Case No.: S262663

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

COAST COMMUNITY COLLEGE DISTRICT, et al.,
Plaintiffs and Appellants,

v.

COMMISSION ON STATE MANDATES,
Defendant and Respondent,

DEPARTMENT Of FINANCE,
Real Party in Interest and Respondent.

PLAINTIFFS AND APPELLANTS ANSWER BRIEF TO COMMISSION ON STATE MANDATES AND THE DEPARTMENT OF FINANCE OPENING BRIEF ON THE MERITS

Third District Court of Appeal Case No. C080349
Sacramento County Superior Court Case No. 34-2014-80001842
The Honorable Christopher E. Krueger, Judge (916-874-7848)

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I. ISSUES PRESENTED

On August 12, 2020, the Court granted review of three issues. Both the Commission on State Mandates, Defendant and Respondent (hereinafter Commission) and the Department of Finance, Real Party in Interest/Respondent (hereinafter Department) sought review of the first issue; only the Commission sought review of the second and third issues:

1. Whether regulations that establish minimum conditions entitling California community college districts to receive state aid constitute a reimbursable state mandate within the meaning of Article XIII B, section 6, of the California Constitution.

2. Whether a court lacks jurisdiction under Article XIII B, section 6, of the California Constitution to make subvention findings on statutes that were not specifically identified in an initial test claim.

3. Whether a court lacks jurisdiction to remand a test claim based on a statute that was the subject of a prior final decision by the Commission on State Mandates.

II. INTRODUCTION

The Petitions for Review filed by the Commission and the Department in this matter challenged sections of the appellate court decision that ruled in favor of the Plaintiffs and Appellants below Coast Community College District, North Orange County Community College District, San Mateo County Community College District, Santa Monica

Community College District, and State Center Community College District (hereinafter College Districts or Plaintiffs). The College Districts brought a writ petition in the trial court challenging Commission decisions in the "Minimum Conditions for State Aid" test claims matter (hereinafter Test Claims).[1] The trial court denied the writ petition and the appeal below followed. (Slip opn. at pp. 4-5.)

The petition for writ of mandate below was filed by five of California's community college districts against the Commission based on the Commission's partial denial of key portions of the Test Claims 02-TC-25 and 02-TC-31. The Department participated as Real Party in Interest. As fully set forth *infra*, the Test Claims requested subvention for multiple state-mandated programs under Article XIII B, section 6, of the California Constitution, including significantly, the post 1980 new and increased minimum conditions[2] imposed on community colleges by the State.

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[1] The Test Claims are specifically identified in the appellate court Slip Opinion, (Slip opn. at p. 5.)

[2] The Department identifies minimum conditions as "funding-entitlement conditions." (Department Opening Brief at pp. 13, fn. 1, 25-26 and 68-72.) The Commission identifies minimum conditions as "the minimum condition regulations set forth in California Code of Regulations, title 5, sections 51000 through 51027." (Commission Opening Brief at p. 10.) The College Districts will continue to use the term minimum conditions as set forth by the Court in the Issues presented.

The Commission concluded that community colleges meeting the required minimum conditions[3] of state apportionments required by Education Code section 70901, subdivision (a)(6), and California Code of Regulations, title 5, sections 51000-51027 and other related regulations, constituted "voluntary activities" (AR at pp. 00010-11, 00032-36.) The Commission reasoned that the requirements only apply if community colleges choose to receive state funding, and the requirements are not "mandatory" within the meaning of Article XIII B, section 6. The Commission relied upon its misapplication of legal principles set forth in *Department of Finance v. Commission on State Mandates* (Kern High School District) (2003) 30 Cal.4th 727 (*Kern*) and related appellate decisions as the ground for its decision regarding the claimed mandates. (AR at pp. 00010-11, 00032-36, 00318.) For example, the Commission stated:

> The claimants argue that a Kern analysis is unnecessary and not relevant, because districts are legally compelled to comply with the minimum conditions.

[3] The minimum conditions are set forth in California Code of Regulations, title 5, sections 51000 through 51027. (Slip opn. at p. 5.) The appellate court determined that these minimum condition regulations "impose requirements on a community college district in connection with underlying programs legally compelled by the state." (Slip opn. at pp. 3 and 7.) The appellate court then directed the trial court to remand the portions of the test claim based on the following minimum condition regulations to the Commission for further determination: 51006 [open courses], 51014 [approval of new colleges and educational centers], 51016 [accreditation], 51018 [counseling programs], 51020 [objectives], and 51025 [full-time/part-time faculty].

> However, there is nothing in the governing statutes, regulations, or in the record that community college districts *are required to become entitled to state aid*. As a result, community college districts *do not face legal compulsion to become entitled to state aid*."[4]

(AR at p. 00318, original italics.)

In so doing and phrasing its determination to be whether community colleges are "required to become entitled to state aid," the College Districts assert the Commission created a new test that stretches *Kern* far beyond its factual and legal parameters.

The trial court agreed with the Commission analogy to *Kern* and denied the writ. (CT at pp. 170-175.) Multiple other significant community college mandate claims, other than the minimum conditions, were also included within the Test Claims particularly denied by the Commission; those Commission decisions were upheld by the trial court on the same basic "voluntary," "optional," or "discretionary" theories (AR at pp. 00011-16, CT at pp. 176-193). Those other claims are not now before this Court. (Slip opn. at pp. 28-43.)

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[4] The Commission does not set out the actual test it adopted and applied in this matter. (See Commission Opening Brief at p. 20.) However, the Commission afterwards often refers to its "choice" analysis. (See Commission Opening Brief at p. 34.)

The College Districts assert the Commission and trial court erred as a matter of law in the decisions now before the Court by grounding their rulings in a serious misapplication of the *Kern* decision. Put simply, as set forth fully *infra* at pp. 21-38, community colleges are constitutional and statutory recipients of state funding and cannot function without such state funding.[5] Further, compliance with the minimum conditions to retain state funding cannot be "voluntary" in either a legal or practical sense. The minimum conditions as a mandatory new level of service thus qualify as reimbursable state mandates.

In the Commission's view, a community college may somehow choose not to receive State funding and still remain a functional California community college. This Commission approach not only defies the Education Code and common sense, it eviscerates the very purpose of Article XIII B, section 6: "The purpose of section 6 is to protect local governments from state attempts to impose or shift the costs of new programs or increased levels of service by entitling local government to reimbursement." (*Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769 (*Department of Finance*) [citing *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81].)

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[5] The majority of community college districts are state funded. A minority of community colleges are primarily locally funded. There is no evidence in the record that these College Districts are primarily locally funded.

The College Districts assert the Commission erred as a matter of law by grounding its decision in a serious re-writing and misapplication of the *Kern* test. As stated by the appellate court:

> "The Commission suggests the minimum conditions are not legally compelled because the community colleges are free to decline state aid. But that argument is inconsistent with the statutory scheme and the appellate record."

(Slip opn. at p. 3.)

The appellate court held, after a comprehensive analysis of applicable court precedent, as well as constitutional provisions regarding community colleges receipt of state funds, that community colleges are by law entitled to state aid. (Slip opn. at pp. 5-12.) The test is not whether the Colleges are "legally or practically compelled to become entitled to state aid." Rather, the legal test is that stated and applied by the appellate court:

> We conclude the minimum condition regulations impose requirements on a community college district in connection with underlying programs legally compelled by the state. The Commission suggests the minimum conditions are not legally compelled because the Community Colleges are free to decline state aid, but that argument is inconsistent with the statutory scheme and the appellate record.

(Slip opn. at pp. 3 and 8.)

Secondarily, this Court adopted "practical compulsion" principles in the mandate context as set forth in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 (*City of Sacramento*); *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859 (*San*

Diego Unified), and the recently issued *Department of Finance, supra*, 1 Cal.5th 749. As set forth *infra* at pp. 27-38, the reasoning of these decisions also supports the College District's position that in the mandate context a governmental activity is mandatory if it is "practically compelled," e.g., the agency has no true choice whether to participate in the activities.

In this minimum conditions situation, there is no election by the College Districts. The state by law and regulation *required* the College Districts to take multiple new actions and increase programs to continue to maintain state funding. Beyond the statutory requirements for the College Districts to participate in the minimum standards, as set forth *infra* they are required to do so at risk of drastic fiscal loss of state funds already received through the state constitution and statutes. Because these new requirements also cannot be practically "voluntary" within the meaning of *Kern, supra, City of Sacramento, supra, San Diego Unified, supra, and Department of Finance, supra,* the minimum conditions must be reimbursable as compulsory mandates.

As to the Second and Third Issues presented, the College Districts agree with the Department that the issues are not jurisdictional (Department Opening Brief at p. 60; see i*nfra* at p. 39). To the extent that Issues Two or Three present "mandatory" process questions, the Commission errs in its arguments. The College Districts argue that the Commission's positions

are in error, see *infra* at pp. 39-46.

III. STATEMENT OF THE CASE

A. Minimum Standards Requirements on California Community College Districts

Numerous statutes passed and regulations promulgated after 1980 changed the legal and practical obligations of California community college districts. (AR at pp. 00459-1945.) The College Districts adopted policies and implemented programs and services in compliance with these new regulatory requirements. (AR at pp. 00484-492; see also Declaration of Vicky Fong and Declaration of Piedad Robinson, AR at pp. 00917-1084.) In turn, the new programs and services caused the College Districts to incur costs that had not been necessary prior to the enactment or promulgation of the new laws. (AR at pp. 00240-261; [Adopted Statewide Cost Estimate].)

Pursuant to the legislatively enacted statutory requirements, the regulations at issue were adopted by the California Community Colleges Board of Governors. Compliance with those new legal requirements is enforced by the Chancellor's Office. (AR at p. 01364; Cal. Code Regs., tit. 5, §§ 51100, 51102.)[6] The Chancellor's Office has overall statewide responsibility for administration of the community college system and implementation of the regulations promulgated by the Board of Governors.

[6] These regulations have been slightly revised since the Commission reviewed the instant matter, however the enforcement mechanism by the Chancellor's Office remains in effect.

(*Ibid*.) The Chancellor's Office reviews college compliance, investigates specific complaints, reviews annual audit reports, and enforces compliance with the regulations. (Cal. Code Regs., tit. 5, §§ 51100 and 51102.) For example, in 2002, the Chancellor's Office proposed fiscal sanctions against one of the Plaintiffs/Appellants herein, San Mateo County Community College District, for failing to have an open recruitment and hiring process for a new college chancellor. (AR at pp. 01842, 01844, 00318-319.) After hearings before the Board of Governors, the Chancellor's Office entered into a compliance agreement with the College Districts. (AR at p. 00319.)

The Chancellor's Office also approves various local plans, curriculum, and course descriptions for compliance with regulatory requirements. (Cal. Code Regs., tit. 5, §§ 55000.5 [courses and programs], 55100 [credit courses], 55510 [student success and support plans].) If the College Districts do not comply with the approval requirements in the regulations as interpreted and applied by the Chancellor's Office, the College Districts, again, do not have authority to perform the functions described in the proposed plans or to receive state funding. (Cal. Code Regs., tit. 5, §§ 55100, 51100(b).)

Finally, California's community colleges rely on state aid for a substantial portion of their funding. (AR at pp. 03426-03427 [Commission Request for Comments, April 21, 2008]; AR at pp. 03428-03509 [Community College, Chancellor's Office, response to request for

Commission comments, dated July 7, 2008, and attachments 1-4, particularly Attachment 1 at p. 03431 [community college Prop 98 budget]; and Attachment 2 at pp. 03432-03490 [categorical apportionments].) As held by the appellate court and analyzed in more detail below, this substantial amount was tied directly to compliance with the regulatory requirements, affirming that compliance with the regulations was "legally" or "practically" compelled.

B. Administrative Procedural History

The mandate claims originally at issue in this matter consisted of several requests for Commission determinations that multiple mandates required by the State through statutes, regulations, and executive orders, prescribe including the minimum standards for the formation and operation of community colleges. In doing so, claimants asserted the claimed Test Claims mandates including the minimum standards, imposed State-mandated costs that must be reimbursed. (AR at p. 00016.) The Commission in its decision at issue in this matter, granted certain claims and denied others. (AR at pp. 00007; 00156-170.)

Specifically, on June 5, 2003, Los Rios Community College District filed test claim 02-TC-25 seeking reimbursement for costs associated with statutes, regulations and Executive Orders that prescribe minimum standards for the community colleges. (AR at p. 00459.) The subject matter areas of the minimum standards were varied and broad. (AR at pp.

000462-481.)

On June 23, 2003, Plaintiff/Appellant herein, Santa Monica Community College District, filed test claim 02-TC-31, seeking reimbursement for required minimum standards including, but not limited to such topical areas as: 1) standards of scholarship; 2) degrees and certificates; 3) open courses; 4) comprehensive or master plans for academics and facilities; 5) equal employment opportunity; 6) student fees; 7) approval of new colleges and educational centers; 8) accreditation; 9) counseling programs; 10) objectives for instructional programs; 11) curriculum; 12) instructional programs; 13) course articulation; 14) academic freedom; 15) staff, faculty and student participation in district and college governance; 16) matriculation; 17) full-time/part-time faculty ratio; 18) student equity; 19) transfer centers; and, 20) investigation and enforcement of minimum conditions by the Chancellor and the Board of Governors. (AR at pp. 00523; 00527-529.)

The topical areas of test claims 02-TC-25 and 02-TC-31 contain significant overlap. In addition to the overlapping areas in both test claims, 02-TC-25 also included requests for reimbursement for: 1) student directory information; 2) student representation fees; 3) the provision of course materials; and 4) possible consequences of failing to pay a proper financial obligation to the district or college. (AR at p. 00017.) On January 9, 2008, 02-TC-31 and 02-TC-25 were consolidated and thereafter referred

to by the Commission as the "Minimum Conditions for State Aid" test claim. (AR at p. 00284.)

On April 2, 2008, the Commission severed a portion of Test Claim filed by West Kern Community College District (02-TC-22) relating to student matriculation and vocational education of disabled students and consolidated the severed portion with the Minimum Conditions for State Aid test claim (02-TC-31 and 02-TC-25) at issue in this case. (AR at p. 00287.)

On June 22, 2010, the Commission severed a portion of the Test Claim related to discrimination complaint procedures and consolidated it with a separate test claim not at issue. (AR at p. 00285.)

On January 19, 2011 and May 6, 2011, the Commission severed a portion of the test claim related to community college construction and consolidated with a separate test claim not at issue here. (AR at pp. 00016, 284.)

Accounting for overlapping requests, Test Claims 02-TC-25 and 02-TC-31 collectively claimed two hundred twenty-five (225) individual bases for reimbursement. Of those, fifty (50) were severed and consolidated with other claims, forty-eight (48) were determined to constitute fully or partially reimbursable mandates, one hundred twenty-six (126) were determined not to be reimbursable mandates, and two (2) were not addressed at all by the Commission. (AR 00092-94 [Summary of state

mandated activities]; AR 0092-94 [Conclusion].)

On May 26, 2011, the Commission heard and decided the consolidated Test Claims. The Commission adopted its staff analysis of the Test Claims, approving in part and denying in part, by a 6-0 vote. (AR at p. 00009.) Some claims were approved (AR at pp. 00156-170), but many claims were denied because the Commission concluded that compliance was voluntary. (AR at pp. 00010-16.)[7]

On June 16, 2011, claimants Santa Monica Community College District, West Kern Community College District, and Los Rios Community College District submitted proposed parameters and guidelines to identify specific reimbursable activities that are reasonably necessary for performance of the state-mandate program. (AR at p. 00172.)

On December 6, 2012, the Commission issued a draft proposed statement of decision on parameters and guidelines to which the above test claimants offered comments. (AR at pp. 00172-173.) On April 19, 2013, the Commission adopted Parameters and Guidelines. (AR at pp. 00171, 04890-4915.)

On January 24, 2014, the Commission adopted a Statewide Cost

[7] The Commission now misstates the grounds for its denial of the minimum conditions claims, referencing denial of the claims and stating "… on the ground that there was no evidence in the record that the requirements were mandated by the state (AR at pp. 28-36)." (Commission Opening Brief at p. 20.) The record is clear the Commission adopted ground for denial was the purported "choice" by the College Districts to accept state funding. (AR at pp. 00010-11, 00032-36, and 00318.)

Estimate, specifying an estimate, in accordance with applicable procedures, of the amount of reimbursable costs incurred by local community colleges districts to comply with the State-mandated activities identified in the Test Claim. (AR at pp. 00240, 04923-4943.)

C. Trial Court Proceedings

Pursuant to Government Code section 17559, subdivision (b) and Code of Civil Procedure section 1094.5, the College Districts[8] petitioned the Sacramento Superior Court for a writ of administrative mandate directing the Commission to set aside and/or revise portions of its May 26, 2011 adoption of its decision in the Test Claims case. (CT at p. 00001-22.)

Specifically, the College Districts requested the trial court direct the Commission to set aside those portions of its decision on the Test Claims that found no reimbursable State-mandates, and as well as to modify the Parameters and Guidelines to reflect changes in the Test Claims decision.

[8] Plaintiffs/Appellants herein Santa Monica Community College District, along with West Kern Community College District, and Los Rios Community College District were named claimants in the Test Claims at issue in this appeal. However, because of the statewide application of the Commission's Test Claims decision to all community colleges in the State, Plaintiffs/Appellants Coast Community College District, North Orange County Community College District, San Mateo County Community College District and State Center Community College District joined Santa Monica Community College District as plaintiffs below for purpose of appealing denials included within the Commission's May 26, 2011 decision on the Test Claims, as well as the Parameters and Guidelines.

(CT at p. 00002.)[9]

On June 11, 2015, the trial court issued a tentative ruling denying the petition for writ of mandate.[10] A full hearing was held on June 12, 2015. (CT at p. 00234.) On June 25, 2015, the trial court issued an Order After Hearing denying the petition in its entirety. (CT at p. 00239.) The trial court, as did the Commission before it, relied on this Court's decision in *Kern* as the fundamental basis of its ruling. (CT at pp. 00005-9.) Per the direction of the trial court, judgment was entered including the trial court's formal Order as Exhibit A. (CT at pp. 00234-267.) There was no oral argument, finding, order, or judgment issued by the trial court regarding Issues Two or Three (*Ibid.*) Notice of Entry of Judgment was served July 21, 2015. (CT at p. 00233.) Notice of Appeal was timely filed on September 15, 2015. (CT at p. 00270.)

D. <u>The Court of Appeal Decision</u>

The appellate court issued a "Tentative Opinion" on March 4, 2020. Oral argument was held on March 16, 2020. The Commission and Department filed motions for re-hearing on April 17, 2020, asserting for the first time Issues Two and Three herein. The appellate court issued its final Order Modifying Opinion and Denying Rehearing (Change in Judgment)

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[9] Again, specifically the College Districts challenged Nos. 02-TC-25 and 02-TC-31, and the Parameters and Guidelines Statement of Decision, adopted by the Commission on April 19, 2013, regarding reimbursable costs for Community Colleges mandates. (CT at pp. 00001-22.)

[10] The tentative ruling was not included in the CT.

on May 1, 2020. In its final Opinion, the appellate court summarized the case as follows:

> This case involves claims for subvention by community college districts pertaining to 27 Education Code sections and 141 regulations. The regulations include "minimum conditions" that, if satisfied, entitle the community college districts to receive state financial support. (Cal. Code Regs., tit. 5, former §§ 51000-51027.) As to the minimum conditions, the Commission generally determined that reimbursement from the state is not required because, among other things, the state did not compel the community college districts to comply with the minimum conditions.

(Slip opn. at p. 2; fn. omitted.)

The appellate court further summarized its conclusion as follows:

> We conclude the minimum condition regulations impose requirements on a community college district in connection with underlying programs legally compelled by the state. The Commission suggests the minimum conditions are not legally compelled because the Community Colleges are free to decline state aid, but that argument is inconsistent with the statutory scheme and the appellate record.

(Slip opn. at p. 3.)

The appellate court determined that in contrast to the trial court:

> But, because we conclude the programs underlying the minimum condition regulations were legally compelled, we need not consider whether the community colleges districts faced practical compulsion based upon certain and severe penalties (cf. *Kern*, *supra*, 30 Cal.4th at pp. 731, 749-751.)

(Slip opn. at p. 12, citation included.)

The appellate court also noted that:

> This conclusion does not end our analysis, however, because the Commission already identified some items for

> reimbursement, other items are not before us, and for some items it has not been established that remand is otherwise appropriate.

(Slip opn., p. 3.)

The appellate court twice specifically delineated those statutes and regulations upon which the trial court judgment was reversed; which statutes and regulations included within the trial court judgment were affirmed; which claims the appellate court would not consider; and the "Test Claims" to be remanded to the Commission for further determination. (Slip opn. at pp. 2-3; 54-55.)

The College Districts respectfully assert the appellate court correctly applied the law to the record in reaching its conclusions. (Slip opn. at pp. 6-54.) The appellate court fully explained the reasoning and constitutional/statutory sources for its finding of legal compulsion. (Slip opn. at pp. 8-12.) The College Districts found the appellate court's opinion and disposition thorough and complete – even though the majority of analyses and dispositions were not in favor of the College Districts. (Slip opn. at pp. 12-33.) Specifically, on the key minimum standards issues on which the College Districts prevailed, the appellate court properly analyzed the state constitution, relevant statutes, and regulations, as well as applicable precedent, to reach its conclusions. (Slip opn. at pp. 8-12.)

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IV. STANDARD OF REVIEW

As recently set forth by this Court in *Department of Finance*:

> Courts review a decision of the Commission to determine whether it is supported by substantial evidence. (Gov. Code, § 17559.) Ordinarily, when the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same. (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 (*County of Los Angeles*).)
>
> However, the appellate court independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810.) The question whether a statute or executive order imposes a mandate is a question of law. (*Ibid*.) Thus, we review the entire record before the Commission … and independently determine whether it supports the Commission's conclusion... (*Ibid.)"*

Department of Finance, supra, 1 Cal5th at p. 762.

(See also *City of Richmond v. Commission on State Mandates* (1998) 64 Cal. App.4th. 1190, 1194-1195; *California School Boards Association v. State of California* (2019) 8 Cal. 5th 713, 719 (*CSBA III*).) So too here, whether the minimum standards at issue impose a reimbursable state mandate is a question of law reviewed by independent judgment.

V. ARGUMENT

A. The Commission Erred In Adopting Its Own Test and Concluding That Compliance With The Minimum Conditions Regulations Is Not Legally Compelled

This Court has reasoned that an activity may be mandatory, for purposes of the reimbursement requirement, if it is either "legally

compelled" by the language of the law, or "practically compelled" by a "concrete showing in the record that a failure to engage in the activity at issue will result in certain and severe penalties," or if the agency has no true choice whether to participate in a program or activity. (AR at p. 00318; *San Diego Unified, supra,* 33 Cal.4th at p. 872; *City of Sacramento, supra,* 50 Cal.3d at p. 72-74; *Kern, supra,* 30 Cal.4th 727.) In this case, the Commission erroneously held the statutes and regulations were *neither* legally nor practically compelled.

First, applicable precedent, as well as related appellate decisions, fully support the appellate court's opinion reversing the Commission on the grounds of legal compulsion. Although case law arose primarily in the federal/state context, the Court's reasoning more generally holds that in the mandate context a governmental activity is mandatory if it is legally or practically compelled, e.g., the agency has no true choice whether to participate in the activities. Most notably, in *San Diego Unified, supra,* the Court itself subsequently limited its previous decision in *Kern* regarding voluntary participation:

> In *Kern High School Dist., supra,* 30 Cal.4th 727, school districts asserted that costs incurred in complying with statutory notice and agenda requirements for committee meetings concerning various state and federally funded educational programs constituted a reimbursable state mandate, because once school districts *elected* to participate in the underlying federal programs, the districts had no option but to hold program-related committee meetings and abide by the challenged notice and agenda requirements. (*Id.*, at p.

> 742) We rejected the school districts' position, reasoning in part that because the districts' participation in the underlying programs was voluntary, the notice and agenda costs incurred as a result of that voluntary participation were not the product of legal compulsion and did not constitute a reimbursable state mandate on that basis.

(*San Diego Unified*, *supra*, 33 Cal.4th at p. 885-886, italics in original, underscore added.)

However, the Commission's final Statement of Decision herein adopted a flawed version of the *Kern* "test" as follows:

> The claimants argue that a "*Kern* analysis" is unnecessary and not relevant, because *districts are legally compelled to comply with the minimum conditions*. However, there is nothing in the governing statutes, regulations, or in the record that *community college districts are required to become entitled to state aid*. As a result, community college districts do not face *legal compulsion to become entitled to state aid*.
>
> The California Supreme Court held in *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is *voluntary or legally compelled*. The court also held open the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion where "'certain and severe … penalties', such as 'double … taxation' and other 'draconian' consequences,'" would result if the local entity did not comply with the program.
>
> Based on the plain language of the code sections and title 5 regulations the Commission finds that only title 5 sections 51000, 51002, 51004, 51006, 51008, 51012, 51014, 51016, 51018, 51020, 51022, 51023, 51023.5, 51023.7, 51024, 51025, and 51027 constitute minimum conditions, satisfaction of which entitles *a community college district to state aid*. However, because community college districts perform the activities in the title 5 regulations as conditions

> for entitlement to state aid and there is no evidence in the record that *districts are legally or practically compelled to become entitled to state aid*, the Commission finds that the title 5 regulations do not impose activities mandated by the state pursuant to K*ern High School Dist.*

(AR at p. 00011, italics added, fn. omitted.)[11]

The Commission thus rephrased the *Kern* herein to be whether "… districts are legally or practically compelled to become *entitled to state aid* …," and reports as a finding "there is no evidence in the record that districts are legally or practically compelled to *become entitled to state aid*." (AR at p. 00011, italics added.)

Community college districts receive state aid each budget year pursuant to the constitution and statutes set forth herein and fully recognized by the Department. The Department's own Petition for Review at p. 15; footnote 7, sets out those constitutional and statutory provisions as follows:

> In this context, "state aid" refers to funding constitutionally required to be appropriated to community college districts, in accordance with Proposition 98, which sets a minimum funding level for "the moneys to be applied by the State for the support of school districts and community college districts." (Cal. Const., art. XVI, § 8, subd. (b).) Since 2012, Proposition 98 funding has included Education Protection Account funding, as established by Propositions 30 and 55. "State aid" does not include funds from other sources, local property taxes, student fees, and dedicated lottery revenues. (See Ed. Code, §§ 84750.4, 84751; Cal. Code Regs., tit. 5, §§ 51102, subd. (b) (2003), 58770, subd. (b) [describing

[11] This is the actual *Kern* "test" grounding the Commission's decision below. (AR at p. 00011.)

> Chancellor's allocation of "state general apportionment for each district"]; Gov. Code, § 8880.5.

The Department again sets these constitutional and statutory source of state funding for community college districts. (Department Opening Brief at pp. 21-23; 43-44.) The Department again admits that:

> During that apportionment process, the chancellor applies a statute-prescribed formula to determine how much aid each district should receive. At no point during that process are districts required to agree to satisfy the funding entitlement in exchange for state aid. (See Ed. Code section 84750.4, et seq.; Cal Code Regs., tit. 5, sections 58770, et. seq.) (Department Opening Brief at p. 44, fn. omitted.)

These succinct Department definitions of "state aid" constitutionally required to be appropriated to the Colleges fully supports the appellate court opinion, and position of the Colleges herein. The question is not whether the College Districts are "legally" or "practically" compelled to become entitled to state aid, which they are as a matter of law, but rather whether the College Districts are subsequently legally required to conform to the minimum conditions. The College Districts are legally required to conform, and the enforcement process takes away the College Districts' state aid. The appellate court agreed with this analysis:

> We conclude the minimum condition regulations impose requirements on a community college district in connection with underlying programs legally compelled by the state. The Commission suggests the minimum conditions are not legally compelled because the Community Colleges are free to decline state aid, but that argument is inconsistent with the statutory scheme and the appellate record.

(Slip opn. at p. 10.)

The most serious error in the previous Commission decision is, thus, the conclusion that the minimum conditions of receiving State aid are not mandates because the College Districts may somehow choose not to receive state funding. This conclusion is erroneous because the College Districts have no true choice – legally or practically. (*San Diego Unified*, *supra*, 33 Cal.4th at pp. 884-888; *City of Sacramento*, *supra*, 50 Cal.3d at p. 73.)

The College Districts contend that since the minimum conditions compliance enforcement processes removes any true choice, compliance with the minimum conditions to retain state aid cannot be "voluntary." Put simply, the College Districts contend community colleges cannot function without state aid.[12] In the Commission's "topsy-turvy" view, a California community college may somehow "choose" not to receive state funding or aid, yet somehow still remain a functional community college. This Commission approach not only defies common sense, it eviscerates the very purpose of Article XIII B, section 6: The purpose of section 6 is:

> Its purpose 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.

[12] The Commission now asserts some community colleges do not receive state aid. (Opening Brief at p. 18; Petition at p. 9.) The Commission points to no finding in the record that any of the College Districts herein do not receive state aid and/or funds.

(*Kern, supra,* 30 Cal.4th at pp. 751-752; quoting *County of San Diego, supra* 15 Cal.4th at p. 81.)

In this minimum conditions situation, there was no *election* by the College Districts' *to receive state aid.* As noted above, the College Districts by the constitution and budget statutes are appropriated state aid or funding each budget year. (Slip opn. at pp. 10-11.) Regarding the minimum conditions, the state, by law and regulation, require the College Districts to take multiple actions and increase programs to continue to receive state aid or funding. (Slip opn. at p. 9.)

B. The Minimum Standards Are Also Practically Compelled

1. Compliance with the Minimum Standards is not Voluntary

The College Districts have also argued compliance with the minimum standards is practically compelled. Controlling case law interpreting state mandates also does not support the conclusion that the College Districts' compliance herein was truly voluntary, because even if not legally required the College Districts' compliance was practically compelled.

The concept of voluntariness was first established in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 784-785 (*Merced*), where the appellate court held that a city could not claim reimbursable mandates for conditions related to eminent domain proceedings, because the city had

discretion whether to exercise that authority. In that context, the city's choice to proceed or not proceed with eminent domain was truly voluntary.

In *City of Sacramento, supra,* this Court concluded that compliance was *not* voluntary where the city was faced with substantial federal tax penalties for failure to require unemployment insurance contributions for employees. The Court held:

> [T]he state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards.

(*City of Sacramento, supra,* 50 Cal.3d at p. 74.)

Although *City of Sacramento, supra,* addressed a federal/state requirement question, the Court's reasoning should apply to any requirement that has serious fiscal and/or practical consequences for noncompliance. This Court in *City of Sacramento* stated as follows:

> A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and *any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.*

(*Id.* at p. 76; italics added.)

In *San Diego Unified, supra,* this Court refused to extend the holding of *Merced* and ordered reimbursement for new state statutory procedures required for student expulsions. This Court stated:

> The District and amici curiae note that although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program.
>
> [¶]…The court in *Carmel Valley* [*Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521 (*Carmel* Valley)] apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, *such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion* concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.

(*San Diego Unified, supra,* 33 Cal.4th at pp. 887-888; italics added.)

This Court in *San Diego Unified, supra,* again recognized that *some functions are essential* to the central purpose of a government agency, even though that agency possesses some discretion regarding how to act, and declined to extend *Merced* to those circumstances. In this matter, the minimum standards are central to the very governmental purposes of the College Districts; indeed, so central that state funding can be lost if the conditions are not met. The College Districts respectfully assert the minimum conditions must be considered mandatory pursuant to legal principles set forth in *Department of Finance, supra; City of Sacramento,*

supra, and *San Diego Unified, supra,* and the costs reimbursable.

The Commission's decision instead relied on a misapplication of *Kern*.[13] In *Kern*, the school districts claimed costs as mandates related to school advisory committees required by the statutes listed in Education Code section 35147(b). However, each of those programs was supplemental and inherently voluntary in that the school districts truly chose to apply for funding, and could only apply if they had eligible students. The conditions of those programs were also then only obligatory if the district chose to receive certain grant funds. (*Kern, supra,* 30 Cal.4th at p. 744.)

The school district's authorization to make a choice and to exercise genuine discretion was key in *Kern.* In holding that school districts' participation was voluntary, this Court in *Kern* stated the following regarding the previous *Merced* decision:

> As suggested above, the core point articulated by the court in *City of Merced* is that activities undertaken at the option or discretion of a local government entity (that is, *actions undertaken without any legal compulsion or threat of penalty for nonparticipation)* do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of *its discretionary decision* to participate in a particular program or practice.

(*Id.* at p. 742; italics added.)

---

[13] The California Community Colleges Chancellor's office also relied upon *Kern* in its analytical response to questions posed by the Commission. (AR at pp. 03384-03385.)

For these reasons, and as aptly stated by the court of appeal referring to *Kern*, "[t]his case is different." (Slip opn. at p. 9.) The *Kern* case holding is not factually or legally controlling here because the funding at risk for the College Districts is the entirety of state aid, and not supplemental, discretionary, or a by-application-only program such as the grants at issue in *Kern.* Nevertheless, the Commission decision here is totally grounded in its misapplication of *Kern.* (AR at p. 00011.)

Going beyond *Kern,* as noted above, the Commission even rephrases the *Kern* test to be whether "…districts are legally or practically compelled to be entitled to state aid…," and reports as a finding "there is no evidence in the record that districts are legally or practically compelled to become entitled to state aid." (AR at p. 00011.) In *Kern* the District's actions were undertaken "without any legal compulsion or threat of penalty," which is clearly not the case in these minimum conditions mandates. (*Kern, supra,* 30 Cal.4th at p. 742.)

California Code of Regulations, title 5, section 51000 states that sections 51002-51027 are "minimum conditions, satisfaction of which entitles a district maintaining community colleges to receive state aid…" (AR at pp. 00028-36.) The simple and most logical understanding of that language is that the College Districts must comply with those minimum conditions in order to maintain state funds. Rather than applying that straight forward interpretation, the Commission interpreted California Code

of Regulations, title 5, section 51000 in pertinent part "…as providing that satisfaction of the minimum conditions *leads to an entitlement* to state aid by a community college district." (AR at p. 00034, italics added.)

However, California Code of Regulations, title 5, section 51000 paraphrases Education Code section 70901(b)(6) which *requires* the Board of Governors to establish "minimum conditions entitling districts to receive and maintain state aid for support of community college." The Board of Governors have no authority to make the minimum conditions voluntary by regulation if the Legislature made such conditions mandatory by statute. Regulations may only make a statute more clear or specific and must be consistent with the statute. (Gov. Code, § 11342.2; *Transworld Systems, Inc. v. County of Sonoma* (2000) 78 Cal.App.4th 713, 717.)

Moreover, a *voluntary regulation* is a non-sequitur. Government Code section 11342.2 states that a regulation is not valid unless it is "reasonably necessary to effectuate the purpose of the statute" by making the statutory requirements more clear or specific. (See also Gov. Code, § 11349(a).) A regulation must create a "rule, regulation, order, or standard of general application" and is not just a suggestion. (See Gov. Code, § 11342.600 (defining the term "regulation").)

2. The Commission Admits the Minimum Conditions Language is Used to Induce Compliance

Perhaps recognizing the Commission's test actually applied in the

record that the College Districts "voluntarily" or "chose" to elect to qualify for state aid is untenable, the Commission now admits the minimum conditions language is used to induce compliance. (Commission Opening Brief at pp. 33-34.) As set forth above, the Commission to date has argued the minimum conditions were entirely voluntary and the College Districts made a "choice" to elect to qualify for state aid. (Slip opn. at pp. 10-12.) Now, although still claiming the College Districts have a "choice," the Commission shifts to at least concede the statutory and regulatory scheme is analogous to the "carrot and stick" approach analyzed by the court in *City of Sacramento, supra*. (Commission Opening Brief at pp. 33-34.) The Commission argues that:

> Against this backdrop of case authority, the appellate court (and the Districts) completely ignored the plain language of the minimum condition regulations and, instead, found the minimum condition regulations constitute legal compulsion when viewed in light of the core functions and mission of community college districts, the State's required support of the educational system, the threat of the penalty imposed for noncompliance, and because community college districts are not free to decline state aid. (Slip Opn., pp. 10-11.)
>
> This analysis is incorrect as it essentially finds that community college districts have no choice but to comply with the regulations. In fact, the Districts have repeated the argument of "no true meaningful choice" and the alleged threat of losing state aid throughout these proceedings. (1 CT 67:15-26; Appellant's Opening Brief in Court of Appeal, pp. 23-30; Appellant's Reply Brief in Court of Appeal, p. 13; Appellant's Answer to Petition for Review, pp. 16-17, 19, 21.) However, having no true choice but to comply and the potential consequence of losing state aid for failing to comply are factors used to establish practical compulsion and not legal compulsion. (*Department of Finance v. Commission on State Mandates (POBRA), supra,* 170 CalApp.4th 1355, 1367; *Department*

> *of Finance v. Commission on State Mandates (Kern High School Dist.), supra*, 30 Cal.4th 727, 754.)

(Commission Opening Brief at p. 33.)

The College Districts have, throughout this proceeding, repeated to point out that there is no meaningful choice. The College Districts again contend that for any community college district to put at risk constitutional and statutory state funding or aid, presents no any choice other than to implement the minimum conditions.

In this matter, the Chancellor is required to annually monitor compliance with the minimum conditions and to investigate complaints. (Cal. Code Regs., tit. 5, § 51102(b)(1)-(5).) If noncompliance is found, the Chancellor must impose such financial sanctions as are necessary to compel future compliance, up to *withholding the entire state apportionment*. (Cal. Code Regs., tit. 5, § 51102(b)(5).) In addition, College Districts are *required* to be audited annually for compliance with fiscal requirements and for sound financial practices. (Ed. Code, § 84040; Cal. Code Regs., tit. 5, § 59100 et seq.) Audit findings are reported to the Chancellor's Office and can result in the compliance sanctions described in California Code of Regulations, title 5, section 51102. (Cal. Code Regs., tit. 5, §§ 59108(b); 59114.)

The legislative purpose is not to bar or recoup state funds; rather, it is to compel the College Districts to comply with all the minimum

conditions and properly operate a legislatively mandated uniform community college system. Since the Chancellor has the power to withhold "all or part" of all future apportionments, the College Districts are under legal and practical compulsion to comply. That type of fiscal leverage mechanism is significant and has been used by the State on many occasions to force an education agency to comply with mandates, or face repayment of state funds. (*Golden Day Schools, Inc. v. Department of Education* (1999) 69 Cal.App.4th 681, 685 [child care contractor billed for overpayments based on audit findings]; *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1195 [charter school and authorizing district required to repay funds based on noncompliance with conditions of apportionment].) The College Districts respectfully assert because the state has created an enforcement mechanism herein, which can legally bar state constitutional and statutory funding, and withhold and or compel repayment for failure to comply with the minimum conditions, there is no true choice and the minimum conditions must be a mandate.

The Department offers a series of hypotheticals about what a Chancellor may or may not do in a compulsion circumstance. (Department Opening Brief at pp. 58-59.) Such hypotheticals are just that and in no way predict what can happen in an enforcement proceeding. To the contrary, the regulations themselves make clear state aid can be lost through the enforcement process. No chief budget officer, president, or governing

board of a community college district is going to put their community college district in the position of losing state aid by failure to implement the minimum conditions.

The proposed sanctions against Plaintiff/Respondent San Mateo Community College District in the record do establish that the threat of enforcement is real. In that case, the Chancellor determined that San Mateo County Community College District was out of compliance with the requirement to have an open recruitment and hiring process for a new college chancellor, and threatened to withhold funds. (AR at pp. 00318-319; 01842, 01844.) After lengthy public hearings and negotiations, the Chancellor entered into a compliance agreement with San Mateo. (AR at p. 00319, fn. 102.)

The Commission concluded from San Mateo's example that loss of funding is only "possible," and not "certain," therefore presenting no "practical compulsion." (AR at pp. 00318-319.) That is an untenable interpretation of both the facts and the law. The Chancellor's duty to monitor compliance annually and to investigate complaints is mandatory and it must be presumed that the Chancellor performs that duty in accordance with the law. (Civ. Code, § 3548; Evid. Code, § 664.) The San Mateo County Community College District situation establishes that the *threat of severe penalty* is at a minimum used as significant leverage to compel compliance. The *actual* imposition of financial sanctions is not

always necessary to enforce the College Districts' compliance, because the *threat* of drastic fiscal sanctions is sufficient.

Any enforcement process involves a degree of prosecutorial discretion and not all violations are discovered or sanctioned. (*San Diego Unified, supra*, 33 Cal.4th at pp. 887-888 [discretion to expel students].) State mandate case law only requires a certain enforcement process that is capable of imposing "serious" consequences that would compel a reasonable person to comply. (*City of Sacramento, supra*, 50 Cal.3d at p. 74.)

3. The Commission's Interpretation Does Not Effectuate The Intent of Article XIII B, Section 6

Laws must be interpreted to effectuate the underlying purpose of the enactment by either the Legislature or initiative (*Hill v. City of Clovis* (2000) 80 Cal.App.4th 438, 446.) Even when the language is not ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152.) In doing so, the courts should seek to avoid harsh or absurd results. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1392.) The Commission here reached the arbitrary conclusion that College Districts have the "choice" to perform their central educational mission without the receipt of state aid.

That was not the intent of the voters in approving Article XIII B, section 6, or the Legislature when enacting Education Code section 70901, subdivision (b)(6).

In *Department of Finance, supra,* the Court stated the fundamental purpose of Article XIII B, section 6 follows:

> The "concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.) The reimbursement provision in section 6 was included in recognition of the fact "that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 (*County of San Diego*).) The purpose of section 6 is to prevent "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." (*County of San Diego,* at p. 81.) Thus, with certain exceptions, section 6 "requires the state 'to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.'"

(*Department of Finance, supra,* 1 Cal.5th at p. 763.)

This "shift" is precisely what has occurred to the minimum conditions mandates in this record. In determining whether statutory language at issue here is mandatory or directory, "the intent must be gathered from the terms of the statute construed as a whole, from the nature

and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time." (*Pulcifer v. Alameda Coun*ty (1946) 29 Cal.2d 258, 262.)

C. <u>There Was No Jurisdictional Error in This Matter</u>

The Commission now at this late stage asserts the appellate court erred as a matter of jurisdiction:

> The two jurisdictional issues first identified in the appellate court's slip opinion are: (1) the remand of Education Code sections 76300 through 76395, and (2) the finding that section 54626(a) of title 5 of the California Code of Regulations imposes a new program or higher level of service because it implements Education Code section 25430.12. (Slip Opn., pp. 49-50.) The claimants did not plead Education Code sections 25430.12 and 76300 through 76395 and have never alleged that these code sections were the source of a reimbursable state-mandated program. Having not been pled, the Commission lacks the power and the fundamental jurisdiction over these statutory provisions and thus they are not properly before the Commission or the courts, pursuant to Government Code section 17559(b), and no finding of subvention may be made regarding them.

(Commission Opening Brief, at p. 40, fn. omitted.)

However, the contrary position of the Department is that Issues Two and Three are not jurisdictional in nature:

> Pleading requirements for claims under Article XIII B, section 6, and the rule barring duplicative consideration of such claims are *mandatory* procedural rules, but not *jurisdictional*. These rules serve the important purposes of facilitating the Commission's research and review of reimbursement claims, as well as preventing piecemeal litigation and the conflicting resolution of claims. But nothing in the relevant implementing statutes provides the

> necessary clear indication that the Legislature intended to make them jurisdictional.

(Department Opening Brief at p. 15; italics in original.)

The Department further differentiates between jurisdiction and mandatory procedure requirements:

> The relevant statutory provisions do, however, speak in mandatory terms, providing no license for parties or courts to disregard them. … Accordingly, if the Commission properly invoked these rules on a timely basis, and its arguments have merit, this Court must "sustain the … objection[s]."

(Department Opening Brief, at pp. 65-66; statutory and case citations omitted.)

The College Districts agree with the Department that Issues Two and Three are not jurisdictional – despite the Commission's assertions to the contrary. (Commission Opening Brief at pp. 47, 49, and 52.) The College Districts will not reargue this position in this brief.

D. The Commission Failed To Properly Raise These Defenses In The Trial Court Or Court Of Appeal

The Department recognizes that any mandatory rules must be invoked on a timely basis. (Department Opening Brief at p. 66.) The College Districts respectfully assert the Commission plainly did not invoke either of its claimed jurisdictional or mandatory bars to court action on a timely basis. The Commission simply did not timely raise Issues Two or Three below at any step in the proceedings. For the following reasons, the College Districts thus respectfully assert that Issues Two and Three as

presented are not properly before this Court, because neither was timely raised before the trial or appellate courts.

1. California Rules of Court 8.500(c) and Failure to Timely Raise in the Court of Appeal

California Rules of Court, rule 8.500(c) states:

> (1) As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.

This matter has always concerned the proper mandate test, and application of that test to a very extensive record. The appellate court below did so by applying the proper legal standard to that record. (Slip opn. at pp. 6-54.) However, neither the Commission, (nor the Department) timely raised and litigated Issue Two or Three before the trial or appellate court. (CT at pp. 31-34) Based upon applicable law, these arguments have been waived. (*California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442 ["A party who fails to plead affirmative defenses waives them."]) Only then could an appeal, or cross-appeal, be brought by the affected party. (See *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1123 [defendant waived affirmative defense by not raising it in its answer or litigating it at trial].)

The verified Answer filed by the Commission in the trial court did not raise either Issues Two or Three as defenses. (CT at pp. 00046-00047.)

The trial court directed counsel for the Commission to prepare a judgment incorporating the Court's order (CT at p. 00194). Neither either the trial court order (CT at pp. 00166-00194), or the judgment prepared by the Commission (CT at pp. 00161-00163), or the final judgment (CT at pp. 00197-00198) made any ruling on either Issue Two or Three (CT at pp. 00166-00194.) The issues were not raised until oral argument and the formal written motion for rehearing filed by the Commission and denied by the appellate court. (Order Modifying Opinion and Denying Rehearing, filed May 1, 2020.) At this even later stage, the Commission should not be allowed to now raise these jurisdictional or procedural affirmative defenses.

E. The Commission's Substantive Arguments Regarding Issue Three Are Erroneous

The Commission analyzes a subset of Court jurisdiction, e.g. the question of subvention findings. (Commission Opening Brief at pp. 40-49.) Even if the Court determines that it can consider the Commission's late challenges regarding Issue Three, the appellate court correctly made a subvention finding with regard to section 54626(a) of title 5 of the California Code of Regulations, and further properly remanded the matter to the Commission to determine whether subvention was required for costs associated with Education Code sections 76300 through 76395.

With regard to California Code of Regulations, title 5, section 54626(a), the appellate court recognized that the standard for determining

whether a mandate is reimbursable is whether the requirement is new in comparison with the "preexisting scheme" as it existed on January 1, 1975:

> The Commission determined that former regulation 54626, subdivision (a) did not involve a new program or higher level of service because the governing statute, Education Code section 76240, already imposed those requirements. However, the statute to first impose those requirements, Education Code former section 25430.12, was enacted in September 1975. (Stats. 1975, ch. 816, § 7; cf. Ed. Code, § 76420, subd. (a)(1).) We have not found, and the parties do not cite, a predecessor statute on this subject predating 1975. *Thus, former regulation 54626, subdivision (a) implemented a statute enacted after January 1, 1975 that mandated a new program.* Costs incurred pursuant to former regulation 54626, subdivision (a) are subject to subvention by the state. (Gov. Code, § 17516.)

(Slip opn. at p. 49, italics added.)

The Commission errs in applying an "immediately before" standard to the mandate in California Code of Regulations, title 5, section 54626 regarding student directory information, incorrectly arguing that the Test Claims at issue must be compared with the legal requirements in effect "immediately before" the enactment of the specific test claim legislation. (Commission Opening Brief at pp. 44-48; AR at p. 00023.) The Commission bases this legal conclusion on *San Diego Unified, supra,* 33 Cal.4th 859 at p. 878. (Commission Opening Brief at p. 46; AR at p. 00023, fn. 47.) However, the *San Diego Unified* decision did not adopt the phrase "immediately before." The Court in *San Diego Unified, supra,* ruled that to be a reimbursable mandate, "the requirements are new in comparison with the preexisting scheme…." (*San Diego Unified, supra,* 33

Cal.4th at p. 878.) As the appellate court determined, the "preexisting scheme" means the law as it stood on January 1, 1975. (See also *Hayes v. Commission on State Mandates*, *supra*, 11 Cal.App.4th at p. 1581.) As such, the appellate court properly found that "former regulation 54626, subdivision (a) required the Community Colleges to adopt a policy." (Slip opn. at p. 45.) As concluded by the appellate court, the Commission must decide whether the Community Colleges incurred any increased costs after July 1, 1980. (Slip opn. at p. 49.)

With regard to the appellate court's remand to the Commission to determine whether subvention was required for costs associated with Education Code sections 76300 through 76395, the Commission argues that the appellate court's remand of the test claim relating to costs incurred in establishing and implementing policies and procedures to ensure that the collection of student fees complies with Education Code sections 76300 through 76395 is incorrect as a matter of law. The Commission argues that because the College Districts purportedly "did not plead and, apparently, did not intend to plead" those Code sections. (Commission Opening Brief at p. 44.) But the application submitted by Plaintiff/Respondent Santa Monica Community College District did include a reference to Education Code sections 76300 through 76395. In the narrative setting forth its test claim, Santa Monica Community College District included the following:

> CONDITION 6. STUDENT FEES. This condition alleges mandated costs reimbursable by the state for community college districts to establish and implement policies and procedures to ensure that the collection of student fees complies with the law (generally, Education Code sections 76300 through 76395).
>
> Title 5, Section 51012 (added in 1983 and last amended in 1991) states that the governing board of a community college district may only establish such mandatory student fees as it is expressly authorized to establish by law.

(AR at pp. 00577-00578.)

As the Department states in its Opening Brief:

> [T]he Commission and Legislature have properly sought to prevent test claim pleading requirements from yielding overly harsh results. As interpreted by the Commission, those rules require only "notice pleading," meaning that a claimant's filing are acceptable if, "'reasonably interpreted'" and "'read as a whole,'" they allow the Commission to identify the "statutes and requirements for which reimbursement is sought.

(Department Opening Brief at p. 62, fn. omitted.)

The Commission also somehow raises as a jurisdictional issue the remand to the Commission by the appellate court of Education Code section 76300. (Commission Opening Brief at pp. 49-52.) However, the Commission has already conceded that Education Code section 76300 creates a reimbursable mandate in connection with enrollment fees. (Commission Opening Brief at p. 49.) Thus, the Commission seems to be seeking to avoid subvention for costs it concedes are reimbursable. The appellate court remanded this matter to determine if Education Code

section 76300 et seq. also creates a reimbursable mandate with regard to student fees. The Commission does concedes that it had not previously considered a test claim under Education Code section 76395 through 76395. Thus, the appellate court properly remanded that portion of the claim for consideration by the Commission.

F. The Commission's Jurisdiction Argument is Not in Accord with Applicable Law

The Commission also argues that the appellate court lacks jurisdiction to remand the College Districts' claim for subvention of costs to ensure that the collection of student fees under California Code of Regulations, title 5, sections 51012 complied with Education Code section 76300 because, claiming again, section 76300 was the subject of an earlier test claim. (Commission Opening Brief at pp. 49-52.) First, since the Commission did not raise this affirmative defense below, it is barred from raising it now. Second, the College Districts agree with the Department that jurisdiction is not at issue.

Next, the Commission asserts it has already determined that Education Code section 76300 creates a reimbursable mandate in connection with enrollment fees. (Commission Opening Brief, p. 49.) Thus, the Commission again seems to be seeking to avoid subvention for costs it has already conceded are reimbursable. The appellate court properly remanded this matter. (Slip opn. at pp. 16-17) Finally, no such jurisdiction

or mandatory process claims impacts Issue One --- the minimum conditions as state mandates.

VI. THE COMMISSION SEEKS AN OVERBROAD REMAND

The Commission argues that if this Court rules in favor of the College Districts regarding the minimum standards, "the minimum condition-claims should be remanded to the Commission to adopt a new decision consistent with this Court's ruling, *and* to determine whether the remaining elements required for reimbursement under article XIII B, section 6, have been met." (Commission Opening Brief at p. 39, citations omitted, italics added.) The Commission argues basically the same points previously made. These issues were also discussed subsequently in its brief regarding jurisdiction. (See Commission Opening Brief at pp. 39-44; and 49-52.) The College Districts respectfully assert that remand to the Commission does not require the College Districts to start once again at the beginning of the mandate process to establish the minimum conditions are reimbursable state mandates.

VII. CONCLUSION

For the foregoing reasons, the College Districts respectfully assert this Court should affirm the court of appeal decision below, based upon the

legal standards set by this Court. The matter should thereafter proceed on appellate court carefully directed remand back to the Commission. (Slip opn. at pp. 4, 54-55.)

Dated: February 16, 2021

Respectfully submitted,

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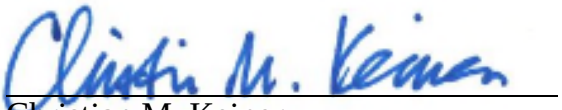
By: 
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rules 8.204 and 8.520 of the California Rules of Court, Appellant's Answer To Commission On State Mandates' Petition For Review was produced using 13-point Roman type including footnotes and contains approximately 11523 words, which is less than the total words permitted by the rules of court. Counsel relies on the word court of the computer program used to prepare this Petition.

Dated: February 16, 2021

Respectfully submitted,

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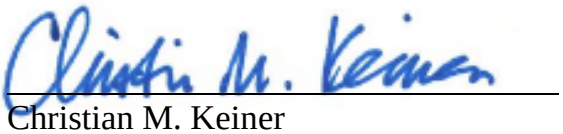
By: 

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DECLARATION OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: 555 Capitol Mall, Suite 645, Sacramento, CA 95814.

On the date set forth below I served the foregoing document described as **PLAINTIFFS AND APPELLANTS ANSWER BRIEF TO COMMISSION ON STATE MANDATES' AND THE DEPARTMENT OF FINANCE'S OPENING BRIEF ON THE MERITS** on interested parties in this action by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, I caused such document to be placed in the U.S. Mail at Sacramento, California with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit, addressee as follows:

Via TrueFiling
Camille Shelton
Chief Legal Counsel
Commission on State Mandates
980 Ninth Street, Ste. 300
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Attorney for Commission on State Mandates

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P. Patti Li
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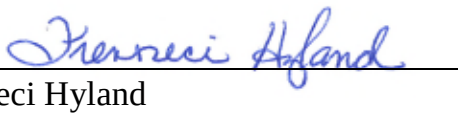
Attorney for Real Party in Interest Department of Finance

Via U.S. Mail
Clerk of Sacramento County Superior Court
County of Sacramento
720 Ninth Street, Room 102
Sacramento, CA 95814

Via TrueFiling
Clerk of the California Court of Appeals, Third Appellate District
914 Capitol Mall
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 16, 2021.



Frenneci Hyland

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **COAST COMMUNITY COLLEGE DISTRICT v. COMMISSION ON STATE MANDATES (DEPARTMENT OF FINANCE)**
Case Number: **S262663**
Lower Court Case Number: **C080349**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ckeiner@dwkesq.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S262663 College Districts' Answer Brief

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

2/16/2021
Date

/s/Fran Hyland

Signature

Keiner, Christian (95144)

Last Name, First Name (PNum)

Dannis Woliver Kelley

Law Firm