BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION ON REMAND: Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608 as added or amended by: Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); and Statutes 1996, Chapter 4 (AB 1496) *Sexually Violent Predators (CSM-4509),* As Alleged to be Modified by: Proposition 83, General Election, November 7, 2006 Filed on January 15, 2013 By the Department of Finance, Requester Notice of Entry of Judgment and Writ of Mandate Remanding the Matter for Reconsideration Served June 5, 2019	Case No.: 12-MR-01-R *Sexually Violent Predators (CSM-4509),* 12-MR-01 RECONSIDERATION OF REQUEST FOR MANDATE REDETERMINATION PURSUANT TO COURT ORDER [Pursuant to *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196; Judgment and Writ of Mandate Issued by Superior Court for the County of San Diego, Case No. 37-2014-00005050-CU-WM-CTL.] (*Adopted May 22, 2020*) (*Served May 26, 2020*)

REQUEST FOR MANDATE REDETERMINATION ON REMAND

The Commission on State Mandates adopted the attached Denial of Request for a New Test Claim Decision on May 22, 2020.

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION ON REMAND: Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608 as added or amended by: Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); and Statutes 1996, Chapter 4 (AB 1496) *Sexually Violent Predators (CSM-4509)*, As Alleged to be Modified by: Proposition 83, General Election, November 7, 2006 Filed on January 15, 2013 By the Department of Finance, Requester Notice of Entry of Judgment and Writ of Mandate Remanding the Matter for Reconsideration Served June 5, 2019	Case No.: 12-MR-01-R *Sexually Violent Predators (CSM-4509)*, 12-MR-01 RECONSIDERATION OF REQUEST FOR MANDATE REDETERMINATION PURSUANT TO COURT ORDER [Pursuant to *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196; Judgment and Writ of Mandate Issued by Superior Court for the County of San Diego, Case No. 37-2014-00005050-CU-WM-CTL.] (*Adopted May 22, 2020*) (*Served May 26, 2020*)

DECISION

The Commission in State Mandates (Commission) heard and decided this Request for Mandate Redetermination on Remand during a regularly scheduled hearing on May 22, 2020. Donna Ferebee appeared on behalf of the requester, the Department of Finance. Christina Snider appeared on behalf of the County of San Diego.

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 Denial of the Request for a New Test Claim Decision by a vote of 7-0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	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	Yes
Jacqueline Wong-Hernandez, Representative of the State Controller	Yes

Summary of the Findings

This matter was remanded from the Court to determine "whether the expanded SVP definition in Proposition 83 transformed the test claim statutes as a whole into a voter-imposed mandate or, alternatively, did so to the extent the expanded definition incrementally imposed new, additional duties on the Counties."[1] With regard to the State's argument, first raised on appeal, that "the specified local government duties became necessary to implement the ballot measure, in that the Counties had been under no obligation to perform any duties for this class of offenders until the voters by initiative expanded the definition of an SVP,"[2] the Court also found that "the current record is insufficient to establish how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to local governments."[3]

The Commission finds that the expanded sexually violent predator (SVP) definition and other indicia support the conclusion that voters reasonably intended to prohibit the Legislature from repealing or significantly reducing the civil commitment program for SVPs; however, the voter mandate did not impose *any* new duties or activities on local government, nor did it require the state to impose any duties or activities on local government. Therefore, the duties remain mandated by the state. Specifically, the Commission finds:

- The record shows that although the number of SVP referrals has not increased over time, at least some portion of all new referrals since 2006 are based on a single offense and those referrals are therefore triggered by Proposition 83 and not by the test claim statutes or other later changes in law.
- An ongoing program and policy of civil commitment of SVPs is *integral* to accomplishing the electorate's goals in enacting Proposition 83 and other indicia support the conclusion that voters reasonably intended to prohibit the Legislature from repealing or significantly reducing the civil commitment program and, thus, the voters are the source of an ongoing policy of civil commitment of SVPs.
- Proposition 83 does not constitute a subsequent change in law that modifies the state's liability for the SVP program because the activities and costs to implement a civil commitment program in accordance with the voter mandate have been shifted to counties based on the state's "true choice" and, thus, the activities and costs remain mandated by the state.

[1] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

[2] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216.

[3] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

COMMISSION FINDINGS

I. Chronology

06/25/1998	The Commission adopted the Test Claim Decision on the *Sexually Violent Predators*, CSM-4509 program, approving eight activities related to civil commitment procedures for persons alleged to be sexually violent predators.[4]
11/07/2006	The voters adopted Proposition 83, which amended some of the Welfare and Institutions Code sections approved in the Test Claim Decision.
01/15/2013	The Department of Finance (Finance) filed a Request for Mandate Redetermination alleging that Proposition 83 constitutes a subsequent change in law that modifies the State's liability for the SVP program.[5]
12/06/2013	The Commission adopted the New Test Claim Decision, approving Finance's Request for Redetermination ending reimbursement for six and approving reimbursement for two of the original eight approved activities.
02/28/2014	The Counties of San Diego, Los Angeles, Orange, Sacramento, and San Bernardino filed a petition for writ of mandate and complaint for declaratory relief.
05/30/2014	The Commission adopted the Statement of Decision and Amended Parameters and Guidelines for the New Test Claim Decision.
03/27/2015	The Commission adopted the Statewide Cost Estimate for the New Test Claim Decision.
11/19/2018	The California Supreme Court held that the Commission's New Test Claim Decision was not supported, and remanded the matter to the trial court to issue a writ directing the Commission to set aside the New Test Claim Decision, the Parameters and Guidelines, and the Statewide Cost Estimate and reconsider its New Test Claim Decision to address specific issues identified in the Court's decision.
02/08/2019	Commission staff issued a Request for Comment and Legal Argument Relating to the Reconsideration of the Request for Mandate Redetermination on Remand, 12-MR-01-R, pursuant to *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196 to be filed by March 11, 2019.[6]
03/04/2019	The County of Orange filed a Request for Extension of Time to file comments.

[4] Exhibit B, Test Claim Statement of Decision, *Sexually Violent Predators*, CSM-4509, adopted June 25, 1998.

[5] Exhibit A, Finance's Request for Mandate Redetermination.

[6] Exhibit E, Request for Comment and Legal Argument Relating to the Reconsideration of the Request for Mandate Redetermination on Remand, 12-MR-01-R, Pursuant to *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196.

03/05/2019	The Counties of Los Angeles, Sacramento, San Bernardino, and San Diego each filed a Request for Extension of Time to file comments.
03/06/2019	Commission staff issued a Notice of Limited Extension Request Approval of an extension to March 22, 2019 for the requesting counties for good cause shown.
03/08/2019	Finance filed a Request for Extension of Time to file comments to March 22, 2019.
03/08/2019 and 03/11/2019	The Counties of Los Angeles, Sacramento, and San Bernardino filed requests for extension of time to comment until at least to April 10, 2019 and postponement of hearing to September 27, 2019.
03/12/2019	The County of San Diego filed a Notice of Change of Representation and a Request for Extension of Time and Postponement of Hearing.
03/12/2019	Commission staff issued a Notice of Limited Approval of Request for Extension of Time and Postponement of Hearing extending the comment period for Finance to March 22, 2019 and for the Counties of Los Angeles, Sacramento, and San Bernardino to April 10, 2019 for good cause shown and Approval of Postponement of Hearing to September 27, 2019.
03/15/2019	The County of Orange filed a Request for Extension of Time to file comments.
03/19/2019	Commission staff issued a Notice of Limited Extension Request Approval extending the comment period to April 10, 2019 for the counties of Orange and San Diego.
03/26/2019	Finance filed Late Comments on the Request for Mandate Redetermination on Remand.[7]
04/10/2019	The County of Los Angeles filed Comments on the Request for Mandate Redetermination.[8]
04/10/2019	The County of Orange filed Comments on the Request for Mandate Redetermination.[9]
04/10/2019	The County of Sacramento filed Comments on the Request for Mandate Redetermination.[10]

[7] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand.

[8] Exhibit G, County of Los Angeles's Comments on the Request for Mandate Redetermination on Remand.

[9] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand.

[10] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand.

04/10/2019	The County of San Bernardino filed Comments on the Request for Mandate Redetermination.[11]
04/10/2019	The County of San Diego filed Comments on the Request for Mandate Redetermination.[12]
04/10/2019	The District Attorney for the County of Los Angeles filed Late Comments on the Request for Mandate Redetermination.[13]
04/29/2019	The Superior Court for the County of San Diego, Case No. 37-2014-00005050-CU-WM-CTL, entered the judgment and writ, directing the Commission to set aside the prior decisions on Finance's Request for Mandate Redetermination in *Sexually Violent Predators (CSM-4509)*, 12-MR-01, and to reconsider the matter consistently with the Supreme Court's opinion.[14]
06/05/2019	The Commission was served the Notice of Entry of Judgment, with the Judgment attached, and the Writ of Mandate.[15]
06/12/2019	The County of San Diego filed additional Late Comments on the Request for Mandate Redetermination on Remand.[16]
07/26/2019	The Commission adopted the Order to Set Aside the Statement of Decision adopted December 6, 2013, the Statement of Decision and Amended Parameters and Guidelines adopted May 30, 2014, and the Statewide Cost Estimate adopted March 27, 2015 pursuant to the court's Judgment and Writ of Mandate.
01/31/2020	Commission staff issued the Draft Proposed Denial of a New Test Claim Decision on Remand.[17]

[11] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand.

[12] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand.

[13] Exhibit L, Los Angeles County District Attorney's Office's Late Comments on the Request for Mandate Redetermination on Remand.

[14] Exhibit C, Writ of Administrative Mandamus, filed in the San Diego Superior Court April 29, 2019 and served to the Commission June 5, 2019 (San Diego County Superior Court, Case No.: 37-2014-00005050-CU-WM-CTL, in accordance with *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196).

[15] Exhibit D, Notice of Entry of Judgment, Judgment, and Writ of Mandate, San Diego Superior Court, Case No. 37-2014-00005050-CU-WM-CTL, served June 5, 2019.

[16] Exhibit M, County of San Diego's Late Comments on the Request for Mandate Redetermination on Remand.

[17] Exhibit N, Draft Proposed Denial of a New Test Claim Decision, issued January 31, 2020.

03/12/2020 Commission staff issued the Proposed Denial of a New Test Claim Decision on Remand setting the matter for the March 27, 2020 meeting.[18]

II. Background

A. Test Claim Decision Adopted June 25, 1998

The *Sexually Violent Predators* (*SVP*), CSM-4509 program established procedures for the civil detention and treatment of sexually violent predators (SVPs) following the completion of an individual's criminal sentence imposed for certain sex-related offenses. The test claim statutes, specifically Statutes 1995, chapters 763 and 764, defined a "sexually violent predator" in section 6600(a) of the Welfare and Institutions Code as "a person who has been convicted of a sexually violent offense against two or more victims for which he or she has received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior."[19] Thus, for a person to be deemed an SVP and civilly committed under the SVP mandate as originally approved, the person must be (1) convicted; (2) of a sexually violent offense; (3) against two or more victims; (4) received a determinate sentence; and (5) have a diagnosed mental disorder that makes the person a danger to others and presents a likelihood that the person will engage in future sexually violent criminal behavior. Section 6600(b) defined "sexually violent offense" to mean the following acts when committed by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or on another person, and that are committed before or after the effective date of [the statute], and result in a conviction and a determinant sentence," a felony conviction for section 261(a)(2) [forcible rape]; section 262(a)(1) [forcible rape of a spouse]; section 264.1 [conspiracy to commit rape, spousal rape, or forcible penetration by force or violence]; section 288(a or b) [lewd or lascivious acts with a minor under 14]; 289 [forcible sexual penetration]; or sections 286 [sodomy] or former 288a [oral copulation].[20] And finally, a "diagnosed mental disorder" was defined to include "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person as a menace to the health and safety of others."[21]

Under the test claim statutes, before civil detention and treatment can be imposed, the Department of Corrections must refer a potential SVP, at least six months before the person's release date, for screening by the Department of Corrections and the Board of Prison Terms (now the Parole Board).[22] If that screening finds that the person may be an SVP, the statutes require a mental health examination by two qualified psychiatrists or psychologists with the Department of

[18] The March 27, 2020 meeting was postponed to May 22, 2020 due to scheduling conflicts.

[19] Welfare and Institutions Code section 6600(a) (as amended, Stats. 1995, ch. 762 and ch.763.

[20] Welfare and Institutions Code section 6600(b) (as amended, Stats. 1995, ch. 762 and ch. 763.

[21] Welfare and Institutions Code section 6600(c) (as amended, Stats. 1995, ch. 762 and ch. 763.

[22] Welfare and Institutions Code section 6601(as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

Mental Health (now Department of State Hospitals).[23] The Department of State Hospitals evaluates the person using a standardized assessment protocol developed by the Department, which includes assessing mental disorders and risk factors. The two evaluating professionals must concur that the person is an SVP; but if they do not, a second evaluation by independent professionals outside state government is required.[24] If the two professionals performing the evaluation find that the person *is* an SVP, the Department then forwards a request to the county in which the offense occurred to file a petition to have the person committed.[25]

If the county's designated counsel concurs, the county counsel or district attorney files a petition for civil commitment.[26] The petition must first withstand a probable cause hearing, in which the judge must determine whether to go forward with a trial on the person's SVP status, or dismiss the petition and send the person to his or her parole.[27] A trial is then conducted to determine beyond a reasonable doubt if the person is an SVP.[28] If the person alleged to be an SVP is indigent, the county is required to provide the indigent person with the assistance of counsel and experts necessary to prepare the defense.[29]

On June 25, 1998, the Commission adopted the Test Claim Decision for the *Sexually Violent Predators*, CSM-4509 mandated program.[30] That Decision approved mandate reimbursement for the following activities related to the counties' filing of petitions for civil commitment of sexually violent predators:

1. Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
2. Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)

---

[23] Welfare and Institutions Code section 6601(as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

[24] Welfare and Institutions Code section 6601(as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

[25] Welfare and Institutions Code section 6601(as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

[26] Welfare and Institutions Code section 6601(as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

[27] Welfare and Institutions Code section 6602 (as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

[28] Welfare and Institutions Code sections 6602-6604 (as amended, Stats. 1995, ch. 762 and ch. 763).

[29] Welfare and Institutions Code section 6603 (as amended, Stats. 1995, ch. 762 and ch. 763).

[30] Exhibit B, Test Claim Statement of Decision, *Sexually Violent Predators*, CSM-4509, adopted June 25, 1998.

3. Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(i).)
4. Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
5. Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
6. Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
7. Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)
8. Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)[31]

The Commission thereafter adopted Parameters and Guidelines consistent with the Test Claim Decision on September 24, 1998, and the boilerplate language of those and many other Parameters and Guidelines was amended on October 30, 2009.

B. <u>Subsequent Amendments to the Test Claim Statutes Made by Statutes 1996, Chapter 462; Statutes 1998, chapter 19; Statutes 2006, Chapter 337 (SB 1128); and Proposition 83 (November 7, 2006)</u>

Statutes 1996, chapter 462 amended section 6600(a) of the Welfare and Institutions Code, effective September 13, 1996, to add that for purposes of SVP commitment, conviction of a sexually violent offense includes a finding of not guilty by reason of insanity; a conviction prior to July 1, 1977, resulting in an indeterminate sentence; a conviction resulting in a finding that the person is a mentally disordered sex offender; or a conviction in another state that includes all the elements of an offense described in section 6600(b) of the Welfare and Institutions Code, thereby expanding the class of offenders to which the civil commitment process applies. Statutes 1996, chapter 462 was never the subject of a test claim and the statute of limitations for filing a test claim on this statute has long past.

Statutes 1998, chapter 19, among other things, amended section 6602.5 to provide that no person may be placed in a state hospital pursuant to sections 6601.3 and 6602 without a finding of probable cause pursuant to 6602. And section 6602.5 provided a process to identify persons in custody who had not had a probable cause hearing and, within 30 days, either remove the person from the state hospital and return the person to local custody or provide a probable cause hearing, thereby increasing the number of probable cause hearings. Statutes 1998, chapter 19 was also never the subject of a test claim.

[31] Exhibit B, Test Claim Statement of Decision, *Sexually Violent Predators*, CSM-4509, adopted June 25, 1998, pages 3 and 13.

On August 15, 2005, Assembly member Sharon Runner amended her bill, AB 231, to propose the substance of what would become known as Proposition 83.[32] At around the same time, Assembly member Sharon Runner and her husband State Senator George Runner began the work of qualifying the proposal as a Proposition to put before the voters.[33] AB 231 failed passage in January 2006, and State Senator Alquist introduced a similar bill that same month, SB 1128, which contained many of the same proposed amendments to the Penal Code and the Welfare and Institutions Code found in AB 231 and Proposition 83.[34] SB 1128 passed as an urgency measure seven weeks prior to the election in which Proposition 83 was adopted.[35] Accordingly, most of the additions and amendments to the Penal Code and Welfare and Institutions Code that were proposed in Proposition 83 were enacted by SB 1128 on September 20, 2006 and became effective immediately upon enactment and prior to the election in which Proposition 83 was put before the voters.[36] And, just as with Statutes 1996, chapter 462, no test claim was filed on Statutes 2006, chapter 337 (SB 1128), despite the significant expansion of the class of offenders to which the civil commitment process applies.

On November 7, 2006, the voters approved Proposition 83, also known as the "Sexual Predator Punishment and Control Act: Jessica's Law," after Jessica Lunsford, of Florida, who was abducted and killed by a registered sex offender.[37] Proposition 83 proposed to amend and reenact several sections of the Penal Code and the Welfare and Institutions Code, including some of the sections approved for reimbursement in the CSM-4509 Test Claim.[38] The Voter Guide for Proposition 83 stated its goals as follows:

- Increases penalties for violent and habitual sex offenders and child molesters.

---

[32] See Exhibit O, Assembly Bill 231 (2005-2006 Reg. Sess.), as amended (2005-2006 Reg. Sess.); Exhibit O, Assembly Committee on Public Safety, Analysis of AB 231 as amended January 10, 2006 (2005-2006 Reg. Sess.). See also, Exhibit O, Written Comment by Senator George Runner (Ret.), Late Filing for September 27, 2013 Hearing of the Commission on State Mandates, dated September 26, 2013.

[33] Exhibit O, California Secretary of State, Campaign Finance Data, Campaign for Child Safety 2006, Jessica's Law, Yes on 83 (Fundraising Events in support of the Proposition began in December 2005) http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1277423&session=2005&view=expenditures (accessed March 4, 2019).

[34] Exhibit O, Senate Committee on Public Safety, Analysis of SB 1128, as amended March 7, 2006 (2005-2006 Reg. Sess.), page 35 [Describing some of the similarities of and differences between Proposition 83 and SB 1128].

[35] Statutes 2006, chapter 337 (SB 1128), enacted September 20, 2006.

[36] Government Code section 9600(b).

[37] Exhibit O, *California Follows Trend with Sex-Offender Crackdown*, Capitol Public Radio, November 2, 2006, https://www.npr.org/templates/story/story.php?storyId=6418295 (accessed February 28, 2019).

[38] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83.

- Prohibits registered sex offenders from residing within 2,000 feet of any school or park.
- Requires lifetime Global Positioning System (GPS) monitoring of felony registered sex offenders.
- Expands definition of sexually violent predator.
- Changes current two-year involuntary civil commitment for a sexually violent predator to an indeterminate commitment, subject to annual review by the Director of Mental Health and subsequent ability of sexually violent predator to petition court for sexually violent predator's conditional release or unconditional discharge.[39]

With respect to the SVP program specifically, Proposition 83 proposed the following changes:

- Section 6600 expanded the definition of a sexually violent predator by broadening the underlying criminal offenses supporting a finding that a person is an SVP; by reducing the number of victims of underlying qualifying offenses from 2 to 1; and by removing the ceiling on juvenile offenses applied as qualifying.[40]
- Section 6601 provides that an SVP determination and commitment shall toll the term of parole for the underlying offense or offenses during indeterminate civil commitment.[41]
- Section 6604 provides for indeterminate commitment, and accordingly, eliminates the requirement to hold a new SVP hearing every two years.[42]
- Section 6605 eliminates the requirement that the Department of Mental Health provide annual notice of an SVP's right to petition for release, and eliminates the requirement that the court must hold a show cause hearing if not waived by the committed person. Under amended section 6605, DMH would authorize an SVP to file a petition for release if the annual report by DMH finds it appropriate.[43]
- Section 6608 provides that even without DMH approval, "nothing in this article shall prohibit" a committed SVP from petitioning for conditional release *or* unconditional discharge. But the section would still prohibit frivolous petitions: if a prior petition was found to be frivolous the court shall deny the petition unless new facts are presented.[44]

---

[39] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, page 4.

[40] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, pages 18-19 [Proposed amendments to Welfare and Institutions Code section 6600 (a)(1); (b); (g)].

[41] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 26 page 20 [Proposed amendments to Welfare and Institutions Code section 6601(k)].

[42] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 27, page 20 [Proposed amendments to Welfare and Institutions Code section 6604].

[43] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 29, page 20 [Proposed amendments to Welfare and Institutions Code section 6605].

[44] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 30, page 21 [Proposed amendments to Welfare and Institutions Code section 6608].

- In addition, section 6600.1, not part of the original 1998 test claim decision, nor part of the 1995 and 1996 test claim statutes, removes a requirement that sexual offenses against children under 14 must involve "substantial sexual conduct" in order to qualify as sexually violent offenses within the meaning of section 6600(b).[45]

- And, section 6604.1, also not part of the original 1998 test claim decision or the 1995 and 1996 test claim statutes, provides that the indeterminate term of commitment shall commence on the date the court issues the initial order of commitment. Previously this section provided that a *two-year* term of commitment would begin on the date the court issued the order of commitment, and for subsequent extended commitments, the term would be two years commencing from the date of termination of the previous commitment. This section would have been unworkable and inconsistent with the indeterminate commitment provided for under amended section 6604 without amendment.[46]

Of the provisions of Proposition 83 amending the Penal Code and the Welfare and Institutions Code relating to SVP commitments, only the following were *not* first made by SB 1128, but were imposed *solely* by Proposition 83:

- Penal Code section 3000, describing the tolling of parole during an SVP commitment and the terms of parole, is structured differently in SB 1128 and Proposition 83, but mostly appears to produce the same results, based on the plain language;[47]

- Welfare and Institutions Code section 6600(a)(1), reducing the number of victims of qualifying offenses required to meet the definition of a sexually violent predator from *two* victims, to *one*; and subdivision (g) and paragraph (g)(2), removing the ceiling on prior juvenile adjudications ("no more than one") that may be counted against an alleged

[45] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 25, page 19 [Proposed amendments to Welfare and Institutions Code section 6600.1].

[46] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 28, page 20 [Proposed amendments to Welfare and Institutions Code section 6604.1].

[47] Compare Statutes 2006, chapter 337 (SB 1128), section 45 with Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 17, page 16 [Both amendments to Penal Code section 3000 provide for tolling of parole during civil commitment, but SB 1128 provides that tolling shall begin during the person's evaluation to determine whether the person is an SVP; in addition, both amendments provide for a ten year term of parole for persons sentenced to life under Penal Code sections 667.61 and 667.71 (sentence enhancements for prior sex offenses), SB 1128 also provided for a ten year term of parole for persons receiving a life sentence under section 209(b) (kidnapping with intent to commit certain violent felonies, including rape); 269 (aggravated sexual assault of a child); and 288.7 (felony sexual intercourse, sodomy, oral copulation with a child under 10 years of age, by a person over 18 years of age, carries a life sentence).].

sexually violent predator, and eliminating the limitation that sex offenses against children must involve "substantial sexual conduct;"[48]

- Welfare and Institutions Code section 6605 previously required DMH to provide annual notice to each SVP of his or her right to petition for release, and if the person did not affirmatively waive his or her right, the court was required to set a show cause hearing. The Proposition 83 amendments to section 6605 require DMH to file an annual report with the court, which includes "consideration of whether the committed person currently meets the definition of a sexually violent predator." If DMH determines that the person either no longer meets the definition of an SVP, or that conditional release to a less restrictive alternative is in the best interest of the person and the community can be adequately protected, the director of DMH "shall authorize the person to petition the court" for conditional release or unconditional discharge.[49]

So although the voters may have believed (and were informed by the ballot materials prepared by the Attorney General, which were published on August 7, 2006) that they were adopting the other substantive amendments to the SVP program and definitions proposed in Proposition 83 (including the broadening of "sexually violent offense[s]" to include certain intent crimes, other forms of rape and sexual assault not covered under prior law, and "threatening to retaliate in the future against the victim or any other person;"[50] and broadening the definition of "conviction"[51]), these changes were *already in effect* pursuant to the enactment of SB 1128 on September 20, 2006, prior to the 2006 general election on November 7, 2006.[52]

---

[48] Compare Statutes 2006, chapter 337 (SB 1128), section 53 with Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 24, pages 18-19.

[49] Compare Statutes 2006, chapter 337 (SB 1128), section 57 with Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 29, page 20. Notwithstanding the apparent restriction imposed upon a committed person's right to petition for release under section 6605, Proposition 83 left largely untouched section 6608, which provides, in pertinent part: "Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release ~~and subsequent~~ or an unconditional discharge without the recommendation or concurrence of the Director of Mental Health." Thus, while the sections appear to make changes to the annual duties of DMH with respect to informing committed persons of their rights, the right to petition for release remains relatively intact. (Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 30, page 21.)

[50] Welfare and Institutions Code section 6600(b) (as amended, Stats. 2006, ch. 337 (SB 1128); Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 24, page 19.

[51] Welfare and Institutions Code section 6600(a)(2)(H-I) (as added, Stats. 2006, ch. 337 (SB 1128); Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 24, page 18.

[52] See Elections Code section 9605.

C. The Commission's December 6, 2013 Decision on the Request for Mandate Redetermination.

On January 15, 2013, Finance filed a Request for Mandate Redetermination alleging that Proposition 83, approved by the voters in the November 2006 general election, constitutes a subsequent change in law with respect to the *Sexually Violent Predators* program, and that the program is no longer reimbursable pursuant to Government Code section 17556(f).[53]

The Commission partially approved Finance's request on December 6, 2013, and adopted a New Test Claim Decision superseding the prior Test Claim Decision. Specifically, the Commission found that the following activities were no longer reimbursable because they had been expressly included in or were necessary to implement Proposition 83:

> **Activity 1** – Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
>
> **Activity 2** – Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)
>
> **Activity 3** – Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(j).)
>
> **Activity 5** – Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
>
> **Activity 6** – Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
>
> **Activity 7** – Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)[54]

In addition, the Commission found that activities 4 and 8 remained partially reimbursable, to the extent of costs and activities attendant to statutorily required probable cause hearings for alleged sexually violent predators were not expressly included in or necessary to implement Proposition 83:

> Therefore, the following activities are required as modified, only for probable cause hearings:
>
> **Activity 4-** Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)

---

[53] Exhibit A, Finance's Request for Mandate Redetermination.

[54] *Sexually Violent Predators (CSM-4509)*, 12-MR-01 New Test Claim Statement of Decision, adopted December 6, 2013, page 2.

> **Activity 8** – Transportation and housing for each potential sexually violent predator from at a secured facility to the probable cause hearing while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)[55]

The Commission thereafter adopted Amended Parameters and Guidelines consistent with the New Test Claim Decision on May 30, 2014, and a Statewide Cost Estimate on March 27, 2015.

D. The California Supreme Court's Decision Overturning and Remanding the Commission's Decision on the Request for Mandate Redetermination

The County of San Diego, joined by the Counties of Los Angeles, Orange, Sacramento, and San Bernardino, filed a petition for writ of mandate and complaint for declaratory relief in the Superior Court for the County of San Diego seeking a determination that the Commission's New Test Claim Decision was incorrect as a matter of law and should be vacated. The case proceeded to the California Supreme Court, and after briefing and oral argument, the Supreme Court rejected the Commission's reasoning and findings and granted the writ of mandate.[56]

The California Supreme Court began its consideration of Proposition 83 and the Commission's decision on the Request for Mandate Redetermination with a summary of the competing legal principles at play:

> To resolve the question before us, we must consider four distinct legal principles. First, the state must reimburse local governments for the costs of discharging mandates imposed by the Legislature. Second, this reimbursement requirement does not apply to those activities that are necessary to implement, or are expressly included in, a ballot measure approved by the voters. Third, a statute must be reenacted in full as amended if any part of it is amended. And fourth, the Legislature is prohibited from amending an initiative statute unless the initiative itself permits amendment.[57]

Beginning with article XIII B, section 6 and Government Code section 17556(f), the Court acknowledged that "the state must reimburse local governments for mandates imposed by the Legislature, but not for mandates imposed by the voters themselves through an initiative."[58] Thus, "[w]here the Legislature cannot use the ordinary legislative process to amend or alter duties imposed by the voters (see Cal. Const., art. II, § 10, subd. (c)), it can no longer be reasonably characterized as the source of those duties."[59]

However, the Court continued by stating that not every word printed in the body of an initiative falls within the scope of the statutory terms "expressly included" in a ballot measure:

---

[55] New Test Claim Statement of Decision, *Sexually Violent Predators (CSM-4509)*, 12-MR-01, adopted December 6, 2013, page 3.

[56] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196.

[57] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 206.

[58] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 207.

[59] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 207.

> The question left unresolved by these provisions is what, precisely, qualifies as a mandate imposed by the voters. Government Code section 17556, subdivision (f) exempts from reimbursement only those "duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters." The boundaries of this subdivision depend, then, on the definition of a "ballot measure" in section 17556. Our reading of the provision's text, the overall statutory structure, and related constitutional provisions persuades us that not every single word printed in the body of an initiative falls within the scope of the statutory terms "expressly included in…a ballot measure."[60]

The Court noted that Proposition 83 "reenacted verbatim" the provisions of Welfare and Institutions Code section 6601, 6605, and 6608 that the Commission had previously identified as imposing mandated activities. The changes that were made to these sections, the Court held, were minor, and non-substantive: "Whatever else Proposition 83 accomplished, it effectively left undisturbed these test claim statutes and the various mandates imposed therein."[61]

The Court therefore rejected the Commission's reasoning that amending and reenacting the relevant sections wholesale within the ballot measure was sufficient to satisfy the "expressly included in" prong of section 17556. Instead, the Court held: "Statutory provisions that are not actually reenacted and are instead considered to 'have been the law all along' cannot fairly be said to be *part of* a ballot measure."[62] Rather, the Court held: "The mere happenstance that the mandated duties were contained in test claim statutes that were amended in other respects not germane to any of the duties – and thus had to be reenacted in full under the state Constitution – should not in itself diminish their character as state mandates."[63]

The Court went on to address the State's argument that, based on Proposition 83's amendment clause, the "compelled reenactment of the test claim statutes transformed the state mandate into a voter-imposed mandate because the voters *simultaneously* limited the Legislature's ability to revise or repeal the test claim statutes."[64] The court explained the amendment clause as follows:

> The strict limitation on amending initiatives generally — and the relevance of the somewhat liberalized constraints imposed by Proposition 83's amendment clause — derive from the state constitution. Article II, section 10, subdivision (c) of the California Constitution provides that an initiative statute may be amended or repealed only by another voter initiative, "unless the initiative statute permits amendment or repeal without the electors' approval." The evident purpose of limiting the Legislature's power to amend an initiative statute "'is to "protect the people's initiative powers by precluding the Legislature from undoing what the

[60] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 207-208.

[61] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 208.

[62] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 209-210 (emphasis added) (citing *Vallejo etc. R. R. Co. v. Reed Orchard Co.* (1918) 177 Cal. 249, 255).

[63] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 210.

[64] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211 (emphasis in original).

> people have done, without the electorate's consent."'" (*Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 597 (*Shaw*).) But we have never had occasion to consider precisely "what the people have done" and what qualifies as "undoing" (*ibid*.) when the subject is a statutory provision whose reenactment was constitutionally compelled under article IV, section 9 of the Constitution.[65]

The Court, however, disagreed with the State's assumption that because of article II, section 10(c), "none of the technically restated provisions may be amended, except as provided in the initiative's amendment clause."[66] If that were the case, then all of the nine subsequent legislative amendments to the test claim statutes technically restated in Proposition 83, as identified by the amicus parties, would be unconstitutional.[67]

The Court distinguished *Shaw*, on which the State relied, saying, "that case analyzed a legislative amendment aimed at the heart of a voter initiative, not a bystander provision that had been only technically restated."[68]

> By contrast, nothing in Proposition 83 focused on duties local governments were already performing under the SVPA. No provision amended those duties in any substantive way. Nor did any aspect of the initiative's structure or other indicia of its purpose suggest that the listed duties merited special protection from alteration by the Legislature….Indeed, no indication appears in the text of the initiative, nor in the ballot pamphlet, to suggest voters would have reasonably understood they were restricting the Legislature from amending or modifying any of the duties set forth in the test claim statutes. Nor is an overbroad construction of article II, section 10 of the California Constitution necessary to safeguard the people's right of initiative. To the contrary: Imposing such a limitation as a matter of course on provisions that are merely technically restated would unduly burden the people's willingness to amend existing laws by initiative.[69]

The Court held that a "more prudent conclusion" was to interpret article II, section 10 and the Amendment Clause more narrowly, and on that basis the Court announced the following rule:

> When technical reenactments are required under article IV, section 9 of the Constitution – yet involve no substantive change in a given statutory provision – the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process. This conclusion applies *unless* the provision is integral to accomplishing the electorate's goals in enacting the

[65] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211.

[66] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211.

[67] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211.

[68] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 212.

[69] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 213-214.

> initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute.[70]

In other words, a provision only technically restated, without amendment, in a ballot measure should not be considered a voter-imposed mandate merely by virtue of its restatement within the initiative "*unless* the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute."[71] Therefore, where the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute, the provision is reasonably necessary to implement the Proposition although it is not "expressly included" in it within the meaning of Government code section 17556(f). This is so because any other interpretation would thwart the will of the people.

Here, the Court noted that Finance "offer[s] no reason – putting aside for the moment the expanded SVP definition – why these restated provisions should be deemed integral to accomplishing the initiative's goals. Nor have they identified any basis for believing that it was within the scope of the voters' intended purpose in enacting the initiative to limit the Legislature's capacity to alter or amend these provisions."[72] Thus, the court concluded that the Commission erred in its finding that those provisions were expressly included in a ballot measure approved by the voters merely because they were restated in the initiative's text, and therefore transformed into mandates of the voters.[73]

The Court then addressed the Commission's findings that the remaining procedures required by the test claim statutes (those that were not restated in the ballot measure) were necessary to implement the ballot measure because they were "indispensable to the implementation of other provisions that – according to the Commission – were 'expressly included' in Proposition 83."[74]

In analyzing that question, the Court considered the State's argument that the expansion of the "definition" of an SVP under section 6600 might be held to impose a voter mandate and noted that Proposition 83 expanded the definition of an SVP in two ways:

> [T]he voters broadened the definition of an SVP within the meaning of Welfare and Institutions Code section 6600 in *two ways*. First, they reduced the required number of victims, so that an offender need only have been 'convicted of a sexually violent offense against one or more victims," instead of two or more victims. Second, the voters eliminated a provision that had capped at one the

---

[70] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214 (emphasis in original).

[71] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214 (emphasis in original).

[72] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214-215.

[73] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 215.

[74] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 215.

> number of juvenile adjudications that could be considered a prior qualifying conviction.[75]

In this respect, the State contended that the test claim duties became necessary to implement the ballot measure, in that the Counties had been under no obligation to perform any duties for this class of offenders until the voters by initiative expanded the definition of an SVP.[76]

The Court went on to observe:

> None of the specified local government duties is triggered until an inmate is identified as someone who may be an SVP. (See §§ 6601, 6603, 6604, 6605, 6608.) Although the SVP definition does not *itself* impose any particular duties on local governments, it is necessarily incorporated into each of the listed activities. Indeed, whether a county has a duty to act (and, if so, what it must do) depends on the SVP definition…When more people qualify as potential SVPs, a county must review more records. It must file more commitment petitions, and conduct more trials. One can imagine that if the roles were reversed — i.e., if the Legislature expanded the scope of a voter-created SVP program — the Counties would be claiming that the burdens imposed by the expanded legislative definition constituted a state mandate.[77]

On this basis, the Court remanded the matter to the Commission, stating:

> Unfortunately, the Commission never considered whether the expanded SVP definition in Proposition 83 transformed the test claim statutes as a whole into a voter-imposed mandate or, alternatively, did so to the extent the expanded definition incrementally imposed new, additional duties on the Counties. Its ruling granting the State respondents' request for mandate redetermination instead rested entirely on grounds that we now disapprove. Moreover, the parties admit — and the Court of Appeal found — that the current record is insufficient to establish how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to local governments….Under the circumstances, we find it prudent to remand the matter to the Commission to enable it to address these arguments in the first instance.[78]

Accordingly, the case was remanded to the Superior Court, which issued a modified judgment and writ, directing the Commission to rehear Finance's request in a manner consistent with the opinion of the California Supreme Court.[79]

---

[75] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216 ([emphasis added] citing Welfare and Institutions Code section 6600(a; g), as amended by Proposition 83 (Nov. 2006).

[76] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216.

[77] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216-217.

[78] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

[79] Exhibit D, Notice of Entry of Judgment, Judgment, and Writ of Mandate, San Diego Superior Court, Case No. 37-2014-00005050-CU-WM-CTL, served June 5, 2019, page 17.

III. Positions of the Parties and Interested Person

A. Department of Finance, Requester

Finance's response to the Request for Comment and Legal Argument Relating to the Reconsideration of the Request for Mandate Redetermination on Remand argues that the voters, by adopting Proposition 83 "materially expanded" the definition of a sexually violent predator, "and directed that the Legislature could not narrow or repeal that definition through its ordinary legislative process."[80] Finance argues that "[t]he source of that expanded definition is now the voters," and "[a]fter that expansion, the costs incurred by local governments in complying with the Sexually Violent Predators mandate flow from Proposition 83 and are 'necessary to implement' the ballot measure for purposes of Government Code section 17556, subdivision (f)."[81] Specifically, Finance asserts:

> In adopting Proposition 83, the voters expanded the definition of "sexually violent predator" in several ways. First, they reduced the required number of victims, so that the offender must have "been convicted of a sexually violent offense against one or more victims," as opposed to "two or more" in the original statute. (Welf. & Inst. Code, § 6600, subd. (a)(1).) Second, the voters expanded the set of crimes that qualify as a "sexually violent offense," adding any felony violation of Penal Code section 207 (kidnapping), section 209 (kidnapping for ransom, reward, or extortion, or to commit robbery or rape), or section 220 of the Penal Code (assault to commit mayhem, rape, sodomy, or oral copulation), committed with the intent to commit another enumerated "sexually violent offense." (Welf. & Inst. Code, § 6600, subd. (b).) Third, the voters directed that if an offender had a prior conviction for which he "was committed to the Department of the Youth Authority pursuant to [Welfare and Institutions Code] Section 1731.5," or that "resulted in an indeterminate prison sentence," that prior conviction "shall be considered a conviction for a sexually violent offense." (Welf. & Inst. Code, § 6600, subd. (a)(2)(H), (I).)[82]

Finance argues that "[t]his expansion of the category of people who would be subject to the SVPA process was a central purpose of Proposition 83."[83] Finance points to section 2 of Proposition 83, which states that the existing SVPA "must be strengthened and improved," and section 31, which states "[i]t is the intent of the People of the State of California in enacting this

---

[80] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 1.

[81] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 1.

[82] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, pages 1-2.

[83] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

measure to strengthen and improve the laws that punish and control sexual offenders."[84] Finance also relies on statements in the Voter Guide relating to expanding the definition of a sexually violent predator and making more offenders eligible for SVP commitment.[85]

Further, Finance asserts that "[t]he voters also insulated these definitional changes from legislative repeal or revision," with section 33 of Proposition 83, which states that "[t]he provisions of this act shall not be amended by the Legislature except by a statute passed in each house by rollcall vote…two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters."[86] Finance concludes that "the Legislature cannot modify the SVPA through its normal legislative process to revert to the definition of 'sexually violent predator' that existed before Proposition 83.[87]

Finance then argues that all of the costs and duties of the SVPA "flow from the definition of 'sexually violent predator.'"[88] Finance states that "[t]he entire purpose of the SVPA is to provide a mechanism for processing and, where appropriate, civilly committing the category of offenders defined as 'sexually violent predators.'"[89] Finance concludes: "Regardless of the number of offenders processed by local governments in a particular year, it is not disputed that the voters expanded the category of offenders who 'shall' be referred to local governments as a part of the SVPA process…All those offenders are now referred to local governments at the direction of the voters – not the Legislature."[90]

Finance did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

B. County of Los Angeles

The County of Los Angeles argues that Finance has not met its burden under Government Code section 17570. The County asserts that "DOF's argument is conclusory in stating that because the voters 'are the source' of the expanded definition of Prop. 83, that the state is no longer

---

[84] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

[85] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

[86] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 2; Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 33, page 21.

[87] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

[88] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

[89] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 3.

[90] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 3.

financially responsible for reimbursing such costs."[91] Accordingly, the County argues that "DOF has failed to make a showing that the state's liability…has been modified based on a subsequent change in law."[92]

The County argues that the expanded definition of a sexually violent predator did not transform the test claim statutes into a voter-imposed mandate:

> The definition of an SVP has always involved a two part process. First, an individual must have been convicted of a crime involving sexual violence. A second component is that an individual "has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent behavior." Prior to Proposition 83, WIC section 6600 defined a SVP as an individual who had been convicted of two or more qualifying sexually violent offenses. The passage of Proposition 83 resulted in the reduction of the qualifying offense to one or more. However, Proposition 83 left unchanged the mental disorder component of the SVP definition.[93]

The County also notes that "DOF ignores the legislature's own expansion of the SVP definition in SB 1128." The County asserts that "[w]hile it is true that Proposition 83 expanded the set of crimes that qualify as 'sexually violent offenses'…it avoids the fact that the legislature in enacting SB 1128, prior to the passage of Proposition 83, had already expanded the SVP definition to include those offenses."[94] The County goes on to assert that "DOF incorrectly states that 'it is undisputed that the voters expanded the category of offenders who "shall" be referred to local governments as part of the SVPA process.'"[95] The County again explains that a person is not deemed an SVP based on "simply whether they have committed one or more qualifying offenses, there is also a mental evaluation component." The County argues that Finance's statement that "all those offenders are now referred to local governments at the direction of the voters" is inaccurate: "This statement misconstrues the SVP identification process by suggesting that Proposition 83 automatically resulted in referrals being generated, giving no consideration to the second prong which involves mental health diagnoses."[96]

Finally, the County argues that the expanded definition of an SVP pursuant to Proposition 83 did not result in an increase in referrals to local governments. The County again argues that the

---

[91] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 3.

[92] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 3.

[93] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 3.

[94] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, pages 3-4.

[95] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 4.

[96] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 4.

mental health diagnosis is critical, and that the average annual number of petitions actually decreased after Proposition 83:

> CDCR's primary role in the SVP identification process was to refer only those prisoners that had the requisite prior convictions. The expanded definition in Proposition 83 resulted in an increase in the number of referrals from CDCR to [the Department of State Hospitals]. (See Table 3 of the July 2011 California State Audit on the Sex Offender Commitment Program, "SVP Audit"). Although the number of individuals screened by CDCR and DSH increased, the number of referrals to local government did not increase as expected. In Los Angeles County, the average annual number of referrals from DSH to the Los Angeles District Attorney's Office was 32.9 cases from 1996-2006. The average annual number of referrals after the passage of Proposition 83 was 23.5 cases.[97]

The County cites a "Dr. Brian Abbott, a psychologist who has conducted over 500 SVP evaluations since 2002," and who offers that the most common diagnosis leading to an SVP designation is one that requires a pattern of behavior and an inability to control impulses or urges, which manifests over a period of months.[98] Dr. Abbott contends that this diagnosis must be established through a pattern of conduct, because a person subject to evaluation "typically [would] not reveal information about their sexual urges and fantasies." And thus, the reduction from two offenses to one means that it is more difficult to establish that pattern for a substantial number of cases referred from CDCR to DSH for evaluation.[99] The County of Los Angeles data, which breaks down its referral data by year, however, indicates an initial spike in referrals after the 2006 amendments in 2007 (46) and 2008 (44), up from an average of just under 30 per year in the five years prior.[100] And, like several other counties, the county notes that it does not file petitions on all referrals received. Rather, although it received 45 referrals in 2011, it filed petitions on just 30 of those referrals.[101]

The County did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

C. County of Orange

The County of Orange also argues that Finance has not met its burden: "On March 26, 2019, the DOF submitted its comments, which cited no evidence regarding whether, and to what extent,

---

[97] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 5.

[98] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, pages 6; 14-17.

[99] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, pages 6; 14-17.

[100] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 10.

[101] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 10.

the number of referrals to local governments was affected by Proposition 83's expanded SVP definition."[102] The County further argues:

> Given that the Supreme Court has already opined that the current record is insufficient to establish that such a change resulted from the simple expansion of the SVP definition, the DOF needed to create a record and provide evidence of the practical effects and costs flowing from this change. By declining to do so, it failed to meet its burden.[103]

The County argues that in Finance's Comments, it "asserted that the new SVP definition expanded the 'category of people' who could be subject to the SVP protocols and, therefore, the costs relating to previously state-mandated duties now 'flow from' this definition."[104] The County argues that "[t]his assertion is completely meaningless in the absence of any data demonstrating that the change in definition had anything other than a de minimis effect on referrals to local governments."[105]

The County argues that Proposition 83 did "nothing" to transform the test claim statutes into a voter-imposed mandate.[106] The County states that "[h]ad Proposition 83 failed, the fundamental burdens of the SVPA protocols would still exist…" and that "Proposition 83 merely asked voters whether they wanted to amend the act in a limited manner and recited a large portion of the remaining statutory scheme to provide the voters with context to guide their decision."[107] The County asserts that "[i]n particular, changes to the SVP definition resulting from Proposition 83 did not require local entities to perform new services or provide a higher level of service."[108] The County acknowledges that "[w]hile the Supreme Court acknowledge [sic] the possibility that the definitional change might, as a practical matter, modify legal duties or significantly increase the burdens of those duties, the DOF has presented no evidence that this actually happened."[109] The County, on the other hand, provides evidence that from 2000 through 2006, it filed an

---

[102] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, page 2.

[103] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, page 2.

[104] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, page 3.

[105] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, page 3.

[106] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, page 3.

[107] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, page 3.

[108] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, page 3.

[109] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, page 4.

average of 4.43 commitment cases per year, while from 2007 through 2018, the average dropped to 3.42 cases per year.[110] The county does not provide a breakdown by whether there were one or two victims or provide any annual data that might show an overall trend.

The County did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

D. County of Sacramento

The County of Sacramento argues that Proposition 83 does not constitute a voter-imposed mandate because, "[i]n short, the reimbursable activities have not changed since Jessica's Law was adopted by the voters."[111] The County asserts that "[t]he constitutionally compelled reenactment of the unaltered test claim statutes cannot be construed as a decision by the voters to impose duties that the ballot measure did not add or amend."[112] The County also notes that "the Department of Finance in their March 22, 2019 comments failed to provide evidence as to this issue and has not met its initial burden of proof."[113]

In addition, the County submits evidence that, as a practical matter, "since the passage of Jessica's Law, the number of referrals has actually decreased state-wide."[114] The County cites a 2011 report from the California State Auditor, which shows a temporary increase in the number of referrals, petitions, and commitments in the first two years after Proposition 83, followed by a significant decrease.[115] The County states: "Sacramento County's statistics are similar to state-wide statistics." In 2007 and 2008, the County experienced a significant increase in petitions filed, but all had more than one victim, and therefore were not part of the population of potential SVPs brought within the coverage of the SVP program by Proposition 83. Since 2008, the County asserts, "the total number of petitions filed has steadily dropped, and there have never been more than three single-victim petitions filed in a year."[116] The County further states that "[t]he District Attorney has located at least four referrals for which a petition was not filed, and several that were dismissed either prior to or shortly after the probable cause hearing."[117] The

---

[110] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, pages 5, 51.

[111] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 2.

[112] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 2.

[113] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 2.

[114] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 2.

[115] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 2.

[116] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 3.

[117] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 3.

County concludes: "Regardless, the change in law did not increase the number of referrals to Sacramento County and in fact appears to have greatly reduced the number of referrals and certainly the number of petitions filed."[118] The County submits a declaration from Brian Morgan, of the Sacramento County District Attorney's office, which includes a year-by-year breakdown of the number of petitions filed, and how many of those were based on only an offense against a single victim and how many on an offense against more than one victim.[119] That data shows a spike from 2006 to 2008 of SVP filings with more than one victim. [120] Then from 2009 to 2019 it shows that there was a significant reduction of total filings and that about 30 percent of the filings that there were (15 out of a total of 50) were with a single victim.[121]

The County did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

E. County of San Bernardino

The County of San Bernardino states that it "objects to the Commission's request for comments at this time."[122] The County asserts that Finance should be required to first establish "its legal and factual basis for its redetermination request."[123] The County argues that "[o]nly after DOF has met this burden should interested parties be required to submit comments," and "[s]ince the DOF has not set forth a factual basis for seeking redetermination, the County of San Bernardino hereby reserves the right to submit further data regarding specific SVP cases, should the Commission find that DOF has met its initial burden."[124]

The County argues that Proposition 83 "modified the SVP criteria by decreasing the number of victims from two to one," but that "this change is de minimis when compared to the overall SVP program and did not relieve the counties of their preexisting state mandated activities…"[125]

The County asserts that there is no significant statistical increase in SVP filings and that "[t]he likely reason…is because the offender is still required to be diagnosed with a mental disorder

---

[118] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 3.

[119] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 4.

[120] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 4.

[121] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 4.

[122] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 1.

[123] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 2.

[124] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 2.

[125] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 2.

and such diagnoses require demonstration of a pattern of behaviors, fantasies or urges that have occurred for at least six months, which would be difficult to obtain in a case with a single victim."[126] In other words, even though the number of underlying offenses needed was reduced, the fact that an individual still must be diagnosed with a "congenital or acquired condition affecting the emotional or volitional capacity that pre-disposes the person to the commission of criminal sexual acts" means that the population of potential SVPs is not significantly increased due to the relatively high burden of the final criterion.[127] Finally, the County asserts that its data is "[s]imilar to the statewide data trend," in that it has declined generally in the years following Proposition 83: "[t]he data available at this time…indicates that prior to Jessica's Law, 2002 to 2006, the average number of SVP filings countywide was 9.2 per year."[128] The County states that "[a]fter Jessica's Law passed, 2007, to 2018, the average number of SVP filings countywide was 6 per year."[129] The county does not provide a break down by whether there were one or two victims or provide any annual data that might show an overall trend.

The County did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

F. County of San Diego

The County of San Diego argues that Finance has the initial burden to demonstrate that the expanded definition of a sexually violent predator constitutes a subsequent change in law, and that it has not yet met that burden. The County cites Government Code section 17570(d), and section 1190.1(c) of the Commission's regulations, which require a detailed analysis and narrative, signed under penalty of perjury, demonstrating how and why the State's liability for mandate reimbursement has been modified by a subsequent change in law.[130] The County notes that "[t]he question presented in the DOF's 2013 request – whether the reenactment of SVPA provisions in Proposition 83 constituted a subsequent change in law…was resolved by the Supreme Court in 2018." The County argues that "[b]ecause the Supreme Court rejected the only basis asserted by DOF in its request for redetermination, its pending request is facially deficient."[131]

---

[126] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 3.

[127] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 3.

[128] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 4.

[129] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 4.

[130] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, pages 2-3.

[131] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, page 3.

The County goes on to argue that Finance's Comments, filed March 22, 2019, are conclusory and "unsupported by any factual analysis."[132] The County argues that Finance failed to provide any data or evidence regarding the effect of Proposition 83 on the number of referrals to local government, and that "while *in theory*, the expanded definition could result in more referrals, as further discussed below, the actual facts presented in the State's own audit demonstrates that, *in reality*, the 'expanded definition' has not resulted in a sustained number of higher referrals being made to local governments."[133] The County continues:

> The State's own audit indicates that the "expanded definition" of SVP has had, at most, a nominal effect on the number of referrals to counties, and thus it can't be said that the definitional changes so altered the duties imposed on local governments that the source of all those duties now derives from the voters as opposed to the Legislature. Additionally, as noted by the Sacramento County District Attorney's Office in its March 26, 2013 letter to the Commission: "The legislature chose to have these civil proceedings handled by the local entities. It can remove that requirement from the local entities if it so chooses…" The fact that there may be limits on the Legislature's ability to narrow the definition of an SVP in a manner that is inconsistent with Proposition 83 is of no moment.[134]

The County goes on to argue that a July 2011 report by the California State Auditor concluded that "while there was a dramatic increase in the number of referrals from the Department of Corrections ("Corrections") to the state Department of Mental Health ("Mental Health") after Senate Bill 1128 became law and the voters passed Prop. 83, there was only a brief uptick in the number of referrals to local designated counsel in 2006 through 2008, after which the number of referrals dropped to the pre-Proposition 83 levels."[135] The County also cites the following from the 2011 California State Auditor's report:

> Thus, Jessica's Law has not resulted in what some expected: the commitment as SVPs of many more offenders. Although an initial spike in commitments occurred in 2006 and 2007, this increase has not been sustained. By expanding the population of potential SVPs to include offenders with only one victim rather than two, Jessica's Law may have unintentionally removed an indirect but effective filter for offenders who do not qualify as SVPs because they lack diagnosed mental disorders that predispose them to criminal sexual acts. In other words, the fact that an offender has had more than one victim may correlate to the

[132] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, page 4.

[133] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, page 4.

[134] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, page 5.

[135] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, page 5.

likelihood that he or she has a diagnosed mental disorder that increases the risk of recidivism.[136]

The County states that it has requested data from the Department of State Hospitals on the number of referrals to designated counsel, both in the County of San Diego and statewide, for the years 1996 through 2018: "Since the DOF has not set forth a factual basis for seeking redetermination, the County hereby reserves the right to submit further data should the Commission find that DOF has met its initial burden."[137] In subsequent Late Comments on the Request for Mandate Redetermination on Remand, the County of San Diego submitted data obtained from the Department of State Hospitals, which show a small increase in the number of referrals from State Hospitals to counties, and specifically to the County of San Diego, between 2006 and 2007, the year of and the first full year after both Proposition 83 and Senate Bill 1128 became law.[138] However, the same data show that over the next several years after the adoption of Proposition 83, those referrals, both statewide and in the County steadily declined, and have remained well below pre-Proposition 83 levels.[139]

Finally, with respect to the changes to the definition of a sexually violent predator, the County argues that the program, "and the duties it imposes on local governments, would have remained in place whether or not Proposition 83 had been approved by the voters."[140] The County argues that "Proposition 83 could only be said to have 'transformed' these duties from obligations imposed by the State to obligations imposed by the voters, if the definitional changes to SVP fundamentally changed the operation of the SVP program as it pertains to local governments."[141] The County argues that "[t]o the extent there exists a small population of offenders who would not have otherwise been eligible for commitment under the SVPA but for Jessica's Law, the County contends the added costs incurred by the County in fulfilling its duties with respect to these offenders should nonetheless be reimbursed as part of the SVP program established by the Legislature."[142] The data provided by the county does not provide a break down by whether there were one or two victims for the referrals that were made.

---

[136] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, pages 5-6 (quoting *Sex Offender Commitment Program*, California State Auditor, July 2011 Report, page 15 [See Exhibit O]).

[137] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, page 6.

[138] Exhibit M, County of San Diego's Late Comments on the Request for Mandate Redetermination on Remand, pages 2; 4.

[139] Exhibit M, County of San Diego's Late Comments on the Request for Mandate Redetermination on Remand, pages 2; 4.

[140] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, page 6.

[141] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, page 6.

[142] Exhibit K, County of San Diego's Comments on the Request for Mandate Redetermination on Remand, pages 6-7.

The County did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

G. Office of the Los Angeles District Attorney

The District Attorney for the County of Los Angeles argues that the expanded definition of an SVP did not alter the duties performed by the counties, but instead only expanded the number of possible cases that could be referred.[143] However, the District Attorney also asserts that the greater burden of the expanded definition is borne by the state agencies implementing the SVPA.[144] The state entities "conduct multiple levels of screening," and "[t]he vast majority of cases considered by the Department of State Hospitals are not referred to the DA for filing of an SVP petition."[145] The District Attorney submits annual statistics for the number of SVP referrals, which show a spike in referrals in 2007 (46) and 2008 (44) referrals followed by a general decline thereafter, except for another one-year spike in 2011 (45).[146]

The Los Angeles County District Attorneys' Office did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

IV. Discussion

Under Government Code section 17570, the Commission may consider a request to adopt a new test claim decision to supersede a prior test claim decision based on a subsequent change in law which modifies the state's liability. As relevant to this case, a "subsequent change in law" is defined as "a change in law that requires a finding that an incurred cost . . . is not a cost mandated by the state pursuant to [Government Code] Section 17556."[147] If the Commission adopts a new test claim decision that supersedes the previously adopted test claim decision, the Commission is required to adopt new parameters and guidelines or amend existing parameters and guidelines.[148]

The Department of Finance filed this request for a new test claim decision in accordance with Government Code section 17570, contending that the test claim statutes in the *Sexually Violent Predators*, CSM-4509 program impose duties that are necessary to implement or are expressly included in Proposition 83, adopted by the voters on November 7, 2006, in accordance with Government Code section 17556(f). Government Code section 17556(f) states that the Commission shall not find "costs mandated by the state" when

---

[143] Exhibit L, Los Angeles County District Attorney's Office's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

[144] Exhibit L, Los Angeles County District Attorney's Office's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

[145] Exhibit L, Los Angeles County District Attorney's Office's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

[146] Exhibit L, Los Angeles County District Attorney's Office's Late Comments on the Request for Mandate Redetermination on Remand, page 3.

[147] Government Code section 17570(a)(2) (Stats. 2010, ch. 719).

[148] Government Code section 17570 (Stats. 2010, ch. 719).

> The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

Therefore, the issue before the Commission is whether Proposition 83 constitutes a subsequent change in law that modifies the state's liability for the *Sexually Violent Predators*, CSM-4509 program.

Pursuant to the court's Judgment and Writ, the Commission is required to consider, on remand "whether the expanded SVP definition in Proposition 83 transformed the test claim statutes as a whole into a voter-imposed mandate or, alternatively, did so to the extent the expanded definition incrementally imposed new, additional duties on the Counties."[149] Thus, the Court remanded this matter to the Commission ". . . so that it can determine, in the first instance, whether and how the initiative's expanded definition of an SVP may affect the state's obligation to reimburse the Counties for implementing the amended statute."[150]

In addition, the court noted that the current record is insufficient to establish how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to local governments and, thus, the court remanded the matter to the Commission to enable it to address these arguments in the first instance.[151]

A. <u>The Expanded SVP Definition and Other Indicia Support the Conclusion That Voters Reasonably Intended to Prohibit the Legislature from Repealing or Significantly Reducing the Civil Commitment Program for SVPs; However, the Voter Mandate Did Not Impose *Any* New Duties or Activities on Local Government, Nor Did It Require the State To Impose Any Duties or Activities on Local Government. Therefore, the Duties Remain Mandated by the State.</u>

1. <u>The Record Shows That Although the Number of SVP Referrals Has Not Increased Over Time, at Least Some Portion of All New Referrals Since 2006 Are Based on a Single Victim and Those Referrals Are Therefore Triggered by Proposition 83 and Not By the Test Claim Statutes or Other Later Changes in Law.</u>

The Court's direction to the Commission on remand follows the State's argument that "the specified local government duties became necessary to implement the ballot measure, in that the Counties had been under no obligation to perform any duties for this *class of offenders* until the voters by initiative expanded the definition of an SVP."[152] The Court acknowledged that "[a]lthough the SVP definition does not itself impose any particular duties on local governments,

---

[149] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

[150] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 201.

[151] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

[152] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

it is necessarily incorporated into each of the listed activities."[153] The Court reasoned that "[n]one of the specified local government duties is triggered until an inmate is identified as someone who may be an SVP…, [w]hen more people qualify as potential SVPs, a county must review more records" and "[i]t must file more commitment petitions, and conduct more trials."[154] However, the court found that the record was insufficient to establish how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to counties and, thus, remanded the case back for the Commission to address this argument.[155]

In reference to the "expanded definition," the Court agrees that Proposition 83 broadened the definition of an SVP in the following two ways:

> [T]he voters broadened the definition of an SVP within the meaning of Welfare and Institutions Code section 6600 in two ways. First, they reduced the required number of victims, so that an offender need only have been 'convicted of a sexually violent offense against one or more victims," instead of two or more victims. Second, the voters eliminated a provision that had capped at one the number of juvenile adjudications that could be considered a prior qualifying conviction.[156]

As the court points out, neither SB 1128 nor Proposition 83 changed the duties or the activities that a local government must perform under the SVP program once a referral has been made. And the court did not attribute to Proposition 83 the expansion of the list of underlying offenses that qualify as "sexually violent offense[s]."[157] Those changes were previously in effect with the enactment of SB 1128.[158]

Thus, the question whether Proposition 83 "transformed" the test claim statutes "to the extent the expanded definition incrementally imposed new, additional duties…" must refer to the "*class of offenders*" that would not have been subject to civil commitment as SVPs but for the enactment of Proposition 83; i.e., those individuals convicted of a sexually violent offense against only *one* victim.

In response to the Commission's Request for Comment and Legal Argument Relating to the Reconsideration of the Request for Mandate Redetermination on Remand, Finance asserts, without evidence, that all SVP referrals are now as a result of Proposition 83:

> Regardless of the number of offenders processed by local governments in a particular year, it is not disputed that the voters expanded the category of offenders who "shall" be referred to local governments as part of the SVPA process when they adopted Proposition 83 and altered the definition of "sexually

---

[153] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216.

[154] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

[155] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

[156] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216 (citing Welfare and Institutions Code section 6600(a; g), as amended by Proposition 83 (Nov. 2006).

[157] Welfare and Institutions Code section 6600(b) (Stats. 2006, chapter 337 (SB 1128)).

[158] Statutes 2006, chapter 337, section 53.

> violent predator." All those offenders are now referred to local governments at the direction of the voters—not the Legislature. This mandate is now imposed by the voters and is no longer reimbursable by the State.[159]

Thus Finance seems to argue that since the trigger for the mandate is now one versus two offenses, Proposition 83 is the source of the mandate for all referrals as a matter of law, regardless of the number of offenders actually referred to local government as a result of only one offense. However, the court directed the Commission to establish a record to address how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to counties.[160] The number of referrals to counties as a result of Proposition 83 is a question that must be based on evidence in the record.

As described in the Background, the civil commitment process begins when the Department of Corrections refers a potential SVP, at least six months before the person's release date, for screening by the Department of Corrections and the Board of Prison Terms (now the Parole Board).[161] If that screening finds that the person may be an SVP, the statutes require a mental health examination by two qualified psychiatrists or psychologists with the Department of Mental Health (now Department of State Hospitals).[162] The Department of State Hospitals evaluates the person using a standardized assessment protocol developed by the Department, which includes assessing mental disorders and risk factors. The two evaluating professionals must concur that the person is an SVP; but if they do not, a second evaluation by independent professionals outside state government is required.[163] The Department then forwards a request to the county in which the offense occurred for a petition to have the person committed only if the two professionals performing the evaluation find that the person *is* an SVP.[164] If the county's designated counsel concurs with the recommendation, the county counsel or district attorney is required to file a petition for civil commitment.[165]

Several counties submitted argument and evidence regarding the number of SVP referrals to counties, or in some cases petitions for commitment filed by the county, before and after Proposition 83. The evidence does not show a permanent increase in the number of referrals to counties, commitment petitions filed, or commitments imposed following the passage of Proposition 83. Rather, it shows a spike in referrals and petitions in 2007 and 2008, followed by a significant decline in the following years. Some of the counties assert that the decline of referrals and petitions is because the definitional changes made in Proposition 83 did not alter the final, controlling criterion for civil commitment of an SVP – that the potential SVP must also

---

[159] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand.

[160] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

[161] Welfare and Institutions Code section 6601.

[162] Welfare and Institutions Code section 6601.

[163] Welfare and Institutions Code section 6601.

[164] Welfare and Institutions Code section 6601.

[165] Welfare and Institutions Code section 6601.

have a diagnosable mental condition that necessitates confinement and treatment.[166] However, as discussed below, a likely cause for the overall decrease in referrals is the change made by Statutes 2006, chapter 337 (SB 1128) from a two-year period of commitment (requiring new SVP commitment every two years) to an indefinite period of commitment. In addition, data from one county shows a number of SVP referrals of persons convicted of a sexually violent offense against one victim in accordance with Proposition 83, though the other counties did not provide breakdowns of whether their referrals were based on an offense against one or more than one victim.

Specifically, the County of Los Angeles asserts, based on the declaration of Deputy District Attorney Jay Grobeson of the Los Angeles County District Attorney's Office, that the county received an average of 32.9 SVP referrals per year from 1996 through 2006 when Proposition 83 was adopted, and an average of only 23.5 per year after 2006.[167] The Los Angeles data in the record shows that after an initial spike in 2007 and 2008 of 44 and 46 SVP referrals respectively, there was in fact a significant decline to an average of 20.75 referrals annually from 2009-2016.[168]

The County of Orange tracks the petitions for commitment filed, stating that the County filed an average of 4.43 commitment cases per year between 2000 and 2006, and an average of 3.42 cases per year between 2007 and 2018 and does not indicate what its numbers were for 2007 and 2008 specifically - but does note that the State Auditor found an initial spike overall for those years followed by a decline thereafter.[169]

The County of San Bernardino asserts that the expanded definition based on Proposition 83 "had no discernable [sic] long term effect on the number of SVP filings" in the County: "San Bernardino County has experienced a general decline in SVP filings year over year since the passage of Jessica's Law," though it notes an initial spike in referrals in 2006 and 2007.[170] Supervising Deputy County Counsel Carol A. Greene of San Bernardino County states under penalty of perjury that from 2002 to 2006, the county filed an average of 9.2 SVP petitions per year, while "[a]fter Jessica's Law passed, 2007 to 2018, the average number of SVP filings countywide was 6 per year," but does not break down the number of referrals by year.[171]

---

[166] See, e.g., Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, pages 4-5.

[167] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, pages 5; 10. See also, Exhibit L, Los Angeles County District Attorney's Office's Late Comments on the Request for Mandate Redetermination on Remand.

[168] Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 10.

[169] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, pages 5; 50-51.

[170] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 3.

[171] Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 3.

The County of San Diego submitted evidence showing that in the years prior to Proposition 83 (from 1996 through 2006), the County received between five and 29 SVP referrals per year.[172] In the years following Proposition 83, through 2018, the County received between one and nine referrals per year, averaging 6.33 per year in 2004-2006. Then in 2007, the first full year of implementation after Proposition 83 was adopted, the County received 12 referrals, nearly double that of the prior three years, but this spike fell off and a general decline in referrals followed.[173] The statewide data the county provided shows a similar trend: a "spike" in referrals in 2007 and 2008 followed by a relatively steady decline (2011 being an apparent outlier[174]).

And the County of Sacramento data shows, after an initial spike in petitions in 2006, 2007, and 2008 (19, 12 and 18, respectively), petitions have steadily declined with fewer petitions filed each year than before Proposition 83.[175] However, the Sacramento County data indicates that approximately one-third of the petitions it has filed since 2009 were based on a conviction of a sexually violent offense against a single victim and therefore there is evidence in the record that at least some portion of all referrals and petitions are now based on only a single victim.[176]

Some of the counties cited to or attached the California State Auditor's report (Report 2010-116, issued July 2011), which covers a time period before and after Proposition 83 (2005-2010), and tracks the number of mental health screenings and referrals to the counties for civil commitment of SVPs statewide.[177] The audit was focused on the screening and evaluation processes at the California Department of Corrections and Rehabilitation and the Department of Mental Health (now the Department of Corrections and Department of State Hospitals, respectively), which occur before the referral to the county is made.[178] But the audit also acknowledged the changes

---

[172] Exhibit M, County of San Diego's Late Comments on the Request for Mandate Redetermination, page 4.

[173] Exhibit M, County of San Diego's Late Comments on the Request for Mandate Redetermination, page 4.

[174] The reason for the 2011 spike is unclear, however, that does correlate with the last year that Mental Health was authorized to use contracted evaluators. According to the California State Auditor's 2011 report: "our review also found that Mental Health primarily used contracted evaluators to perform its evaluations—which state law expressly permits through the end of 2011. Mental Health indicated that it has had difficulty attracting qualified evaluators to its employment and hopes to remedy the situation by establishing a new position with higher pay that is more competitive with the contractors." (Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand (July 2011 Report 2010-116), pages 6-49.

[175] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 3-4.

[176] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 4.

[177] E.g., Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, pages 6-49.

[178] Exhibit O, Sex Offender Commitment Program, California State Auditor, July 2011 Report, page 9.

to the SVPA made by Proposition 83 and Statutes 2006, chapter 337 (SB 1128), and the effect on the population of potential SVPs that must be screened and evaluated.[179] Specifically, it notes that the underlying offense(s) committed is not the only factor or criterion within the "definition" of an SVP: a diagnosable mental condition making the person dangerous to the community is the final, essential criterion, and thus, "despite the increased number of evaluations [conducted by the state], Mental Health recommended to the…[counties] about the same number of offenders in 2009 as it did in 2005, before the voters passed Jessica's Law."[180]

There has been no comment from any of the parties, or discussion in the audit, addressing the change in law made by Statutes 2006, chapter 337 (SB 1128) to the term of commitment from two-years to indeterminate, which almost certainly contributed to the spike in petitions in 2007 and 2008, and the subsequent reduction in the number of petitions. Under the SVPA, until it was amended in 2006 by Statutes 2006, chapter 337 (SB 1128), a person determined to be an SVP was committed to the custody of DMH for a period of two years and was not to be kept in actual custody for longer than two years unless a new petition to extend the commitment was filed by the county.[181] And former Welfare and Institutions Code section 6604.1 provided when the initial two-year term of commitment and subsequent terms of extended commitment began.[182] The requirement that a commitment under the SVPA be based on a *currently* diagnosed mental disorder applied to proceedings to extend a commitment under pre-2006 law. Such proceedings were *not a review hearing or a continuation of an earlier proceeding*.[183] Rather, an extension hearing was a new and independent proceeding at which the petitioner (the county) was required to prove the person meets the criteria of an SVP.[184] The county was required to prove the person *is* an SVP, not that the person *is still* one.[185] Therefore, under pre-SB 1128 law a new commitment was required every two years to hold an SVP in civil commitment. As the Third District Court of Appeal, in 2005, found, "each recommitment requires petitioner independently to prove that the defendant has a currently diagnosed mental disorder making him or her a danger. The task is not simply to judge changes in the defendant's mental state."[186] Statutes 2006, chapter 337 (SB 1128) amended the SVPA to provide that all *new* SVP civil commitments continue indefinitely without the county having to file a petition for recommitment every two years. However, previous two-year commitments were not converted to indeterminate terms under SB 1128 and those SVPs previously committed were entitled to a new civil commitment hearing at the end of their existing two-year term. If recommitted, the subsequent term would

---

[179] Exhibit O, Sex Offender Commitment Program, California State Auditor, July 2011 Report, page 13.

[180] Exhibit O, Sex Offender Commitment Program, California State Auditor, July 2011 Report, page 15.

[181] Former Welfare and Institutions Code section 6604 (Stats.1995, ch. 763, § 3, p. 5925).

[182] Former Welfare and Institutions Code section 6604 (Stats.1998, ch. 19, § 5.).

[183] *People v. Munoz* (2005) 129 Cal.App.4th 421, 429, emphasis in original.

[184] *People v. Munoz* (2005) 129 Cal.App.4th 421, 429, emphasis added.

[185] *People v. Munoz* (2005) 129 Cal.App.4th 421, 430.

[186] *People v. Munoz* (2005) 129 Cal.App.4th 421, 430.

now be an indeterminate term.[187] As a result, the subsequent reduction in referrals and petitions reflected in the State Auditor and local government data was likely based, at least in part, on the fact that new commitment hearings are no longer required every two-years for those already committed for an indeterminate term.

As noted, much of the data and evidence in the record, including the State Auditor's report, do not isolate the effects of the amendments to the "definition" of an SVP attributable to Proposition 83, from those attributable to Statutes 2006, chapter 337 (SB 1128). Therefore, it is difficult to tell to what extent the petitions from 2006 to present day are based on only one victim. Nonetheless, the Sacramento County data indicates that approximately one-third of the petitions it has filed since 2009 were based on a single victim and, thus, there is evidence in the record that at least some portion of all referrals and petitions are now based on only a single victim.[188]

Therefore, it can be safely said at least some portion of all new referrals since 2006 are based on a single victim and those referrals are therefore triggered by Proposition 83 and not by the test claim statutes or other later changes in law.

2. An Ongoing Program and Policy of Civil Commitment of SVPs Is *Integral* to Accomplishing the Electorate's Goals in Enacting Proposition 83 and Other Indicia Support the Conclusion That Voters Reasonably Intended to Prohibit the Legislature from Repealing or Significantly Reducing the Civil Commitment Program and, Thus, the Voters Are the Source of an Ongoing Policy of Civil Commitment of SVPs.

As discussed above, the Court directed the Commission to consider, in this remand "whether the expanded SVP definition in Proposition 83 transformed the test claim statutes as a whole into a voter-imposed mandate. . ."[189] Finance argues that Proposition 83's expanded definition of an SVP *and* the initiative's Amendment Clause, which prohibits the Legislature from narrowing or repealing "the provisions of this act" through its ordinary legislative process, transforms the mandate as a whole into a voter-imposed mandate. Finance explains its argument as follows:

> This expansion of the category of people who would be subject to the SVPA process was a central purpose of Proposition 83. The voters found in Section 2 of the ballot measure that "existing laws that provide for the commitment and control of sexually violent predators must be strengthened and improved." Section 31 of Proposition 83 stated, "It is the intent of the People of the State of California in enacting this measure to strengthen and improve the laws that punish and control sexual offenders." The opening lines of the ballot summary notified voters that one of the ways Proposition 83 would accomplish this goal was by "Expand[ing] [the] definition of a sexually violent predator." The Legislative Analyst also explained that Proposition 83 "generally makes more sex offenders

[187] *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1288; See also footnote 3; See also *People v. Taylor* (2009) 174 Cal.App.4th 920 (in accord on this point of law).

[188] Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 4.

[189] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

> eligible for an SVP commitment" by changing the definition of a sexually violent predator.[190]

Finance further states that:

> The voters also insulated these definitional changes from legislative repeal or revision. Proposition 83 prohibits the Legislature from repealing or narrowing the scope of its provisions "except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters." So, the Legislature cannot modify the SVPA through its normal legislative process to revert to the definition of "sexually violent predator" that existed before Proposition 83.[191]

Thus, Finance concludes that the source of the expanded definition is the voters and the costs incurred by counties in complying with the test claim statutes flow from Proposition 83 and are necessary to implement the ballot measure for purposes of Government Code section 17556(f).[192] On that basis, Finance asserts that Proposition 83 constitutes a subsequent change in law, within the meaning of Government Code section 17570, and the State is no longer liable for mandate reimbursement.

The counties disagree, as described above, and contend that the test claim statutes have not been transformed into voter mandates at all. For example, the County of Orange argues:

> Had Proposition 83 failed, the fundamental burdens of the SVPA protocols would still exist as they now exists; [*sic*] Proposition 83's failure would not have changed this. Instead, Proposition 83 merely asked voters whether they wanted to amend the act in a limited manner and recited a large portion of the remaining statutory scheme to provide the voters with context to guide their decision.[193]

Accordingly, the issue here is whether the voters are now the source of the mandated activities.

The Court in *County of San Diego* held that "[w]here the Legislature cannot use the ordinary legislative process to amend or alter duties imposed by the voters (see Cal. Const., art. II, § 10, subd. (c)), it can no longer be reasonably characterized as the source of those duties."[194] And, the Court observed, "[t]he evident purpose of limiting the Legislature's power to amend an initiative statute is to protect the people's initiative powers by precluding the Legislature from

---

[190] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

[191] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

[192] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 1.

[193] Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, page 3.

[194] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 207.

undoing what the people have done, without the electorate's consent."[195] But, the Court continued, "we have never had occasion to consider precisely 'what the people have done' and what qualifies as 'undoing' when the subject is a statutory provision whose reenactment was constitutionally compelled under article IV, section 9 of the Constitution."[196]

As discussed above, the Court rejected the Commission's reasoning and findings that the test claim provisions in Welfare and Institutions Code sections 6601, 6604, and 6605, were "expressly included in" the ballot measure, within the meaning of Government Code section 17556(f), merely by virtue of being restated and reenacted within the text Proposition 83 in accordance with article IV, section 9.[197] The Court held instead that "no indication appears in the text of the initiative, nor in the ballot pamphlet, to suggest voters would have reasonably understood they were restricting the Legislature from amending or modifying any of the duties set forth in the test claim statutes."[198] In this respect, the court stated that when technical reenactments [of existing provisions] are required to be included in a ballot measure under article IV, section 9 of the California Constitution – yet involve no substantive change in a given statutory provision – the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process and, thus, remains the source of the duties.[199] This conclusion applies "*unless* the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute."[200]

Thus, in order to determine whether Proposition 83 "transformed" the test claim statutes into a voter-imposed mandate, the Commission must determine the extent to which the Legislature "retains the power to amend [the test claim statutes] through its ordinary legislative process."[201] To make that determination, the Commission must consider the electorate's goals when adopting Proposition 83, and determine whether and to what extent those goals and "other indicia" support a conclusion that the voters reasonably intended to limit the Legislature's ability to subsequently amend the test claim statutes. As described below, the voters were informed by the Ballot Pamphlet, the Legislative Analyst's Office summary, and the text of Proposition 83 itself, that the Proposition would expand the definition of an SVP, and "strengthen and improve the laws that . . . control sexual offenders."[202] And from that, when read in context of Proposition 83's

---

[195] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211 (quoting *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 597 [internal quotations omitted].).

[196] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211 (quoting *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 597.)

[197] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 215.

[198] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 213-214.

[199] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.

[200] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214 (emphasis in original).

[201] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.

[202] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, sections 1; 31, pages 10; 21.

Amendment Clause and article II, section 10 of the California Constitution, it can be inferred that voters intended to preserve and expand the policy of civil commitment of SVPs.

The limitations imposed on the Legislature's authority to amend the SVPA derive from article II, section 10, and the "somewhat liberalized constraints" of the Amendment Clause found in section 33 of Proposition 83.[203] Article II, section 10 of the California Constitution provides that "[t]he Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval." Proposition 83's Amendment Clause is slightly more permissive with respect to *amendments,* but is silent on *repeal*:

> The provisions of this act shall not be amended by the Legislature except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters. However, the Legislature may amend the provisions of this act to expand the scope of their application or to increase the punishments or penalties provided herein by a statute passed by majority vote of each house thereof.[204]

Therefore, Proposition 83 itself permits a simple majority vote to enact amendments that "expand the scope" of the provisions of the act or "increase the punishments or penalties."[205] Meanwhile any other amendment of the "provisions of this act" other than to expand the scope or increase penalties or punishments requires a two-thirds super-majority vote or a statute approved by the voters. Moreover, a complete repeal of the SVPA, or an amendment that substantially undermines the SVPA, would require submitting the question to the voters, pursuant to article II, section 10 and *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577.[206]

The Court does not precisely identify the scope of "the provisions of this act," but holds that if provisions of Proposition 83 were only technically reenacted pursuant to article IV, section 9 (i.e. the reenactment rule which requires reprinting of the entire section (including any unchanged portions) for any amendment), "*and* the Legislature has retained the power to amend the provisions through the ordinary legislative process" those provisions are not within "the

---

[203] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211.

[204] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 33.

[205] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 33.

[206] See *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 212-214 (The Court discussed *Shaw* at length, in which the Legislature "sought to undermine the voter-created [transportation] trust fund by adding new provisions to divert those funds from uses the voters had previously designated." The Court characterized this amendment as "alter[ing] the voters' careful handiwork, both the text and its intended purpose," and the Court noted with approval the *Shaw* court's holding that such Legislative "tinker[ing]" was improper and inconsistent with the voters' intent.)

provisions of this act."[207] This conclusion applies "*unless* the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute."[208]

On this basis the Amendment Clause would apply to those provisions substantively and actually amended by Proposition 83, including the definition of an SVP, and any other provision the repeal or narrowing of which would undermine the voter's intent in approving Proposition 83 to "to strengthen and improve the laws that punish and control sexual offenders." Thus, Finance is correct to the extent it argues that "voters also insulated these definitional changes from legislative repeal or revision."[209]

The key to determining whether the voters or the Legislature is the source of the mandate lies in determining whether the expanded definition is *integral* to the electorate's goals in enacting the initiative, or if "other indicia support the conclusion that the voters reasonably intended to limit the Legislature's ability to amend" the test claim provisions.[210]

The Official Title and Summary of Proposition 83 states that the Proposition:

- Increases penalties for violent and habitual sex offenders and child molesters.
- Prohibits registered sex offenders from residing within 2,000 feet of any school or park.
- Requires lifetime Global Positioning System monitoring of felony registered sex offenders.
- *Expands definition of a sexually violent predator.*
- *Changes current two-year involuntary civil commitment for a sexually violent predator to an indeterminate commitment*, subject to annual review by the Director of Mental Health and subsequent ability of sexually violent predator to petition court for sexually violent predator's conditional release or unconditional discharge.[211]

The Legislative Analyst's Office's description of the initiative, as relevant to the SVP program, states:

---

[207] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214 ("Imposing such a limitation as a matter of course on provisions that are merely technically restated would unduly burden the people's willingness to amend existing laws by initiative.").

[208] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214 (emphasis in original).

[209] Exhibit F, Finance's Late Comments on the Request for Mandate Redetermination on Remand, page 2.

[210] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.

[211] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, page 4 (emphasis added).

> ***Change SVP Law.*** This measure generally makes more sex offenders eligible for an SVP commitment. It does this by (1) reducing from two to one the number of prior victims of sexually violent offenses that qualify an offender for an SVP commitment and (2) making additional prior offenses – such as certain crimes committed by a person while a juvenile – "countable" for purposes of an SVP commitment.[212]

And, the findings and declarations in the text of Proposition 83 itself states that "existing laws that provide for the commitment and control of sexually violent predators must be strengthened and improved."[213]

Thus, Proposition 83 as put before the voters sought amendments to strengthen and improve the laws that control sexual offenders as follows:

- Proposed amendment to section 6000 to *expand* the definition of a sexually violent predator by broadening the underlying criminal offenses supporting a finding that a person is an SVP; by reducing the number of victims of underlying qualifying offenses from two to one; and by removing the ceiling on juvenile offenses applied as qualifying.[214]
- Proposed amendment to section 6601 to provide that an SVP determination and commitment shall toll the term of parole for the underlying offense or offenses during indeterminate civil commitment.[215]
- Proposed amendment to section 6604 to provide for indeterminate commitment, and accordingly, to eliminate the requirement to hold a new SVP hearing every two years.[216]
- Proposed amendment to section 6605 to eliminate the requirement that the Department of Mental Health provide annual notice of an SVP's right to petition for release, and eliminate the requirement that the court must hold a show cause hearing if not waived by the committed person. Under amended section 6605, DMH would authorize an SVP to file a petition for release *if* the annual report by DMH finds it appropriate.[217]
- Proposed amendment to section 6608 to provide that even without DMH approval, "nothing in this article shall prohibit" a committed SVP from petitioning for conditional

---

[212] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, page 6.

[213] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 2(h), page 10.

[214] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, pages 18-19 [Proposed amendments to Welfare and Institutions Code section 6600 (a)(1); (b); (g)].

[215] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 26 page 20 [Proposed amendments to Welfare and Institutions Code section 6601(k)].

[216] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 27, page 20 [Proposed amendments to Welfare and Institutions Code section 6604].

[217] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 29, page 20 [Proposed amendments to Welfare and Institutions Code section 6605].

release *or* unconditional discharge. But the section would still prohibit frivolous petitions: if a prior petition was found to be frivolous the court shall deny the petition unless new facts are presented.[218]

- In addition, section 6600.1, not part of the original 1998 test claim decision, nor part of the 1995 and 1996 test claim statutes, was proposed to be amended by Proposition 83 to remove a requirement that sexual offenses against children under 14 must involve "substantial sexual conduct" in order to qualify as sexually violent offenses within the meaning of section 6600(b).[219]
- And, section 6604.1, which also was not included test claim decision or the test claim statutes, was proposed to be amended by Proposition 83 to provide that the indeterminate term of commitment shall commence on the date the court issues the initial order of commitment. Previously (before the circulation of Proposition 83 and enactment of SB 1128) this section provided that a *two-year* term of commitment would begin on the date the court issued the order of commitment, and for subsequent extended commitments, the term would be two years commencing from the date of termination of the previous commitment. This section would have been unworkable and inconsistent with the indeterminate commitment provided for under amended section 6604 without amendment.[220]

As discussed in the Background, many of these proposed amendments were in fact first enacted by Statutes 2006, chapter 337 (SB 1128), which became effective on September 20, 2006, approximately seven weeks before the election in which Proposition 83 was adopted. As a result, those amendments enacted prior to the adoption of Proposition 83 are not, based on their restatement under the reenactment rule alone, expressly included as part of the ballot measure.[221] Thus the Court recognized only two of the four amendments to section 6600 shown in the strikeout and italics text of the ballot measure, which were not amended by SB 1128, as expressly included in Proposition 83:

> [T]he voters broadened the definition of an SVP within the meaning of Welfare and Institutions Code section 6600 in two ways. First, they reduced the required number of victims, so that an offender need only have been "convicted of a sexually violent offense against *one* or more victims," instead of two or more victims. (*Ibid*.; see Welf. & Inst. Code, § 6600, subd. (a)(1).) Second, the voters

---

[218] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 30, page 21 [Proposed amendments to Welfare and Institutions Code section 6608].

[219] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 25, page 19 [Proposed amendments to Welfare and Institutions Code section 6600.1].

[220] Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 28, page 20 [Proposed amendments to Welfare and Institutions Code section 6604.1].

[221] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 209-210, where the court held that "Statutory provisions that are not actually reenacted and are instead considered to 'have been the law all along' . . . cannot fairly be said to be part of a ballot measure within the meaning of Government Code section 17556, subdivision (f)."

> eliminated a provision that had capped at one the number of juvenile adjudications that could be considered a prior qualifying conviction. (Voter Guide, *supra*, text of Prop. 83, § 24, p. 136; Welf. & Inst. Code, § 6600, subd. (g).)[222]

Nevertheless, the Court directed the Commission to consider the electorate's goals and intent in adopting the initiative, and all of the proposed amendments could be relevant to the voters' understanding of the scope of the initiative, and thus relevant to discerning their goals in enacting the initiative. The Legislature is generally presumed to know the state of the law, but the voters are not necessarily held to the same standard: "Although not deciding the validity of the legislative presumption as it applies to voter initiatives, the Supreme Court has acknowledged there exists [sic] qualitative and quantitative differences between the state of knowledge of informed voters and that of elected members of the Legislature."[223] Here, because SB 1128 and Proposition 83 were enacted so close in time, and because the ballot pamphlet for Proposition 83, including the proposed text, was prepared and circulated before SB 1128 was enacted, the voters, realistically, would have had no way of knowing that these provisions were already in effect. And because each of the proposed amendments appeared in the strikeout and italics of Proposition 83, those provisions would have appeared to voters as entirely new provisions in law. This includes the change from two-year commitments to indeterminate commitments, and the expansion of the list of underlying offenses that qualify as "sexually violent offense[s]."[224] Both of those amendments, first enacted within SB 1128, nevertheless appeared on the face of Proposition 83. Therefore, even though the enactment of SB 1128 in September of 2006 effectively blunted the effects of Proposition 83, any and all provisions that *appeared to be amended* by Proposition 83 could be considered a part of the electorate's goals and intent, including the change from two-year commitments to indeterminate commitments, and the changes in sections 6605 and 6608 addressing the SVP's petitioning for release from commitment.

Therefore, consistent with the amended definition itself, "what the people have done" and what cannot be "undone" through the ordinary legislative process must include a *general intent* that civil commitment of SVPs continue, based on the text of Proposition 83, the legislative intent statement in section 31 of the initiative, the ballot arguments, and other information in the Voter Guide, discussed above. In other words, even if "[t]he provisions of this act," for purposes of the Amendment Clause, does not expressly include each and every provision of the Welfare and Institutions Code that was technically restated in the ballot measure, the electorate's goals in enacting the initiative include the continuance and expansion of civil commitment of SVPs and

---

[222] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216.

[223] *McLaughlin v. State Bd. of Educ.* (1999) 75 Cal.App.4th 196, 214 (citing *People v. Davenport* (1985) 41 Cal.3d 247, 263, Fn 6 ["We recognize that in California initiatives are written and enacted without the benefit of the hearings, debates, negotiation and other processes by which the Legislature informs itself of the ramifications of its actions. Thus there may be some basis for the argument that some of the principles which guide courts in their efforts to ascertain the intent of particular statutory provisions enacted through the legislative process may not carry the same force and logic when applied to an initiative measure."].)

[224] Welfare and Institutions Code sections 6604; 6600(b) (Stats. 2006, chapter 337 (SB 1128)).

some of the provisions so restated are integral to accomplishing that goal and other indicia (i.e. the ballot materials) support the conclusion that voters reasonably intended to limit the Legislature's ability to amend those parts of the statute integral to maintaining a civil commitment program. It would therefore be inconsistent with article II, section 10 to *repeal* the SVP program as a whole leaving only the definition, or to undermine significant portions of the civil commitment policy without submitting the question first to the electorate.[225] Some minor amendments, such as those pointed out by the Court in *County of San Diego*[226] may be permissible, based on the Court's reading of the Amendment Clause. But based on the analysis herein, the Legislature has not retained its ordinary legislative authority to *repeal* or significantly *reduce the scope* of civil commitment.

Based on the foregoing, the Commission finds that an ongoing program and policy of civil commitment of SVPs is *integral* to accomplishing the electorate's goals in enacting Proposition 83, and other indicia (such as the information in the ballot pamphlet) support the conclusion that voters reasonably intended to prohibit the Legislature from repealing or significantly reducing the scope of the civil commitment program. Therefore, the voters are the source of an ongoing policy of civil commitment of SVPs.

3. Proposition 83 Does Not Constitute a Subsequent Change in Law that Modifies the State's Liability for the SVP Program Because the Activities and Costs to Implement a Civil Commitment Program in Accordance with the Voter Mandate Have Been Shifted to Counties Based on the State's "True Choice" and, Thus, the Activities and Costs Remain Mandated by the State.

As discussed above, there are no new duties imposed on local government as a result of Proposition 83- even to the extent that Proposition 83 expanded the population to which the mandated activities apply or is now the trigger for those activities for proceedings based on a single victim, the activities required to be performed remain the same as under the original test claim statutes.

To the extent the voters mandated a civil commitment program, and that voter mandate triggers a process that must be provided to implement that program consistent with constitutional due process requirements, there is no indication that the voters required that the process must be provided by *local government*. As the court in *Hayes* explained, when the state shifts costs to local agencies, even if the costs are imposed upon the state by federal law, or in this case a ballot measure, reimbursement under article XIII B, section 6 is required:

> A central purpose of the principle of state subvention is to prevent the state from shifting the cost of government from itself to local agencies. (*City of Sacramento*

[225] See *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577 (Rejecting legislative amendments that undermined the transportation trust fund created by Proposition 116.)

[226] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211-212 (E.g., Stats. 2012, ch. 24, and Stats. 2012, ch. 440, which changed "Department of Mental Health" to "Department of State Hospitals" in several instances. These were technical, non-substantive changes, but nevertheless were not consistent with the plain language of Proposition 83's Amendment Clause, which requires a two-thirds legislative majority to amend "the provisions of this act" unless to expand the scope of the act or increase punishments or penalties.).

> *v. State of California, supra*, 50 Cal.3d at p. 68.) Nothing in the statutory or constitutional subvention provisions would suggest that the state is free to shift state costs to local agencies without subvention merely because those costs were imposed upon the state by the federal government. In our view the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.[227]

Similarly, the Court in *Department of Finance v. Commission on State Mandates* (*Stormwater*) held that where the State had a "primary responsibility" for certain inspection requirements under both federal and state law, and "shifted that responsibility" to local governments through its permitting authority, those inspection requirements were not *federal* mandates.[228]

Here, unlike some other states with civil commitment programs for SVPs that provide for the filing of a commitment petition and the prosecution of the case to be handled by a state official rather than by county authorities, California law charges counties with the filing of the commitment petition as well as the prosecution and defense of the petition.[229] In New Jersey, the Attorney General files the petition for commitment and "[t]he Attorney General is responsible for presenting the case for the person's involuntary commitment as a sexually violent predator to the court."[230] Under Florida law, the state has a two tiered system of trial courts: county courts, whose jurisdiction is limited to civil disputes involving $15,000 or less and misdemeanor crimes, and state circuit courts that are organized into 20 judicial circuits and have original jurisdiction over everything else, and each of the 20 state attorneys, rather than a county district attorney or county counsel, is the elected chief prosecutor and handles commitment petitions under the state's SVP law.[231] In Iowa, if the person has not yet been released from confinement, the Attorney General "may file a petition," but if the person has been discharged from confinement, or was acquitted by reason of insanity or held incompetent to stand trial and released, "[a] prosecuting attorney of the county in which the person was convicted or charged, *or the attorney general if requested* by the prosecuting attorney, *may file* a petition…"[232] Similarly, in the State

---

[227] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594; see also, *Department of Finance v. Commission on State Mandates* (*Stormwater*) (2016) 1 Cal.5th 749, 765, affirming that principle.

[228] *Department of Finance v. Commission on State Mandates* (Stormwater) (2016) 1 Cal.5th 749, 771.

[229] Revised Code Washington 71.09.030; Iowa Code 229A.4; Kansas Statutes Annotated 59-29a04.

[230] N.J. Stat. Ann. § 30:4-27.29 (West).

[231] Fla. Stat. Ann. §§ 27.01; 27.02. See Fla. Stat. Ann. § 394.9125 (A "*state attorney* shall refer a person…for civil commitment.").

[232] Iowa Code Ann. § 229A.4 (West).

of Washington, a petition may be filed by the prosecuting attorney of the county in which the person was charged or convicted, or by "the attorney general, if requested by the county prosecuting attorney…"[233] In 38 of Washington's 39 counties, SVP petitions and hearings are indeed filed and prosecuted by a team in the Attorney General's office.[234] The legislative history for SB 1128 shows that the California Legislature considered whether the prosecution of SVP cases "should be handled by a single state office (such as the Attorney General) to develop and maintain coordination, expertise and consistency in SVP cases, as has been the case in Washington," as follows:[235]

> In Washington, the Attorney General prosecutes SVP cases in 38 of the 39 counties. SVP cases can thereby be coordinated and streamlined. The Washington SVP prosecutors know the experts and issues in this field very well. Attorneys in the office report that they use discretion in the filing of cases so as to avoid wasting resources.
>
> In California, each county district attorney handles SVP cases arising from that county. Different policies and standards can be followed in each county. Prosecutors and defense attorneys in Los Angeles can develop deep experience and skill in SVP cases, while those in smaller counties may have little experience or skill in these matters. Because of the constitutional right to a speedy trial in criminal cases, district attorneys are very likely to place a priority on felony trials over SVP cases. SVP cases are often delayed for years, producing absurd results.[236]

Although the Legislature in enacting SB 1128 did not shift the filing of civil commitment petitions to the State, it did consider having the State handle the civil commitment petitions as evidenced in the above legislative analysis, though the reasons it chose not to do so are unknown.[237] Other than the test claim statutes themselves, there is no law or evidence in the record to support a finding that the State is compelled to require county district attorneys or county counsels, instead of the Attorney General's Office, to handle the civil commitment petitions for SVPs.[238] The California Constitution recognizes the Attorney General as the

---

[233] Wash. Rev. Code Ann. § 71.09.030.

[234] Exhibit O, Senate Committee on Public Safety, Analysis of SB 1128, as amended March 7, 2006 (2005-2006 Reg. Sess.), pages 36-37.

[235] Exhibit O, Senate Committee on Public Safety, Analysis of SB 1128, as amended March 7, 2006 (2005-2006 Reg. Sess.), page 37.

[236] Exhibit O, Senate Committee on Public Safety, Analysis of SB 1128, as amended March 7, 2006 (2005-2006 Reg. Sess.), page 37.

[237] Exhibit O, Senate Committee on Public Safety, Analysis of SB 1128, as amended March 7, 2006 (2005-2006 Reg. Sess.), page 37.

[238] See generally, California Constitution, article V, section 13, which describes the State Attorney General as the chief law enforcement officer of the state who has jurisdiction statewide, and holds supervisory authority over each district attorney. In addition, the Constitution

government's highest legal official. (Cal. Const., art. V, § 13 ["[T]he Attorney General shall be the chief law officer of the State."].) As such he possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest. [Citations.] ... '[I]n the absence of any legislative restriction, [he] has the power to file any civil action or proceeding directly involving the rights and interests of the state ....' [Citation.]"[239]

Similarly, it is indisputable that a voter-imposed program of civil commitment of SVPs demands indigent defense counsel, experts, and investigators for the defense of the SVP.[240] And here, those duties have been imposed on counties and mandated solely by the test claim statutes. Just as the petition may be filed and an adversarial hearing conducted by a State prosecutor, a constitutionally adequate defense may be provided by a State defender or an attorney appointed by the court at the State's expense.

Therefore, the activities and costs to implement a civil commitment program consistently with federal constitutional requirements may be "necessary to implement" civil commitment, but have been shifted to counties based on the State's "true choice." In addition, no "other indicia support the conclusion" that the voters specifically intended that *counties* perform these duties.[241] Thus, the State is free to shift the costs back to the State using its ordinary legislative process.[242] The costs imposed on counties by the test claim statutes are *state-mandated*, based on the reasoning of *Hayes v. Commission on State Mandates* and *Department of Finance v. Commission on State Mandates* (*Stormwater*).[243]

Moreover, Finance has produced no argument or evidence to suggest that probable cause hearings, and the activities associated with those hearings, are required for a civil commitment program under Proposition 83. A number of federal and state cases demonstrate that there is substantial latitude in what process is due in civil commitment of mentally ill persons and sexually violent predators (or in some jurisdictions "sexually dangerous persons"), and

---

provides that "When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office."

[239]*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d, pages 14-15.

[240] *People v. Otto* (2001) 26 Cal.4th 200, 210 (outlining four part test of due process applicable to Sexually Violent Predators Act proceedings); *People v. Fraser* (2006) 138 Cal.App.4th 1430, 1449-1451 (assuming, without deciding, that SVPs have a right to counsel pursuant to the four part test of *Otto*, *supra*, but holding that there is no right to self-representation); *People v. Dean* (2009) 174 Cal.App.4th 186, 204 ("Here, even though an SVPA proceeding is a civil proceeding, due process requires the provision of a qualified expert for defendant.").

[241] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.

[242] See *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594; see also, *Department of Finance v. Commission on State Mandates* (*Stormwater*) (2016) 1 Cal.5th 749, 765, affirming that principle.

[243] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594; *Department of Finance v. Commission on State Mandates* (*Stormwater*) (2016) 1 Cal.5th 749, 765.

substantial variation in the due process protections that states and the federal government have chosen to adopt for their programs.[244] As noted above, where a deprivation of liberty is at stake, the courts have generally held that some form of adversarial hearing is required, which includes a right to counsel, and a right to expert witnesses.[245] However, a number of other jurisdictions with similar civil commitment programs do not require probable cause hearings, as noted by the New Jersey Superior Court, Appellate Division, in *In re Commitment of M.G.*[246] And, subsequent to that New Jersey decision, the federal government also instituted civil commitment for "sexually dangerous persons," and the federal statute does not require a probable cause hearing before imposing commitment.[247]

Here, Welfare and Institutions Code section 6602 requires a formal probable cause hearing, and requires the assistance of counsel at that hearing, in excess of federal due process guarantees required for a civil commitment program. The activities and costs associated with this entirely separate hearing exceed the scope of the activities in *San Diego Unified School Dist.* (i.e. "primarily various notice, right of inspection, and recording rules"), which in that case were treated as part and parcel to the underlying federal program since those activities produced incidental and de minimis costs.[248]

Therefore, the activities and costs associated with the probable cause hearings are not necessary to implement voter-imposed civil commitment, but instead are required based on the state's "true choice."[249] Moreover, no "other indicia support the conclusion" that the voters specifically or generally intended that probable cause hearings be included as part of the civil commitment process. Thus, the state is free to eliminate the probable cause hearing using its ordinary

---

[244] See *In re Commitment of M.G.* (2000) 331 N.J.Super. 365, 380-383 (describing some of the differences in procedures and statutes for SVP commitment in different states). See also 18 U.S.C. 4241-4248 (The federal SVP statute); *United States v. Sahhar* (1990) 917 F.2d 1197 (upholding civil commitment of mentally ill persons based on federal statute).

[245] *Vitek v. Jones* (1980) 445 U.S. 480, 494-495 (Finding a right to counsel for mentally disordered offenders, furnished by the state); *People v. Otto* (2001) 26 Cal.4th 200, 210 (outlining four part test of due process applicable to Sexually Violent Predators Act proceedings); *People v. Fraser* (2006) 138 Cal.App.4th 1430, 1449-1451 (assuming, without deciding, that SVPs have a right to counsel pursuant to the four part test of *Otto, supra*, but holding that there is no right to self-representation); *People v. Dean* (2009) 174 Cal.App.4th 186, 204 ("Here, even though an SVPA proceeding is a civil proceeding, due process requires the provision of a qualified expert for defendant.").

[246] *In re Commitment of M.G.* (2000) 331 N.J.Super. 365, 380-383; N.J. Stat. Ann. § 30:4-27.28 (West); Fla. Stat. Ann. § 394.915 (West) (adversarial probable cause hearing only if judge deems necessary due to failure to begin trial); 18 U.S.C. 4248 (no probable cause hearing under federal SVP statute).

[247] 18 U.S.C. § 4248.

[248] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 873, footnote 11, and 890.

[249] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593.

legislative process,[250] and the probable cause hearing and the costs associated with it are not necessary to implement Proposition 83 within the meaning of Government Code section 17556(f).

Accordingly, the Commission finds that the Legislature retains substantial discretion with respect to the activities involved in the program, and with respect to how those activities become imposed upon the counties. Based on these and the above findings, the Commission finds that the activities required by the test claim statutes remain mandated by the state and, thus, Proposition 83 does not constitute a subsequent change in law that modifies the state's liability for the *Sexually Violent Predators*, CSM-4509 program.

V. Conclusion

Based on the foregoing, the Commission denies the Request for a New Test Claim Decision.

[250] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Public Utilities Code Section 132354.1 Statutes 2017, Chapter 658 (AB 805) Filed on March 19, 2020 San Diego Association of Governments, Claimant	Case No.: 19-TC-03 *SANDAG: Independent Performance Auditor* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 25, 2020*) (*Served September 29, 2020*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on September 25, 2020.

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Public Utilities Code Section 132354.1 Statutes 2017, Chapter 658 (AB 805) Filed on March 19, 2020 San Diego Association of Governments, Claimant	Case No.: 19-TC-03 *SANDAG: Independent Performance Auditor* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 25, 2020*) (*Served September 29, 2020*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 25, 2020. Amberlynn Deaton appeared on behalf of the San Diego Association of Governments (claimant). Chris Hill and Brittany Thompson 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
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	Yes
Andre Rivera, Representative of the State Treasurer, Vice Chairperson	Yes
Jacqueline Wong-Hernandez, Representative of the State Controller	Yes

Summary of the Findings

This Test Claim alleges that reimbursement is required for state-mandated activities arising from Statutes 2017, chapter 658 (AB 805), which amended Public Utilities Code section 132354.1 to require the San Diego Association of Governments (claimant/SANDAG) to appoint an independent performance auditor who is charged with specified powers and responsibilities, including the power to appoint and employ its own staff.

The Commission finds that SANDAG is not eligible to seek reimbursement pursuant to article XIII B, section 6, because it is not subject to the taxing and spending limitations of article XIII A and B of the California Constitution. SANDAG has authority to charge fees, but no authority to levy taxes. Moreover, the authority of the San Diego County Regional Transportation Commission to levy a transactions and use tax does not apply to SANDAG, a separate legal entity. Furthermore, SANDAG's authority to create a Mello-Roos community facilities district does not make SANDAG subject to the appropriations limit of the community facilities district.

Alternatively, even if SANDAG were found to be an eligible test claimant, SANDAG has not incurred "costs mandated by the state" and is therefore not entitled to reimbursement because SANDAG has fee authority sufficient to pay the costs associated with the new activities required by the test claim statute pursuant to Government Code section 17556(d).

The Commission further finds that the claimant has received a fair hearing under due process. The claimant has not presented facts showing that Commission staff, in granting Finance's request for an extension of time to file comments on the Test Claim or in issuing the Draft Proposed Decision and Proposed Decision, resulted in the Commission members acting with "an unacceptable probability of actual bias" in reaching their decision on the Test Claim. The issues presented in this Test Claim are pure issues of law, subject to the Commission's de novo review, and the claimant has been given a full opportunity to file written comments and provide testimony in support of the Test Claim.

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/01/2018 Effective date of Statutes 2017, chapter 658, amending Public Utilities Code section 132354.1.

03/19/2020 The claimant filed the Test Claim.[1]

04/29/2020 Commission staff issued the Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date.[2]

05/21/2020 The claimant filed comments on the Test Claim.[3]

[1] Exhibit A, Test Claim.

[2] Exhibit T, Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date.

[3] Exhibit B, Claimant's Comments on the Test Claim.

05/22/2020 The City of Imperial Beach filed comments on the Test Claim.[4]

05/26/2020 Jim Desmond, San Diego County Supervisor, Fifth District filed comments on the Test Claim.[5]

05/27/2020 The City of Chula Vista, the City of El Cajon, and Mr. Paul J. Dostart filed comments on the Test Claim.[6]

05/28/2020 The City of La Mesa, the City of Lemon Grove, the City of National City, the City of Oceanside, and the City of Vista filed comments on the Test Claim.[7]

05/29/2020 The City of Carlsbad, the City of Del Mar, the City of Encinitas, and the City of Solana Beach filed comments on the Test Claim.[8]

06/03/2020 The Department of Finance (Finance) filed a request for extension of time to file comments on the Test Claim.[9]

06/03/2020 Commission staff issued the Notice of Extension Request Approval.[10]

06/29/2020 Finance filed comments on the Test Claim.[11]

07/15/2020 Commission staff issued the Draft Proposed Decision.[12]

07/20/2020 The claimant filed rebuttal comments and comments on the Draft Proposed Decision.[13]

---

[4] Exhibit C, City of Imperial Beach's Comments on the Test Claim.

[5] Exhibit D, Jim Desmond, San Diego County Supervisor, Fifth District's Comments on the Test Claim.

[6] Exhibit E, City of Chula Vista's Comments on the Test Claim; Exhibit F, City of El Cajon's Comments on the Test Claim; Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim.

[7] Exhibit H, City of La Mesa's Comments on the Test Claim; Exhibit I, City of Lemon Grove's Comments on the Test Claim; Exhibit J, City of National City's Comments on the Test Claim; Exhibit K, City of Oceanside's Comments on the Test Claim; Exhibit L, City of Vista's Comments on the Test Claim.

[8] Exhibit M, City of Carlsbad's Comments on the Test Claim; Exhibit N, City of Del Mar's Comments on the Test Claim; Exhibit O, City of Encinitas's Comments on the Test Claim; Exhibit P, City of Solana Beach's Comments on the Test Claim.

[9] Exhibit T, Finance's Request for Extension of Time.

[10] Exhibit T, Notice of Extension Request Approval.

[11] Exhibit Q, Finance's Comments on the Test Claim.

[12] Exhibit R, Draft Proposed Decision.

[13] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision.

II. Background

This Test Claim alleges that Statutes 2017, chapter 658, which amended Public Utilities Code section 132354.1, impose reimbursable state-mandated increased costs resulting from the activities required of the claimant, San Diego Association of Governments (SANDAG), in hiring an independent performance auditor and for related auditing services.

A. SANDAG's Governance Structure

SANDAG was established in 1966 as the Comprehensive Planning Organization, a voluntary association of 18 incorporated cities in the San Diego region and the San Diego county government, operating under a joint powers agreement and responsible for long-range transportation and regional planning.[14] In 1970, it was designated a metropolitan planning organization and then in 1971 as a regional transportation planning agency.[15] In 1972, it became an independent joint powers agency and changed its name to the San Diego Association of Governments in 1980.[16] While state and federal law have given SANDAG additional powers and duties over the years, the agency continues to operate as a "council of governments" wherein local agencies appoint one or more elected officials to serve on the board of a regional governmental entity.[17]

1. San Diego County Regional Transportation Commission

In 1986, the Legislature enacted the San Diego Regional Transportation Commission Act to provide "alternative methods of financing" for improvements to the County's transportation system.[18] The Act defines SANDAG as a joint powers agency established under the Joint Exercise of Powers Act and as the transportation planning agency for the San Diego County region.[19]

SANDAG's Board of Directors is designated as the San Diego County Regional Transportation Commission (Transportation Commission)[20] and the agency's joint powers agreement, bylaws, and rules and regulations govern the Transportation Commission's administration and

---

[14] Exhibit T, LAO, SANDAG, *An Assessment of Its Role in the San Diego Region* (March 30, 2006), https://lao.ca.gov/Publications/Detail/1471 (accessed on June 19, 2020), page 11.

[15] Exhibit T, About SANDAG, History, https://www.sandag.org/index.asp?fuseaction=about.history (accessed on June 2, 2020), page 9.

[16] Exhibit T, LAO, SANDAG, *An Assessment of Its Role in the San Diego Region* (March 30, 2006), https://lao.ca.gov/Publications/Detail/1471 (accessed on June 19, 2020), page 11.

[17] Exhibit T, LAO , SANDAG, *An Assessment of Its Role in the San Diego Region* (March 30, 2006), https://lao.ca.gov/Publications/Detail/1471 (accessed on June 19, 2020), page 14.

[18] Public Utilities Code section 132001.

[19] Public Utilities Code section 132005.

[20] Public Utilities Code sections 132000, 132051.

proceedings.[21] The Transportation Commission is authorized by statute to impose a retail transactions and use tax ordinance, subject to approval by two-thirds of the electors.[22] The tax must not exceed one percent, and must be levied in quarter-percent increments.[23] Tax revenues may be used for Transportation Commission administration and related legal action, construction, capital acquisition, maintenance, and operation of streets, roads, and highways, construction, maintenance, and operation of public transit systems, and planning, environmental reviews, engineering and design costs, related right-of-way acquisition, and for public transportation purposes consistent with regional transportation planning.[24]

2. TransNet sales tax

In 1987, a majority of San Diego County voters approved a one-half percent countywide transportation sales tax measure proposed by the Transportation Commission, which established the TransNet program for a 20-year period to deliver transportation projects throughout the region.[25] In 2004, more than two-thirds of the County's voters approved a 40-year extension of TransNet, for the period of 2008 to 2048.[26] The TransNet Extension Ordinance and Expenditure Plan details the purposes for which the TransNet tax revenues may be used and sets the annual appropriations limit for the Transportation Commission.[27]

3. San Diego Consolidated Transportation Agency

In 2003, the San Diego Regional Transportation Consolidation Act consolidated the transit planning and capital project responsibilities of the San Diego Metropolitan Transit Development Board and the North San Diego County Transit Development Board with all of the roles and responsibilities of SANDAG.[28] The consolidation formed a new public agency known as the consolidated agency, and became the successor agency to SANDAG and the two Transit Boards.[29] As the successor to SANDAG, it maintains SANDAG's designations, including but not limited to the San Diego County Regional Transportation Commission and the council of

---

[21] Public Utilities Code section 132100.

[22] Public Utilities Code section 132301.

[23] Public Utilities Code section 132307.

[24] Public Utilities Code sections 132302, 132305.

[25] Exhibit T, TransNet Fact Sheet (April 2018), https://www.sandag.org/uploads/publicationid/publicationid_1788_16614.pdf (accessed on June 3, 2020), page 1.

[26] Exhibit T, TransNet Fact Sheet (April 2018), https://www.sandag.org/uploads/publicationid/publicationid_1788_16614.pdf (accessed on June 3, 2020), page 1.

[27] Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, pages 9-11, 16.

[28] Public Utilities Code section 132353.1; Exhibit T, Senate Committee on Governance and Finance, Analysis of AB 805 (2017-2018 Reg. Sess.), June 30, 2017, page 2.

[29] Public Utilities Code section 132351.3.

governments for the San Diego Region.[30] The consolidated agency is also a regional transportation planning agency under Government Code section 29532.1.[31] It operates under the auspices of SANDAG.[32]

The Consolidation Act sets forth the consolidated agency's membership, voting procedures, and organizational structure. The agency's powers and responsibilities are carried out by a board of directors, composed of 21 members, consisting of one locally elected official selected by the governing body of each city in the county and a member of the county board of supervisors.[33] Voting is weighted and based on both membership and on the number of people who reside within each jurisdiction.[34]

Amongst the agency's powers are the right to sue and be sued, acquire property by any means, including eminent domain, appoint necessary employees, contract, fix and collect fees, adopt an annual budget, fix the compensation of staff and board members, establish and enforce rules and regulations for the administration, operation, and maintenance of facilities and services, enter joint powers arrangements, provide insurance, and issue bonds.[35] It can also use the Transportation Commission's transactions and use tax authority under Public Utilities Code sections 132301 and 132302 to fund infrastructure needs as identified in the regional comprehensive plan.[36]

B. The Test Claim Statute

The test claim statute, Statutes 2017, chapter 658, became effective January 1, 2018, amending Public Utilities Code sections 120050.2, 120051.6, 120102.5, 125102, 132351.1, 132351.2, 132351.4, 132352.3, 132354.1, 132360.1, and 132362; adding sections 120221.5, 125222.5, 132354.7, Article 11 (commencing with Section 120480) to Chapter 4 of Division 11, Article 9 (commencing with Section 125480) to Chapter 4 of Division 11.5; and repealing Sections 120050.5 and 120051.1.

At issue here is the test claim statute's amendments to section 132354.1 of the Public Utilities Code.

1. Prior law

Public Utilities Code section 132354.1 was originally enacted in 2003 following the passage of SB 1703, the San Diego Regional Transportation Consolidation Act. It falls under Article 5, pertaining to the consolidated agency's powers and functions. The statute originally consisted of

[30] Public Utilities Code section 132351.3.

[31] Public Utilities Code section 132351.3.

[32] Public Utilities Code section 132353.1. Hereafter, the consolidated agency is referred to as either "the consolidated agency" or "SANDAG."

[33] Public Utilities Code section 132351.1.

[34] Public Utilities Code section 132351.2.

[35] Public Utilities Code section 132354.

[36] Public Utilities Code section 132360.6.

what is now subdivision (a) and read in its entirety as follows: "The board shall arrange for a post audit of the financial transactions and records of the consolidated agency to be made at least annually by a certified public accountant."[37]

2. Public Utilities Code section 132354.1

The test claim statute amended section 132354.1 of the Public Utilities Code to require the San Diego consolidated transportation agency to appoint an independent performance auditor with the power to appoint and employ staff as deemed necessary. Specifically, section 132354.1 was amended as follows:

> (a) The board shall arrange for a post audit of the financial transactions and records of the consolidated agency to be made at least annually by a certified public accountant.
>
> (b) (1) The audit committee shall appoint an independent performance auditor, subject to approval by the board, who may only be removed for cause by a vote of at least two-thirds of the audit committee and the board.
>
> (2) The independent performance auditor shall have authority to conduct or to cause to be conducted performance audits of all departments, offices, boards, activities, agencies, and programs of the consolidated agency. The auditor shall prepare annually an audit plan and conduct audits in accordance therewith and perform those other duties as may be required by ordinance or as provided by the California Constitution and general laws of the state. The auditor shall follow government auditing standards. All officers and employees of the consolidated agency shall furnish to the auditor unrestricted access to employees, information, and records, including electronic data, within their custody regarding powers, duties, activities, organization, property, financial transactions, contracts, and methods of business required to conduct an audit or otherwise perform audit duties. It is also the duty of any consolidated agency officer, employee, or agent to fully cooperate with the auditor, and to make full disclosure of all pertinent information.
>
> (3) The auditor shall have the power to appoint, employ, and remove assistants, employees, and personnel as deemed necessary for the efficient and effective administration of the affairs of the office and to prescribe their duties, scope of authority, and qualifications.
>
> (4) The auditor may investigate any material claim of financial fraud, waste, or impropriety within the consolidated agency and for that purpose may summon any officer, agent, or employee of the consolidated agency, any claimant, or other person, and examine him or her upon oath or affirmation relative thereto. All consolidated agency contracts with consultants, vendors, or agencies will be prepared with an adequate audit provision to allow the auditor access to the entity's records needed to

[37] Public Utilities Code section 132354.1(a).

verify compliance with the terms specified in the contract. Results of all audits and reports shall be made available to the public in accordance with the requirements of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of the Title 1 of the Government Code).

(c) The board shall develop and adopt internal control guidelines to prevent and detect financial errors and fraud based on the internal control guidelines developed by the Controller pursuant to Section 12422.5 of the Government Code and the standards adopted by the American Institute of Certified Public Accountants.

(d) The board shall develop and adopt an administration policy that includes a process to conduct staff performance evaluations on a regular basis to determine if the knowledge, skills, and abilities of staff members are sufficient to perform their respective functions, and shall monitor the evaluation process on a regular basis.

(e) The board members shall make an annual report to their member agencies at a public meeting pursuant to Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code, that includes a summary of activities by the consolidated agency including, but not limited to, program developments, project updates, changes to voter-approved expenditure plans, and potential ballot measures.

3. Impetus behind the test claim statute

In 2016, SANDAG endorsed Measure A, a local ballot measure which proposed an additional half-percent retail sales tax for San Diego County.[38] Members of the agency's board of directors publicly represented that the additional sales tax would generate approximately $18 billion in revenue for transportation development.[39] The proposal fell short of the two-thirds required for approval.[40] Soon thereafter, it was uncovered through local media attention that the projected tax revenues were inflated.[41] An independent examination report commissioned by SANDAG

[38] Exhibit T, John C. Hueston, Report on Independent Examination of Measure A Revenue Estimate Communications (July 31, 2017), https://www.sandag.org/uploads/publicationid/publicationid_2126_22337.pdf (accessed on June 19, 2020), page 1.

[39] Exhibit T, John C. Hueston, Report on Independent Examination of Measure A Revenue Estimate Communications (July, 31 2017), https://www.sandag.org/uploads/publicationid/publicationid_2126_22337.pdf (accessed on June 19, 2020), page 1.

[40] Exhibit T, Senate Committee on Governance and Finance, Analysis of AB 805 (2017-2018 Reg. Sess.), June 30, 2017, page 4.

[41] Exhibit T, John C. Hueston, Report on Independent Examination of Measure A Revenue Estimate Communications (July 31, 2017), https://www.sandag.org/uploads/publicationid/publicationid_2126_22337.pdf (accessed on June 19, 2020), page 3.

found that SANDAG knew about the Measure A forecasting error but failed to correct it.[42] Amongst the agency's "lapses in judgment" were instructing employees to delete draft documents, to stop communicating by email, and to instead use phones or speak in person.[43] According to the author of the test claim statute, using the inflated projection that SANDAG was aware was incorrect for about a year prior to the election, allowed the agency to obscure an $8.4 billion cost increase facing the projects until after the Measure A tax increase had failed.[44] Therefore, the author's intent in proposing the bill was to increase SANDAG's transparency and accountability as a consolidated agency by making changes to the agency's governance structure and finance authority.[45]

4. SANDAG's audit activities under the test claim statute

Prior to the passage of the test claim statute, SANDAG's audit authority was limited to a certified public accountant conducting an annual post-audit of its financial transactions and records.[46] The test claim statute created an independent auditor position and charged the position with specified powers and the performance of certain duties.[47] Additionally, it created an audit committee and tasked the committee with certain responsibilities, including appointing the independent performance auditor.[48] The committee consists of five voting members, including two board members and three public members appointed by the board.[49] In addition to appointing the independent performance auditor, the audit committee is responsible for recommending the contract of the firm conducting the annual financial statement audits and approving the annual audit plan.[50]

---

[42] Exhibit T, John C. Hueston, Report on Independent Examination of Measure A Revenue Estimate Communications (July 31, 2017), https://www.sandag.org/uploads/publicationid/publicationid_2126_22337.pdf (accessed on June 19, 2020), pages 2-3.

[43] Exhibit T, John C. Hueston, Report on Independent Examination of Measure A Revenue Estimate Communications (July 31, 2017), https://www.sandag.org/uploads/publicationid/publicationid_2126_22337.pdf (accessed on June 19, 2020), pages 3, 33.

[44] Exhibit T, Assembly Committee on Local Government, Analysis of AB 805 (2017-2018 Reg. Sess.), as amended April 6, 2017, pages 1, 7.

[45] Exhibit T, Assembly Committee on Local Government, Analysis of AB 805 (2017-2018 Reg. Sess.), as amended April 6, 2017, pages 1, 7.

[46] Public Utilities Code section 132354.1(a); Exhibit A, Test Claim, page 10.

[47] Exhibit T, Senate Committee on Governance and Finance, Analysis of AB 805 (2017-2018 Reg. Sess.), June 30, 2017, page 4.

[48] Public Utilities Code Section 132354.1 (Stats. 2017, ch. 658).

[49] Public Utilities Code Section 132354.1 (Stats. 2017, ch. 658).

[50] Public Utilities Code Section 132354.1 (Stats. 2017, ch. 658).

The Regional Transportation Commission is also required to have a certified public accountant conduct an annual post-audit of its financial transactions, records, and revenue expenditures.[51] The Transportation Commission is required by statute to use SANDAG's staff in lieu of hiring its own and pays SANDAG for audit services through its transactions and use tax revenue.[52] Under the TransNet Extension Ordinance, an Independent Taxpayers Oversight Committee (ITOC) conducts an annual independent audit using the services of an independent fiscal auditor.[53] The purpose of the ITOC is to ensure that the TransNet Extension voter mandates are carried out as required.[54]

SANDAG's board policy pertaining to the audit committee and independent performance auditor requires that the independent performance auditor coordinate audit functions such that there is *no* duplication of effort between independent performance audits conducted pursuant to Public Utilities Code section 132354.1 and those undertaken by the ITOC.[55]

5. New requirements under Public Utilities Code section 132354.1(b)(2), (b)(3), (b)(4), (c), (d), and (e).

Under Public Utilities Code section 132354.1, as amended by the test claim statute, the independent performance auditor is charged with the following:

- Conducting performance audits of "all departments, offices, boards, activities, agencies, and programs of the consolidated agency"[56];
- Preparing an annual audit plan[57]; and
- Appointing, employing and removing staff as necessary to carry out the duties of the office and prescribing the duties, scope of authority and qualifications of its staff.[58]

The auditor is authorized to investigate claims of financial fraud, waste or impropriety within the consolidated agency and may conduct examinations under oath for that purpose.[59]

The board is charged with the following:

---

[51] Public Utilities Code section 132104 (Stats. 1985, ch. 1576).

[52] Public Utilities Code sections 132052, 132103 (Stats. 1985, ch. 1576).

[53] Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, pages 14-15, 47 (Statement of Understanding).

[54] Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, page 14.

[55] Exhibit T, SANDAG Board Policy No. 39, Audit Policy Advisory Committee and Audit Activities, paragraph 6.15, as amended September 2019.

[56] Public Utilities Code section 132354.1(b)(2).

[57] Public Utilities Code section 132354.1(b)(2).

[58] Public Utilities Code section 132354.1(b)(3).

[59] Public Utilities Code section 132354.1(b)(4).

- Establishing internal control guidelines to prevent and detect financial errors and fraud;[60]
- Establishing an administration policy pertaining to regularly conducting staff performance evaluations to ensure that staff are sufficiently qualified[61]; and
- Making an annual report to member agencies at a public meeting that summarizes the consolidated agency's activities, including "program developments, project updates, changes to voter-approved expenditure plans, and potential ballot measures."[62]

The consolidated agency's officers and employees are required to fully cooperate with the auditor, including making a full disclosure of all pertinent information and granting the auditor unrestricted access to necessary employees, information, and records.[63] All of the consolidated agency's contracts with consultants, vendors, or agencies must include an audit provision allowing the auditor access to the entity's records as needed to verify compliance with the contract terms.[64] All audit results and reports must be made publicly available.[65]

III. Positions of the Parties

A. Claimant, San Diego Association of Governments

The claimant alleges that the test claim statute, as it amended Public Utilities Code section 132354.1(b)(2), (b)(3), (b)(4), (c), (d), and (e), imposes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution. Specifically, the claimant alleges reimbursable costs for hiring an independent performance auditor and additional audit staff, and for associated costs, including equipment and supplies, training and professional development, travel, and professional dues and licensing.[66] The claimant alleges increased costs to comply with the mandate of $76,030 for the 2018-2019 fiscal year and $295,537.61 for the 2019-2020 fiscal year.[67] The claimant estimates $134,621.15 in additional costs for the 2019-2020 fiscal year attributable to the mandate.[68] Although the claimant agrees it has fee authority through membership fees, those fees have not been sufficient to cover the cost of the alleged mandate as follows:

> Though SANDAG has the ability to and has assessed membership assessment fees to board members that represent the county and cities around the San Diego Region, the amounts collected are *not sufficient* to pay for the full mandated

[60] Public Utilities Code section 132354.1(c).

[61] Public Utilities Code section 132354.1(d).

[62] Public Utilities Code section 132354.1(e).

[63] Public Utilities Code section 132354.1(b)(2).

[64] Public Utilities Code section 132354.1(b)(4).

[65] Public Utilities Code section 132354.1(b)(4).

[66] Exhibit A, Test Claim, pages 11-14.

[67] Exhibit A, Test Claim, pages 11-12.

[68] Exhibit A, Test Claim, pages 11-12.

> program increased cost. As a result of the state-imposed mandate, in 2019, SANDAG *doubled* membership assessments fees to help recover some of the increased cost that resulted from the state-imposed mandate. Since April of 2019, the assessments have and continue to be used to offset the cost mandated cost [sic], but there are residuals [sic] cost associated with the state-imposed mandate. The amounts collected are *not sufficient and do result in cost incurred that are fully covered by offsets*, thus the remainder of the cost associated with the mandate-imposed actions and increased level of activity is what SANDAG is seeking through this test claim.[69]

The Test Claim includes a declaration summarizing these allegations by Andre Douzdjian, Chief Financial Officer for SANDAG.[70]

In addition, the claimant alleges that it is a special district that is subject to the tax and spend limitations of articles XIII A and XIII B and, therefore, is eligible to claim reimbursement under article XIII B, section 6 of the California Constitution.[71]

The claimant filed additional comments in support of the Test Claim that are substantially similar to the comments submitted by the City of Imperial Beach, summarized below.[72]

In its rebuttal comments and comments on the Draft Proposed Decision, the claimant alleges a violation of its due process rights based on its objection to Finance's comments as untimely.[73] The claimant alleges that Finance submitted a request for an extension to file comments on the Test Claim on June 3, 2020, five days after the filing deadline of May 29, 2020 and in violation of Commission regulations.[74] The claimant asserts that while the Commission is permitted to grant an extension to a filing deadline, section 1187.9 of the Commission's regulations requires that an extension request be filed before the filing date and must be certified.[75] Furthermore, Commission Regulation 1181.3 requires that any representations of fact be supported by documentary or testimonial evidence.[76] The claimant argues that not only was Finance's request untimely, it contained representations of fact regarding workload impacts but was not certified

---

[69] Exhibit A, Test Claim, page 17, emphasis in original.

[70] Exhibit A, Test Claim, page 21-22.

[71] Exhibit A, Test Claim, pages 6-7.

[72] Exhibit B, Claimant's Comments on the Test Claim.

[73] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.

[74] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.

[75] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.

[76] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.

nor supported by documentary or testimonial evidence.[77] While the Commission has broad discretion under Commission Regulation 1187.9 to consider the merits of an extension request, the claimant asserts that that discretion is limited to timely requests with proper supporting evidence.[78] The claimant argues that because Finance's request was both untimely and unsupported, the Commission lacked discretion to grant it and Finance's comments must be stricken and failure to do so is prejudicial error.[79]

The claimant also objects to what it describes as the "premature filing of the Commission's Proposed Order."[80] According to the claimant, the Commission issued a proposed decision before allowing the claimant or any other interested party to file a rebuttal to Finance's comments.[81] Section 1183.6 of the Commission's regulations and the basic principles of due process require that the proposed decision be based on a review of the filed comments, which must include rebuttal to those comments.[82] The claimant alleges that the Commission has exhibited prejudicial bias in this matter by improperly allowing Finance to untimely file comments and denying the claimant and other interested parties due process by prematurely issuing a proposed order.[83]

On the merits, the claimant challenges Finance's position that the claimant is a joint powers agency without independent taxation authority as incorrect as a matter of law.[84] Under the San Diego Regional Transportation Consolidation Act (Public Utilities Code section 132350 et seq.), the claimant, SANDAG, was transformed from a joint powers authority to a "new statutorily-created public entity with expanded powers, including the power to levy taxes.[85] Public Utilities Code sections 132301 and 132302 authorize the San Diego County Regional Transportation

---

[77] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, pages 1-2.

[78] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

[79] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

[80] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

[81] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

[82] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

[83] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, pages 3-4.

[84] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

[85] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

Commission to levy a retail transactions and use tax.[86] The claimant asserts that section 132360.6 vests that same authority in SANDAG as the consolidated agency, giving it independent taxing authority.[87]

The claimant challenges Finance's assertion that it has overstated the mandate costs and included costs that are not mandated, namely miscellaneous costs associated with professional licensing and staff training and development.[88] Furthermore, the claimant disagrees that the test claim statute calls for a single independent performance auditor, stating that section 132354.1(b)(3) states in pertinent part as follows: "The auditor shall have the power to appoint, employ, and remove assistants, employees, and personnel as deemed necessary for the efficient and effective administration of the affairs of the office…"[89] The miscellaneous costs identified in the Test Claim include the costs associated with the government auditor positions that the claimant has or will be forced to incur as a result of the mandate.[90]

B. Department of Finance

Finance argues that the Test Claim should be denied because SANDAG is not an eligible claimant, and even if it were, it has fee authority to cover the cost of complying with the test claim statute.[91] Specifically, Finance argues, as a joint powers agency, SANDAG is not an eligible claimant under article XIII B, section 6 of the California Constitution because it does not have the power to levy taxes.[92] Finance states further that SANDAG's allegation that it has authority to levy a retail transactions and use tax in San Diego County is incorrect; under Public Utilities Code section 132301, the local entity authorized to impose that tax is the San Diego County Regional Transportation Commission.[93] The Transportation Commission transfers its tax revenue to SANDAG to pay for administrative costs, making SANDAG an indirect recipient of tax revenue with no independent authority to impose taxes.[94]

---

[86] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

[87] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

[88] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

[89] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2-3.

[90] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

[91] Exhibit Q, Finance's Comments on the Test Claim, page 1.

[92] Exhibit Q, Finance's Comments on the Test Claim, page 1.

[93] Exhibit Q, Finance's Comments on the Test Claim, page 1.

[94] Exhibit Q, Finance's Comments on the Test Claim, page 1.

Even if SANDAG were an eligible claimant, Finance argues, it has fee authority to cover the cost of complying with the test claim statute.[95] Under Government Code section 17556(d), costs are not mandated by the state because SANDAG has the authority to assess membership fees to its board members.[96] SANDAG doubled its membership fees in 2019 but claims that the fees only partially offset the claimed costs.[97] Because there is no cap on SANDAG's fee authority, SANDAG could use fees to offset the full costs imposed by the test claim statute.[98]

Finance further argues that the costs claimed by SANDAG may be overstated.[99] Of the total claimed costs of $430,159 for the 2019-2020 fiscal year, costs such as salaries and benefits for multiple audit positions are not reimbursable because the test claim statute only requires appointment of a single independent performance auditor.[100] SANDAG can carry out the required audit functions by contracting an auditor rather than hiring additional staff.[101] The costs for staff training and development and professional licensing are not specified in the test claim statute and are therefore not related to the alleged mandated activities.[102]

Finance did not file comments on the Draft Proposed Decision.

C. City of Imperial Beach

The City of Imperial Beach filed comments as an interested party, arguing that the test claim statute imposes a reimbursable state mandate by requiring SANDAG to appoint an independent performance auditor, a position that did not exist prior to the passage of AB 805.[103] Imperial Beach argues that the test claim statute meets the definition of "program" under *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56: "(1) programs that carry out the governmental function of providing services to the public, or (2) laws which implement a state policy and impose unique requirements on local governments.[104] Imperial Beach further argues that under *County of Los Angeles v. Comm'n on State Mandates* (2003) 110 Cal.App.4th 1176, 1189, a program is "new" if the local agency was not previously required to institute it.[105]

[95] Exhibit Q, Finance's Comments on the Test Claim, page 1.

[96] Exhibit Q, Finance's Comments on the Test Claim, page 2.

[97] Exhibit Q, Finance's Comments on the Test Claim, page 2.

[98] Exhibit Q, Finance's Comments on the Test Claim, page 2.

[99] Exhibit Q, Finance's Comments on the Test Claim, page 2.

[100] Exhibit Q, Finance's Comments on the Test Claim, page 2.

[101] Exhibit Q, Finance's Comments on the Test Claim, page 2.

[102] Exhibit Q, Finance's Comments on the Test Claim, page 2.

[103] Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 1.

[104] Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 1.

[105] Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 1.

Imperial Beach states that the legislative history of AB 805 shows that the Legislature anticipated that the test claim statute would impose a mandate on SANDAG.[106] In support, it cites both the Senate and Assembly Committees on Appropriations as finding that the bill potentially imposes a reimbursable mandate, but concedes that those comments are not binding on the Commission.[107] Imperial Beach also alleges that the Department of Finance opposed AB 805 because it appeared to create a reimbursable state mandate.[108]

Imperial Beach states that while SANDAG assesses membership fees, those fees are insufficient to cover the increased cost of the mandated program.[109] As a result of the mandate, SANDAG doubled its membership assessment fees in 2019 in an effort to recover some of the increased costs.[110] Imperial Beach further states that since April 2019, member assessments have been used to offset mandates costs, but that there are residual costs associated with the mandate.[111] Due to the current economic situation, Imperial Beach alleges that the amounts collected are insufficient and the member agencies are unable to further increase their member assessments.[112] The costs incurred that are not fully covered by offsets is what SANDAG seeks to have reimbursed through this Test Claim.[113]

D. Jim Desmond, San Diego County Supervisor, Fifth District

The comments of Jim Desmond, San Diego County Supervisor for the Fifth District, are in support of the Test Claim and are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.[114]

E. City of Chula Vista

The City of Chula Vista's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.[115]

---

[106] Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 1.

[107] Exhibit C, City of Imperial Beach's Comments on the Test Claim, pages 1-2.

[108] Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

[109] Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

[110] Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

[111] Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

[112] Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

[113] Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

[114] Exhibit D, Jim Desmond, San Diego County Supervisor, Fifth District's Comments on the Test Claim.

[115] Exhibit E, City of Chula Vista's Comments on the Test Claim.

F. City of El Cajon

The City of El Cajon's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.[116]

G. Mr. Paul J. Dostart

Mr. Paul J. Dostart, a corporate tax attorney and public member of the SANDAG audit committee, filed a public comment, arguing that AB 805 is an unfunded mandate.[117] Mr. Dostart states that Section 19 of AB 805 contemplates a determination by the Commission on State Mandates that the bill imposes an unfunded mandate.[118] According to Mr. Dostart, AB 805 clearly mandates a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution because Public Utilities Code section 132354.1 imposes only upon SANDAG a duty with an accompanying expense that does not otherwise exist under California law, namely the duty to appoint an independent performance auditor with expansive responsibility and authority.[119] Therefore, the costs of SANDAG's Office of the Independent Performance Auditor are reimbursable.[120]

H. City of La Mesa

The City of La Mesa's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above. The comments were submitted by Bill Baber, Deputy-Mayor of the City of La Mesa, SANDAG board member, and chair of the SANDAG Audit Committee.[121]

I. City of Lemon Grove

The City of Lemon Grove's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.[122]

J. City of National City

The City of National City's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.[123]

---

[116] Exhibit F, City of El Cajon's Comments on the Test Claim.

[117] Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim, page 1.

[118] Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim, page 1.

[119] Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim, page 1.

[120] Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim, page 1.

[121] Exhibit H, City of La Mesa's Comments on the Test Claim.

[122] Exhibit I, City of Lemon Grove's Comments on the Test Claim.

[123] Exhibit J, City of National City's Comments on the Test Claim.

K. City of Oceanside

The City of Oceanside's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.[124]

L. City of Vista

The City of Vista's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.[125]

M. City of Carlsbad

The City of Carlsbad's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach.[126]

N. City of Del Mar

The City of Del Mar's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.[127]

O. City of Encinitas

The City of Encinitas' comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.[128]

P. City of Solana Beach

The City of Solana Beach's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.[129]

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

[124] Exhibit K, City of Oceanside's Comments on the Test Claim.

[125] Exhibit L, City of Vista's Comments on the Test Claim.

[126] Exhibit M, City of Carlsbad's Comments on the Test Claim.

[127] Exhibit N, City of Del Mar's Comments on the Test Claim.

[128] Exhibit O, City of Encinitas's Comments on the Test Claim.

[129] Exhibit P, City of Solana Beach's Comments on the Test Claim.

articles XIII A and XIII B impose."[130] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[131]

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.[132]
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.[133]
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.[134]
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.[135]

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.[136] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[137] 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."[138]

---

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

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

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

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

[134] *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.

[135] *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.

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

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

[138] *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].

A. The Test Claim Was Timely Filed Pursuant to Government Code Section 17551.

Government Code section 17551(c) requires that a test claim 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." The Test Claim includes a declaration by Andre Douzdjian, Chief Financial Officer for SANDAG, stating that SANDAG first incurred costs as a result of the test claim statute on April 2, 2019.[139] The Test Claim was filed on March 19, 2020. Accordingly, the Test Claim was filed within 12 months of incurring increased costs as a result of the test claim statute, which is timely pursuant to the second prong of Government Code section 17551(c).

B. The Claimant Is Not Eligible to Claim Reimbursement Under Article XIII B, Section 6, Because it Has No Authority to Impose Taxes and Is Not Subject to the Appropriations Limit of Article XIII B.

1. Article XIII B, section 6 requires reimbursement only when the local government is subject to the tax and spend provisions of Articles XIII A and XIII B of the California Constitution.

An interpretation of article XIII B, section 6 requires an understanding of articles XIII A and XIII B. "Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend taxes for public purposes."[140]

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" and that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…"[141] In addition to limiting property tax revenue, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by voters.[142]

Article XIII B was adopted by the voters 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."[143] 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 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.'"[144]

---

[139] Exhibit A, Test Claim, pages 21, 23.

[140] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486.

[141] California Constitution, article XIII A, section 1.

[142] California Constitution, article XIII A, section 1.

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

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

Article XIII B established "an appropriations limit," or spending limit for each "local government" beginning in fiscal year 1980-1981.[145] 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 by this article.[146]

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.[147]

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."[148] 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).[149]

No limitation is placed on the expenditure of those revenues that do not constitute "proceeds of taxes."[150] 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 in liquid securities."[151] 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 [and one half] cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter

---

[145] California Constitution, article XIII B, section 8(h).

[146] California Constitution, article XIII B, section 1.

[147] California Constitution, article XIII B, section 2.

[148] California Constitution, article XIII B, section 8.

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

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

[151] California Constitution, article XIII B, section 8(i).

> created by a vote of the people, which is totally funded by other than the proceeds of taxes.[152]

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.

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 which are subject to limitation. The California Supreme Court, in *County of Fresno v. State of California*,[153] explained:

> 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*.[154]

Not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement. Redevelopment agencies, for example, have been identified by the courts as being exempt from the restrictions of article XIII B. In *Redevelopment Agency of San Marcos v. Commission on State Mandates*,[155] 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." (*County of Placer v. Corin*, *supra*, 113 Cal.App.3d at p. 451, original italics.) 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

---

[152] California Constitution, article XIII B, section 9(c).

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

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

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

> 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 limit 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.[156]

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates*, affirmed the reasoning of the *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.[157]

As such, to be eligible for reimbursement under article XIII B, section 6, a local agency must be subject to the taxing and spending limitations of article XIII A and XIII B of the California Constitution and must be required to expend "appropriations subject to limitation." Article XIII B, section 6 was designed only to protect the tax revenues of local governments from state mandates that would require expenditure of tax revenues which are subject to limitation.

2. The claimant has no authority to levy taxes, and its sources of revenue are not subject to the appropriations limit of article XIII B, section 6.

The claimant, SANDAG, argues that it is an eligible claimant before the Commission as follows:

> SANDAG is a special district subject to the types of constitutional taxing and spending limitations that article XIII B, section 6(a) of the California Constitution (Section 6) is designed to address… SANDAG is authorized to levy a retail transactions and use tax in the incorporated and unincorporated territory of the county. (Pub. Util. Code, §§ 132300, 132362.) Similar to special taxes, this tax is subject to approval by a supermajority of electors and is capped at 1%. (Pub. Util. Code, § 132307.) As part of the ballot proposition to approve imposition of the tax, an appropriations limit was also required to be established. (Pub. Util. Code, § 132309.) The consolidated agency is also authorized to initiate proceedings to establish a district pursuant to the Mello-Roos Community Facilities Act of 1982, and may impose a special tax within the district, subject to approval by 2/3 of the votes cast. (Pub. Util. Code, § 132370.4.) These statutory limitations on the consolidated agency's taxing and spending authority align with the constitutional limitations on local government taxing and spending authority in articles XIII A, XIII B, and XIII C, which demonstrate that SANDAG should be considered a "local agency" subject to the tax and spend limitations of articles XIII A and B of

---

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

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

> the California Constitution, and thus eligible to seek a subvention of funds under Sec. 6.[158]

Statutory authorization for the creation and powers of SANDAG as a consolidated transportation agency is found in Chapter 3 of Division 12.7 of the Public Utilities Code, commencing with section 132350, which states that the Chapter [section 132350 to 132372.4, inclusive] may be cited as the San Diego Regional Transportation Consolidation Act. Section 132353.1 states in relevant part as follows:

> Notwithstanding any other provision of law and except as provided in this chapter, the San Diego Association of Governments shall be consolidated into a public agency known as the consolidated agency. In addition… all public transit and other transportation planning and programming responsibilities…of the San Diego Metropolitan Transit Development Board (MTDB) and the North San Diego County Transit Development Board (NCTD), except as set forth in subdivision (c) of Section 132353.2 shall be consolidated into the consolidated agency.[159]

The consolidated agency is the successor agency to SANDAG and the two transit boards and is a statutorily created regional transportation planning agency under Section 29532.1 of the Government Code.[160] Section 132351.3 further provides:

> As the successor to SANDAG, the consolidated agency succeeds to, continues, and maintains SANDAG's federal, state and local designations, including, but not limited to, designation as the Metropolitan Planning Organization, is the San Diego County Regional Transportation Commission pursuant to Section 132005, is the congestion management agency, and is the council of governments for the San Diego region.[161]

Section 132354 describes the rights and powers of the consolidated agency as follows:

> The consolidated agency shall have and may exercise all rights and powers, expressed or implied, that are necessary to carry out the purposes and intent of this chapter, including, but not limited to, the power to do all of the following:
>
> (a) Sue and be sued.
>
> (b)(1) To acquire any property by any means, and to hold, manage, occupy, develop, jointly develop, dispose of, convey, or encumber property.
>
> (2) To create a leasehold interest in property for the benefit of the consolidated agency.

---

[158] Exhibit A, Test Claim, pages 6-7.

[159] Public Utilities Code section 132353.1.

[160] Public Utilities Code section 132351.3.

[161] Public Utilities Code section 132351.3.

(c) To acquire, by eminent domain, any property necessary to carry out any of its powers or functions.

(d) To merge or split parcels, adjust boundary lines, or take similar actions as part of the acquisition of land or as needed in order to carry out its functions.

(e) To construct, acquire, develop, jointly develop, maintain, operate, lease, and dispose of work, property, rights-of-way, and facilities.

(f) To appoint necessary employees, including counsel, and to define their qualifications and duties.

(g) To enter into and perform all necessary contracts.

(h) To fix and collect fees for any services rendered by it.

(i) To adopt a seal and alter it at the consolidated agency's pleasure.

(j) To adopt an annual budget and to fix the compensation of its officers, board members, and employees.

(k) To establish and enforce rules and regulations for the administration, operation, and maintenance of facilities and services.

(l) To enter joint powers arrangements with other entities.

(m) To provide insurance.

(n) To issue bonds.

(o) To do any other things necessary to carry out the purposes of this chapter.

Section 132354(h) authorizes the consolidated agency to "fix and collect fees for any services rendered by it," but does not authorize the consolidated agency to levy taxes.

Nevertheless, the claimant argues it is authorized to levy a retail transactions and use tax in the incorporated and unincorporated territory of the county, and to initiate proceedings to establish a community facilities district pursuant to the Mello-Roos Community Facilities Act of 1982, and may impose a special tax within the district.

As described below, the Commission finds that the claimant is not eligible to claim reimbursement under article XIII B, section 6 of the California Constitution.

a. The Transportation Commission's taxation power is not imputed to the claimant.

Contrary to the claimant's assertions in the Test Claim and its rebuttal comments and comments on the Draft Proposed Decision, the claimant has no authority to levy a retail transactions and use tax. The power of a local agency to tax is derived from the Constitution, upon the Legislature's authorization.[162] "The Legislature may not impose taxes for local purposes but

[162] *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1454.

may authorize local governments to impose them."[163] As such, a local agency's authority to tax must come from statute.[164]

The claimant's primary fiscal function is to allocate revenues from a wide variety of federal, state and local sources to transportation projects and programs in the San Diego region.[165] Federal and state government funding make up the largest portion of the claimant's revenues, totaling more than $408 million for the 2020 fiscal year. While the claimant, SANDAG, is statutorily authorized to generate revenue by issuing bonds and collecting fees "for any services rendered by it," there are no statutes authorizing the claimant to impose taxes.[166]

The Transportation Commission's statutory authority to levy a transactions and use tax is not imputed to the claimant. Rather, SANDAG and the Transportation Commission are separate legal entities, with SANDAG's board designated by statute to serve as the Transportation Commission,[167] and SANDAG's joint powers agreement, bylaws, and rules and regulations governing Transportation Commission proceedings and administration.[168] The claimant's authority to administer the Transportation Commission's transactions and use tax and allocate the revenues in accordance with the tax ordinance does not equate to authority to levy the tax.

The claimant cites to Public Utilities Code sections 132300 and 132362 as authorizing the agency to levy a retail transactions and use tax. Sections 132300 through 132314, inclusive, form Article 5 of the San Diego County Regional Transportation Commission Act, pertaining to the Transportation Commission's transactions and use tax. Section 132300 states as follows:

> The Legislature, by the enactment of this article, intends the additional funds provided government agencies by this article to supplement existing local revenues being used for public transportation purposes. The government agencies are further encouraged to maintain their existing commitment of local funds for public transportation purposes.[169]

Section 132301 states in pertinent part:

---

[163] California Constitution, article XIII, section 24(a).

[164] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 450 ["Taxes are levied by the Legislature, or by counties and municipalities under their delegated power, for the support of the state, county, or municipal government"].

[165] Exhibit T, LAO, *SANDAG, An Assessment of Its Role in the San Diego Region*, (March 30, 2006), https://lao.ca.gov/Publications/Detail/1471 (accessed on June 19, 2020), page 14; Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf (accessed on June 4, 2020), pages 1-14, 1-19.

[166] Public Utilities Code section 132354.

[167] Public Utilities Code section 132051.

[168] Public Utilities Code section 132100.

[169] Public Utilities Code section 132300.

> (a) A retail transactions and use tax ordinance applicable to the entirety of, or a portion of, the incorporated and unincorporated territory of the county shall be imposed by the commission in accordance with Section 132307 and the Transactions and Use Tax Law (Part 1.6 (commencing with Section 7251) of Division 2 of the Revenue and Taxation Code), if two-thirds of the electors voting on the measure within the portion of the county to which the tax would apply, vote to approve its imposition at a special election called for that purpose by the commission.
>
> …
>
> (g) As used in this section, "commission" shall refer to the consolidated agency if the tax is to be imposed by the consolidated agency pursuant to Section 132360.6.[170]

Neither section 132300 nor the more applicable section 132301 gives SANDAG independent authority to impose a retail transactions and use tax. The reference in section 132301(g) to "commission" to mean the consolidated agency pertains to the consolidated agency's authority under section 132360.6 to allocate the Transportation Commission's tax revenue more broadly than originally intended.

The claimant argues in its rebuttal comments and comments on the Draft Proposed Decision that section 132360.6 gives the consolidated agency the power to levy a transactions and use tax independent of the Transportation Commission's taxation authority.[171] Section 132360.6 was added to the San Diego Regional Transportation Consolidation Act in 2008 as part of an effort to expand the purposes for which the Transportation Commission's retail transactions and use tax revenues could be used, namely for broader regional programs beyond traditional transportation projects.[172] Section 132360.6 states as follows:

> The consolidated agency may use the authority for the retail transactions and use tax provided under Sections 132301 and 132302 to fund and finance infrastructure needs identified in the regional comprehensive plan developed in accordance with this article. Development of the proposal and expenditure plan shall be conducted using a public collaborative planning process that is consistent with Section 132360.1.[173]

The plain language of section 132360.6 gives the consolidated agency the ability to more widely allocate the Transportation Commission's retail transactions and use tax for regional planning purposes, but does not grant the consolidated agency the authority to impose such a tax on its own behalf.

---

[170] Public Utilities Code section 132301(a), (g).

[171] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

[172] Exhibit T, Statutes 2008, chapter 83 (SB 1685), section 1 (2007-2008 Reg. Sess.).

[173] Public Utilities Code section 132360.6.

SANDAG's reliance on section 132362 as authorizing it to impose a retail transaction and use tax similarly fails. Section 132362 states in pertinent part:

> (a) In addition to the authority set forth in Article 5 (commencing with Section 132300) and Article 6 (commencing with Section 132320) of Chapter 2 of Division 12.7, if the consolidated agency provides compensation to San Diego County for the cost of including an ordinance or measure on the ballot, the consolidated agency may call an election, including an advisory election, in San Diego County on any ordinance or measure regarding the governance of or matters related to the powers, privileges, or duties of the consolidated agency, including, but not limited to, merger or complete consolidation of the transit boards.[174]

Section 132362 gives the consolidated agency the ability to call an election pertaining to matters within its scope of authority, not to impose taxes. The section's reference to Articles 5 and 6 pertains to the Transportation Commission's authority to conduct an election to either impose a retail transactions and use tax ordinance[175] or an ordinance "expanding, extending, or increasing" a retail transactions and use tax.[176]

Moreover, Public Utilities Code section 132309 requires that the Transportation Commission seek authorization to establish "the appropriations limit of the commission" as part of the ballot proposition to obtain approval for the retail transactions and use tax.[177] The TransNet Extension Ordinance sets forth the appropriations limit for the Transportation Commission and provides that all expenditures of the transactions and use tax are subject to the appropriations limit.[178]

> The maximum annual appropriations limit for the Commission shall be established as $950 million for the 2004-05 fiscal year. The appropriations limit shall be subject to adjustment as provided by law. All expenditures of the transactions and use tax revenues imposed in Section 3 [pertaining to the TransNet Extension and any future authorized state or local transactions and use tax] are subject to the appropriations limit of the Commission.[179]

SANDAG's use of the retail transactions and use tax revenues, whether pursuant to section 132360.6 or as administrator of the TransNet program, does not alter the nature of the tax revenues as the Transportation Commission's "proceeds of taxes" and subject to the Transportation Commission's appropriations limit. Additionally, SANDAG has submitted no

---

[174] Public Utilities Code section 132362.

[175] Public Utilities Code section 132300 et seq.

[176] Public Utilities Code section 132320 et seq.

[177] Public Utilities Code section 132309(a).

[178] Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, page 16.

[179] Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, page 16.

evidence, and the Commission is aware of none, to show that it has ever reported an appropriations limit.[180]

b. SANDAG's authority to create a community facilities district does not make SANDAG subject to an appropriations limit.

SANDAG alleges that it has the authority to impose a special tax under the Mello-Roos Community Facilities Act.

> The consolidated agency is also authorized to initiate proceedings to establish a district pursuant to the Mello-Roos Community Facilities Act of 1982, and may impose a special tax within the district, subject to approval by 2/3 of the votes cast. (Pub. Util. Code, § 132370.4.)[181]

Public Utilities Code section 132370.4 provides as follows:

> The consolidated agency shall be considered to be a "local agency" as defined in subdivision (h) of Section 53317 of the Government Code and the provisions of Chapter 2.5 (commencing with Section 53311) of Part 1 of Division 2 of Title 5 of the Government Code [Mello-Roos Community Facilities Act of 1982] are applicable to the consolidated agency.

Government Code section 53317(h) defines "local agency" as "any city or county, whether general law or chartered, special district, school district, joint powers entity created pursuant to Chapter 5 (commencing with Section 6500) of Division 7 of Title 1, redevelopment agency, or any other municipal corporation, district, or political subdivision of the state." SANDAG as a consolidated agency is a "local agency" under the Mello-Roos Community Facilities Act of 1982, and has been authorized by Public Utilities Code section 132370.4 to establish a community facilities district.

i. The Mello-Roos Community Facilities Act of 1982

The Mello-Roos Community Facilities Act of 1982 was created in response to the passage of Proposition 13, which added article XIII A to the California Constitution and significantly limited the ability of local governments to raise money through property taxes.[182] The purpose of the Act is to provide local agencies with "an alternative method of financing certain public capital facilities and services, especially in developing areas and areas undergoing rehabilitation," and enables the local agency and the developer making the improvements to avoid incurring any general obligation indebtedness to finance the needed improvements or services, because the cost is borne solely by residents of the benefited area.[183] A Mello-Roos community facilities district is a "legally constituted governmental entity established…for the

---

[180] See generally Exhibit T, About SANDAG, Work Program & Budget, https://www.sandag.org/index.asp?fuseaction=about.workprogram (accessed on June 25, 2020).

[181] Exhibit A, Test Claim, page 7.

[182] *Building Industry Assn. of Bay Area v. City of San Ramon* (2016) 4 Cal.App.5th 62, 68.

[183] Government Code section 53311.5; *Building Industry Assn. of Bay Area v. City of San Ramon* (2016) 4 Cal.App.5th 62, 70.

sole purpose of financing facilities and services"[184] and does not itself provide public services.[185] The legislative body or governing board of the local agency establishing the district constitutes the legislative body of a community facilities district.[186] The Act specifies the services or facilities that may be financed through the establishment of a community facilities district, including but not limited to: police or fire protection services, library services, public school maintenance services, street and road maintenance, hazardous substance cleanup services, purchase, construction, or rehabilitation of real or other tangible property with an estimated useful life of five years or longer, and planning and design work directly related to such property.[187]

ii. Formation of a Mello-Roos community facilities district

Specific procedures must be followed before a local government agency may establish a community facilities district.[188] A local agency may institute proceedings to establish a district on its own or may be required to do so at the request of certain parties.[189] The local agency must institute proceedings when: (1) a written request is made by two members of the legislative body of the local agency; (2) a petition requesting that the agency institute proceedings, signed by a specified number of registered voters, is submitted; or (3) a petition requesting that the agency institute proceedings, signed by specified landowners, is submitted.[190] The local agency is then required to adopt a resolution of intention to establish a community facilities district, which must include specified terms describing the public facilities and services proposed to be financed by the community facilities district and state whether a special tax will be annually levied and secured by a lien on the real property within the district to fund the facilities or services.[191] If the legislative body determines to actually establish a district, it must then adopt a resolution of formation, which must contain all of the information required in the resolution of intention.[192] If a special tax is proposed and has not been eliminated through majority protest, the resolution must contain additional specified information pertaining to the proposed tax levy.[193] Following adoption of the resolution of formation, the local agency submits the proposal to levy any special

---

[184] Government Code section 53317(b).

[185] Exhibit T, Senate Local Government Committee, *What's So Special About Special Districts?* (Fourth Ed.) (October 2010), https://sgf.senate.ca.gov/sites/sgf.senate.ca.gov/files/2010WSSASD4edition.pdf (accessed on June 24, 2020), page 3.

[186] Government Code section 53317(g).

[187] Government Code sections 53313 and 53313.5.

[188] Government Code section 53318 et seq.

[189] Government Code section 53318.

[190] Government Code section 53318(a)-(c).

[191] Government Code sections 53320 and 53321.

[192] Government Code section 53325.1.

[193] Government Code section 53325.1(a).

taxes to the voters of the proposed district, which must be approved by two-thirds of the district's voters.[194]

After a community facilities district has been created and authorized to levy special taxes, the legislative body of the local agency adopts an ordinance to levy the special taxes at the rate and in the manner specified in the resolution and apportion the proceeds to the community facilities district.[195] Any tax imposed under the Act is considered a special tax, not a general tax, fee, or assessment.[196] The special tax is collected in the same manner as ad valorem property taxes and is subject to the same penalties, procedure, sale, and lien priority in the event of delinquency, unless another procedure is authorized in the resolution of formation.[197] Special tax revenues may only be used to fund public facilities, services, and incidental costs.[198]

iii. There is no evidence that SANDAG has ever established a community facilities district.

While the Mello-Roos Act authorizes SANDAG as the consolidated agency to establish a community facilities district, there is no evidence that SANDAG has ever done so or even taken any steps to initiate proceedings to establish a community facilities district. SANDAG did not file any documentation, nor is the Commission aware of any, showing that SANDAG has participated in creating a community facilities district, such as a resolution of intention as discussed in Government Code section 53320 and 53321, a resolution of formation as discussed in Government Code section 53325.1, or any community facilities district reports, some of which are required to be displayed on the local agency's website.[199] Without adoption of a resolution of formation, there can be no community facilities district and no election to approve the levy and apportionment of a special tax.

[194] Government Code sections 53326(a), 53328.

[195] Government Code section 53340(a).

[196] Government Code section 53325.3 ["tax imposed pursuant to this chapter is a special tax and not a special assessment"]; *Riverside County Community Facilities Dist. No. 87-1 v. Bainbridge 17* (1999) 77 Cal.App.4th 644 [charges levied against properties by a community facilities district to pay off bonds were "special taxes", not "special assessments"; Mello-Roos Act refers repeatedly and unambiguously to the levying of a "special tax," not a "special assessment]; *Building Industry Assn. of Bay Area v. City of San Ramon* (2016) 4 Cal.App.5th 62, 86-89 [special taxes imposed by a community facilities district are not general taxes].

[197] Government Code section 53340(e).

[198] Government Code section 53340(d).

[199] See Government Code section 53343.2.

iv. SANDAG is not subject to the appropriations limit of any established community facilities district.

The Mello-Roos Community Facilities Act permits a local agency to establish an appropriations limit of a community facilities district upon approval by the voters of the district.[200] Government Code section 53325.7 states in relevant part:

> The legislative body may submit a proposition *to establish* or change the *appropriations limit*, as defined by subdivision (h) of Section 8 of Article XIII B of the California Constitution, *of a community facilities district* to the qualified electors of a proposed or established district. The proposition establishing or changing the appropriations limit shall become effective if approved by the qualified electors voting on the proposition...[201]

The plain language of Government Code section 53325.7, however, makes clear that the appropriations limit under the Mello-Roos Community Facilities Act applies to the community facilities district itself, not the local agency that establishes the district. Such a reading is supported by the fact that the Act defines a community facilities district as a "legally constituted governmental entity"[202] and expressly authorizes a community facilities district to "levy specified special taxes."[203] As such, the appropriations limit of a community facilities district is not imputed to the local agency that forms it.

SANDAG has filed no evidence to show that it has ever established a community facilities district. Furthermore, even if SANDAG had established a community facilities district, because a community facilities district is subject to its own appropriations limit, SANDAG does not receive the "proceeds of taxes" levied by the district and cannot claim eligibility for reimbursement on that basis. SANDAG's authority to create a community facilities district does not subject it to the district's appropriations limit.

Thus, based on the analysis above and contrary to its assertions in the Test Claim, SANDAG has no authority to levy taxes and is not subject to the appropriations limit of article XIII B. A local agency's ability to impose a tax requires express authorization by the Legislature, and there is no statute granting SANDAG the authority to levy a tax. The Transportation Commission's statutory authorization to impose a transactions and use tax and establish an appropriations limit is not imputed to SANDAG, a separate legal entity. Nor does SANDAG's ability to create a community facilities district give the agency such authority: there is no evidence that SANDAG has ever created a community facilities district and even if it had, a community facilities district is subject to its own appropriations limit. Reimbursement under article XIII B, section 6 is only required when a mandated new program or higher level of service forces local government to

---

[200] Government Code section 53325.7.

[201] Government Code section 53325.7, emphasis added.

[202] Government Code section 53317(b).

[203] Government Code section 53340(a).

incur "increased actual expenditures of limited *tax* proceeds that are counted against the local government's spending limit."[204]

Because SANDAG is without authority to levy taxes subject to the appropriations limit of article XIII B of the California Constitution, SANDAG is ineligible to claim mandate reimbursement under article XIII B, section 6.

C. SANDAG Has Not Incurred "Costs Mandated by the State" Because It Has Sufficient Fee Authority to Pay for Such Costs.

Even if SANDAG were found to be an eligible claimant, SANDAG has not incurred increased costs mandated by the state because it has sufficient fee authority to cover the costs of the new required activities.

Reimbursement under article XIII B, section 6 of the California Constitution is required only when a new program or higher level of service results in increased costs mandated by the state.[205] "Costs mandated by the state" are any increased costs which a local agency is required to incur after July 1, 1980, as a result of any statute or executive order enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of article XIII B, section 6 of the California Constitution.[206] Government Code section 17556(d), provides that "[t]he commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." The California Supreme Court concluded that Government Code section 17556(d), is facially constitutional under article XIII B, section 6.[207]

SANDAG, as the consolidated agency, is authorized under Public Utilities Code section 132354(h) to "fix and collect fees for any services rendered by it." The agency uses three forms of member agency assessments as part of its annual budget: (1) SANDAG member assessments, (2) Criminal Justice member assessments, and (3) Automated Regional Justice Information System (ARJIS) member assessments and user fees.[208] SANDAG's bylaws provide for the manner in which the "portion of the budget for SANDAG, which is to be supplied by the Member Agencies, as adopted by the Board of Directors" is assessed.[209] General member

---

[204] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185, emphasis added.

[205] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735-736; Government Code section 17514.

[206] Government Code section 17514.

[207] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 489.

[208] Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf (accessed on June 4, 2020), page 10-1.

[209] Exhibit T, SANDAG Bylaws, as amended April 2020, article VI, section 2.

assessments are based on population estimates for each member agency relative to the total regional population.[210]

SANDAG acknowledges having fee authority to offset costs, but claims that member assessments are insufficient to fully cover the costs resulting from the new activities required by the test claim statute.[211] SANDAG's final program budget for the 2020 fiscal year provides the following breakdown of revenues derived from general member assessments:[212]

- Criminal Justice Analysis and Monitoring – Substance Abuse Monitoring ($18,750);
- Regional Shoreline Management Planning ($95,501);
- Regional Energy/Climate Change Planning ($23,177);
- Regional Sea-Level Rise Adaptation Guidance for Transportation Infrastructure ($7,740); and
- Government relations ($244,084).

Based on the information contained in the final program budget for the 2020 fiscal year, total revenues as derived from general member assessments are $389,252. SANDAG increased general member assessments from $547,426 (2019 fiscal year) to $1,094,852 (2020 fiscal year) and added an annual increase going forward based on the Consumer Price Index.[213] The doubling of general membership fees was intended "to provide the agency with a sustainable source of funding necessary to support ongoing and future activities" due to "limited outside funding opportunities for personnel and planning efforts."[214] SANDAG acknowledges in the Test Claim that it doubled membership fees in order to recover some of the costs arising from the test claim statute.[215]

In interpreting the exception to reimbursement under Government Code section 17556(d), the court in *Connell v. Superior Court* found that "the plain language of the statute precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees

---

[210] Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf (accessed on June 4, 2020), page 10-1.

[211] Exhibit A, Test Claim, page 17.

[212] Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf (accessed on June 4, 2020), page 206.

[213] Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf (accessed on June 4, 2020), page 10-1.

[214] Exhibit T, SANDAG News: https://www.sandag.org/index.asp?newsid=1124&fuseaction=news.detail (accessed on June 4, 2020), page 3.

[215] Exhibit A, Test Claim, page 17.

sufficient to cover the costs of the state-mandated program. [216] Whether a local agency has the fee authority sufficient to pay for the costs of the program under Government Code section 17556 (d) is a pure question of law.[217] The application of Government Code section 17556(d) does not depend on the "practical ability [of charging fees] in light of surrounding economic circumstances," but rather on the right or power to levy such fees.[218]

In *Paradise Irrigation District, et al. v. Commission on State Mandates, Department of Finance, and Department of Water Resources* (2019) 33 Cal.App.5th 174, water and irrigation districts acknowledged their statutory authority to recover the costs necessary to comply with conservation goals imposed by the Water Conservation Act, but denied having the practical ability to impose such fees. The court held that the districts were not entitled to subvention, despite the existence of a power-sharing arrangement between districts and voters under which a majority of property owners could protest a fee imposed by districts and prevent its imposition.[219] The court said that the possibility of a protest did not divest districts of their authority to levy fees to pay for the costs of complying with the Water Conservation Act without prior voter approval.[220] Here, moreover, the fees charged to the member agencies are not subject to the procedural requirements at issue in *Paradise Irrigation District.*

Therefore, if SANDAG has "the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program," reimbursement is not required.[221] The agency's practical ability (or lack thereof) to assess fees sufficient to cover such costs is immaterial to the analysis. The plain language of Public Utilities Code section 132354(h) gives SANDAG, as the consolidated agency, broad authority to levy fees on its member agencies to pay for "any services rendered by it." The consolidated agency is statutorily required to provide the services of an independent performance auditor.[222] There are no laws restricting SANDAG's ability to "fix and collect fees for any services rendered by it."[223] In fact, SANDAG recently doubled membership fees to more than $1 million for the 2020 fiscal year, a decision it acknowledges making in order to pay for the cost of the new activities required under the test claim statute.

As such, SANDAG, as a consolidated agency, has the fee, service charge, or assessment authority sufficient to pay for the new required activities imposed by the test claim statute.

---

[216] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[217] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 399.

[218] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[219] *Paradise Irrigation District, et al. v. Commission on State Mandates, Department of Finance, and Department of Water Resources* (2019) 33 Cal.App.5th 174, 194.

[220] *Paradise Irrigation District, et al. v. Commission on State Mandates, Department of Finance, and Department of Water Resources* (2019) 33 Cal.App.5th 174, 195.

[221] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[222] Public Utilities Code section 132354.1.

[223] Public Utilities Code section 132354(h).

Therefore, reimbursement is not required under article XIII B, section 6 of the California Constitution.

D. The Commission Has Not Violated the Claimant's Due Process Rights or Committed Prejudicial Error or Bias in Favor of Finance, As Alleged, in Granting Finance's Request for an Extension of Time to File Comments on the Test Claim or in Issuing the Proposed Decision.

The claimant argues that the Commission staff erred in granting Finance an extension of time to file comments on the Test Claim because the request was untimely and failed to comply with the Commission's regulations.[224]

The claimant also appears to be confused about the mandates process and objects to the issuance of the "Proposed Order" prior to the claimant or any other interested party having the opportunity to file a rebuttal to Finance's comments on the Test Claim.[225] However, the "Proposed Decision," which would be roughly equivalent to the "Proposed Order" indicated is not issued until approximately two-weeks prior to the hearing and after consideration of the claim, all comments on the claim including any rebuttal comments, and all comments on the Draft Proposed Decision. In this case, the transmittal for the "*Draft* Proposed Decision" clearly indicated that

> Pursuant to Commission on State Mandates (Commission) regulations in section 1183.3, the rebuttal period for the comments filed on this matter by the Department of Finance (Finance) served on June 30, 2020 ends July 30, 2020. Rebuttal comments, if they are filed, will be reviewed and considered in the Proposed Decision. Please note that rebuttal comments and comments on the Draft Proposed Decision may be combined.[226]

The claimant, nonetheless, concludes by stating that the following factors have violated its due process rights:

> The Commission's disregard of objective regulatory deadlines in allowing the Department of Finance to file untimely comments may be viewed independently as demonstrating prejudicial bias. Its issuance of a proposed decision mirroring the Department's comments before the Claimant's deadline to file a rebuttal to such comments not only violates the Commission's regulations, it firmly establishes the presence of a prejudicial bias for the Department of Finance and against both Claimant SANDAG as well as all other interested parties commenting in favor of the test claim. "Due process requires fair adjudicators in courts and administrative tribunals alike." *Haas v. County. of San Bernardino*, 27 Cal. 4th 1017, 1024, (2002). "In the administrative setting, a hearing must be conducted 'before a reasonably impartial, noninvolved reviewer,'" *Nasha L.L.C.*

[224] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, pages 1-2.

[225] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

[226] Exhibit R, Draft Proposed Decision, page 1 (Transmittal).

> *v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 484. For a hearing to be deemed fair . . . biased decision makers are... impermissible and even the probability of unfairness is to be avoided..." *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170. In the present matter, the Commission staff has and continues to demonstrate an impermissible bias in favor or the Department of Finance and against Claimant SANDAG. Such bias will render any decision in favor of the Department of Finance's position in this matter subject to future reversal.[227]

The claimant is correct that the protections of procedural due process apply to administrative proceedings, and while administrative agencies have considerable leeway in how they structure their adjudicative functions, agencies may not disregard certain basic precepts of a fair hearing before a neutral or unbiased decision-maker.[228] Just as in a judicial proceeding, due process in an administrative hearing demands an appearance of fairness and the absence of even a probability of outside influence on the adjudication.[229] While procedural due process is a "flexible concept that does not establish universally applicable procedures," at a minimum, due process requires notice, an opportunity to respond, and an impartial decision maker. [230]

To prevail on a claim of bias in violation of due process, the aggrieved party must present "concrete facts" showing "an unacceptable probability of actual bias on the part of those who have actual decision making power over their claims."[231]

> When, as here, an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46.) A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. (*People v. Harris* (2005) 37 Cal.4th 310, 346; see *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025 ["When due process requires a hearing, the adjudicator must be impartial."].) Violation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation "in which experience

---

[227] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, pages 3-4.

[228] *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 4; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90-91. This basic principle is consistent with the California Law Revision Commission's note on Government Code section 17533. Section 17533 provides that Chapter 4.5, beginning with section 11400 of the Administrative Procedures Act, does not apply to a hearing by the Commission. The note by the Law Revision Commission states that "Nothing in section 17533 excuses compliance with procedural protections required by due process of law."

[229] *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.

[230] *Sommerfield v. Helmick* (1997) 57 Cal.App.4th 315, 320.

[231] *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483, citing *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236.

> teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Withrow v. Larkin*, supra, at p. 47.)[232]

In this case, the Commission has not violated the claimant's due process rights or committed prejudicial error or bias in favor of Finance as alleged by SANDAG. The issues presented in this Test Claim are pure issues of law, subject to the Commission's de novo review,[233] and the claimant has been given a full opportunity to file written comments and provide testimony in support of the Test Claim, in rebuttal to Finances comments, and in response to the Draft Proposed Decision, all of which have been considered in this Decision. The claimant has not presented facts showing that Commission staff, in granting Finance's request for an extension of time to file comments on the Test Claim or in issuing the Draft Proposed Decision and Proposed Decision, resulted in the Commission members acting with "an unacceptable probability of actual bias" in reaching their decision on the Test Claim.

1. The approval of Finance's request for an extension of time to file comments on the Test Claim was proper and did not violate the claimant's due process rights.

The claimant argues that Commission staff erred in granting Finance an extension of time to file its comments on the Test Claim because the request was untimely and failed to comply with the Commission's regulations.[234]

Section 1183.2 of the Commission's regulations require written comments on a test claim to be certified, filed, and served within 30 days of issuance of the test claim.[235] Under section 1187.9, a request to extend the 30-day deadline must be filed "before the date set for filing of comments or rebuttals" and must "fully explain the reasons for the extension, propose a new date of filing, and be certified, filed, and served in accordance with section 1181.3 of these regulations."[236] Section 1187.9 further states that "If representations of fact are made, they shall be supported with documentary or testimonial evidence in accordance with section 1187.5 of these regulations. So long as a postponement of a hearing would not be required, there is no prejudice to any party or interested party, and there is no good reason for a denial, the request shall be approved."[237]

Here, the Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date issued April 29, 2020 provided a deadline of May 29, 2020 for written comments

---

[232] *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.

[233] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64 and 71, fn. 15; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281.

[234] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.

[235] California Code of Regulations, title 2, section 1183.2.

[236] California Code of Regulations, title 2, section 1187.9(a).

[237] California Code of Regulations, title 2, section 1187.9(a).

on the Test Claim.[238] Finance filed its request for an extension on June 3, 2020, three business days after the filing deadline.[239] The request states that more time is needed to review and respond to the Test Claim "[d]ue to the additional workload and logistical challenges with protective measures, such as teleworking, associated with the COVID-19 pandemic."[240] The claimant argues that in addition to being late, Finance's request is further invalid because it was not certified and the factual allegations contained therein were not supported by documentary or testimonial evidence as required by the Commission's regulations.[241]

Certification under section 1181.3 requires that any new filing or written material filed with the Commission "be signed at the end of the document, under penalty of perjury, with the declaration that the filing is true and correct to the best of the declarant's personal knowledge, information, or belief," along with the date of signing and the declarant's title and contact information.[242] Section 1187.5 requires that any written representation of fact "be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief."[243] Here, Finance's request for an extension is not signed under penalty of perjury, nor does it contain a declaration that the filing is based on the declarant's personal knowledge, information or belief.

Section 1187.9(a) further provides that "[s]o long as a postponement of a hearing would not be required, there is no prejudice to any party or interested party, and there is no other good reason for denial, the request shall be approved."[244] While Finance did not strictly adhere to the Commission's regulations in the timing and format of its extension request, the claimant has failed to show that it suffered any harm or prejudice as a result of the approval of Finance's request for an extension of time to file written comments on the Test Claim.

Section 1187.9 gives the Commission up to two business days to determine whether to grant an extension request and to give notice of that determination.[245] Finance's request was filed three business days after the filing deadline, with the Commission issuing and serving a Notice of Extension Request Approval the same day.[246] No postponement of the scheduled hearing date of

[238] Exhibit T, Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date, page 1.

[239] Exhibit T, Finance's Request for Extension of Time, page 1.

[240] Exhibit T, Finance's Request for Extension of Time, page 1.

[241] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, pages 1-2.

[242] California Code of Regulations, title 2, section 1181.3(a).

[243] California Code of Regulations, title 2, section 1187.5(b).

[244] California Code of Regulations, title 2, section 1187.9(a).

[245] California Code of Regulations, title 2, section 1187.9(a).

[246] Exhibit T, Notice of Extension Request Approval, page 1.

September 25, 2020 was necessary, nor was the rebuttal period shortened.[247] The claimant's rights to file written comments, rebuttal, and testimony have been preserved. Accordingly, the claimant has not shown that the approval of Finance's request violated its due process right to a fair hearing.

2. The Commission did not prematurely or otherwise improperly issue the Proposed Decision.

The claimant objects to the Commission's issuance of the "Proposed Order" prior to the claimant or any other interested party having the opportunity to file a rebuttal to Finance's comments on the Test Claim.[248] The claimant confuses the Draft Proposed Decision with the Proposed Decision, the latter of which was not yet issued at the time of claimant's objection. Section 1183.6 of the Commission's regulations states in pertinent part as follows:

> (a) Before the hearing on the test claim, Commission staff shall prepare a proposed decision for the test claim, which shall include but not be limited to a review of the written comments filed…
>
> (b) At least eight weeks before the hearing, or at a time required by the executive director or stipulated to by the parties, Commission staff shall prepare a draft proposed decision and distribute it to the parties, interested parties, and those on the mailing list described in section 1181.3 of these regulations, and shall post it on the Commission's website.
>
> (c) Anyone may file written comments concerning the draft proposed decision. If representations of fact are made, they shall be supported by documentary or testimonial evidence in accordance with section 1187.5 of these regulations. Written comments shall be certified, filed, and served in accordance with section 1181.3 of these regulations, by the date determined and noticed by the executive director. A three-week period for comments shall be given, subject to the executive director's authority to expedite all matters pursuant to Government Code section 17530. All written comments timely filed shall be reviewed by Commission staff and may be incorporated into the proposed decision for the test claim.[249]

Here, the Draft Proposed Decision was issued on July 15, 2020, which reiterated the deadlines for filing rebuttal comments to Finance's comments on the Test Claim (July 30, 2020) and comments on the Draft Proposed Decision (August 5, 2020).[250] As such, it was the *Draft* Proposed Decision, not the Proposed Decision, that was issued prior to the end of the rebuttal

---

[247] See California Code of Regulations, title 2, section 1183.3(a) [written rebuttal period is 30 days from date of service of written comments on the test claim]. See also Exhibit R, page 1, stating the same.

[248] Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

[249] California Code of Regulations, title 2, section 1183.6(a)-(c).

[250] Exhibit R, Draft Proposed Decision, page 1 (Transmittal).

comment period. The notice enclosing the Draft Proposed Decision makes clear that rebuttal comments filed before the end of the rebuttal period will be reviewed and considered by the Commission in the Proposed Decision "and may be combined with comments on the Draft Proposed Decision."[251] The claimant, as well as any interested party, was given the full length of time allowed by the Commission's regulations and to file rebuttal comments and comments on the Draft Proposed Decision prior to issuance of the Proposed Decision. A proposed decision was not prematurely or otherwise improperly issued in this matter.

Accordingly, the Commission has not violated the claimant's due process rights or committed prejudicial error or bias in favor of Finance as alleged.

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the claimant is exempt from the taxing and spending restrictions of articles XIII A and B of the California Constitution and therefore ineligible to claim mandate reimbursement under article XIII B, section 6. Alternatively, even if the claimant were found to be an eligible test claimant, the Commission finds that it has fee authority sufficient to pay for the costs associated with the new activities required by the test claim statute pursuant to Government Code section 17556(d) and therefore is not entitled to reimbursement.

[251] Exhibit R, Draft Proposed Decision, page 1 (Transmittal).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Penal Code Sections 188, 189, and 1170.95 as added or amended by Statutes 2018, Chapter 1015 (SB 1437) Filed on December 31, 2019 County of Los Angeles, Claimant	Case No.: 19-TC-02 *Accomplice Liability for Felony Murder* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 4,2020*) (*Served December 9, 2020*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on December 4, 2020.

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Penal Code Sections 188, 189, and 1170.95 as added or amended by Statutes 2018, Chapter 1015 (SB 1437) Filed on December 31, 2019 County of Los Angeles, Claimant	Case No.: 19-TC-02 *Accomplice Liability for Felony Murder* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 4, 2020*) (*Served December 9, 2020*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on December 4, 2020. Lucia Gonzalez, Felicia Grant, and Craig Osaki appeared as witnesses for the County of Los Angeles (claimant). Christina Snider and John O'Connell appeared on behalf of the County of San Diego.

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

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

Member	**Vote**
Lee Adams, County Supervisor	No
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	No
Carmen Ramirez, City Council Member	Yes
Andre Rivera, Representative of the State Treasurer, Vice-Chairperson	Yes
Jacqueline Wong-Hernandez, Representative of the State Controller	No

Summary of the Findings

This Test Claim filed by the County of Los Angeles (claimant) addresses Statutes 2018, chapter 1015, which amended Penal Code sections 188 and 189 and added Penal Code section 1170.95, with respect to accomplice liability for felony murder.

Generally, to prove the crime of murder, the prosecution must show that the defendant performed an act that took a human life and that the defendant had the necessary state of mind or "malice aforethought" to commit that act.[1] However, under prior law, if a killing occurred during the commission of another crime, then malice and the intent to kill could be presumed or implied to support a conviction of murder. For example, under the felony-murder rule, if a person is killed, even accidentally or by an accomplice while the defendant committed certain other felonies, the defendant could be convicted of murder without the prosecutor having to prove that the defendant intended or had the state of mind to kill.[2] Similarly, the natural and probable consequences doctrine allows for a conviction of murder without the need to prove the defendant's state of mind, if the killing was a natural and probable consequence of the "targeted" crime committed by the defendant.[3]

The test claim statute amended Penal Code sections 188 and 189, and added section 1170.95, to limit the definition of murder to be applicable only to those who have either an intent to kill or who were major participants in the underlying crime and acted with reckless indifference to human life. Thus, the law no longer allows a person to be convicted of murder simply based on implied or presumed intent. To apply these standards retroactively, Penal Code section 1170.95 sets forth a petition process allowing petitioners who were convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine, to request the court to vacate the murder conviction and to resentence the petitioner on the remaining counts. The statute requires county district attorneys and public defenders, when appointed to defend the petitioner, to participate in the process and the hearing on the petition. The court shall vacate the murder conviction and recall the sentence when:

- The parties stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing.
- The court or jury at the original trial made specific findings that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony.
- The district attorney fails to sustain its burden of proof, beyond a reasonable doubt, that the petitioner is ineligible to have the murder conviction vacated and for resentencing; in other words, the district attorney fails to prove that the petitioner intended to kill or was a major participant in the crime and acted with reckless indifference to human life.[4]

[1] Penal Code sections 187, 188.

[2] *People v. Dillon* (1983) 34 Cal.3d 441, 467-468; Penal Code section 189, as last amended by Statutes 2010, chapter 178.

[3] *People v. Chiu* (2014) 59 Cal.4th 155, 158.

[4] Penal Code section 1170.95(d).

The Commission finds that this Test Claim was timely filed within 12 months of the effective date of the test claim statute.

The Commission finds that sections 188 and 189 of the Penal Code, as amended by the test claim statute, do not impose any requirements on local government and, thus, do not impose a state-mandated program. Penal Code sections 188 and 189 define "malice" and "murder" and, as amended, limit the definition of murder to the actual killer, someone with the intent to kill who assisted the killer, or a major participant in the crime who acted with reckless indifference to human life.

The Commission further finds that Penal Code section 1170.95 imposes new requirements on county district attorneys and public defenders to participate in the petition process, however those requirements do not impose costs mandated by the state. Government Code section 17556(g), which implements article XIII B, section 6, 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." The test claim statute changed the elements of the crime of murder and, in so doing, "vacated" or eliminated the crime of murder under the felony-murder rule and the natural and probable consequences doctrine unless it is proven beyond a reasonable doubt, that the defendant had the intent to kill or was a major participant acting with reckless indifference to human life and, thus, there are no costs mandated by the state within the meaning of Government Code section 17556(g).

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/01/2019	The effective date of Statutes 2018, chapter 1015, amending Penal Code sections 188, 189, and enacting Penal Code section 1170.95.
12/31/2019	The claimant filed the Test Claim.[5]
04/17/2020	The Department of Finance (Finance) requested a 60-day extension of time to file comments on the Test Claim, which was approved for good cause.
06/19/2020	Finance filed comments on the Test Claim.[6]
06/26/2020	Commission staff issued the Draft Proposed Decision.[7]
07/16/2020	The County of San Diego requested a four-week extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.
07/17/2020	The claimant filed Notice of Change of Representation.

[5] Exhibit A, Test Claim, filed December 31, 2019.

[6] Exhibit B, Finance's Comments on the Test Claim, filed June 19, 2020.

[7] Exhibit C, Draft Proposed Decision, issued July 21, 2020.

07/17/2020	The San Joaquin County Board of Supervisors' Chair filed comments on the Draft Proposed Decision.[8]
07/21/2020	The claimant requested a four-week extension of time to file comments on the Draft Proposed Decision and to postpone the hearing to December 4, 2020, which was approved for good cause.
08/04/2020	The County of San Diego requested an eight day extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.
08/10/2020	The California Public Defenders Association filed late comments on the Draft Proposed Decision.[9]
08/14/2020	The County of San Diego filed comments on the Draft Proposed Decision.[10]
08/14/2020	The claimant filed comments on the Draft Proposed Decision.[11]
08/17/2020	The Alameda County Public Defender's Office filed late comments on the Draft Proposed Decision.[12]

II. Background

A. A History of the Felony-Murder Rule and the Natural and Probable Consequences Doctrine

1. The History of the Felony-Murder Rule in California

Generally, to be convicted of murder, proof must be shown that the defendant performed an act that took the life of a human being and had the necessary state of mind to commit that act.[13] Application of the felony-murder rule, however, removes the need to prove the defendant's malice, or state of mind.

> [T]he two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. From this profound legal

[8] Exhibit D, San Joaquin County, Board of Supervisors' Chair's Comments on the Draft Proposed Decision, filed July 17, 2020.

[9] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020.

[10] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020.

[11] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020.

[12] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020.

[13] Penal Code section 187 defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." Penal Code section 188 defines "malice."

> difference flows an equally significant factual distinction, to wit, that first degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.
>
> Despite this broad factual spectrum, the Legislature has provided only one punishment scheme for all homicides occurring during the commission of or attempt to commit an offense listed in section 189: regardless of the defendant's individual culpability with respect to that homicide, he must be adjudged a first degree murderer and sentenced to death or life imprisonment with or without possibility of parole — the identical punishment inflicted for deliberate and premeditated murder with malice aforethought.[14]

The felony-murder rule derives from English law.[15] In 1850, the California Legislature codified the felony-murder rule.[16] In 1872, the Legislature enacted the Penal Code with the inclusion of the felony-murder rule codified at Penal Code section 189.[17] Section 189(a) enumerates a list of felonies and if a killing occurs during the commission of one of the enumerated felonies, even if the death is unknown to the defendant or is accidental, then the defendant could be convicted of murder in the first-degree without the need for proof of the defendant's malice. The California Supreme Court explained the purpose of the felony-murder rule as follows:

> The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony. [Citation omitted.] "The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer

---

[14] *People v. Dillon* (1983) 34 Cal.3d 441, 476-477 citing Penal Code section 190 et seq.

[15] Exhibit I, Bald, *Rejoining Moral Culpability With Criminal Liability: Reconsideration of the Felony Murder Doctrine for the Current Time* (2017) 44 J. Legis. 239, 241-242, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1679&context=jleg (accessed on April 16, 2020); Miller, *People v. Dillon: Felony Murder in California* (1985) 21 Cal. Western L.Rev. 546, 546-547, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1578&context=cwlr (accessed on April 10, 2020).

[16] Statutes 1850, chapter 99, page 229; *People v. Dillon* (1983) 34 Cal.3d 441, 465.

[17] *People v. Dillon* (1983) 34 Cal.3d 441, 467-468.

> entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof."[18]

A homicide that is a direct causal result of the commission of a felony inherently dangerous to human life, other than the felonies enumerated in Penal Code section 189, constitutes "at least second degree murder."[19]

The application of the felony-murder rule has been strongly criticized.[20] Three states have abolished it and several others have tempered its impact by lessening the degree of murder or homicide that can be charged.[21] The California Supreme Court has characterized the felony-murder rule as a "'barbaric' concept that has been discarded in the place of its origin"[22] and "a 'highly artificial concept' which 'deserves no extension beyond its required application'"[23] and that "'in almost all cases in which it is applied it is unnecessary' and 'it erodes the relation between criminal liability and moral culpability.'"[24]

While acknowledging that it was not empowered to overrule the Legislature, the court took a step toward reestablishing the relationship between criminal liability and culpability in *People v. Dillon*.[25] In that case, a 17-year-old was convicted of first-degree murder under the felony-murder rule for the shooting death of a property owner during an attempted robbery.[26] The defendant and several others armed themselves and entered a marijuana grow to steal some plants. The property owner and his security, also armed, responded.[27] The defendant heard gun fire. In the ensuing confusion, the defendant panicked and thinking that he was soon to be shot, the defendant shot the property owner nine times only stopping when his gun was empty.[28] Weighing the facts of the crime — the immaturity of the defendant, his panic and lack of intent to kill, only the defendant was charged with any type of homicide — against the punishment of life in prison, the court found the application of the felony-murder rule was unconstitutional in

---

[18] *People v. Cavitt* (2004) 33 Cal.4th 187, 197.

[19] *People v. Ford* (1964) 60 Cal.2d 772, 795.

[20] *People v. Dillon* (1983) 34 Cal.3d 441.

[21] Exhibit I, Miller, *People v. Dillon: Felony Murder in California* (1985) 21 Cal. Western L.Rev. 546, 547-548, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1578&context=cwlr (accessed on April 10, 2020).

[22] *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Phillips* (1966) 64 Cal.2d 574, 583, footnote 6.

[23] *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Phillips* (1966) 64 Cal.2d 574, 582.

[24] *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Washington* (1965) 62 Cal.2d 777.

[25] *People v. Dillon* (1983) 34 Cal.3d 441, 465.

[26] *People v. Dillon* (1983) 34 Cal.3d 441, 450.

[27] *People v. Dillon* (1983) 34 Cal.3d 441, 451-452.

[28] *People v. Dillon* (1983) 34 Cal.3d 441, 482.

this case and reduced the defendant's sentence from first-degree murder to second-degree murder.[29]

2. The History of the Natural and Probable Consequences Doctrine in California

The natural and probable consequences doctrine allows for a conviction for any crime, including murder, without the need to prove the defendant's malice or state of mind, if the "nontargeted" crime was a natural and probable consequence of the "targeted" crime that the defendant aided and abetted.[30]

> There are two distinct forms of culpability for aiders and abettors. "First, an aider and abettor with the necessary mental state is guilty of the intended crime [target offense]. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted [nontarget offense].'"[31]

The nontarget offense is a natural and probable consequence if it was foreseeable by an objective, reasonable person.[32] Like the felony-murder rule, the natural and probable consequences doctrine has been strongly criticized by legal scholars.[33] Indeed, the majority of states do not adhere to it and the Model Penal Code does not include it.[34]

The California Supreme Court took another step toward reestablishing the relationship between criminal liability and culpability in *People v. Chiu*.[35] In that case, high school students were gathered after school. The defendant made a remark to a young woman. Her friends engaged in

---

[29] *People v. Dillon* (1983) 34 Cal.3d 441, 488-489.

[30] Exhibit I, Goldstick, *Accidental Vitiation: The Natural and Probable Consequence of Rosemond v. United States on the Natural and Probable Consequence Doctrine* (2016) 85 Fordham L.Rev. 1281, 1290, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5268&context=flr (accessed on April 10, 2020).

[31] *People v. Chiu* (2014) 59 Cal.4th 155, 158 citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1117. Internal citations omitted in original.

[32] *People v. Chiu* (2014) 59 Cal.4th 155, 161-162.

[33] Exhibit I, Decker, *The Mental State Requirement For Accomplice Liability in American Criminal Law* (2008) 60 S.C. L.Rev. 237, 243-244, https://works.bepress.com/john-decker/2/download/ (accessed on April 17, 2020); Goldstick, *Accidental Vitiation: The Natural and Probable Consequence of Rosemond v. United States on the Natural and Probable Consequence Doctrine* (2016) 85 Fordham L.Rev. 1281, 1285, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5268&context=flr (accessed on April 10, 2020).

[34] Exhibit I, Decker, *The Mental State Requirement For Accomplice Liability in American Criminal Law* (2008) 60 S.C. L.Rev. 237, 380, https://works.bepress.com/john-decker/2/download/ (accessed on April 17, 2020).

[35] *People v. Chiu* (2014) 59 Cal.4th 155.

a verbal exchange with the defendant and his friends. A brawl broke out. One of the defendant's friends drew a gun and shot and killed one of the woman's friends.[36] The defendant was convicted of first-degree premeditated murder.[37] The court explained that liability under the natural and probable consequences doctrine is vicarious. The defendant didn't intend for the nontarget offense, the shooting, to happen. So, the defendant's intent is imposed vicariously from the shooter's premeditation.[38] The court noted that premeditation "is uniquely subjective and personal" making it "too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved…."[39] The court held that the natural and probable consequences doctrine cannot support a conviction of first-degree premeditated murder.[40]

3. The U.S. Supreme Court Cases Analyzing the Range of Criminal Liability Under the Felony Murder Rule.

The U.S. Supreme Court examined the criminal liability under the felony-murder rule in two key cases that, when read together, form the two extremes on the continuum of criminal accomplice conduct. The first of these, *Enmund v. Florida*[41] (hereinafter *Enmund*), presented a constitutional challenge under the Eighth Amendment ban against cruel and unusual punishment.[42] Enmund and his companions planned to rob a couple in their home. Enmund remained in the car as the getaway driver while his companions robbed and ultimately killed the couple.[43] Even though Enmund did not kill, attempt to kill, or intend to kill, he was convicted of first-degree murder and sentenced to death.[44] The court held that the sentence of death was cruel and unusual punishment under the Eighth Amendment and that criminal liability must be limited to a defendant's participation in the crime.[45]

In *Tison v Arizona*[46] (hereinafter *Tison*) the issue was whether the rule in *Enmund* had been properly applied in the state court.[47] The Tison brothers broke their father and his cellmate, both convicted murderers, out of prison using a large ice chest full of guns. After their car was disabled by a flat tire, the group carjacked a family of four and drove them into the desert to

---

[36] *People v. Chiu* (2014) 59 Cal.4th 155, 159-160.

[37] *People v. Chiu* (2014) 59 Cal.4th 155, 158.

[38] *People v. Chiu* (2014) 59 Cal.4th 155, 164-165.

[39] *People v. Chiu* (2014) 59 Cal.4th 155, 166.

[40] *People v. Chiu* (2014) 59 Cal.4th 155, 166-167.

[41] *Enmund v. Florida* (1982) 458 U.S. 782.

[42] *Enmund v. Florida* (1982) 458 U.S. 782, 787.

[43] *Enmund v. Florida* (1982) 458 U.S. 782, 783-784.

[44] *Enmund v. Florida* (1982) 458 U.S. 782, 785, and 787.

[45] *Enmund v. Florida* (1982) 458 U.S. 782, 800-801.

[46] *Tison v Arizona* (1987) 481 U.S. 137.

[47] *Tison v Arizona* (1987) 481 U.S. 137, 145-146.

exchange vehicles. Their father indicated he was "thinking about" killing the family and sent the Tison brothers to bring the family some water. When the brothers were returning from retrieving the water from one of the cars, their father and his cellmate shot each of the family members, killing the parents and infant and mortally wounding the teenaged niece, who later died at the scene. The brothers at no point attempted to intervene or render aid to the victims. The group then fled and were apprehended during a shootout with police some days later.[48] Applying the felony-murder rule, the brothers were convicted of four counts of murder and sentenced to death.[49] In applying their own holding in *Enmund*, the court noted that the facts in *Tison* were different from those of *Enmund*. *Enmund* had examined the criminal participant who neither killed nor intended to kill and whose participation in the underlying crime was minor. The facts of *Tison* didn't fit that scenario. Although the Tison brothers were not participants who had killed or who intended to kill, the court found that the brothers were not minor participants and that they knew that their acts would likely result in the death of an innocent person.[50] The court focused on the importance of the brothers' mental state, but noted that the intent to kill is not necessarily a determinant of culpability.[51] Indeed, the court reasoned, "This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'"[52] The court held that engaging in criminal acts that present a grave risk of death is acting with reckless indifference for human life and this mental state, along with the resulting death, may be part of decision process for setting a sentence.[53]

4. The California Supreme Court Case Analyzing Criminal Liability Under the Felony-Murder Rule

Against the backdrop of the *Enmund* and *Tison* cases, the California Supreme Court in *People v. Banks*[54] considered the felony-murder special circumstances conviction of a getaway driver who was sentenced to life imprisonment without parole.[55] At issue was Proposition 115[56] which had extended death penalty eligibility to major participants in felonies who demonstrated reckless indifference to human life under the felony-murder rule. Prior to Proposition 115, aiders and abettors had to have an intent to kill to be sentenced to death or life imprisonment without parole.[57] The court had never reviewed a case involving death penalty eligibility for aiders and

---

[48] *Tison v Arizona* (1987) 481 U.S. 137, 139-141.

[49] *Tison v Arizona* (1987) 481 U.S. 137, 141-143.

[50] *Tison v Arizona* (1987) 481 U.S. 137, 150-152.

[51] *Tison v Arizona* (1987) 481 U.S. 137, 156-157 [noting as examples the defenses of self-defense and provocation].

[52] *Tison v Arizona* (1987) 481 U.S. 137, 157.

[53] *Tison v Arizona* (1987) 481 U.S. 137, 157-158.

[54] *People v. Banks* (2015) 61 Cal.4th 788.

[55] *People v. Banks* (2015) 61 Cal.4th 788, 794-795.

[56] Proposition 115, Primary Election (June 5, 1990).

[57] *People v. Banks* (2015) 61 Cal.4th 788, 798.

abettors.[58] The court examined the two U.S. Supreme Court decisions, *Enmund* and *Tison*. Harmonizing the decisions into the *Tison-Enmund* standard, the Court concluded that punishment must relate to the individual's culpability and the determination of such culpability requires individualized analysis.[59] The court reversed the sentence of life imprisonment without parole.[60]

B. The Test Claim Statute, Statutes 2018, Chapter 1015, Amended Sections 188 and 189 and Added Section 1170.95 to the Penal Code to Limit the Application of the Felony-Murder Rule and the Natural and Probable Consequences Doctrine.

1. The Test Claim Statute

During the 2017-2018 legislative session, the Senate, citing the decision in *People v. Banks*, adopted Concurrent Resolution 48, which set forth the factual bases upon which the Legislature would seek to align penalty with criminal liability in the application of the felony-murder rule and the natural and probable consequences doctrine. The factual bases included: prison overcrowding with the housing of inmates at an average of 130 percent of capacity, the $70,836 annual cost to taxpayers to house an inmate, the fundamental unfairness in punishing felons in a manner not commensurate with their individual culpability, and the felony-murder rule had been limited or rejected by several states and is no longer followed in England where it originated. The resolution resolves, "That the Legislature recognizes the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime."[61]

The Legislature followed through on the resolution with the passage of the test claim statute, Statutes 2018, chapter 1015, which limited the applicability of the felony-murder rule and the natural and probable consequences doctrine.

> It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.[62]

Statutes 2018, chapter 1015, section 1(g) further states the Legislature's intent: "Except as stated in subdivision (e) of Section 189 of the Penal Code [regarding felony murder], a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea [mental state]."

Thus, the test claim statute amended Penal Code sections 188 and 189. Penal Code section 188 was amended to add subdivision (a)(3), which states as follows:

---

[58] *People v. Banks* (2015) 61 Cal.4th 788, 800-801.

[59] *People v. Banks* (2015) 61 Cal.4th 788, 800-805.

[60] *People v. Banks* (2015) 61 Cal.4th 788, 812.

[61] Exhibit I, Senate Concurrent Resolution 48 (2017-2018 Reg. Sess.), resolution chapter 175.

[62] Statutes 2018, chapter 1015, section 1(f).

> (3) Except as stated in subdivision (e) of Section 189 [regarding felony murder], in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

Penal Code section 189 was amended to add subdivision (e), which specifies the proof necessary to apply the felony-murder rule; that is, the liability for murder is limited to the actual killer, someone with the intent to kill who assisted the killer, or a major participant who acted with reckless indifference to human life.

Penal Code section 1170.95 was added to provide a petition and hearing process by which those convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine, who would not have been convicted under the amended Penal Code sections 188 and 189, can obtain a review by filing a petition to have their murder conviction vacated and to be resentenced on any remaining counts:

> (a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:
>
> > (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.
> >
> > (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.
> >
> > (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.
>
> (b)(1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:
>
> > (A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).
> >
> > (B) The superior court case number and year of the petitioner's conviction.
> >
> > (C) Whether the petitioner requests the appointment of counsel.
>
> (2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.

(c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

(d)(1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.

(2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.

(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

(e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

(f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.

(g) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.

The legislative history supporting the test claim statute cites to the disproportionately long sentences, the lack of deterrent effect, and that other countries had abandoned the felony-murder

rule.[63] Appropriations committees in both houses detailed the high costs involved in implementing the bill which included: the courts' costs to conduct the hearings, the Department of Corrections and Rehabilitation's costs to transport and supervise inmates going to hearings and to review records, as well as the costs to local governments for the time of district attorneys and public defenders to prepare for and appear at the hearings.[64] The Senate Appropriations Committee also noted the downstream savings on incarceration costs.[65] The bill passed both houses. As one court observed, "[t]hus, the Legislature's dual intents — making conviction and punishment commensurate with liability, and reducing prison overcrowding by eliminating lengthy sentences where unwarranted — dovetailed."[66]

2. The California Appellate Court Upholds Constitutionality of Test Claim Statute.

The constitutionality of the test claim statute was challenged in *People v. Superior Court (Gooden)*, after petitioners, convicted of murder under both the felony murder rule and the natural and probable consequences doctrine, petitioned the court to have their murder convictions vacated under Penal Code section 1170.95.[67] The People moved to dismiss the petitions on the ground that the test claim statute, which the voters did not approve, invalidly amended Propositions 7[68] and 115[69], which increased the punishments for murder and augmented the list of predicate offenses for first-degree felony murder liability under Penal Code section 189.[70] The California Constitution provides that the Legislature may only amend or repeal a statute enacted by voter initiative if there is voter approval or as provided in the initiative.[71] The Legislature may also amend statutes enacted by the voters if the initiative neither authorizes nor prohibits such action.[72] The court held that the test claim statute was not an invalid amendment to Proposition 7 or Proposition 115 because it neither added to, nor took

---

[63] Exhibit I, Senate Committee on Public Safety, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), April 24, 2018, pages 3-8; see also, Assembly Committee on Public Safety, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), June 26, 2018, pages 4-7.

[64] Exhibit I, Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), May 14, 2018, page 1; Assembly Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), Aug. 8, 2018, page 1.

[65] Exhibit I, Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), May 14, 2018, page 1.

[66] *People v. Munoz* (2019) 39 Cal.App.5th 738, 763.

[67] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270.

[68] Proposition 7, General Election (Nov. 7, 1978).

[69] Proposition 115, Primary Election (June 5, 1990).

[70] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 274.

[71] California Constitution, article II, section 10, subdivision (c), *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 279.

[72] California Constitution, article II, section 10, subdivision (c), *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 280 citing *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.

away from, the initiatives and, therefore, the test claim statute was constitutional in that respect.[73]

Specifically, the amendments made by Proposition 7 did three things to increase the punishment for murder: 1) set the penalty for murder in the first-degree at death, or confinement for life without possibility of parole, or confinement for 25 years to life; 2) set the penalty for murder in the second-degree at confinement for 15 years to life; and 3) expanded the list of special circumstances that would result in a conviction of murder in the first-degree.[74] The prosecution argued that the test claim statute changed the penalties for murder. The court reasoned that such an argument stemmed from confusing the elements of murder[75] and the punishment for murder.[76] As the court explained, "the language of Proposition 7 demonstrates the electorate intended the initiative to increase the punishments, or consequences, for persons who have been convicted of murder. Senate Bill 1437 did not address the same subject matter. . . . Instead, it amended the mental state requirements for murder."[77] The court held that the test claim statute did not amend Proposition 7.[78]

The amendments made by Proposition 115 added kidnapping, train wrecking, and sex offenses to the list of felonies that can result in a charge of murder. Like the test claim statute, Proposition 115 changed the circumstances under which a person may be liable for murder. The issue, reasoned the court, was whether the test claim statute addressed what Proposition 115 authorized or prohibited. The court concluded that the test claim statute only changed the mental state necessary for a murder conviction, not the listed felonies which were the subject of Proposition 115.[79] The court held that the test claim statute did not deprive the voters from what they enacted under either initiative.[80]

The test claim statute is currently under review by the California Supreme Court to determine whether it applies to *attempted* murder liability under the natural and probable consequences doctrine.[81]

---

[73] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 275.

[74] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 280-281.

[75] "'Every crime consists of a group of elements laid down by the statute or law defining the offense and every one of these elements must exist or the statute is not violated.'" (*People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 281, quoting *People v. Anderson* (2009) 47 Cal.4th 92, 101.)

[76] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 281.

[77] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 282.

[78] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 286.

[79] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 287, footnote omitted.

[80] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 289.

[81] *People v. Lopez*, California Supreme Court, Case No. S258175, review granted November 13, 2019, on the following question:

III. Positions of the Parties

A. County of Los Angeles

The claimant alleges that the test claim statute results in reimbursable increased costs mandated by the state. Specifically, the claimant alleges that the test claim statute "requires the County to provide representation, prosecution, and housing to the petitioners who file a resentencing petition . . . ." under Penal Code section 1170.95.[82] The claimant argues that the test claim statute "does not eliminate the felony murder rule" but rather revises "the felony murder rule to prohibit a participant in the commission or attempted commission of a felony that has been determined as inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act."[83] The claimant alleges new requirements on District Attorneys, Public Defenders, Alternate Public Defenders, and Sheriffs as follows:

> [T]he subject law mandates the following activities on Public Defender:
>
> > a) To file a petition with the court that sentenced the petitioner if: 1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; 2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder; and 3) The petitioner could not be convicted of first or second degree murder because of changes to sections 188 or 189 of the Penal Code effective January 1, 2019. (Penal Code §§ 1170.95 (a), (1), (2), and (3);
> >
> > b) If the Court reviews the petition and determines that the petitioner has proven the *prima facie* showing that he/she qualifies for resentencing who has requested a counsel, the court appoints a counsel to represent the petitioner. The Counsel will have to prepare for attendance at the resentencing hearing. (Penal Code § 1170.95 (c));

> The petitions for review are granted. The issues to be briefed and argued are limited to the following: (1) Does Senate Bill No. 1437 (Stats. 2018, ch. 1015) apply to attempted murder liability under the natural and probable consequences doctrine? (2) In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868, 143 Cal.Rptr.3d 659, 279 P.3d 1131 be reconsidered in light of *Alleyne v. United States* (2013) 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 and *People v. Chiu* (2014) 59 Cal.4th 155, 172 Cal.Rptr.3d 438, 325 P.3d 972?

[82] Exhibit A, Test Claim, filed December 31, 2019, page 5.

[83] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), page 2.

c) In preparing for and appearing at the re-sentencing hearing, counsel will have to review discovery, read transcripts, interview the defendant, retain experts, utilize investigators, review reports prepared by experts and investigators, and draft legal briefs for presentation to the court. (Penal Code §§ 1170.95 (c) & (d) (1)); and

d) Participation of counsel in training to competently represent the petitioners. (Penal Code§ 1170.95 (c))

On average, it will take at least: a) 25 hours per case excluding visitation with clients, b) additional investigation hours, and c) four (4) to five (5) hours of research. In total, a minimum of 30 hours per case.[84] [¶] . . . [¶]

[A]fter the petitioner serves his/her petition on the prosecution, the prosecutor shall:

a) File a response within 60 days of service of the petition. The petitioner may file and serve a reply within 30 days after the prosecutor response is served. If the petitioner makes a *prima facie* showing that he or she is entitled to relief, the court shall issue an order to show cause. Within 60 days after the order to show cause is issued, the court will set a resentencing hearing date. (Penal Code § 1170.95 (c))

b) Preparation and attendance at the resentencing hearing. (Penal Code§ 1170.95 (d) (1))

c) To prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. The prosecutors may rely on the record of conviction or offer new or additional evidence to meet their respective burdens or request additional documents. (Penal Code § 1170.95 (d) (3))

d) Retention and utilization of experts to evaluate the petitioner's eligibility for resentencing. (Penal Code§ 1170.95 (d) (3))

e) Participation of counsel in training for a competent prosecution. (Penal Code § 1170.95 (d) (3))

On average, it will take at least 20 hours per case for obtaining documents, reviewing voluminous records, writing responses, and litigating in court. Some cases require significantly more research and development time due to the loss of records that will be used to establish the firm basis for the petition.[85]

---

[84] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), pages 14-15. Footnotes omitted. See also Section 6, Declaration of Harvey Sherman, the Deputy-in-Charge of the Public Integrity Assurance Section, Los Angeles County Public Defender's Office, pages 22-24.

[85] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), pages 15-16. Footnotes omitted. See also Section 6, Declaration of Brock Lunsford, the Deputy-in-Charge of the Murder Resentencing Unit, County of Los Angeles District Attorney's Office, pages 25-28.

The claimant alleged the following costs of complying with the requirements of the test claim statute:

Department	**FY 2018-19**	**FY 2019-20**
District Attorney	$1,592,284	$1,295,852
Public Defender	$ 206,496	$ 471,595
Total	**$1,798,780**	**$1,767,447**[86]

Relying on the statistics provided to the Senate Committee on Appropriations by the California Department of Corrections and Rehabilitation, the claimant concluded "there would be a statewide cost estimate of about $18,153,459."[87]

The claimant alleges that there are no funding sources to cover these costs.[88] Finally, the claimant alleges that "none of the exceptions in Government Code Section 17556 excuse the state from reimbursing Claimant for the costs associated with the implementing the required activities."[89]

In its comments on the Draft Proposed Decision, the claimant disagrees with the conclusion that test claim statute eliminated a crime within the meaning of Government Code section 17556(g).[90] The claimant argues that the test claim statute amended Penal Code sections 188 and 189 to limit their application to the felony-murder rule and the natural and probable consequences doctrine, which are legal theories and not crimes.[91]

The claimant further argues that Penal Code section 1170.95 sets forth a post-conviction proceeding allowing convicted individuals to petition the court to vacate their murder convictions. The claimant asserts that the right to counsel attaches in a criminal proceeding before conviction and the claimant is not seeking reimbursement of those costs. Post-conviction proceedings do not invoke a constitutional right to counsel. The test claim statute, however,

[86] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), page 16; see also Section 6, Declaration of Sung Lee, Departmental Finance Manager, Los Angeles County Public Defender's Office, pages 29-32 and Declaration of Ping Yu, Accounting Officer, County of Los Angeles District Attorney's Office, pages 37-39.

[87] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), page 18; see also Exhibit I, Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.) May 14, 2018, page 3.

[88] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), page 10.

[89] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), page 13.

[90] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2, 4.

[91] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 4.

compels the counties to provide representation in the post-conviction proceeding set forth in Penal Code section 1170.95.[92]

Finally, the claimant argues that even if the test claim statute eliminated a crime, the post-conviction proceeding does not directly relate to the enforcement of any crime within the meaning of Government Code section 17556(g). The post-conviction proceeding "is separate and apart from the pre-conviction enforcement of the crime of murder."[93] The proceeding itself is not a simple motion, but rather a complicated procedure akin to a civil commitment under the Sexually Violent Predators Act or a habeas corpus proceeding.[94] The handling of the petitions by the Los Angeles County District Attorney's Office is time consuming work with voluminous records requiring review and reinvestigation.[95] As a result, a new unit was created within the office.[96] The Los Angeles County District Attorney's Office received 2,036 petitions as of July 2020 with attorneys spending about 20 hours per case. The claimant estimates that it could potentially receive 9,704 petitions.[97] The Los Angeles County Public Defender's Office received 898 petitions with attorneys spending about 25 hours per case.[98] The fact-finding nature of the post-conviction proceeding to determine if relief can be granted has nothing to do with the enforcement of the prohibition against murder.[99]

The claimant reports the actual costs for the Public Defender's Office was $206,496 for fiscal year 2018-2019 and estimates that it will incur $471,595 to comply with the test claim statute in fiscal year 2019-2020.[100]

---

[92] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2-3.

[93] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 4.

[94] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 4-5.

[95] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 7 (Declaration of Brock Lunsford).

[96] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 8 (Declaration of Brock Lunsford).

[97] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 9 (Declaration of Brock Lunsford).

[98] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 12 (Declaration of Harvey Sherman).

[99] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 5.

[100] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 15 (Declaration of Sung Lee).

The claimant urges the Commission to find that the test claim statute imposes a reimbursable state mandate.[101]

B. Department of Finance

Finance filed comments on June 19, 2020, recommending that the Commission deny the test claim as follows: "Finance believes SB 1437 is subject to Government Code section 17556, subdivision (g), the 'crimes and infractions' exclusion since SB 1437 changed the application of and the penalty for the felony murder rule. Accordingly, the Commission should deny this claim because SB 1437 does not impose costs mandated by the state."[102]

Finance did not file comments on the Draft Proposed Decision.

C. Chair of the San Joaquin County Board of Supervisors

The Chair of the San Joaquin County Board of Supervisors filed comments on behalf of the Board of Supervisors in support of the Test Claim. Noting that the test claim statute "redefined liability in first-degree and second-degree murder convictions" and established "a statutory mechanism" to allow convicted inmates and parolees to retroactively overturn their murder convictions, the Board of Supervisors concludes that the test claim statute is an unfunded state mandate.[103] The Chair explains that "there is significant workload associated with reviewing petitions, including reviewing each homicide file in order to assess and make a determination on the number of eligible defendants and which petition filings to prioritize. These extensive files include: trial transcripts, crime reports, investigation, motions, probation reports and other documents to determine initial eligibility."[104] Relying on data from the California Department of Corrections, there are 432 individuals from San Joaquin County that are currently incarcerated for murder in the first- or second-degree and another 78 on parole for such convictions. New staff have been hired to address the 107 petitions filed to overturn murder convictions to date and eligible applicants could exceed 500. The Chair asserts, that implementation costs for San Joaquin County District Attorney and Public Defender are $1,648,657 as of July 17, 2020.[105] The Chair agrees with the claimant that the test claim statute imposes a reimbursable state mandated program.[106]

---

[101] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 5.

[102] Exhibit B, Finance's Comments on the Test Claim, filed June 19, 2020, page 2.

[103] Exhibit D, San Joaquin County, Board of Supervisors' Chair's Comments on the Draft Proposed Decision, filed July 17, 2020, page 1.

[104] Exhibit D, San Joaquin County, Board of Supervisors' Chair's Comments on the Draft Proposed Decision, filed July 17, 2020, page 1.

[105] Exhibit D, San Joaquin County, Board of Supervisors' Chair's Comments on the Draft Proposed Decision, filed July 17, 2020, page 1.

[106] Exhibit D, San Joaquin County, Board of Supervisors' Chair's Comments on the Draft Proposed Decision, filed July 17, 2020, page 2.

D. California Public Defenders Association

The California Public Defenders Association (CPDA) filed late comments in support of the Test Claim. CPDA disagrees with the analysis and conclusion of Finance and the Draft Proposed Decision on two grounds: "(1) No crime was eliminated by SB 1437's amendments to sections 188 and 189; these amendments merely modified the elements of an existing crime, the crime of Murder, and (2) Even if SB 1437 could be viewed as eliminating a crime, Penal Code section 1170.95, the resentencing provision of SB 1437, does not "relate directly to the enforcement of the crime or infraction."[107]

CPDA argues its first ground explaining that murder has been a crime in California since being codified as Penal Code section 187 in 1872. So, too, malice has been defined in Penal Code section 188 since 1872. Through the test claim statute, the Legislature clarified that malice would no longer be imputed to an individual based solely on that individual's participation in a crime. Thus CPDA concludes that the crime of murder was not eliminated nor was the penalty changed, but the definition of malice was amended. CDPA also asserts that the test claim statute also amended Penal Code section 189, but again, not to eliminate the crime of murder, nor to change the penalty, but to clarify the circumstances under which an individual can be liable for the crime of murder.[108]

CPDA argues its second ground noting that Government Code section 17556(g) includes the language "but only for that portion of the statute *relating directly to the enforcement* of the crime or infraction."[109] CPDA explains, "Assuming, arguendo, that SB 1437, in part, eliminated a class of conduct formerly punishable as murder (death resulting from certain felonious acts committed by a person acting as an aider or abettor to the principal, who was not the killer, did not intend to kill another person, was not a major participant, and did not display reckless indifference to human life), the resentencing statute enacted by SB 1437, Penal Code section

---

[107] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 1. 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, in this case, although the CPDA filed comments approximately three and one-half weeks after they were due and without requesting an extension of time, it was feasible to consider the comments in the Proposed Decision since the matter had already been postponed at the request of the claimant. 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 after they were due and without requesting an extension of time.

[108] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 2.

[109] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 2. Emphasis in citation.

1170.95, does *not* relate directly to the *enforcement* of any crime."[110] Relying on the Meriam Webster definition, CPDA asserts that "enforce the law" is generally understood as "make sure that people obey the law," which makes no sense when applied to the proceedings described in Penal Code section 1170.95. These proceedings do not ensure that individuals follow the law, and they do not enforce the law; rather, they enforce justice. Resentencing proceedings provide relief to those who committed acts but whose treatment under prior law was unjust. "When it enacted SB 1437, the California Legislature concluded that it was unjust to punish certain felonious acts resulting in unintended deaths as Murder, and so, in addition to amending Penal Code sections 188 and 189, it enacted Penal Code section 1170.95, to restore justice to those eligible individuals who were convicted and sentenced for the crime of Murder based on felonious acts they committed in the past, but who could not be convicted of murder today. This cannot reasonably come within the meaning of 'law enforcement.'"[111]

CPDA concludes that SB 1437 has produced a considerable financial burden on counties to handle the "complex postconviction proceedings" and these costs are reimbursable. CPDA urges the Commission to grant the test claim.[112]

E. County of San Diego

The County of San Diego filed comments on the Draft Proposed Decision, asserting that Penal Code section 1170.95 does not eliminate a crime, but "simply creates a post-conviction petition procedure."[113] The County states that the placement of Penal Code section 1170.95 under Part 2, "Of Criminal Procedure" and not under Part 1 "Of Crimes and Punishments" is indicative of the fact that the section sets forth a procedure rather than a crime, noting that this approach was persuasive in the Decision in *Youth Offender Parole Hearings*, 17-TC-29.[114] Also, Penal Code section 1170.95 does not change the penalty for a crime within the meaning of Government Code section 17556(g). "Section 1170.95 provides a methodology to vacate a sentence based on the assumption that the crime of murder was not even committed."[115] The County asserts that the changes to Penal Code sections 188 and 189 neither changed the crime of murder, nor did they eliminate a crime. "Those sections merely changed a **theory of liability** for the crime of murder.

---

[110] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 3. Emphasis in citation.

[111] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 3.

[112] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 3.

[113] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 1.

[114] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 1, footnote 1.

[115] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 2, footnote 2.

The crime of murder still exists."[116] The County points to the fact that a jury need not reach a unanimous decision on the theory of liability. They must only agree that the defendant is liable for murder to convict. The Commission, however, need not reach this issue as the Test Claim seeks reimbursement for costs solely incurred due to the resentencing petition process which is found only in Penal Code section 1170.95.[117]

Specifically, the County argues, Penal Code section 1170.95 is a separate statute and should be analyzed independently from Penal Code sections 188 and 189 as to whether section 1170.95 eliminated a crime. The County states that the Draft Proposed Decision analyzes the sections separately as to whether they impose requirements on local government and the analysis as to whether they eliminate a crime should be no different.[118] Since the Draft Proposed Decision acknowledges that Penal Code section 1170.95 is a petition and hearing process, the County concludes, "[t]his petition and hearing process provides a method to reverse a conviction, but it does not change the crime of murder itself. [citation] Accordingly, Section 1170.95 does not fall within the exception set forth in [Government Code] Section 17556(g)."[119]

F. Alameda County Public Defender's Office

The Alameda County Public Defender's Office filed late comments on the Draft Proposed Decision explaining: "Alameda County is the seventh largest county in the state. In 2019 alone, our office was appointed to represent 86 habeas corpus petitioners who were seeking relief under Penal Code section 1170.95; One full time and two part time attorneys were assigned to handle these cases. They worked more than 3300 hours and, by year's end, had resolved 56 of them."[120]

---

[116] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 2, footnote 3. Emphasis in original.

[117] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 2, footnote. 3.

[118] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2-3.

[119] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 3. Citation omitted in the original.

[120] Exhibit H, Alameda County Public Defender's Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 1. 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, in this case, although the Office filed comments approximately one month after they were due and without requesting an extension of time, it was feasible to consider the comments in the Proposed Decision since the matter had already been postponed at the request of the claimant. 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.

The Office asserts that the test claim statute did not eliminate a crime, rather SB 1437 modified the scope of malice aforethought.[121] Penal Code section 189(f) narrows the scope of the new law by stating that a defendant that kills a police officer while committing a felony is guilty of felony murder regardless of intent and, thus, the crime of murder was not eliminated.[122] Further, the case law confirms that while the changes to Penal Code sections 188 and 189 modified the scope of murder, these changes did not eliminate any crime nor eliminate the felony murder or natural and probable consequences theories, themselves. The court in *People v. Superior Court (Gooden)* noted that SB 1437 only amended the mens rea, or mental state, requirement for murder.[123] The court in *People v. Solis* noted that SB 1437 limited the application of the felony-murder rule and the natural and probable consequences doctrine by changing the mens rea element.[124] In *People v. Cervantes*, the court stated, "SB 1437 modified the felony murder rule and natural and probable consequences doctrine to ensure murder liability is not imposed on someone unless they were the actual killer, acted with the intent to kill, or acted as a major participant in the underlying felony and with reckless indifference to human life."[125] The court in *People v. Martinez* noted that SB 1437 changed the definitions of malice and murder.[126] In *People v. Gentile,*[127] the court rejected the argument that SB 1437 eliminated murder liability under the natural and probable consequences theory:

---

[121] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 1-2.

[122] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 2.

[123] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 2, citing *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 281, 287.

[124] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 2, citing *People v. Solis* (2020) 46 Cal.App.5th 762, 768-769.

[125] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 2, citing *People v. Cervantes* (2020) 46 Cal.App.5th 213, 220.

[126] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 2, citing *People v. Martinez* (2019) 31 Cal.App.5th 719, 722.

[127] *People v Gentile* (2019) 35 Cal.App.5th 932, review granted September 11, 2019 (California Supreme Court Case No. S256698), on the following question:

> The petition for review is granted. The issues to be briefed and argued are limited to the following: 1. Does the amendment to Penal Code section 188 by recently enacted Senate Bill No. 1437 eliminate second degree murder liability under the natural and probable consequences doctrine? 2. Does Senate Bill No. 1437 apply retroactively to cases not yet final on appeal? 3. Was it prejudicial error to instruct the jury in this case on natural and probable consequences as a theory of murder?

> …"defendant argues that the amendment to section 189, "has now eliminated all murder liability, including second degree murder liability, based on the natural and probable consequences doctrine." *We disagree.* This argument proposes a construction of section 189, subdivision (e), which is contrary to the plain language of the statute, misconstrues the holding in *Chiu,* and would lead to absurd results. Contrary to defendant's interpretation, section 189, subdivision (e) does not eliminate all murder liability for aiders and abettors. To the contrary, the amendment expressly provides for both first and second degree murder convictions under appropriate circumstances."[128]

The Alameda County Public Defender's Office concludes: "Of the nearly two dozen published cases interpreting SB 1437, not a single one has said that it eliminated a crime."[129]

The Office asserts that the test claim statute did not change the penalty for a crime within the meaning of Government Code section 17556(g)[130] and the Draft Proposed Decision did not analyze whether Penal Code section 1170.95 is directly related to the enforcement of a crime or infraction as set forth in Government Code section 17556(g). Noting that the "30 or so cases that have invoked section 17556 have never defined the word 'enforcement,'" the Office relies on the Black's Law Dictionary's definition "to compel obedience to" and Webster's definition "to compel observance of a law."[131] The Office asserts that section 1170.95 does not compel obedience to the law nor does it apply to the arrest or prosecution of individuals for murder. Section 1170.95 is a resentencing statute. Even if SB 1437 eliminated a crime, section 1170.95 does not relate directly to the enforcement of the crime of murder as defined in Penal Code sections 188 and 189. The Office urges the Commission to grant the Test Claim, explaining that "Penal Code section 1170.95 petitions involve complex legal issues that require experienced counsel and substantial amounts of legal research, writing and courtroom litigation. It has placed a considerable burden on our office's staff as well as our budget."[132]

IV. Discussion

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

Oral argument was heard on October 7, 2020. This case is currently pending and additional briefing has been ordered on the retroactivity of SB 1437.

[128] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 3 citing *People v Gentile* (2019) 35 Cal.App.5th 932, 943-944. Emphasis in original.

[129] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, pages 2-3.

[130] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 3.

[131] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 3-4.

[132] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 4.

> 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."[133] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …."[134]

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.[135]
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.[136]
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.[137]
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.[138]

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.[139] The determination whether a statute or executive order imposes a reimbursable

---

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

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

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

[136] *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].

[137] *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.

[138] *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.

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

state-mandated program is a question of law.[140] 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."[141]

A. The Test Claim Was Timely Filed.

Government Code section 17551(c) states: "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 costs as a result of a statute or executive order, whichever is later." Section 1183.1(c) of the Commission's regulations, effective April 1, 2018, defines "12 months" as 365 days.[142]

The test claim statute became effective on January 1, 2019,[143] resulting in a January 1, 2020 deadline for the filing of a test claim. The claimant filed this Test Claim on December 31, 2019, within twelve months of the effective date.[144] Accordingly, this Test Claim was timely filed.

B. Penal Code Sections 188 and 189, as Amended by the Test Claim Statute, Do Not Impose Any Requirements on Local Government.

As indicated in the Background, the test claim statute amended sections 188 and 189 of the Penal Code, which define "malice" and "murder," to limit the application of the felony-murder rule and the natural and probable consequences doctrine to the actual killer, someone with the intent to kill who assisted the killer, or a major participant in the crime who acted with reckless indifference to human life. These code sections do not impose any requirements on local government and, thus, they do not impose a state-mandated program.

C. Penal Code Section 1170.95, as Added by the Test Claim Statute, Does Not Impose "Costs Mandated by the State" Within the Meaning of Article XIII B, Section 6 of the California Constitution and Government Code Section 17556(g).

Penal Code section 1170.95 imposes requirements on county district attorneys and public defenders. However, those requirements do not impose costs mandated by the state.

1. Penal Code section 1170.95 allows a person convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine to file a petition to have their conviction vacated and to be resentenced, and imposes new requirements on counties to prosecute and defend that petition.

As indicated in the Background, the claimant seeks reimbursement for costs associated with Penal Code section 1170.95, which sets forth a petition and hearing process for persons convicted of first- or second-degree murder under the felony-murder rule or the natural and

---

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

[141] *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.

[142] California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

[143] Statutes 2018, chapter 1015.

[144] Exhibit A, Test Claim, filed December 31, 2019, page 1.

probable causes doctrine to seek to vacate their conviction and to be resentenced, when it is alleged that the petitioner did not have the intent to kill or was not a major participant in the crime acting with reckless indifference to human life.[145]

The process begins with a person convicted under the felony-murder rule or the natural and probable consequences doctrine filing a petition with the sentencing court and serving the petition on the county district attorney and the petitioner's defense counsel or the county public defender.[146] The statute states that the person convicted will file the petition. The claimant alleges that the petitioner has a statutory right to counsel and, thus, the petitioner's defense counsel will write, file, and serve the petition.[147] The right to counsel is specifically conferred by the statute, however, the California Supreme Court will determine when the right to counsel under section 1170.95 attaches, in the case of *People v. Lewis* which is currently pending.[148] In that case, the petitioner requested a review under Penal Code section 1170.95 and sought the appointment of counsel.[149] The trial court denied the petition without hearing and without appointing counsel.[150] On appeal, the court held that the petitioner's right to counsel derived from the statute, but only after an initial review of the petition by the court. The court relied on the steps listed in Penal Code section 1170.95(c) which require that the court "review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section" and, if so, the court appoints defense counsel if requested.[151]

After the petition is filed and served, the plain language of the test claim statute requires county district attorneys to file and serve a response to a petition within 60 days from the date the

---

[145] Penal Code section 1170.95(a).

[146] Penal Code section 1170.95(a) and (b)(1).

[147] Exhibit A, Test Claim, filed December 31, 2019, page 14. The claimant also states that the right to counsel is not constitutional, but given by Penal Code section 1170.95. (Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2-3.) The claimant is correct. (See, *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064, and *Pennsylvania v. Finley* (1987) 481 U.S. 551, 555, which hold that there is no constitutional right to counsel when mounting collateral attacks on the conviction.)

[148] *People v. Lewis* (2020) 43 Cal.App.5th 1128 review granted March 18, 2020 (California Supreme Court, Case No. S260598), on the following question:

> The petition for review is granted. The issues to be briefed and argued are limited to the following: (1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c).

[149] *People v. Lewis* (2020) 43 Cal.App.5th 1128 review granted March 18, 2020 (California Supreme Court, Case No. S260598).

[150] *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1134.

[151] *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1139-1140.

petition is served.[152] If the parties agree or if the court or jury at the original trial made specific findings that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the parties can waive the hearing and, in such cases, the court shall vacate the petitioner's conviction and resentence the petitioner without a hearing.[153] If the court sets a hearing, the district attorney bears the burden of proof to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.[154] If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.[155]

In California, indigent defendants in criminal proceedings are represented by the county public defender's office and the people are represented by the county district attorney's office. Therefore, county district attorneys and public defenders representing indigent defendants who are appointed under Penal Code section 1170.95(c) are required to represent their clients in the petition process and hearing pursuant to Penal Code section 1170.95, and these requirements are new.

2. The requirements imposed on counties by Penal Code section 1170.95 do not result in costs mandated by the state because the test claim statute eliminates a crime within the meaning of Government Code section 17556(g).

Article XIII B, section 6 is not intended to provide reimbursement for the enforcement or elimination of crime. Government Code section 17556(g), which implements article XIII B, section 6 and must be presumed constitutional by the Commission,[156] 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 the reimbursement requirement 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.[157] As described below, the test claim statute eliminates a crime or infraction under Government Code section 17556(g) and, thus, there are no costs mandated by the state.

---

[152] Penal Code section 1170.95(c).

[153] Penal Code section 1170.95(d)(2).

[154] Penal Code section 1170.95(d)(3).

[155] Penal Code section 1170.95(d)(3).

[156] California Constitution, article III, section 3.5.

[157] *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.").

Under prior law, the felony-murder rule and the natural and probable consequences doctrine allowed the prosecution to convict a defendant of murder without proving the defendant's state of mind.[158] The test claim statute changed that. One of the reasons the test claim statute was enacted was "to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual."[159]

Thus, as amended, Penal Code sections 188 and 189 now require proof beyond a reasonable doubt that the defendant intended to kill or that the defendant was a major participant in the crime who acted with reckless indifference to human life in order for the defendant to be found guilty of first- or second-degree murder. As explained in *Gooden*, these amendments changed the elements of the crime of murder by now requiring proof that the defendant had the requisite mental state at the time of the crime to support a conviction of murder.[160] A conviction of murder can no longer be found when malice is imputed or implied based solely on the defendant's participation in a crime.

Penal Code section 1170.95 was enacted to provide a petition and hearing process by which those convicted of first- or second-degree murder under the felony murder rule or the natural and probable consequences doctrine, who would not have been convicted of murder under the Penal Code sections 188 and 189 as amended by the test claim statute, to obtain a review by filing a petition to have the murder conviction vacated and to be resentenced on any remaining counts. Penal Code section 1170.95(d) states that the court shall "vacate the murder conviction and . . . recall the sentence when:

- The parties stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing.
- The court or jury at the original trial made specific findings that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony.
- The district attorney fails to sustain its burden of proof, beyond a reasonable doubt, that the petitioner is ineligible to have the murder conviction vacated and for resentencing; in other words, the district attorney fails to prove that the petitioner intended to kill or was a major participant in the crime and acted with reckless indifference to human life.

Thus, the test claim statute eliminates the crime of murder under the felony-murder rule and the natural and probable consequences doctrine for those who either lacked intent to kill or who were not major participants acting with reckless indifference to human life.

The claimant and local agency interested parties and interested persons argue that the test claim statute did not eliminate a crime. They argue that the amendments to Penal Code sections 188 and 189 modified the element of malice in the existing crime of murder and limited the

---

[158] Penal Code section 189, as last amended by Statutes 2010, chapter 178; *People v. Dillon* (1983) 34 Cal.3d 441, 467-468; *People v. Chiu* (2014) 59 Cal.4th 155, 158.

[159] Statutes 2018, chapter 1015, section 1(e).

[160] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 282.

application of legal theories that give rise to liability for murder.[161] In support of their position, the Alameda County Public Defender's Office cites several cases including *People v. Gentile.* The Office asserts that the *Gentile* court rejected the argument that the test claim statute eliminated murder liability under the natural and probable consequences theory.[162] Finally, the claimant, interested parties, and interested persons argue that even if the test claim statute eliminated a crime, the petition and hearing process set forth in Penal Code section 1170.95 does not directly relate to the enforcement of any crime within the meaning of Government Code section 17556(g).[163]

The Commission disagrees with these comments. It is correct that the test claim statute modified the element of malice. As stated in Penal Code section 188, malice shall no longer be imputed to a person based solely on his or her participation in a crime. However, there is no question that persons who lack intent to kill while committing other felonies, or who are not major participants acting with reckless indifference to human life, may no longer be found guilty of murder as a result of the test claim statute. If the crime of murder under these circumstances was not eliminated, there would be no need to have the process set forth in section 1170.95 to petition the court to *vacate* the murder conviction.

Furthermore, the parties' reading of *People v. Gentile* is not correct. In *Gentile*, the defendant argued that the amendment to Penal Code section 189 by the test claim statute "has now eliminated all murder liability, including second degree murder liability, based on the natural and probable consequences doctrine."[164] The court disagreed that the statute eliminated *all* murder liability.[165] The court quoted the plain language of Penal Code section 189(e), as amended by the test claim statute, which now provides that a person may still be convicted of murder if the person is the actual killer, has the intent to kill, or was a major participant in the underlying felony and acted with reckless indifference to human life:

---

[161] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2, 4; Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 2; Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 1-2; Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, pages 1-2.

[162] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 3, citing *People v Gentile* (2019) 35 Cal.App.5th 932, 943-944.

[163] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 4; Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 3; Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2-3; Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, pages 3-4.

[164] *People v Gentile* (2019) 35 Cal.App.5th 932, 943-944.

[165] *People v Gentile* (2019) 35 Cal.App.5th 932, 944.

> A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.[166]

The test claim statute and the court cases make it clear, however, that the crime of murder has been eliminated for those persons who lack intent to kill while committing other felonies, or who are not major participants acting with reckless indifference to human life, as they may no longer be found guilty of murder. The test claim statute "amend[s] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is *not imposed* on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life."[167]

The Commission also disagrees with the argument that, even if the test claim statute eliminated a crime, the petition and hearing process set forth in Penal Code section 1170.95 does not directly relate to the enforcement of any crime within the meaning of Government Code section 17556(g). This interpretation of section 17556(g) is not supported by the plain language of the statute or with past decisions of the Commission. 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." The "but only" clause affects only the last provision or antecedent before the comma ("changed the penalty for a crime or infraction"), but is not relevant and has no effect on the first two provisions when the test claim statute creates or eliminates a crime or infraction.

The first step in the interpretation of 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.[168] Section 17556(g) contains the modifier, "but only for that portion of the statute relating directly to the enforcement of the crime or infraction." To avoid ambiguity, rules of grammar suggest that modifiers be placed next to the word they modify.[169] Also known as the "last antecedent rule," this construction is not followed

---

[166] *People v Gentile* (2019) 35 Cal.App.5th 932, 943.

[167] *People v. Cervantes* (2020) 46 Cal.App.5th 213, 220, emphasis added.

[168] *Burden v. Snowden* (1992) 2 Cal.4th 556, 562; *People v. King* (1993) 5 Cal.4th 59, 69.

[169] Strunk & White, The Elements of Style (3d ed. 1979), page 30.

when strict adherence to the rules of grammar would result in statutory interpretation that contravenes legislative intent.[170]

Under the "last antecedent rule," the "but only" clause modifies only the third phrase: "changed the penalty for a crime or infraction." This application is in accordance with legislative intent and the rules of construction. It would not make sense for the "but only" clause to modify the first phrase, "created a new crime or infraction," because that exception to reimbursement is already provided for in article XIII B, section 6(b), of the California Constitution without the "but only" language.[171] Inserting the "but only" limitation in that instance would conflict with the Constitution.[172] Similarly, it would not make sense for the "but only" clause to modify the second phrase, "eliminated a crime or infraction," because an eliminated crime cannot be enforced. Thus, the "but only" language applies only to a statute that changes the penalty for a crime or infraction.

Although the Commission does not designate its past decisions as precedential, and old test claims do not have precedential value,[173] the Commission's findings in this matter are consistent with its prior decisions, all of which applied the "but only" language to changes in the penalty for a crime. Recently, in *Youth Offender Parole Hearings*, 17-TC-29, the claimant sought reimbursement for the costs of parole hearings 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 for an offense committed when the offender was under 18.[174] The Commission reasoned that incarceration and parole are part of the penalty for committing the underlying crime. The Commission found that Penal Code section 3051 changed the penalty for crimes within the meaning of Government Code section 17556(g) and denied reimbursement.[175]

In *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, the claimant sought reimbursement for the costs of 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

---

[170] 67 Ops.Cal.Atty.Gen. 452, 454 (1984).

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

[172] See, *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1151 ("A statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality.")

[173] 72 Ops.Cal.Atty.Gen. 173, 178, footnote 2 (1989).

[174] Decision, *Youth Offender Parole Hearings*, 17-TC-29, September 27, 2019, https://www.csm.ca.gov/decisions/093019.pdf (accessed on September 25, 2020), pages 18-23.

[175] Decision, *Youth Offender Parole Hearings*, 17-TC-29, September 27, 2019, https://www.csm.ca.gov/decisions/093019.pdf (accessed on September 25, 2020), pages 53-54.

increased workload for its sheriff and probation departments.[176] 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 Government Code section 17556(g).[177] The Commission found that the plain meaning of the language of section 17556(g) ("enforcement of the crime or infraction") meant to carry out to completion of the penalty or punishment imposed by the criminal statute, and 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."[178] The Commission found that Penal Code section 667 changed the penalty for a crime within the meaning of Government Code section 17556(g) and denied reimbursement.[179]

In *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01, 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 as they were directly related to the enforcement of the crime under Government Code section 17556(g).[180] 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.[181]

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

---

[176] Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://csm.ca.gov/decisions/4503sod.pdf (accessed on September 25, 2020), page 6.

[177] Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://www.csm.ca.gov/decisions/4503sod.pdf (accessed on September 25, 2020), pages 6-7.

[178] Statement of Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://www.csm.ca.gov/decisions/4503sod.pdf (accessed on September 25, 2020), pages 8-9.

[179] Statement of Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://www.csm.ca.gov/decisions/4503sod.pdf (accessed on September 25, 2020).

[180] 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 September 25, 2020), pages 6-8.

[181] 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 September 25, 2020), pages 9-11.

Code section 17556(g).[182] Using a similar analysis to the one in *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01, the Commission found that the modification in law changed the penalty for convicted child abusers.[183] The Commission, however, approved reimbursement for the activities required to develop or approve a child abuser's treatment counseling program, as these activities were not directly related to the enforcement of the underlying crime.[184]

Unlike the statutes at issue in each of the cited Commission Decisions, the test claim statute here does not change a penalty for a crime, but rather eliminates a crime and, thus the "but only" language does not apply here.

Additionally, even if the "but only" language applied to the elimination of a crime or infraction, the process set forth in Penal Code section 1170.95 is directly related to the enforcement of the crime of murder when construed in context with the amendments to Penal Code sections 188 and 189.

In analyzing statutes, "[t]he meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible."[185] As set forth in detail above, changes to Penal Code sections 188 and 189 eliminated the crime of murder within the meaning of Government Code section 17556(g) for aiders and abettors by limiting the application of the felony-murder rule and the natural and probable consequences doctrine. Penal Code section 1170.95 established a petition and hearing process for aiders and abettors already convicted under the prior law to use current law to vacate their convictions. This petition and hearing process is not a stand-alone process, but instead is inexorably linked to the amendments to section 188 and 189 and therefore part of the elimination of a crime under Government Code section 17556(g).

The rest of the analysis turns on the definition of the phrase "the enforcement of the crime or infraction." As there is no court decision interpreting Government Code section 17556(g), the Commission may rely on a dictionary definition. Black's Law Dictionary defines enforcement as "[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement."[186] This definition is easy to understand within the parameters of compelling compliance with a new criminal law. The government enforces the new criminal law by

---

[182] 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 September 25, 2020), page 9.

[183] 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 September 25, 2020), pages 6-9.

[184] 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 September 25, 2020), page 9.

[185] *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

[186] Black's Law Dictionary (11th ed. 2019).

compelling compliance with the law through the criminal legal process of charging the crime, proving the elements, and obtaining a conviction. The definition may also apply to the elimination of a crime if the entire crime has not been eliminated, but rather the crime has been eliminated for a certain group of individuals. Under those circumstances, the government enforces the criminal law that now contains a new mental state element by compelling compliance with the law through a process that allows individuals who were convicted without proof of their mental state to apply the new law to their prior convictions. In this way, the law is enforced retroactively to undo the convictions that would not have been currently possible. Thus the petition and hearing process set forth in Penal Code section 1170.95 is directly related to the enforcement of the crime of murder as defined under the amendments of Penal Code sections 188 and 189.

Accordingly, the Commission finds that Penal Code section 1170.95, as added by the test claim statute, eliminates a crime within the meaning of Government Code section 17556(g) and therefore, the Commission cannot find costs mandated by the state.

V. Conclusion

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