]. It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.[95]

Statutes 2013, chapter 312 added section 3051 and amended sections 3041, 3046, and 4801 of the Penal Code, creating YOPHs during the 15th, 20th, or 25th year of incarceration for inmates who committed their controlling offense before reaching age 18. Statutes 2013, chapter 312 required the parole of inmates found suitable for parole at a YOPH, notwithstanding consecutive life sentences or minimum terms before parole eligibility. The statute also required the state BPH, while reviewing suitability for parole at a YOPH, to provide for a meaningful opportunity to obtain release and to give great weight to the diminished culpability of juveniles, the hallmarks of youth, and any growth or maturity displayed by the prisoner.[96]

a. Amendments to Penal Code section 3041

The amendments to section 3041 changed how the state BPH met with inmates serving life sentences with a possibility of parole. Previously, BPH met with such inmates during their third year of incarceration, to review their files, make recommendations, and document activities or conduct relevant to granting or withholding postconviction credit.[97] The amendment changed the meeting (now called a consultation) to the sixth year before the inmate's minimum eligible

[95] Statutes 2013, chapter 312, section 1.

[96] Penal Code sections 3051(e) and 4801(c). The terms "inmate" and "prisoner" are interchangeable; for purposes of this Decision, whichever term is being used in the statute under discussion will be used.

[97] Pursuant to Penal Code section 2930 et seq., certain inmates are eligible to receive good conduct credits reducing their sentence by up to one-third; however, such credits can be taken away for misconduct inside the prison.

parole release date,[98] and required much more individualized recommendations to the inmate regarding suitability for parole and behavior that would indicate the same.

Statutes 2013, chapter 312 amended Penal Code section 3041(a) as follows (in strikeout and underline):

> (a) In the case of any inmate sentenced pursuant to any law, other than Chapter 4.5 (commencing with Section 1170[99]) of Title 7 of Part 2, the Board of Parole Hearings shall meet with each inmate during the ~~third year of incarceration~~ sixth year prior to the inmate's minimum eligible parole release date for the purposes of reviewing and documenting the inmate's ~~file, making recommendations,~~ activities and conduct pertinent to both parole eligibility and to the granting or withholding of postconviction credit. During this consultation, the board shall provide the inmate information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior. Within 30 days following the consultation, the board shall issue its positive and negative findings and recommendations to the inmate in writing. One year prior to the inmate's minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. No more than one member of the panel shall be a deputy commissioner. In the event of a tie vote, the matter shall be referred for an en banc review of the record that was before the panel that rendered the tie vote. Upon en banc review, the board shall vote to either grant or deny parole and render a statement of decision. The en banc review shall be conducted pursuant to subdivision (e). The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime. At least one commissioner of the panel shall have been present at the last preceding meeting, unless it is not feasible to do so or where the last preceding meeting was the initial meeting. Any person on the hearing panel may request review of any decision

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[98] The minimum eligible parole release date, in the case of inmates serving a life sentence with no other specific term of years, is seven years; in the case of inmates serving a life sentence with a specific term of years, e.g., 25 to life, the minimum eligible parole release date occurs after 25 years of incarceration, i.e., after serving the specific term of years. (Pen. Code, § 3046.)

[99] Inmates sentenced to Penal Code section 1170 have determinate sentences, i.e., a sentence for a fixed term of years, such as 12 years in prison, and are released on parole at the end of their sentences, without the need for a parole hearing in front of the BPH.

regarding parole for an en banc hearing by the board. In case of a review, a majority vote in favor of parole by the board members participating in an en banc review is required to grant parole to any inmate.

b. Amendments to Penal Code section 3046

The amendments to section 3046 required that a prisoner found suitable for parole at a YOPH actually be granted parole, despite provisions elsewhere in that section requiring that inmates sentenced to a term of years to life sentence (e.g., 50 years to life) or to consecutive life sentences, serve their term of years or a minimum of seven years for each consecutive life sentence.[100] Statutes 2013, chapter 312 amended section 3046 as follows (in underline):

(a) No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following:

(1) A term of at least seven calendar years.

(2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole.

(b) If two or more life sentences are ordered to run consecutively to each other pursuant to Section 669, no prisoner so imprisoned may be paroled until he or she has served the term specified in subdivision (a) on each of the life sentences that are ordered to run consecutively.

(c) Notwithstanding subdivisions (a) and (b), a prisoner found suitable for parole pursuant to a youth offender parole hearing as described in Section 3051 shall be paroled regardless of the manner in which the board set release dates pursuant to subdivision (a) of Section 3041, subject to subdivision (b) of Section 3041 and Sections 3041.1 and 3041.2, as applicable.

(d) The Board of Prison Terms[101] shall, in considering a parole for a prisoner, consider all statements and recommendations which may have been submitted by the judge, district attorney, and sheriff, pursuant to Section 1203.01, or in response to notices given under Section 3042, and recommendations of other persons interested in the granting or denying of the parole. The board shall enter on its order granting or denying parole to these prisoners, the fact that the statements and recommendations have been considered by it.

c. Addition of Penal Code section 3051

Statutes 2013, chapter 312 added section 3051 to the Penal Code, establishing the YOPH as a hearing conducted by the state BPH to review the suitability for parole of prisoners who were under 18 at the time of their controlling offense (i.e., juvenile offenders). "Controlling offense"

[100] For example, three consecutive life sentences would require a minimum of 21 years in prison (7+7+7) before eligibility for parole; or, two consecutive 25 years to life sentences would require a minimum of 50 years in prison before eligibility for parole (25+25).

[101] As of July 1, 2005, the Board of Prison Terms was abolished, and was replaced by the BPH, and any references to the Board of Prison Terms refer to the BPH. (Pen. Code, § 5075(a).)

is defined as the offense or enhancement for which the longest term of imprisonment was imposed. Section 3051 requires that juvenile offenders sentenced to a determinate sentence (i.e., a fixed term, such as 20 years) receive a YOPH by the BPH during their 15th year of incarceration, unless previously released. Juvenile offenders sentenced to a life term of less than 25 years to life are required to have a YOPH before the BPH during their 20th year of incarceration. Juvenile offenders sentenced to 25 years to life are required to have a YOPH during their 25th year of incarceration.[102] At a YOPH, the BPH is required to give great weight to, among other things, the diminished culpability of juveniles and the hallmark features of youth, when considering a prisoner's suitability for parole. Section 3051 also specifically excludes juvenile offenders convicted under the Three Strikes Law[103] or the One Strike Law,[104] or those who have committed very grave offenses after turning 18, from being given YOPHs. Lastly, it requires the state BPH to complete all YOPHs for prisoners eligible for them as of January 1, 2014, by July 1, 2015.[105]

Penal Code section 3051 reads

> (a)(1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was under 18 years of age at the time of his or her controlling offense.
>
> (2) For the purposes of this section, the following definitions shall apply:
>
> (A) "Incarceration" means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.
>
> (B) "Controlling offense" means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

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[102] This applies to juvenile offenders who are sentenced to a term greater than 25 years to life; for example, a juvenile offender sentenced to 32 years to life would have the right, under section 3051, to receive a YOPH after 25 years of incarceration. (*People v. Garcia* (2017) 7 Cal.App.5th 941, 949-951.)

[103] As provided for in both Penal Code sections 1170.12 and 667, the Three Strikes law provides that a person convicted for the third time of a serious felony, as defined in Penal Code section 1192.7, or a violent felony, as defined in Penal Code section 667.5, shall serve a minimum of 25 years to life in state prison.

[104] As provided for in Penal Code section 667.61, the One Strike Law provides that a person convicted of certain sex offenses under certain circumstances shall receive a 15 years to life, 25 years to life, or LWOP sentence, depending on the specifics of the crime and the circumstances – even if the person has no prior criminal record.

[105] On April 10, 2019, the Court of Appeal for the First District, Division 4, held that Penal Code section 3051 was unconstitutional to the extent that it allowed youthful offenders convicted of murder to be eligible for YOPHs, but denied youthful offenders convicted under the One Strike Law such eligibility – and that this was a violation of the principles of equal protection of the laws as guaranteed by the Fourteenth Amendment to the U. S. Constitution. (*People v. Edwards* (2019) 34 Cal.App.5th 183, 194-199.)

(b)(1) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.

(2) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(c) An individual subject to this section shall meet with the board pursuant to subdivision (a) of Section 3041.

(d) The board shall conduct a youth offender parole hearing to consider release. At the youth offender parole hearing, the board shall release the individual on parole as provided in Section 3041, except that the board shall act in accordance with subdivision (c) of Section 4801.

(e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.

(f)(1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

(2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.

(3) Nothing in this section is intended to alter the rights of victims at parole hearings.

(g) If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5, the board shall consider the factors in subdivision (c) of Section 4801. No subsequent youth offender parole hearing shall be necessary if the offender is released pursuant to other statutory provisions prior to the date of the subsequent hearing.

(h) This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or in which an individual was sentenced to life in prison without the possibility of parole. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 18 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

(i) The board shall complete all youth offender parole hearings for individuals who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of this section by July 1, 2015.[106]

d. Amendments to Penal Code section 4801

Statutes 2013, chapter 312 amended section 4801 to require the BPH, during a prisoner's YOPH, to give great weight to the diminished capacity of juveniles, the hallmark features of youth, and subsequent growth and maturation of the prisoner, consistent with decisional law. The statute amended section 4801, as relevant to this claim, by adding subdivision (c) as follows:

(c) When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 18 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

2. Statutes 2015, Chapter 471 (SB 261) Expanded YOPH Eligibility to Individuals Who Were under the Age of 23 at the Time of Their Controlling Offense, and Set Deadlines for the BPH To Complete Such Hearings.

Statutes 2015, chapter 471 further amended sections 3051 and 4801of the Penal Code. Penal Code section 3051 was amended to expand YOPH eligibility to prisoners who were under 23 at the time of their controlling offenses. In addition, section 3051 was amended to require the BPH to complete all YOPHs for individuals who were sentenced to *indeterminate life terms* and who are eligible for a YOPH as of January 1, 2016, by July 1, 2017. Section 3051, as amended, also required the BPH to complete all YOPHs for those individuals who were sentenced to

[106] Pursuant to Penal Code section 3051(e), BPH initiated a proposed regulatory package on December 24, 2018, to implement these statutes. The regulatory package remains pending. (https://www.cdcr.ca.gov/BOPH/reg_revisions.html, accessed on June 18, 2019.)

determinate terms and who became entitled to a YOPH as of January 1, 2016, by July 1, 2021, and to complete all consultations of these individuals before July 1, 2017.

Statutes 2015, chapter 471 also made similar changes to Penal Code section 4801 to provide that prisoners who were under 23 at the time of their controlling offenses were eligible for YOPHs, with no changes to the special considerations the BPH was expected to give great weight to at such hearings.

3. Statutes 2017, Chapter 684 (SB 394) Expanded YOPH Eligibility to Individuals Who Were 25 or Younger at the Time of Their Controlling Offense and to Individuals Sentenced to Life Without the Possibility of Parole (LWOP) for a Controlling Offense Committed While under the Age of 18, and Set Deadlines for the BPH to Complete Such Hearings.

Statutes 2017, chapter 684 amended Penal Code sections 3051 and 4801, allowing prisoners with the possibility of parole who committed their controlling offenses at the age of 25 or younger to qualify for YOPHs, and granting those who had been sentenced to LWOP for a controlling offense committed while under the age of 18 to receive a YOPH during their 25th year of incarceration in accordance with the U.S. Supreme Court's 2016 decision in *Montgomery*.[107] This statute set new deadlines for the BPH to complete the YOPHs for persons entitled thereto on the effective date of the statute (January 1, 2018) by January 1, 2020 (for individuals sentenced to indeterminate life terms) and January 1, 2022 (for individuals sentenced to determinate terms), and for completion of YOPHs for qualifying LWOP prisoners by July 1, 2020.

E. <u>California Supreme Court Decisions Issued and Statutes Enacted After the Test Claim Statutes.</u>

On June 17, 2016, the California Supreme Court issued its decision in *People v. Franklin*.[108] This case involved a defendant, Franklin, who committed a murder at the age of 17, where the trial court at sentencing had no discretion other than to impose two consecutive 25 years to life sentences, for a total sentence of 50 years to life.[109] Franklin challenged the sentence as a violation of the Eighth Amendment ban on cruel and unusual punishment based on the holdings in *Graham*, *Miller*, and *Caballero*.[110] Franklin argued the following:

> As noted, Franklin would first become eligible for parole at age 66 under the sentence imposed by the trial court. That sentence was mandatory; the trial court had no discretion to consider Franklin's youth as a mitigating factor. According to Franklin, the 50-year-to-life sentence means he will not experience any substantial period of normal adult life; instead, he will either die in prison or have

[107] Exhibit I, Assembly Committee on Public Safety – Analysis of SB 394, as amended June 26, 2017, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB394 (accessed on January 16, 2019), pages 4-5.

[108] *People v. Franklin* (2016) 63 Cal.4th 261.

[109] *People v. Franklin* (2016) 63 Cal.4th 261, 268.

[110] *People v. Franklin* (2016) 63 Cal.4th 261, 268.

> the possibility of geriatric release. He contends that his sentence is the "functional equivalent" of LWOP [citing *Caballero*] and that it was imposed without the protections set forth in *Miller*.[111]

The court agreed that the constitutional protections outlined in *Graham* and *Miller* apply to sentences that are the "functional equivalent of a life without parole sentence," as follows:

> We now hold that just as *Graham* applies to sentences that are the "functional equivalent of a life without parole sentence" (Citation), so too does *Miller* apply to such functionally equivalent sentences. As we noted in *Caballero*, *Miller* "extended *Graham*'s reasoning" to homicide offenses, observing that "'none of what [*Graham*] said about children — about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.'" (Citation.) Because sentences that are the functional equivalent of LWOP implicate *Graham*'s reasoning (Citation), and because "'*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile' " whether for a homicide or nonhomicide offense (citation), a sentence that is the functional equivalent of LWOP under *Caballero* is subject to the strictures of *Miller* just as it is subject to the rule of *Graham*. In short, a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*.[112]

The court cited *Montgomery* in support of its holding that "the law categorically prohibits the imposition of certain penalties, including mandatory LWOP, on juvenile offenders."[113]

While his appeal was pending, the Legislature enacted the test claim statutes, Penal Code sections 3051 and 4801, to provide a parole hearing during the 25th year of incarceration for certain juveniles sentenced as adults.[114] Thus, the court concluded that Franklin's Eighth Amendment constitutional challenge was moot because of the passage of Penal Code sections 3051 and 4801:

> . . . Penal Code sections 3051 and 4801 – recently enacted by the Legislature to bring juvenile sentencing in conformity with *Miller*, *Graham*, and *Caballero* – moot Franklin's constitutional claim. Consistent with constitutional dictates, those statutes provide Franklin with the possibility of release after 25 years of imprisonment (Pen. Code § 3051, subd. (b)(3)) and require the Board of Parole Hearings (Board) to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity." (*id.*, § 4801, subd. (c)). In light of this holding, we need not decide whether a life sentence with parole eligibility after 50 years of

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[111] *People v. Franklin* (2016) 63 Cal.4th 261, 276.

[112] *People v. Franklin* (2016) 63 Cal.4th 261, 276.

[113] *People v. Franklin* (2016) 63 Cal.4th 261, 283.

[114] *People v. Franklin* (2016) 63 Cal.4th 261, 269.

> incarceration is the functional equivalent of an LWOP sentence and, if so, whether it is unconstitutional in Franklin's case.[115]

The court also found that Franklin raised colorable concerns about whether he was given an adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth, since he was sentenced before *Miller* was decided and before the Legislature enacted the test claim statutes. The court explained what happened at the sentencing hearing as follows:

> Franklin was sentenced in 2011, before the high court's decision in *Miller* and before our Legislature's enactment of Senate Bill No. 260 in response to *Miller*, *Graham*, and *Caballero*. When Franklin's attorney did not receive a probation report until the morning of sentencing, the trial court acknowledged that this delay would ordinarily merit a continuance. But the court, recognizing that it lacked discretion in sentencing Franklin, proceeded with sentencing and allowed the defense to submit mitigation information at a later date. At the post sentencing hearing where these materials were submitted, Franklin's attorney raised concerns about the record at his eventual parole hearing. In response, the trial court said, "it sort of doesn't matter because the statute mandates the sentence here. So there's no basis and occasion for any findings to be made on aggravation and mitigation at all." The court eventually admitted a mitigating statement submitted by Franklin and a handwritten note from this mother. But the court expressed "misgiving" that because of the mandatory sentences, "[a]t no point in the process is anyone, other than the district attorney's office, ever able to really consider that this is a juvenile."[116]

The court recognized that following Franklin's sentencing hearing, the Legislature enacted the test claim statutes to declare "that '[t]he youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release (§ 3051, subd. (e)) and that in order to provide such meaningful opportunity, the Board [of Parole Hearings] 'shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity' (§ 4081, subd. (c))," and, referring to *Miller*, *Graham*, *Caballero*, *Roper*, and *Montgomery*, that "[t]hese statutory provisions echo language in constitutional decisions of the high court.[117] The court stated that Penal Code section 3051 "changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole" and that the "Legislature has effected this change by operation of law, with no additional resentencing procedure required."[118] The court further determined that the test claim statutes "contemplate that information regarding the juvenile offender's characteristics and

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[115] *People v. Franklin* (2016) 63 Cal.4th 261, 268; see also pages 277-280.

[116] *People v. Franklin* (2016) 63 Cal.4th 261, 282-283.

[117] *People v. Franklin* (2016) 63 Cal.4th 261, 283.

[118] *People v. Franklin* (2016) 63 Cal.4th 261, 278-279.

circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration."[119]

Thus, the court remanded the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity at his sentencing to make a record of the type of information that may describe the diminished culpability of juveniles and the hallmarks of youth, which would be relevant to his future YOPH.[120] The court reasoned that the goal of any proceeding to make such a record

> [I]s to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the [BPH], years later, may properly discharge its obligation to 'give great weight to' youth related factors ([section 4801(c)]) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.' (Citation.)[121]

The Court clarified that if Franklin were to be granted such a proceeding, the trial court may receive evidence and testimony from both parties pursuant to existing sentencing procedures as follows:

> [The court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in [Penal Code] section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors.[122]

In August 2016, the Fourth District Court of Appeal decided *People v. Perez*.[123] In *Perez*, the defendant appealed from a judgment after a jury convicted him of three counts of attempted premeditated murder, discharging a firearm with gross negligence, and vandalism, and found firearm enhancements. These crimes were committed when Perez was 20 years old.[124] Perez argued his 86–year–to–life sentence constituted cruel and unusual punishment, relying on *Roper*, *Graham*, *Miller*, and *Caballero*.[125] The court concluded, however, that because Perez was not a juvenile at the time of the offenses (he was 20 years old), *Roper*, *Graham*, *Miller*, and *Caballero*

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[119] *People v. Franklin* (2016) 63 Cal.4th 261, 283.

[120] *People v. Franklin* (2016) 63 Cal.4th 261, 284.

[121] *People v. Franklin* (2016) 63 Cal.4th 261, 284.

[122] *People v. Franklin* (2016) 63 Cal.4th 261, 284.

[123] *People v. Perez* (2016) 3 Cal.App.5th 612.

[124] *People v. Perez* (2016) 3 Cal.App.5th 612, 615, 617.

[125] *People v. Perez* (2016) 3 Cal.App.5th 612, 617.

were not applicable, and that the 86–years–to–life sentence did not constitute cruel and unusual punishment under the U.S. Constitution.[126]

The court noted that effective January 1, 2016, anyone who committed a controlling offense before reaching 23 years of age is entitled to a YOPH pursuant to Penal Code section 3051, as amended by the 2015 test claim statute.[127] Thus, under this statute and pursuant to the court's holding in *Franklin*, the court ordered a limited remand for both parties "to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors . . . in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime."[128]

In 2018, the California Supreme Court decided *People v. Rodriguez* to determine whether defendant's constitutional challenge to a 50-years-to-life sentence was moot because of the test claim statutes, which were enacted after the defendant was sentenced to make him eligible for a YOPH during his 25th year of incarceration.[129] The court of appeal had applied *Franklin*, finding that the Eighth Amendment constitutional challenge was moot because of the enactment of the test claim statutes, but declined to remand the case to the trial court on the ground that Rodriguez had a sufficient opportunity at the original sentencing hearing to make a record.[130] The California Supreme Court disagreed with the court of appeal's failure to remand, and held that Rodriguez was entitled to have his case remanded for the opportunity to supplement the record with information relevant to his eventual YOPH, reasoning that:

> Although a defendant sentenced before the enactment of Senate Bill No. 260 could have introduced such evidence through existing sentencing procedures, he or she would not have had reason to know that the subsequently enacted legislation would make such evidence particularly relevant in the parole process. Without such notice, any opportunity to introduce evidence of youth-related factors is not adequate in light of the purpose of Senate Bill No. 260.[131]

Most recently, on June 3, 2019, the California Supreme Court issued its decision in *In re Cook*.[132] Cook was convicted in 2007 of murder and attempted murder committed when he was 17 years old, and received an LWOP sentence for the attempted murder and five consecutive 25 year terms for the murder, and his conviction was final. The California Supreme Court concluded that the right to a *Franklin* proceeding applies also to Cook and other offenders who

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[126] *People v. Perez* (2016) 3 Cal.App.5th 612, 617.

[127] *People v. Perez* (2016) 3 Cal.App.5th 612, 618.

[128] *People v. Perez* (2016) 3 Cal.App.5th 612, 619.

[129] *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1125.

[130] *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1131.

[131] *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1131.

[132] *In re Cook* (2019) 7 Cal.5th 439.

are entitled to a parole hearing under Penal Code sections 3051 and 4801, and whose judgment and sentence are otherwise final.[133]

The court in *Cook* further held that the offenders who seek to preserve evidence following a final judgment would not have to file a petition for writ of habeas corpus to exercise the right to receive a *Franklin* proceeding, but instead would simply have to file a motion with the superior court under Penal Code section 1203.01, using the original caption and case number and citing the Supreme Court's decision in *Cook*:

> By its terms, the statute addresses the filing of statements with the court "after judgment has been pronounced." (§ 1203.01, subd. (a).) Further, the motion we recognize under section 1203.01 does not impose the rigorous pleading and proof requirements for habeas corpus. . . Nor does it require the court to act as a factfinder. Rather, it simply entails the receipt of evidence for the benefit of the Board. [Citation to *Franklin* omitted.][134]

The court noted that the proceedings it outlines under Penal Code section 1203.01 derive from the test claim statutes, Penal Code sections 3051 and 4801, but the court expressed no view on whether such a remand is constitutionally required in all cases.[135] The court also stated that the Legislature has not enacted any new laws to specify what evidence-gathering procedures should be afforded to youth offenders who will be eligible for a YOPH, and explained that the Legislature remains free to enact statutes governing the procedure as follows:

> While we unquestionably have the power to interpret these laws, the Legislature is in a superior position to consider and implement rules of procedure in the first instance. The Legislature remains free to amend the pertinent statutes to specify what evidence-gathering procedures should be afforded to youth offenders, taking into account the objectives of the youth offender parole hearing and the burden placed on our trial courts to conduct *Franklin* proceedings for the many thousands of offenders who will be eligible for them under today's decision.[136]

The court in *Cook* made it clear that the "opportunity for a *Franklin* hearing is just that: an opportunity." The court noted that "[d]elving into the past is not always beneficial to a defendant" and, thus, some offenders will forgo a *Franklin* proceeding altogether.[137]

Finally, effective January 1, 2019, the Legislature amended Welfare and Institutions Code section 707 to repeal the authority of a district attorney to make a motion to transfer a minor from juvenile court to adult court in a case in which a minor is alleged to have committed a specified serious offense, including murder, when the minor was 14 or 15 years of age, unless the individual was not apprehended prior to the end of juvenile court jurisdiction.[138] As a

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[133] *In re Cook* (2019) 7 Cal.5th 439, 447-452.

[134] *In re Cook* (2019) 7 Cal.5th 439, 457.

[135] *In re Cook* (2019) 7 Cal.5th 439, 458.

[136] *In re Cook* (2019) 7 Cal.5th 439, 459.

[137] *In re Cook* (2019) 7 Cal.5th 439, 459.

[138] Statutes 2018, chapter 1012 (SB 1391.) No test claim has been filed on this statute.

practical matter, this may significantly reduce the number of future offenders eligible for YOPH consideration.

III. Positions of the Parties and Interested Parties

A. County of San Diego

The claimant alleges that the test claim statutes resulted in reimbursable increased costs mandated by the state. The claimant asserts that "as a result" of Statutes 2013, chapter 312; Statutes 2015, chapter 471; and Statutes 2017, chapter 684, and the decisions interpreting and applying that legislation in *Franklin*[139] and *People v. Perez*,[140] defense counsel and prosecutors are now required to provide newly mandated services and incur newly mandated costs as detailed below in preparation of and appearance at a YOPH-eligible individual's sentencing hearing:[141]

> (1) Preparation and presentation of evidence by counsel including evaluations and testimony regarding an individual's cognitive culpability, cognitive maturity, or that bears on the influence of youth related factors at the sentencing hearing (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c));
>
> (2) Retention and utilization of investigators to: (a) locate and gather relevant evidence, including but not limited to, interviews with anyone that can provide mitigating information about the defendant, including family, friends, teachers, and anyone else that knows the defendant; and (b) gather records of the defendant, including school, hospital, employment, juvenile, and other relevant persona [*sic*] records (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c));
>
> (3) Retention and utilization of experts to evaluate the offender and prepare reports for presentation at the sentencing hearing (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c));
>
> (4) Attendance by the district attorney's office and indigent defense counsel at the sentencing hearing (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c)); and
>
> (5) Participation of counsel in training to be able to competently represent their clients at the sentencing hearing (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c)).[142]

Although the claimant does not appear at YOPHs, it contends that its activities regarding the conduct of sentencing hearings for new offenders who may one day qualify for YOPHs, constitute state-mandated activities that are unique to local government and carry out a state policy.[143] The claimant argues that it is eligible to receive subvention as follows:

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[139] *People v. Franklin* (2016) 63 Cal.4th 261.

[140] *People v. Perez* (2016) 3 Cal.App.5th 612.

[141] Exhibit A, Test Claim, page 13.

[142] Exhibit A, Test Claim, pages 21-22.

[143] Exhibit A, Test Claim, pages 23-24.

> Prior to SB 260, 261, and 394, and the decisions of the courts in *Franklin* and *Perez*,[144] California defense attorneys were not mandated to present evidence, evaluations, or testimony regarding the influence of youth-related factors at sentencing hearings for use at a subsequent Youth Offender Parole Hearing many years in the future. Such information was unlikely to have any impact on the sentence imposed, given the existence of mandatory sentences for many of the crimes and judges' limited discretion with regard to certain enhancements. Because there was no effort to gather and present this information, defense attorneys expended a minimal amount of time to prepare for and to attend the sentencing hearings.
>
> For the same reasons as defense attorneys, California prosecutors presented no information and incurred no costs, other than the cost of attending sentencing hearings.
>
> In contrast to defense attorneys and prosecutors, Probation Departments were responsible for investigating and compiling information to be considered by the sentencing judge and, as a result, did incur costs. Probation officers gathered and provided information concerning the facts surrounding the offense, victim restitution requests and impact statements, the defendant's education, military, and employment history, the defendant's medical, psychiatric and substance abuse history, and the defendant's criminal and delinquent history. (See Pen. Code, § 1203, Cal. Rules of Court, Rules 4.411-4.433.) Such information was typically gathered by interviewing the defendant, without attempting to gather information from other sources. However, this effort to gather information did not include any investigation or reporting on the circumstances of the defendant's youth and is therefore distinguishable from the effort required by the mandate.
>
> As a result of the statutory changes, youth offenders now must be granted an opportunity to present evidence, evaluations, and testimony regarding the influence of youth-related factors at the sentencing hearing. Defense attorneys must perform the activities described . . . above, which will result in costs not previously incurred. In addition, prosecutors will be required to prepare for the hearings, which will also result in costs not previously incurred.[145]

The claimant further argues the "enhanced *Franklin* sentencing hearings" allegedly required by the test claim statute cost, on average, between $5,500 and $12,750 each, and that statewide costs for such hearings "will exceed $2,750,000 per year and may be as high as $6,375,000 per year."[146] The claimant alleges that "total increased costs to comply with SB 260 and 261 in Fiscal Year 2016-17 totaled at least $10,763."[147] The claimant further alleges that for fiscal year

[144] *People v. Franklin* (2016) 63 Cal.4th 261; *People v. Perez* (2016) 3 Cal.App.5th 612.

[145] Exhibit A, Test Claim, pages 24-25.

[146] Exhibit A, Test Claim, page 26.

[147] Exhibit A, Test Claim, page 21.

2017-2018, it "incurred at least $10,705 in increased costs to comply with SB 260 and 261. Claimant also incurred at least $6,344 in increased costs to comply with SB 394."[148]

The Test Claim further notes that *Cook* was pending before the California Supreme Court when the Test Claim was filed in June 2018 to address the issue of whether a *Franklin* hearing was required for youth offenders whose convictions were already final, and that it reserves the right to amend or supplement the Test Claim if a decision in *Cook* is reached:

> The issue before the Court [in *Cook*] is whether "youth offenders" whose convictions are already final and who are currently incarcerated, are entitled to a hearing before the trial court to preserve evidence for use at a future youth offender parole hearing, as ordered in *Franklin*. An affirmative decision would significantly expand the scope of the mandated activities for which reimbursement is sought by this Test Claim. Claimant reserves the right to amend or supplement this Test Claim if the Court reaches a decision during the pendency of this claim, or alternatively, submit an additional Test Claim if a decision is reached after a mandate determination has been made on this claim.[149]

The claimant states, however, that the test claim statutes, as interpreted by the courts, require the sheriff's department to transport, house, and feed youth offenders who have been previously sentenced and incarcerated without having had an opportunity to present the youth-related evidence at the time they were sentenced.[150]

The claimant, in its comments on the Draft Proposed Decision, argues

> The Commission's position ignores the California Supreme Court's **interpretation of the statutes** as articulated in *People v. Franklin*[151], which indicates an offender must be given the opportunity to "make an accurate record of the juvenile offender's characteristics and circumstances **at the time of the offense** so that the [BPH], **years later, may properly discharge its obligation** to give "great weight to" youth-related factors [citation] in determining whether the offender is "fit to rejoin society."[152]

The claimant further argues that the *Franklin* decision clarifies that the BPH cannot discharge its obligations pursuant to the test claim statutes without imposing the "newly mandated activities" on defense counsel and prosecutors, and that state-appointed counsel are only responsible for the

[148] Exhibit A, Test Claim, page 21.

[149] Exhibit A, Test Claim, page 13, footnote 3.

[150] Exhibit A, Test Claim, page 24.

[151] *People v. Franklin* (2016) 63 Cal.4th 261.

[152] Exhibit E, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1 (emphasis in original).

YOPHs, and not for "the presentation of youth-related factors at the hearing in the trial court at or around the time of sentencing."[153]

The claimant continues that Government Code section 17556(b) and (c) are not applicable to the test claim, stating

> The *Franklin* Court's determination that an offender be given an opportunity, in the trial court, to make a record of information that will be relevant to the offender's eventual YOPH, was not the Court's "declaration" of existing law – it was the Court's *interpretation of the statutes* enacted by the Legislature. In other words, the origin of the obligations imposed on the Claimants is the test claim statutes, not some independent judicial declaration of the law.[154]

The claimant lastly contends that the test claim statutes did not merely affirm what the courts, in the *Graham*[155], *Miller*[156], and *Caballero*[157] decisions, had declared to be existing law.[158] The claimant asserts that none of those three cases required the California Legislature to enact the test claim statutes, as the Legislature could have, in the alternative, "developed a new sentencing for juvenile offenders that addressed the constitutional issues articulated by these cases."[159] The claimant adds that none of these cases, or any case cited by Finance or in the Draft Proposed Decision, extends protections to offenders over the age of 18, and the Legislature, in extending the applicability of the YOPH statutes to offenders up to 25, imposes costs that "exceed any obligations that might be argued to arise from the cases pertaining to the sentencing of juveniles."[160]

The claimant, in its comments on the Proposed Decision, argues that the activities are mandated by the state.[161] The claimant argues that the *Franklin* decision did not extend the common law, nor create new rights, but rather explained what the test claim statutes had actually meant, stating "…the Commission errs in finding that *Franklin* hearings are a judicial appendage to the statutes. In reality, such hearings are required by the statutes themselves, and the *Franklin* Court did

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[153] Exhibit E, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

[154] Exhibit E, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, pages 2-3 (original italics).

[155] *Graham v. Florida* (2010) 560 U.S. 48.

[156] *Miller v. Alabama* (2012) 567 U.S. 460.

[157] *People v. Caballero* (2012) 55 Cal.4th 262.

[158] Exhibit E, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

[159] Exhibit E, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

[160] Exhibit E, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

[161] Exhibit H, Claimant's Comments on the Proposed Decision, page 1.

nothing more than say what the law is" and "…the *Franklin* decision did not create any new mandates. Rather, the Court explained what had been implicit in the statutes all along."[162]

The claimant contends that Government Code section 17514 does not require that statutes must expressly direct or require local agencies to perform activities in order to qualify as costs mandated by the state.[163] The claimant continues that as a result of the test claim statutes, as interpreted by the California Supreme Court, local agencies are forced to incur costs to preserve evidence of juvenile offenders' characteristics and circumstances so that BPH may properly consider youth-related factors years later.[164]

The claimant further argues that the California Legislature, in passing the test claim statutes, went "far beyond" what the United States Constitution and the United States Supreme Court require, and thus, there is no federal mandate.[165] The claimant states that the reasoning in the Proposed Decision only applies to juvenile offenders who received LWOP or LWOP equivalent sentences, and not to the 18-25 year old offenders described in the test claim statutes.[166] The claimant adds that even for such juvenile offenders, the United States Supreme Court left specific procedures and evidentiary considerations to the discretion of the states, and that the California Supreme Court, not the United States Supreme Court, decided that mandatory sentences "the functional equivalent of LWOP" are unconstitutional.[167]

The claimant contends that, to comply with the United States Supreme Court's dictates in *Graham* and *Miller*, states could simply ban "LWOP sentences for all juvenile offenders," and cites statutes passed in Wyoming and other states that purported to do "just that."[168] The claimant also cites Louisiana statute, which provides that an "expert in adolescent brain development" evaluate juvenile offenders at the time of their parole hearings, as opposed to the California practice of preserving evidence at the time of sentencing.[169] The claimant continues that many states have not passed any legislation at all to comply with *Miller*, rather leaving it to their "trial courts to craft constitutional sentences on a case by case basis."[170] The claimant argues that California took a "very different route" in enacting the test claim statutes, an "approach not mandated by the Constitution or by the Supreme Court decisions interpreting it."[171]

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[162] Exhibit H, Claimant's Comments on the Proposed Decision, pages 1-2.

[163] Exhibit H, Claimant's Comments on the Proposed Decision, pages 1-2.

[164] Exhibit H, Claimant's Comments on the Proposed Decision, page 2.

[165] Exhibit H, Claimant's Comments on the Proposed Decision, page 3.

[166] Exhibit H, Claimant's Comments on the Proposed Decision, page 3.

[167] Exhibit H, Claimant's Comments on the Proposed Decision, pages 4-5.

[168] Exhibit H, Claimant's Comments on the Proposed Decision, page 5.

[169] Exhibit H, Claimant's Comments on the Proposed Decision, page 5.

[170] Exhibit H, Claimant's Comments on the Proposed Decision, page 6.

[171] Exhibit H, Claimant's Comments on the Proposed Decision, page 6.

The claimant asserts that *Franklin* proceedings are not required by the Constitution or by federal law, but are the result of

> [T]he California Legislature's discretionary actions in establishing the youth offender parole scheme to begin with. In other words, the only reason there is a need to establish the "record on youth related factors" is because of the manner in which the California Legislature opted to implement the youth offender parole process.[172]

The claimant argues that the "expanded duties of indigent defense counsel" come from the Legislature's discretionary enactment of the test claim statutes, and not from the Constitution, and that this requires county defense counsel to prepare evidence not for sentencing, but for use at a YOPH years in the future, where county defense counsel will not represent the offender.[173] The claimant states that even if the test claim statutes were passed in response to federal requirements, the state exercised "true discretion" and chose to "impose a regime of new procedural requirements that impose costs on localities," which requires subvention.[174] The claimant further argues that the Proposed Decision is not supported by article XIII B, section 9 of the California Constitution, or by Government Code section 17556(c), as the test claim statutes were the product of legislative discretion, and "imposed costs that exceed any mandate under federal law."[175]

Claimant asserts that that *Franklin* proceedings do not change "the penalty for a crime" and are thus not exempt from reimbursement pursuant to Government Code 17556(g).[176] The claimant argues that the test claim statutes do not impact the length of sentences, or the amount of fines or restitution, but rather provide for parole hearings and require new proceedings to preserve evidence at sentencing.[177] The claimant argues that the test claim statutes are "purely procedural" and are akin to Penal Code sections that provide convicted felons a procedure for obtaining DNA testing of biological evidence – a procedure that the Commission found eligible for reimbursement.[178] The claimant further contends that the "mere possibility" of early release does not constitute a change in penalty, as, pursuant to the test claim statutes, juvenile offenders are not eligible for parole, but not necessarily suitable for parole.[179]

The claimant argues that Government Code section 17556(g)'s use of the singular pronouns "a" and "the" demonstrate that the Legislature intended that it would only apply to statutes that "change the sentence for *particular* crimes, not to statutes that indirectly impact criminal

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[172] Exhibit H, Claimant's Comments on the Proposed Decision, page 7.

[173] Exhibit H, Claimant's Comments on the Proposed Decision, page 7.

[174] Exhibit H, Claimant's Comments on the Proposed Decision, page 7.

[175] Exhibit H, Claimant's Comments on the Proposed Decision, page 8.

[176] Exhibit H, Claimant's Comments on the Proposed Decision, page 8.

[177] Exhibit H, Claimant's Comments on the Proposed Decision, page 9.

[178] Exhibit H, Claimant's Comments on the Proposed Decision, page 9.

[179] Exhibit H, Claimant's Comments on the Proposed Decision, page 9.

procedure more generally."[180] The claimant lastly contends that *Franklin* hearings do not relate directly to the enforcement of crimes, indicating the Legislature's intent that section 17556(g) would only apply to statutes introducing new crimes, and not "a new criminal procedure generally applicable to a broad swath of crimes."[181]

B. Department of Finance

Finance filed late comments on the Test Claim on March 13, 2019.[182] Finance argues that the claimant's expenses have been incurred as a result of court-made law, and thus the Test Claim should be rejected pursuant to Government Code section 17556(b).[183] Finance contends that the United States Supreme Court's decisions in *Graham v. Florida*[184] and *Miller v. Alabama*[185] led to the California Supreme Court's decision in *People v. Caballero,*[186] which urged the Legislature to establish a mechanism for parole eligibility for juvenile offenders serving de facto life sentences without the possibility of parole, so that they would have the opportunity to be released upon a showing of rehabilitation.[187] Finance asserts that Statutes 2013, chapter 312 was

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[180] Exhibit H, Claimant's Comments on the Proposed Decision, page 10 (emphasis in original).

[181] Exhibit H, Claimant's Comments on the Proposed Decision, page 10.

[182] Exhibit C, Finance's Late Comments on the Test Claim. The late filing of comments in this case resulted in a delay in the issuance of the Draft Proposed Decision in this matter, since the comments came in just two days before the Draft would normally be issued for comment and more than a month after the due date on the approved request for extension, which was limited to February 11, 2019. Pursuant to 1183.6(d) of the Commission's regulations, "[i]t is the Commission's policy to discourage the introduction of late comments, exhibits, or other evidence filed after the three-week comment period. . . The Commission need not rely on, and staff need not respond to, late comments, exhibits, or other evidence submitted in response to a draft proposed decision after the comment period expires." However, despite this policy, it is indeed best for a fully fleshed out decision to consider all comments, when feasible. In this case however, it resulted in the Draft Proposed Decision being issued prior to the deadline for Claimant's Rebuttal Comments (which are due 30 days after the comments are served) to try to keep the matter on for the May hearing. In addition, it negatively impacted the timely processing of other matters pending before the Commission. Finally, in part due to not being given sufficient time to rebut Finance's Late Comments on the Test Claim, the claimant filed a request for an extension of time to file rebuttal comments, comments on the Draft Proposed Decision, and postponement of hearing, which was granted as of right, which delayed the hearing of this matter to the July 2019 Commission meeting. Though all parties have circumstances from time to time that present good cause for an extension or postponement, deadlines must be honored by all (and extension requests must be filed when necessary) to ensure the smooth functioning and timeliness of the mandates process.

[183] Exhibit C, Finance's Late Comments on the Test Claim, page 1.

[184] *Graham v. Florida* (2010) 560 U.S. 48.

[185] *Miller v. Alabama* (2012) 567 U.S. 460.

[186] *People v. Caballero* (2012) 55 Cal.4th 262.

[187] Exhibit C, Finance's Late Comments on the Test Claim, page 1.

enacted in response to the *Caballero* decision, establishing the YOPH process, but not applicable to persons serving a life sentence without the possibility of parole.[188]

Finance continues that Statutes 2015, chapter 471 and Statutes 2017, chapter 684 extended eligibility for YOPHs, and that as a consequence of the California Supreme Court's decision in *People v. Franklin,*[189] offenders who are eligible for future YOPHs pursuant to the three test claim statutes must now receive "*Franklin* hearings" if their trial courts did not allow them to present evidence of youth-related factors that would eventually be considered by the BPH.[190] Finance notes the amount of the costs allegedly incurred by the claimant in fiscal years 2016-2017 and 2017-2018 for the conduct of five *Franklin* hearings.[191] Finance argues that the language of these cases and statutes clearly indicates that YOPHs were created as a mechanism "to affirm what the courts had declared to be existing law."[192] Finance concludes that since claimant's costs were incurred as a result of court-made law, the Commission should reject the Test Claim in its entirety pursuant to Government Code section 17556(b).[193]

Finance did not file comments on the Draft Proposed Decision.

C. Board of Parole Hearings

No comments have been filed by BPH.

D. County of Los Angeles

The County of Los Angeles, an interested party under the Commission's regulations,[194] filed comments on the Test Claim on January 9, 2019.[195] The County of Los Angeles argues that the California Supreme Court's ruling in *Franklin*, indicating that assembling the type of information about a person who would ultimately appear at a YOPH is more easily done near the time of the offense, rather than decades later.[196] The County of Los Angeles concludes

> Prior to the passage of SB 260, 261, and 394, attorneys were not required to present youth related factors at the time of sentencing. Now, the Legislature has created a new youth offender parole process, mandating a higher level of service by requiring defense counsel to present youth related factors at sentencing hearings. The Legislature seeks to ensure that the California Board of Parole Hearings receives an accurate record of the offender's characteristics and

[188] Exhibit C, Finance's Late Comments on the Test Claim, pages 1-2.

[189] *People v. Franklin* (2016) 63 Cal.4th 261.

[190] Exhibit C, Finance's Late Comments on the Test Claim, page 2.

[191] Exhibit C, Finance's Late Comments on the Test Claim, page 2.

[192] Exhibit C, Finance's Late Comments on the Test Claim, page 2.

[193] Exhibit C, Finance's Late Comments on the Test Claim, page 2.

[194] California Code of Regulations, title 2, section 1181.2(i).

[195] Exhibit B, Interested Party's (County of Los Angeles's) Comments on the Test Claim.

[196] Exhibit B, Interested Party's (County of Los Angeles's) Comments on the Test Claim, page 2.

> circumstances at the time of the offense to later afford the offender with a fair parole hearing.
>
> In light of the significant costs associated with this state mandate to ensure that parole hearings provide youth offenders with an opportunity for release, the County of Los Angeles, on behalf of the Los Angeles County Public Defender's Office, hereby collectively request that the Commission adopt the County of San Diego's test claim.[197]

The County of Los Angeles filed late comments on the Draft Proposed Decision on May 16, 2019.[198] The County of Los Angeles argues that the YOPH process is a "new program" that "compels local agencies to provide a higher level of service in order to comply with State statutes."[199] The County of Los Angeles continues that "These test claim statutes requires [*sic*] the [BPH] to 'give great weight' to youth related factors, however, the statutes were silent as to who would investigate and present these youth related factors."[200]

The County of Los Angeles contends that the *Franklin*[201] decision held that Statutes 2013, chapter 312 "contemplates that information regarding a youthful offender's characteristics and circumstances at the time of the offense will be available at the time of the [YOPH] to facilitate consideration by the [BPH]."[202] It is further stated that *Franklin* noted that gathering information from an offender's family and friends is easier at or near the time of the offense, and that psychological evaluations and risk assessments require information to be gathered at such time, for better consideration of the offender's "subsequent growth and maturity."[203] It is further

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[197] Exhibit B, Interested Party's (County of Los Angeles's) Comments on the Test Claim, pages 2-3.

[198] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision. Pursuant to 1183.6(d) of the Commission's regulations, "[i]t is the Commission's policy to discourage the introduction of late comments, exhibits, or other evidence filed after the three-week comment period. . . The Commission need not rely on, and staff need not respond to, late comments, exhibits, or other evidence submitted in response to a draft proposed decision after the comment period expires." However, despite this policy, it is indeed best for a fully fleshed out decision to consider all comments, when feasible. In this case, the county filed comments approximately one month after they were due and without requesting an extension of time. In the future, such late comments without an approved extension may be simply added to the record but not added to, considered, or discussed in the decision.

[199] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision, page 1.

[200] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision, page 1.

[201] *People v. Franklin* (2016) 63 Cal.4th 261.

[202] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision, page 1.

[203] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision, pages 1-2.

argued that *Franklin*'s language to the effect that the trial court "may hold a proceeding" to preserve evidence for a YOPH years later means that "the costs associated with investigating and presenting youth-related factors at the trial court for later consideration at a [YOPH] derives from a reimbursable state mandate."[204]

The County of Los Angeles, citing *County of Los Angeles v. State of California*[205] and *Long Beach Unified School District v. State of California,*[206] states that courts have been willing to "extend and broaden the scope of mandates beyond what is expressly written" and that courts should examine "the increased financial burdens being shifted to local government, not the form in which those burdens appeared."[207] The County of Los Angeles further argues that the test claim statutes do not state who is responsible to gather evidence of youth-related factors for use at YOPHs, and that the Legislature "clearly" contemplated that someone would gather such evidence at or near the time of the offense.[208]

The County of Los Angeles further asserts

> The [Draft] Proposed Decision ignores the practical realities of the parole process. The [BPH]'s duty to "give great weight" to youthful factors is impossible to execute if no one is responsible for investigating and presenting those factors at or near the time of the offense. The Commission's [draft] proposed decision naturally implies that State appointed counsel, not the local agency, would provide youthful factors to the Board. However, it is evident that a State parole attorney is not appointed until a decade or more after the time of the offense and sentencing. If the intent of the Legislature is to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release be established, the Commission's [draft] proposed decision would defeat the stated purpose of the statute.[209]

The County of Los Angeles states that, pursuant to the *Franklin*[210] decision, trial courts may hold proceedings to preserve evidence of youth-related factors for use by the BPH years later, adding

> From a practical standpoint, the State-appointed attorney, who is appointed many years later, would not be in a position to present such information. On page 40 of

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[204] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision, page 2.

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

[206] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155.

[207] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision, page 2 (citing *Long Beach Unified School District. v. State of California,* (1990) 225 Cal. App.3d 155).

[208] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision, pages 2-3.

[209] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision, page 3.

[210] *People v. Franklin* (2016) 63 Cal.4th 261.

> its Draft Proposed Decision, the Commission conceded that prosecution and defense counsel are now effectively required to make such a record of "factors, including youth-related factors, relevant to the eventual [YOPH] determination." It is evident from the *Franklin* decision that the source of the requirement to provide a thorough and meaningful [YOPH] comes from the statutes themselves which contemplate local agency involvement at the sentencing stage.[211]

The County of Los Angeles concludes

> In order to effectuate the legislative purpose of these [YOPHs], the local agency is required to investigate and present evidence of youthful factors at the trial court. Years later the State appointed attorney will be in a position to utilize the information preserved in the record and provide evidence of growth and maturity for the [BPH]'s consideration. Respectfully, the Commission's analysis results in a quagmire where the State creates a youthful offender parole process to consider factors that must be collected at the time of the offense, but no one is required to collect these factors. In the end, local agencies will be required to comply with the program by assuring that youthful factors are collected at or near the time of sentencing — a task they were not required to do prior to this legislation. This increased financial burden being shifted to local government is exactly that which the Constitution prohibits —State legislation that creates a program that will be administered by local agencies.[212]

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."[213] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[214]

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

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[211] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision, page 3.

[212] Exhibit F, Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision, page 4.

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

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[215]

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.[216]

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.[217]

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.[218]

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.[219] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[220] 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."[221]

A. <u>This Test Claim Was Timely Filed.</u>

Government Code section 17551(c) provides that a test claim must be filed "not later than 12 months after the effective date of the statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."

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

[216] *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).

[217] *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.

[218] *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.

[219] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

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

[221] *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].

Section 1183.1(c) of the Commission's regulations, effective April 1, 2018, defines "12 months" as 365 days.[222]

Prior to April 1, 2018, former section 1183.1(c) of the Commission's regulations provided that the "within 12 months" as specified in Government Code section 17551(c) meant "by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant."[223]

The statute with the earliest effective date pled in this Test Claim, became effective on January 1, 2014.[224] The claimant filed this Test Claim on June 29, 2018, and alleges that it first incurred increased costs as a result of the test claim statutes on July 11, 2016.[225]

The regulation in effect when the claimant filed this Test Claim on June 29, 2018, would have barred this Test Claim immediately upon the regulation's April 1, 2018 effective date, since the date 365 days from the date of first incurring costs in this case had already passed nearly nine months earlier. Under the current regulation, the Test Claim would have had to be filed by July 11, 2017 (within 365 days of first incurring increased costs on July 11, 2016) to be timely.

It is established precedent that a plaintiff or party has no vested right in any particular statute of limitations or time for the commencement of an action, and that the Legislature may shorten a statute of limitations.[226] However, "a statute is presumed to be prospective only and will not be applied retroactively unless such intention clearly appears in the language of the statute itself."[227] Furthermore, "a statute shortening period of limitations cannot be applied retroactively to wipe out an accrued cause of action that is not barred by the then applicable statute of limitations."[228] To avoid the unconstitutional effect of retroactive application, the statute of limitations must be applied prospectively to such causes of action. Even when applied prospectively, the claimant must be allowed a reasonable time within which to proceed with his cause of action.[229] "If the time left to file suit is reasonable, no such constitutional violation occurs, and the statute is applied as enacted. If no time is left, or only an unreasonably short time remains, then the statute

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[222] California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

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

[224] Statutes 2013, chapter 312.

[225] Exhibit A, Test Claim, pages 22; 30-34 (Declaration of John O'Connell summarizing actual costs for fiscal years 2016-2017 and 2017-2018 and stating that costs were first incurred July 11, 2016).

[226] *Krusesky v. Baugh* (1982) 138 Cal.App.3d 562, 566; *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 773.

[227] *Krusesky v. Baugh* (1982) 138 Cal.App.3d 562, 566.

[228] *Niagra Fire Ins. Co. v. Cole* (1965) 235 Cal.App.2d 40, 42-43.

[229] *Niagra Fire Ins. Co. v. Cole* (1965) 235 Cal.App.2d 40, 42-43; *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 121-125.

cannot be applied at all."[230] Thus, though the courts have upheld the shortening of periods of limitation and making the changed period applicable to pending proceedings, they have required that a reasonable time be made available for an affected party to avail itself of its remedy before the statute (here regulation) takes effect.[231]

In the instant case, the April 1, 2018 amendment to section 1183.1 of the Commission's regulations would have instantly terminated the claimant's ability to file a test claim. Nothing in the language of section 1183.1(c) gives any indication of an intent to apply the amendment's new statute of limitations retroactively. Moreover, "a statute shortening period of limitations cannot be applied retroactively to wipe out an accrued cause of action that is not barred by the then applicable statute of limitations."[232] Thus, the 2018 amendment to section 1183.1 cannot be applied to this Test Claim as this would not allow claimant a reasonable time to avail itself of the remedy provided in the mandate determination process, as required by law.[233] The Commission's prior regulation must therefore apply.

Accordingly, since the deadline to file the Test Claim under the former regulation was by June 30 of the fiscal year following fiscal year 2016-2017, or by June 30, 2018, this Test Claim filed on June 29, 2018 was timely filed pursuant to Government Code section 17551(c) and former section 1183.1 of the Commission's regulations.

B. The Plain Language of the Test Claim Statutes Impose Requirements on the State BPH, but Do Not Impose Any Activities on Local Agencies and, Thus, the Test Claim Statutes Do Not Impose a State-Mandated Program on Local Agencies.

As indicated in the Background, Statutes 2013, chapter 312 (SB 260) requires BPH to conduct a YOPH to consider release of juvenile offenders who were under 18 at the time of their controlling offense.[234] "Controlling offense" is defined as the offense or enhancement for which the longest term of imprisonment was imposed.[235] Juvenile offenders sentenced to a determinate sentence (i.e., a fixed term, such as 20 years) receive a YOPH by the BPH during their 15th year of incarceration, unless previously released. Juvenile offenders sentenced to a life term of less than 25 years to life are required to have a YOPH during their 20th year of incarceration. Juvenile offenders sentenced to 25 years to life are required to have a YOPH during their 25th year of incarceration.[236] Juvenile offenders convicted under the Three Strikes Law, the One Strike Law, and those who have committed very grave offenses after turning 18, are expressly excluded from being given YOPHs.[237]

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[230] *Aronson v. Superior Court* (1987) 191 Cal.App.3d 294, 297.

[231] *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-125.

[232] *Niagra Fire Ins. Co. v. Cole* (1965) 235 Cal.App.2d 40, 42-43.

[233] *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-125.

[234] Penal Code section 3051(a), (d), as added by Statutes 2013, chapter 312 (SB 260).

[235] Penal Code section 3051(a)(2)(B).

[236] Penal Code section 3051(b).

[237] Penal Code section 3051(h).

The YOPH shall provide for a meaningful opportunity to obtain release.[238] At the YOPH, the BPH is required to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."[239] In this respect, the BPH shall consider the following information:

> (1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.
>
> (2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.[240]

Juvenile offenders "found suitable for parole pursuant to a youth offender parole hearing as described in Section 3051 shall be paroled regardless of the manner in which the board set release dates . . . ."[241]

Statutes 2015, chapter 471 (SB 261) and Statutes 2017, chapter 684 (SB 394) expanded YOPH eligibility to offenders who were under 23, and then under 25, at the time of their controlling offenses.[242] Statutes 2017, chapter 684 also extended the remedy to those who had been sentenced to LWOP for a controlling offense committed while under the age of 18, and required that these offenders receive a YOPH during their 25th year of incarceration.[243]

The claimant agrees that the plain language of the test claim statutes do not impose any requirements on local agencies.[244] All responsibilities created by these statutes are assigned to the BPH – a state agency. Nothing in any of these sections expressly directs or requires local agencies to perform any activities. Furthermore, it is the BPH that is required to provide state-

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[238] Penal Code section 3051(e).

[239] Penal Code sections 4801(c).

[240] Penal Code section 3051(f).

[241] Penal Code section 3046(c).

[242] Statutes 2015, chapter 471 (AB 261); Statutes 2017, chapter 684 (SB 394).

[243] Statutes 2017, chapter 684 (SB 394).

[244] Exhibit E, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2; Exhibit H, Claimant's Comments on the Proposed Decision, page 1.

appointed counsel to inmates at YOPHs – not the local agency.[245] The Legislature noted this during its deliberations on Statutes 2015, chapter 471.[246]

The claimant, however, seeks reimbursement for costs associated with presenting evidence regarding the influence of youth-related factors at the sentencing hearings of criminal defendants eligible for eventual YOPH review, in anticipation of YOPHs many years in the future, pursuant to the California Supreme Court's decisions in *People v. Franklin* and *In re Cook,* which the claimant asserts are necessary to implement the test claim statutes and are, therefore, mandated by the state.[247] The claimant states that "*Franklin* makes clear that the BPH could not discharge its obligations under the test claim statutes without imposing the newly mandated activities on the Claimants."[248] The claimant states that "the *Franklin* court did not extend the common law in any manner, nor did it create any new rights. Rather, the *Franklin* court interpreted the statutes, and clarified what they mean," and that "[t]he statutes themselves, not the Constitution, require evidence preservation proceedings."[249] The claimant further asserts that Government Code section 17514, which defines "costs mandated by the state" to mean costs required to be incurred "as a result of any statute," does not mean that the mandated activity has to be expressly directed or required by the statute in order to be reimbursable under article XIII B, section 6 of the California Constitution.[250]

The County of Los Angeles, citing *County of Los Angeles v. State of California* and *Long Beach Unified School District v. State of California*, argues that courts have been willing to "extend and broaden the scope of mandates beyond what is expressly written" and that courts should examine "the increased financial burdens being shifted to local government, not the form in which whose burdens appeared," as follows:

> In determining whether a mandate exists we first must look to Section 6 of Article XIII B of the California Constitution and the plain language of the Test Claim statutes for its purpose and intent. The concern which prompted the inclusion of section 6 of Article XIII B was the perceived attempt by the State to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the State believed should be extended to the public. *County of Los Angeles v. State of California*, (1987) 43 Cal.App.3d 46. Given this

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[245] Penal Code section 3041.7; California Code of Regulations, title 15, section 2256(c).

[246] Exhibit I, Senate Committee on Appropriations – Analysis of SB 261, as amended May 28, 2015, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB261 (accessed on January 16, 2019), page 3.

[247] Exhibit A, Test Claim, pages 13 and 17 (citing to *People v. Franklin* (2016) 63 Cal.4th 261; *In re Cook* (2019) 7 Cal.5th ___ [247 Cal.Rptr.3d 669.].)

[248] Exhibit E, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

[249] Exhibit H, Claimant's Comments on the Proposed Decision, pages 1-2.

[250] Exhibit H, Claimant's Comments on the Proposed Decision, pages 1-2.

> stated purpose, courts have been willing to extend and broaden the scope of mandates beyond what is expressly written. In *Long Beach Unified School District. v. State of Californi*a, the court expanded mandates to include executive orders. The court examined the increased financial burdens being shifted to local government, not the form in which those burdens appeared. *Long Beach Unified School District. v. State of California*, (1990) 225 Cal.App.3d 155.[251]

The Commission finds, however, that the plain language of the test claim statutes impose requirements on the state BPH, but do not impose any activities on local agencies and, thus, the test claim statutes do not impose a state-mandated program on local agencies within the meaning of article XIII B, section 6.

The juvenile offenders identified in the test claim statutes have a constitutional right to assistance of counsel for their defense.[252] The right to counsel "applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake," which would include a right to counsel at a *Franklin* proceeding.[253] In California, indigent defendants in criminal proceedings are represented by the county public defender's office and the state is represented by the county district attorney's office. At *Franklin* proceedings, the juvenile offender "may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors."[254]

Therefore, based on these cases, county prosecutors and indigent defense counsel are required to represent their clients in a *Franklin* proceeding that gives the offender eligible for a YOPH an opportunity to make an accurate record of his or her characteristics and circumstances at the time of the offense so that the BPH may discharge its obligation under the test claim statutes to give great weight to youth-related factors in determining whether the offender is fit to rejoin society.

However, article XIII B, section 6 requires reimbursement only for mandates imposed by the Legislature or any state agency. The plain language of article XIII B, section 6(a) states that "[w]henever 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 . . . ." The Government Code provides that a "test claim" seeking reimbursement under article XIII B, section 6 may only be filed "alleging a particular statute or executive order imposes costs mandated by the state . . . .[255] Moreover, the courts, when interpreting article XIII B, section 6,

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[251] Exhibit F, Interested Party's (County of Los Angeles's) Comments on the Draft Proposed Decision, page 2.

[252] *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 815 (citing *Gideon v. Wainwright* (1963) 372 U.S. 335)

[253] *Mempa v. Rhay* (1967) 389 U.S. 128, 134; and Government Code, section 27706.

[254] *People v. Franklin* (2016) 63 Cal.4th 261, 284.

[255] Government Code section 17521; see also, Government Code section 17556(b) and *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595.

have held that reimbursement is required only when the "Legislature" or a state agency imposes a mandate.[256]

In this case, the court in *Cook* noted that the Legislature has *not* enacted any laws to specify what evidence-gathering procedures should be afforded to youth offenders who will be eligible for a YOPH, and explained that the Legislature still remains free to enact statutes governing the procedure as follows:

> While we unquestionably have the power to interpret these laws, the Legislature is in a superior position to consider and implement rules of procedure in the first instance. The Legislature remains free to amend the pertinent statutes to specify what evidence-gathering procedures should be afforded to youth offenders, taking into account the objectives of the youth offender parole hearing and the burden placed on our trial courts to conduct *Franklin* proceedings for the many thousands of offenders who will be eligible for them under today's decision.[257]

And, to date, the courts have never found activities, which are not explicitly required by a test claim statute or executive order, to be mandated by the state. Nor have they found such activities to be necessary to implement a state mandate, or part and parcel of a state mandate, where, as here, there are no explicit requirements in the test claim statutes that local governments are required to implement. Thus, although the *courts* have identified procedures to implement the test claim statutes in this case, the costs imposed by the courts are not eligible for reimbursement.[258] The Legislature "remains free to amend the pertinent statutes to specify what evidence-gathering procedures should be afforded to youth offenders."[259]

Accordingly, the Commission finds that the test claim statutes do not impose any activities on local agencies and, thus, do not impose a state-mandated program on local agencies within the meaning of article XIII B, section 6.

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[256] *County of Los Angeles v. State of California* (1987) 43 Cal.46, 56 ("The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to *enact legislation or adopt administrative orders* creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public."); *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174 ("We understand the use of 'mandates' in the ordinary sense of 'orders' or 'commands' . . . ."); *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595 (If the costs are imposed by the federal government or the courts, then the costs are not included in the local government's taxing and spending limitations. If the costs are imposed by the state then the state must provide a subvention to reimburse the local agency."); *CSBA v. State of California* (2009) 171 Cal.App.4th 1183, 1207 ("Article XIII B, section 6 requires reimbursement for mandated imposed by the 'Legislature' and not by ballot measures.").

[257] *In re Cook* (2019) 7 Cal.5th 439, 459; see also, *People v. Franklin* (2016) 63 Cal.4th 261, 286, where the court noted that BPH had not yet adopted regulations applicable to a YOPH.

[258] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595.

[259] *In re Cook* (2019) 7 Cal.5th 439, 459.

C. The Test Claim Statutes "Change the Penalty for a Crime" by Capping the Number of Years an Offender May Be Imprisoned Before Becoming Eligible for Parole, and Thus, to the Extent that the Test Claim Statutes Are Found to Impose any Mandated Activities with Regard to *Franklin* Proceedings for *Any* Offender Eligible for a YOPH, They Do Not Impose Costs Mandated by the State Pursuant to Article XIII B, Section 6 and Government Code Section 17556(g).

Even if a court were to agree with the claimant that the test claim statutes mandated activities with regard to the *Franklin* proceedings, the test claim statutes changed the penalty for crimes committed by all YOPH eligible offenders and, thus, the test claim statutes, including the resultant *Franklin* proceedings, do not impose "costs mandated by the state" pursuant to Government Code section 17556(g).

Article XIII B, section 6 is not intended to provide reimbursement for the enforcement of a crime.[260] Thus, Government Code section 17556(g), which implements article XIII B, section 6 and must be presumed constitutional by the Commission,[261] provides that the Commission "shall not find costs mandated by the state when the "statute or executive order 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 directly relating to the enforcement of the crime or infraction." This exception to reimbursement is intended to allow the State to exercise its discretion when addressing public safety issues involving crimes, without having to consider whether reimbursement to local government would be required under article XIII B, section 6 as a result of its actions.

As explained in the Background, the test claim statutes were, in part, enacted to comply with the United States and California Supreme Court cases in *Roper*, *Graham*, *Miller*, *Montgomery*, and *Caballero*, which ruled that the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment, is violated when a juvenile offender commits a crime before reaching the age of 18 and receives a sentence of death, mandatory LWOP, or a mandatory LWOP equivalent. A state must instead provide these juvenile offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[262] The court in *Graham* explained that,

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham *some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.* It is for the State, in the first instance, to explore the means and mechanisms for compliance. . . . Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus

[260] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1191 (recognizing the three exceptions to reimbursement, as stated in article XIII B, section 6(a), as "(1) mandates requested by the local government, (2) legislation concerning crimes, and (3) mandates implemented prior to January 1, 1975.")

[261] California Constitution, article III, section 3.5.

[262] *Miller v. Alabama* (2012) 567 U.S. 460, 479; *People v. Caballero* (2012) 55 Cal.4th 262, 268-269.

> deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of . . . crimes committed before adulthood will remain behind bars for life. *It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.*[263]

These decisions further held that the *sentencing authority* must have the ability to consider mitigating qualities of youth, including immaturity, irresponsibility, impetuousness, recklessness, and susceptibility to influence and psychological damage.[264] For example, in *Graham*, the court held that the Eighth Amendment "prohibits States from making the judgment at the outset that those offenders never will be fit to reenter society.[265] In *Miller*, the court held that the *sentencing authority* must have individualized discretion to impose the sentence, taking into account how children are different.[266] The court further stated that "*Graham*, *Roper*, and our individualized sentencing decisions make clear that *a judge or jury* must have the opportunity to consider mitigating circumstances *before* imposing the harshest possible penalty for juveniles."[267] In 2014, the California Supreme Court in *People v. Gutierrez* interpreted *Miller* and *Graham*, holding that "*Miller* requires a trial court, in exercising its sentencing discretion, to consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' *before* imposing life without the possibility of parole on a juvenile offender;"[268] and that "*Graham* spoke of providing juvenile offenders with 'meaningful opportunity to obtain release' as a constitutionally required alternative to – not as an after-the-fact corrective for – 'making the judgment at the outset that those offenders never will be fit to reenter society.'"[269] And in *Caballero*, the California Supreme Court stated that "the state may not deprive [these juvenile offenders] *at sentencing* of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future," and that "the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life."[270]

The court in *Caballero* further held that incarcerated offenders whose convictions were already final and who wished to modify their LWOP or equivalent sentences in accordance with these cases, could file a petition for writ of habeas corpus in the trial court to allow the court to weigh

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[263] *Graham v. Florida* (2010) 560 U.S. 48, 75 (emphasis added).

[264] *Miller v. Alabama* (2012) 567 U.S. 460, 476.

[265] *Graham v. Florida* (2010) 560 U.S. 48, 75 (emphasis added).

[266] *Miller v. Alabama* (2012) 567 U.S. 460, 478-479 (emphasis added).

[267] *Miller v. Alabama* (2012) 567 U.S. 460, 489 (emphasis added).

[268] *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1361 (emphasis added); see also page 1387 ("Consistent with *Graham*, *Miller* repeatedly made clear that the sentencing authority must address this risk of error by considering how children are different and how those differences counsel against a sentence of life without parole '*before* imposing a particular penalty.' [Citing *Miller v. Alabama* (2012) 567 U.S. 460, 483.]").

[269] *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1386.

[270] *People v. Caballero* (2012) 55 Cal.4th 262, 268-269 (emphasis added).

the mitigating evidence of youth, and reiterated that *the sentence* must provide the offender with "a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' under *Graham*'s mandate."[271]

As noted in *Montgomery*, the United States Supreme Court held that a state is not required to re-litigate the juvenile offender's sentence, but may remedy the Eighth Amendment violation by permitting the offender to be considered for parole.[272] And, as the claimant explains, some states complied with these Eighth Amendment cases by simply banning LWOP sentences for all juvenile offenders, or leaving the decision to the trial courts to "craft constitutional sentences on a case by case basis."[273]

California was already in compliance with the Eighth Amendment with respect to the death penalty for juvenile offenders under the age of 18 at the time these cases were issued. A 1978 initiative adopted by the voters added section 190.5 to the Penal Code to state that "[n]otwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime."[274]

However, with the respect to mandatory LWOP or LWOP equivalent sentences for an offender who commits a crime before reaching the age of 18, the court in *Caballero* urged the Legislature to comply with federal law and to prevent a cruel and unusual punishment violation by "enact[ing] legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity."[275] The Legislature took the advice of the court, and established a parole eligibility mechanism to comply with federal law. Penal Code section 3051(b)(3), as added by Statutes 2013, chapter 312, provides that "[a] person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life [which includes life with the possibility of parole where the parole eligibility date falls outside the juvenile offender's natural life expectancy] shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing." Section 3051(b)(3) was amended in 2017 to extend the remedy to those who had been sentenced to LWOP for a controlling offense committed while under the age of 18 to receive a YOPH during their 25th year of incarceration.[276] The Legislature cited to *Graham*, *Miller*, and *Caballero* in Statutes 2013, chapter 312, section 1 (SB 260), to declare the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.[277] And the legislative history to

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[271] *People v. Caballero* (2012) 55 Cal.4th 262, 269 (emphasis added).

[272] *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718, 736] (emphasis added).

[273] Exhibit H, Claimant's Comments on the Proposed Decision, page 6.

[274] Penal Code section 190.5, added by section 12 of Initiative Measure (Prop. 7) approved November 7, 1978, effective Nov. 8, 1978.

[275] *People v. Caballero* (2012) 55 Cal.4th 262, 269, fn. 5.

[276] Statutes 2017, chapter 684 (SB 394).

[277] Statutes 2013, chapter 312, section 1 (SB 260).

Statutes 2017, chapter 684 (SB 394) explains that the amendment to extend the YOPH to juveniles sentenced to a LWOP would be in accordance with the United States Supreme Court's decision in *Montgomery*.[278]

The test claim statutes (Statutes 2015, chapter 471 (SB 261) and Statutes 2017, chapter 684 (SB 394)) also extended YOPH eligibility to offenders who were under 23, and then under 25, at the time of their controlling offenses. In this respect, the claimant is correct that the courts have not found an Eighth Amendment violation for offenders who are 18 and over when the crime is committed. For example, in *People v. Perez*, the court concluded that because Perez was not a juvenile at the time of the offenses (he was 20 years old), *Roper*, *Graham*, *Miller*, and *Caballero* are not applicable, and that the 86–years–to–life sentence did not constitute cruel and unusual punishment under the United States Constitution.[279] However, the court held that Perez was entitled to a YOPH pursuant to Penal Code section 3051, as amended by the Statutes 2015, Chapter 471 (SB 261).[280] Thus, under this statute and pursuant to the court's holding in *Franklin*, the court in *Perez* ordered a limited remand for both parties "to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime."[281] As the courts have explained, "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood" (*ibid*.), and that is the line the high court has drawn in its Eighth Amendment Jurisprudence.[282] In addition, the courts have not found an Eighth Amendment violation for youthful offenders who receive a sentence of less than an LWOP equivalent, but the test claim statutes extended YOPH eligibility to those offenders who have received such sentences.

Although the test claim statutes may exceed the minimum constitutional requirements to prevent a cruel and unusual punishment charge, reimbursement is still not required in this case. Government Code section 17556(g) provides that the Commission "shall not find costs mandated by the state when the "statute or executive order 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 directly relating to the enforcement of the crime or infraction." (Emphasis added.) In this case, the test claim statutes, including the *Franklin* proceedings that arose as a result of them, changed the penalty for a crime within the meaning of Government Code section 17556(g).

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[278] Exhibit I, Assembly Committee on Public Safety – Analysis of SB 394, as amended June 26, 2017, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB394 (accessed on January 16, 2019), pages 4-5.

[279] *People v. Perez* (2016) 3 Cal.App.5th 612, 617.

[280] *People v. Perez* (2016) 3 Cal.App.5th 612, 618.

[281] *People v. Perez* (2016) 3 Cal.App.5th 612, 619.

[282] *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380.

As stated in *Franklin*, the test claim statutes, by operation of law, "superseded the statutorily mandated sentences"[283] by capping the number of years the offender may be imprisoned before becoming eligible for release on parole:

> [S]ection 3051 has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required.[284]

This reasoning is further confirmed by subsequent appellate court decisions interpreting *Franklin*, one of which holds:

> Section 3051 specifically and sufficiently addresses these concerns regarding cruel and unusual punishment. *This is because section 3051 has in effect abolished de facto life sentences in California.* Section 3051 universally provides each juvenile offender convicted as an adult with a mandatory parole eligibility hearing on a legislatively specified schedule, and after no more than 25 years in prison. When the Legislature enacted section 3051, it followed precisely the urging of the *Caballero* court to provide this parole eligibility mechanism.[285]

The claimant asserts, however, that the test claim statutes and *Franklin* proceedings do not change the penalty for a crime or infraction, but are purely procedural and, thus, are not exempt from reimbursement pursuant to Government Code section 17556(g).[286] The claimant states in relevant part the following:

> As in initial matter, the statutes do not "change the penalty for a crime or infraction." They have no impact on the length of a sentence, or on the amount of any fines or restitution. Rather, they provide for parole hearings, and mandate a new proceeding at the time of sentencing to preserve evidence for any future parole hearings. That does not effectuate a substantive "change" to any existing criminal penalty. Rather, the statutes are purely procedural – the only changes they effectuate are to the purpose and timing of hearings. *Consider Franklin*, 63 Cal.4th at 278 (noting "the continued operation of the original sentence"; "The Legislature did not envision that the original sentences would be vacated and that new sentences would be imposed").
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> Because the statutes are procedural, they are akin to California Penal Code section 1405, which provides a post-conviction procedure for convicted felons to obtain DNA testing of biological evidence. This Commission unanimously found that the statutes mandating such hearings imposed a reimbursable state-mandated program on local agencies. Specifically, localities are entitled to reimbursement for defense counsel's investigation and representation of the convicted person in

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[283] *People v. Franklin* (2016) 63 Cal.4th 261, 278.

[284] *People v. Franklin* (2016) 63 Cal.4th 261, 279.

[285] *People v. Garcia* (2017) 7 Cal.App.5th 941, 950 (emphasis added).

[286] Exhibit H, Claimant's Comments on the Proposed Decision, pages 8-9.

> conjunction with the mandated hearings, as well as for certain additional work required of district attorneys. [Citation omitted to the Commission's decision in *Post-Conviction, DNA Proceedings* (00-TC-21/01-TC-08).)
>
> To be sure, some offenders might be released following a parole hearing. But the mere possibility of early release does not constitute an actual "change [in] the penalty for a crime" – under the test claim statutes, juvenile offenders are now *eligible* for parole hearings, but this does not make them *suitable* for parole. Indeed, in practice, early release is the rare exception, not the rule. . . .[287]

The claimant, relying on the language in section 17556(g) that refers to the singular phrases of "a crime" and "the crime," also argues that Government Code section 17556(g) applies to only laws that create new crimes or change penalties for particular existing crimes, but not to laws that generally change criminal procedures.[288]

Finally, the claimant asserts that a statutory provision, like the one here, which "mandates a new criminal procedure generally applicable to a broad swath of crimes, however, does not 'relate directly' to the 'enforcement of the crime,' as follows:

> The plain language "relating ***directly*** to the enforcement of the crime" further confirms the Legislature intended there could be no mandate for that portion of a statute [creating a new crime or infraction, eliminating a crime or infraction, or changing the penalty for a crime or infraction] that relates directly to the enforcement of the crime. For example, if a statute introduces a new crime, local entities cannot recover costs incurred in directly enforcing the new crime (e.g. Sheriff costs). A statutory provision, like the one here, that mandates a new criminal procedure generally applicable to a broad swath of crimes, however, does not 'relate directly" to the "enforcement of the crime."[289]

Thus, the claimant contends that Government Code section 17556(g) does not apply to new criminal procedures required to be carried out by local government that broadly apply to crime or offenders. The claimant's interpretation is not supported by the plain language of Government Code section 17556(g), or with past decisions of the Commission.

First, the claimant's assertion that the test claim statutes do not change the penalty for a crime under section 17556(g) since they have no impact on the length of sentence, is incorrect and not supported by the law. The test claim statutes fall under Part 3 of the Penal Code ("Of Imprisonment and the Death Penalty"), and not under Part 2 ("Of Criminal Procedure"), indicating that the test claim statutes are intended to relate to criminal penalties. Under the test claim statutes, youthful offenders (defined in state law as under 25) sentenced to a determinate sentence (i.e., a fixed term, such as 20 years) are now eligible to receive a YOPH by the BPH during their 15th year of incarceration, unless previously released. Youthful offenders sentenced to a term of less than 25 years to life are eligible to receive a YOPH during their 20th year of incarceration. And youthful offenders sentenced to 25 or more years to life are eligible to

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[287] Exhibit H, Claimant's Comments on the Proposed Decision, page 9 (emphasis in original).

[288] Exhibit H, Claimant's Comments on the Proposed Decision, page 10.

[289] Exhibit H, Claimant's Comments on the Proposed Decision, page 10 (emphasis in original).

receive a YOPH during their 25th year of incarceration.[290] Thus, some youthful offenders have received a reduction (sometimes by decades) in the minimum number of years of incarceration they must serve before becoming eligible for parole, and other such offenders who were ineligible for parole are now eligible as a result of the test claim statutes.

California law provides that a sentence (other than death or LWOP) that results in imprisonment in the state prison must include a term of parole.[291] And the courts have explained that although parole is distinct from the underlying prison sentence, parole is part of the penalty for the underlying crime.[292]

> Although parole constitutes a distinct phase from the underlying prison sentence, a period of parole following a prison term has generally been acknowledged as a form of punishment. "[P]arolees are on the 'continuum' of state-imposed punishments." (*Samson v. California* (2006) 547 U.S. 843, 850, 126 S.Ct. 2193, 165 L.Ed.2d 250 (*Samson*).) Further, parole is a form of punishment accruing directly from the underlying conviction. As the Attorney General observes, 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 ...." (§ 3000, subd. (a)(1).) Thus, a prison sentence "contemplates a period of parole, which in that respect is related to the sentence." (*Roberts, supra,* 36 Cal.4th at p. 590, 31 Cal.Rptr.3d 458, 115 P.3d 1121.) Being placed on parole is a direct consequence of a felony conviction and prison term.[293]

Thus, as recognized by the courts, the test claim statutes have changed the penalty for a crime by "in effect abolish[ing] de facto life sentences in California," for crimes committed before age 25, by now allowing parole eligibility, and by capping the number of years the offender may be imprisoned before becoming eligible for release on parole.[294]

Moreover, the claimant's argument that Government Code 17556(g)'s use of the singular articles "a" and "the" indicates that section 17556(g) applies only to statutes that change the penalties for particular crimes, and not to statutes that change the penalties for a "broad swath" of crimes, also fails. The general laws of statutory construction in California provide that "[t]he singular number includes the plural, and the plural the singular."[295] Moreover, Penal Code section 7

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[290] Penal Code section 3051(b).

[291] Penal Code section 3000(a)(1); see also *People v. London* (1988), 206 Cal.App.3d 896, 910 ("[A] 'sentence' includes both a prison term and any parole term.").

[292] *People v. Nuckles* (2013) 56 Cal.4th 601, 608 ("These competing arguments focus on the nature of parole and whether it constitutes part of the punishment for the underlying crime. It does."), and 610 ("The restraints on liberty and constructive custody status further demonstrate that service of parole is part of the punishment imposed following a defendant's conviction.")

[293] *People v. Nuckles* (2013) 56 Cal.4th 601, 609.

[294] *People v. Franklin* (2016) 63 Cal.4th 261, 278-279; *People v. Garcia* (2017) 7 Cal.App.5th 941, 950.

[295] Government Code section 13.

similarly provides that in the interpretation of the Penal Code: "Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; *the singular number includes the plural, and the plural the singular*…." (Emphasis added.)

Finally, the claimant's argument that a statutory provision, like the one here, which "mandates a new criminal procedure generally applicable to a broad number of crimes does not "relate directly" to the "enforcement of the crime" within the meaning of section 17556(g), is not supported by the plain language of the statute, or with past decisions of the Commission. Section 17556(g) provides there are no costs mandated by the state when the statute "*changed the penalty for a crime or infraction, but only for that portion of the statute directly relating to the enforcement of the crime or infraction*." As indicated above, the test claim statutes changed the penalty for a crime, and the exception to reimbursement applies only to that portion of the statute directly relating to the enforcement of the crime. Although the "but only" language limits the applicability of the exception to reimbursement in section 17556(g), all of the activities alleged in this case to comply with the test claim statutes and *Franklin* proceedings are directly relating to the enforcement of the offender's underlying crime.

The first step in the proper interpretation of this statutory language is to give the words their plain and ordinary meaning. Where these words are unambiguous, they must be applied as written and may not be altered in any way. In addition, statutes must be given a reasonable and common sense construction designed to avoid absurd results.[296] The dictionary definition of "enforce" is "to compel observance of or compliance with (a law, rule, or obligation)."[297] Black's Law Dictionary defines "enforcement" as "[t]he act of putting something such as a law into effect; the execution of a law."[298] Black's defines "execution," in turn, as "[c]arrying out some act or course of conduct to its completion."[299] Thus, when a youthful offender commits a crime, the "enforcement" of that crime includes all activities required of local government by law to carry out to completion the penalty or punishment imposed by the underlying criminal statute of which the offender was convicted. As indicated above, parole is required in every criminal case that results in imprisonment in the state prison and is part of the offender's penalty.[300] And, under the test claim statutes, the offender now has the right to establish a record of the mitigating factors of youth for an eventual YOPH.

Accordingly, the test claim statutes changed the penalty for crimes committed by youthful offenders by capping the number of years the offender may be imprisoned before becoming eligible for release on parole,[301] and all of the activities alleged in this case to comply with the test claim statutes, including the resultant *Franklin* proceedings, relate directly to the

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[296] *Burden v. Snowden* (1992) 2 Cal.4th 556, 562; *People v. King* (1993) 5 Cal.4th 59, 69.

[297] The New Oxford American Dict. (2001) page 563, column 2.

[298] Black's Law Dict. (6th ed. 1990) page 528, column 2.

[299] Black's Law Dict. (6th ed. 1990) page 568, column 1.

[300] Penal Code section 3000(a)(1); *People v. Nuckles* (2013) 56 Cal.4th 601, 608-609.

[301] *People v. Franklin* (2016) 63 Cal.4th 261, 278-279; *People v. Garcia* (2017) 7 Cal.App.5th 941, 950.

enforcement of the youthful offender's underlying crime. Thus, there are no costs mandated by the state pursuant to Government Code section 17556(g).

Nevertheless, the claimant cites to a previous Commission decision, *Post Conviction: DNA Court Proceedings*, 00-TC-21 and 01-TC-08, asserting that the test claim statutes in the instant matter are procedural, and therefore, should be found to be reimbursable, as some of the activities relating to local agencies handling post-conviction procedures for deoxyribonucleic acid (DNA) testing requested by prisoners, were.[302] However, that decision did not address Government Code section 17556(g) at all. The parties did not raise the issue, and the Commission found that the DNA-testing motion was a separate *civil* action and, thus, under that interpretation, Government Code section 17556(g) would not have been triggered.[303]

In addition, although the Commission does not designate its past decisions as precedential pursuant to Government Code section 11426.60, and old test claims do not have precedential value,[304] the Commission's findings in this matter are consistent with several of its prior decisions. In *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, the claimant sought reimbursement for additional research of the defendant's criminal history, increased trial rates and third strike appeals for both the district attorney and public defender's office, and increased workload for its sheriff and probation departments.[305] The Commission found that Penal Code section 667 changed the penalty for a crime and was exempt from reimbursement pursuant to Government Code section 17556(g), and that section 17556(g) encompassed those activities that directly related to the enforcement of the Three Strikes statute, which had changed the penalty for a crime from arrest through conviction and sentencing.[306] The Commission reasoned that the Three Strikes law "changed the sentencing scheme by subjecting a double strike defendant to a penalty of double the term of imprisonment previously required under the Penal Code for the current crime committed" and that this constituted a change in the penalty for a crime pursuant to section 17556(g).[307] The Commission further found in *Three Strikes* that the plain meaning of the language of section 17556(g) ("enforcement of the crime or infraction") meant to carry out to completion the penalty or punishment imposed by the criminal statute, and

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[302] Exhibit H, Claimant's Comments on the Proposed Decision, page 9; Statement of Decision, *Post Conviction: DNA Court Proceedings*, 00-TC-21 and 01-TC-08, July 28, 2006, https://www.csm.ca.gov/decisions/00tc21,01tc08sod.pdf (accessed on August 16, 2019).

[303] Statement of Decision, *Post Conviction: DNA Court Proceedings*, 00-TC-21 and 01-TC-08, July 28, 2006, https://csm.ca.gov/decisions/00tc21,01tc08sod.pdf (accessed on August 16, 2019), page 2.

[304] 72 Ops.Cal.Atty.Gen. 173, 178 fn.2 (1989).

[305] Statement of Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://csm.ca.gov/decisions/4503sod.pdf (accessed on August 16, 2019), page 6.

[306] Statement of Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://www.csm.ca.gov/decisions/4503sod.pdf (accessed on August 16, 2019).

[307] Statement of Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://www.csm.ca.gov/decisions/4503sod.pdf (accessed on August 16, 2019), pages 6-7.

thus "encompasses those activities that directly relate to the enforcement of the statute that changes the penalty for the crime from arrest through conviction and sentencing."[308] The Commission's finding in the current case are wholly consistent with this conclusion.

In *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01 the Commission interpreted the language of section 17556(g) with an analysis of the "but only" clause of that statute, and interpreted the meaning of "enforcement of the crime or infraction" consistent with the analysis here.[309] In *Domestic Violence Treatment Services*, the Commission found that changes to Penal Code section 1203.097, which required counties to perform several activities to assess convicted domestic violence offenders who were ordered to complete a batterer's program as part of the terms and conditions of probation, were not reimbursable due to section 17556(g).[310] The Commission found that probation was part of the changed penalty and punishment for a domestic violence conviction, and thus, the activities regarding the batterer's program were not reimbursable, as they were directly related to the enforcement of the crime.[311] However, the Commission *approved* the activities required by the test claim statutes to generally administer the batterer treatment program, provide services to victims of domestic violence, and to assess the future probability of the defendant committing murder, on the ground that these activities were *not* directly related to the enforcement of the offender's domestic violence crime within the meaning of Government Code section 17556(g).[312]

Lastly, in *Child Abuse Treatment Services Authorization and Case Management*, 98-TC-06, the Commission found that modification to Penal Code sections 273a, 273d, and 273.1, which made changes to the criteria for treatment programs required by the terms and conditions of probation for convicted child abusers, did not impose costs mandated by the state pursuant to Government Code section 17556(g) to place, refer, and assess the convicted abusers into the treatment

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[308] Statement of Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://www.csm.ca.gov/decisions/4503sod.pdf (accessed on August 16, 2019), pages 8-9.

[309] Statement of Decision, *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01, April 23, 1998, https://www.csm.ca.gov/decisions/213.pdf (accessed on August 16, 2019), pages 5-6.

[310] Statement of Decision, *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01, April 23, 1998, https://www.csm.ca.gov/decisions/213.pdf (accessed on August 16, 2019), page 1.

[311] Statement of Decision, *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01, April 23, 1998, https://www.csm.ca.gov/decisions/213.pdf (accessed on August 16, 2019), pages 6-8.

[312] Statement of Decision, *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01, April 23, 1998, https://www.csm.ca.gov/decisions/213.pdf (accessed on August 16, 2019), pages 9-11.

programs.[313] Using a similar analysis to the one in *Domestic Violence Treatment Services*, the Commission found that

> [S]ubdivision (g) applies to activities relating to the capture, detention, prosecution, sentencing (including probation and parole) of a defendant. Based on the foregoing, the Commission found that a defendant's probation and the completion of a child abuser's treatment counseling program, as a condition of probation, is a penalty assessed against the defendant for the conviction of child abuse and is subject to Government Code section 17556, subdivision (g).[314]

The Commission, however, approved reimbursement for the activities required to develop or approve a child abuser's treatment counseling program, as activities not directly related to the enforcement of the underlying crime within the meaning of section 17556(g).[315]

Unlike the statutes at issue in *Domestic Violence Treatment Services* and *Child Abuse Treatment Services*, all of the activities and costs alleged by the claimant to comply with the test claim statutes, and the resultant *Franklin* proceedings, relate directly to the enforcement of the youthful offender's underlying crime.

Accordingly, the test claim statutes, and the resultant *Franklin* proceedings, do not impose costs mandated by the state pursuant to article XIII B, section 6 and Government Code section 17556(g).

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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[313] Statement of Decision, *Child Abuse Treatment Services Authorization and Case Management*, 98-TC-06, September 29, 2000, https://www.csm.ca.gov/decisions/98tc06sod.pdf (accessed on August 16, 2019), page 9.

[314] Statement of Decision, *Child Abuse Treatment Services Authorization and Case Management*, 98-TC-06, September 29, 2000, https://www.csm.ca.gov/decisions/98tc06sod.pdf (accessed on August 16, 2019), pages 6-9.

[315] Statement of Decision, *Child Abuse Treatment Services Authorization and Case Management*, 98-TC-06, September 29, 2000, https://www.csm.ca.gov/decisions/98tc06sod.pdf (accessed on August 16, 2019), page 9.

STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

RE: **Decision**

Youth Offender Parole Hearings, 17-TC-29
Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261); and Statutes 2017, Chapters 675 and 684 (AB 1308 and SB 394)
County of San Diego, Claimant

On September 27, 2019, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Dated: September 30, 2019

Heather Halsey, Executive Director