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In the Supreme Court of the State of California

CALIFORNIA SCHOOL BOARDS ASSOCIATION, and its EDUCATIONAL LEGAL ALLIANCE; et al., **Petitioners-Appellants,** **v.** **STATE OF CALIFORNIA, et al.,** **Defendants and Respondents.**	Case No. S247266

SUPREME COURT
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Deputy

First Appellate District, Division Five, Case No. A148606
Alameda County Superior Court, Case No. RG11554698
The Honorable Evelio Martin Grillo, Judge

RESPONSE TO AMICUS BRIEFS

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INTRODUCTION

Four amicus briefs have been filed in support of petitioner California School Boards Association (CSBA) in this matter.[1] Although many of the arguments in these briefs are duplicative of the arguments raised by CSBA and therefore addressed in respondents' answer brief, this brief addresses several new arguments made by amici.[2]

First, contrary to amici's assertion, it is not respondents' burden to demonstrate that the challenged legislation is constitutional. The rule that it is the petitioner's burden to demonstrate a law's unconstitutionality does not change.

Second, this Court should reject amici's claim that school funding is "insufficient." The sufficiency of school funding is a question for the Legislature rather than the courts, and article XIIIB, section 6 is not intended to act as an equitable remedy to cure perceived unfairness. Moreover, and most importantly, amici's arguments overlook the key question in this case—whether schools will be required to use their own local tax revenue to pay for the costs of the mandates. Because such use of local tax revenue will not be required, amici's insufficiency claims are both legally irrelevant and factually incorrect.

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[1] One amicus brief was filed by the California State Association of Counties, the League of California Cities, and the California Special Districts Association. The second was filed by the San Jose Unified School District and other school districts. The third was filed by Clovis Unified School District and other school districts. A fourth amicus brief was filed by School Innovations and Achievement, a for-profit company that assists school districts in preparing mandates claims.

[2] Respondents respectfully request that Betty Yee and Keely Bosler be substituted for their predecessors in office, John Chiang and Michael Cohen, respectively.

Third, although amici reference the principle of local control, both the Constitution and this Court accept that the Legislature's control over education policy is plenary. The Legislature therefore can direct schools on how to use state funding.

Fourth, there is no merit to amici's argument that new legislation reveals some plan by the state Legislature to end mandate reimbursement. Moreover, nothing in the new legislation affects the analysis, or alters the conclusion, that the offsetting revenue statutes are constitutional.

Finally, this Court should reject amici's new argument about the proper interpretation of Government Code section 17557, subdivision (d)(2)(B), which was not argued by petitioner or included in the issues for review.

Accordingly, this Court should affirm the opinion of the Court of Appeal.

ARGUMENT

I. It Is CSBA's Burden to Demonstrate that the Challenged Statutes Are Unconstitutional

Amicus California State Association of Counties et al. (CSAC) asserts that respondents have misapplied "this Court's approach on the issue of which party bears the burden of showing that an exemption to the subvention requirement applies." (CSAC brief, p. 14.) Based on *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, CSAC argues that it is respondents' burden to prove that the challenged legislation is constitutional. (*Id.*, pp. 13-15.) Even assuming that CSAC correctly describes the Court's ruling in that case, CSAC's argument fundamentally misunderstands the nature of this case, and incorrectly relies on that ruling.

CSAC cites to the *Department of Finance* case as establishing the standard of review for "when an exemption to the subvention requirement

applies" or a situation where "the State is relieved from providing . . . subventions." (CSAC brief, pp. 14-15.) But neither circumstance is applicable to this case. Here, respondents do not contend that any exemption to the subvention requirement applies. The State *is providing* a subvention to reimburse schools for the cost of the graduation requirements and Behavioral Intervention Plans (BIP) mandates in the form of offsetting revenue under Education Code sections 42238.24 and 56523, subdivision (f). Of course, CSBA asserts that these statutes are unconstitutional, but that is a very different situation than the one addressed by this Court in *Department of Finance*, where the question was whether a state law was a mandate in the first instance. (See *Department of Finance*, *supra*, 1 Cal.5th at 755.)

Moreover, contrary to CSAC's arguments, it is petitioner's burden to demonstrate that a challenged law is unconstitutional either facially or as applied. (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1138; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084-1085.) Unlike *Department of Finance*, which was a challenge to an administrative decision of the Commission on State Mandates, 1 Cal.5th at 755, this lawsuit does not arise out of an administrative decision. Instead, it is a constitutional challenge to several statutes. CSBA alleged in its first and second causes of action that Education Code sections 56523 and 42238.24, as well as Government Code section 17557, subdivision (d)(2)(B), violate article XIIIB of the Constitution. (I JA 307-310.) CSBA also alleged that the State improperly overturned decisions of the Commission on State Mandates in applying these statutes, violating article III, section 3 of the Constitution. (*Id.* at. 307-308.) *Department of Finance*

does not suggest that mandate constitutional challenges be treated any differently than any other constitutional challenge.[3]

Accordingly, it is CSBA's burden to demonstrate that the challenged offset legislation is unconstitutional.

II. CSBA Has Not Demonstrated That School Funding Is Insufficient to Pay for the Two Mandates

Amici also generally assert that school funding is "insufficient" or "severely underfunded." (See, e.g., CSAC brief, p. 1.) This argument is in line with CSBA's similar claims. However, rather than put forth any competent evidence demonstrating an actual insufficiency in school funding, CSBA simply repeated the claim without support. (See Answer Brief, pp. 31-32, 34-35.) Amici's undocumented, unsupported, and non-record assertions about inadequate funding do not fill this gap. (Clovis Unified School District et al. (Clovis) brief, pp. 13-14). And even assuming amici's claims were correct and supported by the record, "there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities." (*Cty. of Sonoma v. Comm'n on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, quoting *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.)

The legally relevant question in this case is whether schools will be required to use local tax revenues to pay for the cost of the mandate. This Court and lower courts have held that a new program is not a reimbursable mandate if the local government is not required to use its own revenues to

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[3] CSAC also cites regulations governing the administrative process engaged by the Commission on State Mandates in deciding mandates claims as support for its position. (CSAC brief, pp. 14-15.) But this case did not arise from these types of proceedings, and the referenced regulations have no bearing on its resolution.

pay for it. (*Cty. of Fresno v. California* (1991) 53 Cal.3d 482, 487 ["the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes"]; *Cty. of Sonoma, supra,* 84 Cal.App.4th at 1283 ["it is the expenditure of tax revenues of local governments that is the appropriate focus of section 6"].)

CSBA's own declarations demonstrate that the school board petitioners will not be required to use their own local tax revenues to pay for the cost of the mandate. (See Answer brief, p. 32.) The Court of Appeal agreed. With respect to graduation requirements, the court explained that "[w]here school districts and county offices of education receive tens of billions of dollars in state funding each year, it simply does not follow that they are or were required to use local revenues to pay for teacher salaries and benefits associated with the GR Mandate." (*California Sch. Boards Assn. v. State of California* (2018) 19 Cal.App.5th 566, 583.) As for BIP, the Court determined that special education funding was "sufficient to cover the costs of the BIP mandate" where "[t]he BIP Mandate is estimated to cost $65 million per year, but school districts and county offices of education receive approximately $3 billion in special education funding." (*Id.*, p. 586.) Amici do not show these findings to have been clearly erroneous.[4]

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[4] Similarly unsupported are claims that respondents seek to avoid their constitutional school funding obligations. (See, e.g., CSAC brief, p. 1.) Schools receive more than $78 billion in 2018-19 through Proposition 98, including over $56 billion from the state's general fund. (Answer brief, p. 14.) And as CSBA admits, the backlog in mandates payments to schools has been dramatically reduced in recent years. (See *id.*, p. 15 fn. 4.) Amici's generalized complaints and discussion about the history of the mandates process are irrelevant to the legal issues in this case: whether the Legislature continues to have plenary authority to direct schools as to how state funds must be expended and whether schools will

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Amici CSAC offers a hypothetical in which three programs, each determined to be mandates, cost $100 million each and the Legislature provides only $200 million in revenue, and requires one program to use offsetting revenues. (CSAC brief, pp. 11-12.) CSAC claims this hypothetical supports its claim that the offset statutes are unconstitutional because there will inevitably be a shortage in state mandate reimbursement somewhere requiring schools to use local revenues. But CSAC's argument falsely assumes that all moneys going to schools are for mandate reimbursement, which is simply not true. And nothing prevents the state from ordering local government to redirect state funding from non-mandate programs to mandates. As this Court has explained, "[t]he circumstance that the program funds claimants may have wished to use exclusively for substantive program activities are thereby reduced, does not in itself transform the related costs into a reimbursable state mandate." (*Department of Finance v. Commission on State Mandates (Kern)* (2003) 30 Cal.4th 727, 748; see also *City of San Jose*, *supra*, 45 Cal.App.4th at 1816 [rejecting claim "that budget cuts in other programs trigger the subvention requirement in section 6"].) If a local government entity could demonstrate that all of their state funding is tied up in mandate reimbursement such that the offset statutes will inevitably lead to them using local revenues to pay for mandates, that could present a circumstance for an as-applied challenge. But that is not the case here, as CSBA presents only a facial challenge.

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be required to use their own tax revenues to pay for the costs of BIP and graduation requirements.

Because schools are not required to use local tax revenue to pay for the costs of graduation requirements or BIP, the two Education Code sections are constitutional.

III. THE PRINCIPLE OF LOCAL CONTROL DOES NOT SUPPLANT THE LEGISLATURE'S PLENARY CONTROL OF PUBLIC EDUCATION FUNDING

Amici Clovis relies on article IX, section 14 of the Constitution and various Education Code provisions to assert that the Court of Appeal's opinion is inconsistent with the principle of local control, particularly as to school budgeting. (Clovis brief, pp. 8-12.) Clovis overreaches. The principle of local control, while important, is ultimately subordinate to the Legislature's plenary control over public education.

This Court has recognized that "the local-district system of school administration, though recognized by the Constitution and deeply rooted in tradition, is not a constitutional mandate, but a legislative choice." (*Butt v. State of California* (1992) 4 Cal.4th 668, 688.) This is demonstrated in the text of Article IX, section 14 itself, which states that "the Legislature may authorize" schools to carry on programs or activities that are "not in conflict with the laws and purposes for which school districts are established." (Cal. Const., art. IX, sec. 14.) What the Legislature may give it may also take away. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 255.) And as this Court explained in considering and rejecting a prior local control claim, the "long-established level of State involvement in the public education system undermines any claim that local control is a paramount and compelling State policy for all purposes." (*Butt, supra*, 4 Cal.4th at 689.) Indeed, this Court has expressly recognized that although the Legislature has provided "local school districts with a considerable degree of local autonomy" ultimately "the state retains plenary

power over public education." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1195.)

Moreover, with respect to school budgeting, the court in *California Teachers Association v. Hayes* (1992) 5 Cal.App.4th 1513, 1532, rejected an argument that the Legislature's decision to include certain childcare funding within the Proposition 98 guarantee improperly "divest[ed] school districts of complete and total control over the funds the state is required to devote to education under Proposition 98." The court acknowledged article IX, section 14, noting that "[i]t has been and continues to be the legislative policy of this state to strengthen and encourage local responsibility for control of public education through local school districts. (§ 14000.)" (*Id.*, pp. 1523–1524.) Nonetheless, the court held that because the operation of public schools is a matter of statewide concern, the Legislature's control over school districts is plenary, and school districts "do not have a proprietary interest in moneys which are apportioned to them." (*Ibid.*; see also *Butt*, *supra*, 4 Cal.4th at 689 [rejecting idea that "the State has had a . . . policy of absolute budgetary freedom and responsibility for local districts"].)

As discussed in more detail in the answer brief, the Legislature's plenary authority over school districts—and the allocation of state education appropriations—allows the Legislature to direct schools as to how state funds must be expended absent a constitutional provision that says otherwise. (Answer brief, pp. 25-26; *Cal. Teachers Assn.*, *supra*, 5 Cal.App.4th at pp. 1532-1533.) This authority encompasses the offsetting revenue at issue here, which is state funding provided for education.

IV. New Legislation Does Not Change the Analysis That the Offsetting Revenue Statutes Are Constitutional

As explained above and in the answer brief, the challenged legislation is constitutional because the Legislature is free to prioritize how schools spend state funding, and the mandate is satisfied when the state provides

offsetting revenues. (Answer Brief, pp. 24-29, 33-35.) In the answer brief, respondents also refuted CSBA's hyperbolic claim that the challenged legislation is an attempt to end mandate reimbursement by pointing out that the offset statutes only applied to two mandates, not all education mandates. (*Id.*, pp. 39-40.) And even as to these two mandates, respondents have demonstrated that the challenged legislation's impact is limited. Specifically, BIP was repealed in 2013, and the current lawsuit therefore does not address the applicability of Education Code section 56523(f) going forward but simply seeks additional reimbursement for activities that took place more than five years ago. (*Id.*, pp. 17-18.) And the graduation requirements mandate is now part of the mandates block grant, through which almost all schools receive mandate reimbursement, and therefore almost no schools are affected by Education Code section 42238.24 going forward. (*Id.*, pp. 18-19.)

Now, amici point to new legislation—Assembly Bill No. 1840 (AB 1840), that was signed into law on September 17, 2018 after briefing in this matter was complete—as evidence of the Legislature's alleged intent to end mandate reimbursement and the ongoing importance of the issues presented in this case. (See School Innovations and Achievement (SIA) brief, p. 7; Clovis Unified et al. brief, pp. 14-15.) But nothing about this new statute suggests an attempt to end mandate reimbursement.

Of course, only the Commission on State Mandates (and then a court reviewing that determination) can determine whether a state law constitutes a mandate. (*Cty. of Los Angeles v. Comm'n on State Mandates* (1995) 32 Cal.App.4th 805, 819.) However, the offsetting revenue language in section 43[5] appears to be directed towards certain requirements for school

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[5] See AB 1840, § 43 ("If the Commission on State Mandates determines that this act contains costs mandated by the state,

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districts when they go into receivership and choose to accept emergency loans from the State. (See, e.g., Educ. Code §§ 41320 et seq.; AB 1840, §§ 6-14, and Education Code §§ 42160 et seq.; AB 1840, §§ 15-16; see also *Butt*, *supra*, 4 Cal.4th at 690 [discussing emergency loan provisions].) These provisions apply only to an extremely limited number of schools. Moreover, it makes sense and is constitutional to prohibit a school that has had to seek an emergency loan and/or go into receivership from claiming as a mandate the costs of the loan or receivership. (See *Butt*, *supra*, 4 Cal.4th at 692 ["The State's plenary power over education includes ample means to discourage future mismanagement in the day-to-day operations of local districts"].) Again, like the offset language in the challenged legislation regarding graduation requirements and BIP, AB 1840's offset language is limited to a highly unusual circumstance that does not apply to the vast majority of schools, and will not apply to any schools except those that choose to enter into a receivership. Given this, AB 1840 certainly is not a bellwether of a legislative attack on the mandates system, and its enactment has no bearing on the issues in this case.

V. THIS COURT SHOULD NOT CONSIDER CLOVIS UNIFIED SCHOOL DISTRICT'S NEW STATUTORY CONSTRUCTION ARGUMENT ABOUT GOVERNMENT CODE SECTION 17557, SUBDIVISION (d)(2)(B)

Clovis argues that that Government Code section 17557, subdivision (d)(2)(B) is ambiguous and that the Court of Appeal, the State, the

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reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code, except that funding provided for school districts, county offices of education, and charter schools pursuant to Sections 2574, 2575, 2575.2, 42238.02, and 42238.03, as applicable, shall be used to directly offset any mandated costs.").

Commission on State Mandates, and CSBA have each been interpreting it incorrectly. (Clovis brief, pp. 16-27.)

This Court does "not ordinarily consider questions not raised by the appellate record and put forward only by an amicus curiae." (*In re Marriage of Oddino* (1997) 16 Cal.4th 67, 82, fn. 7; see, e.g., *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1047, fn. 12 [because the issue was not raised by the parties, Court would not address amicus' argument that interpreting Proposition 35 to allow governmental entities to contract with private firms would violate the California Constitution].)

There is good reason to follow that practice here. This Court granted review to decide two issues of constitutional interpretation—whether the offsetting revenue statutes violate article XIIIB, section 6 and whether they violate separation of powers. (See Petition for Review, p. 5 [defining issues in the case].) The Court nowhere indicated it would decide a statutory construction claim (or any other argument) not raised in the petition. Clovis' new argument ignores a fundamental rule of appellate practice—that amici may not expand the issues on appeal—and the Court should decline to consider the argument. (*California Redevelopment Assn.*, *supra*, 53 Cal.4th at 242 fn. 2.)[6]

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[6] Of course, this Court may adopt a narrowing construction of Government Code section 17557, subdivision (d)(2)(B) if it finds that the challenged statute as applied by the parties is unconstitutional. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548 ["If a statute is susceptible of two constructions . . . the court will adopt the construction which . . . will render it valid in its entirety"].) But such construction properly occurs after a court finds an application problematic rather than before such determination. (See *id.*) Clovis' new argument puts the cart before the horse, and this Court should decline Clovis' invitation to disregard the narrow issues on which the Court granted review and decide the case based on an entirely new legal theory.

In any event, Clovis' new argument—that the offsetting revenue language of 17557(d)(2)(B) is required to be "additional" revenue, because Government Code section 17556(e) uses the word "additional" instead of "offsetting" (Clovis brief, pp. 16-27)—fails on the merits. The argument ignores a cardinal rule of statutory interpretation: different words used by the Legislature in the same statutory scheme should have different meanings. (*Roy v. Superior Court* (2011) 198 Cal.App.4th 1337, 1352 ["Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning,"] internal quotation and citation omitted].) Interpreting "offsetting" (as used in section 17557(d)(2)(B)) to mean "additional" (as used in section 17556(e)), would violate this rule. Clovis also makes this argument despite its apparent recognition that the literal language of the challenged statute does not support it. (*Id.* at p. 25 [urging court to reject "literal construction"].)

The Court should not consider Clovis's new statutory construction argument, which seeks to improperly expand the issues on review. Alternatively, the Court should reject it as meritless for the reasons stated above.

CONCLUSION

For all of the above reasons, and for those demonstrated in the answer brief, this Court should affirm the opinion of the Court of Appeal.

Dated: December 10, 2018

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONSE TO AMICUS BRIEFS** uses a 13 point Times New Roman font and contains 2,983 words.

Dated: December 10, 2018

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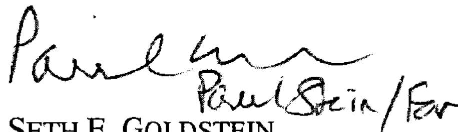

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No.: **S247266**

I declare:

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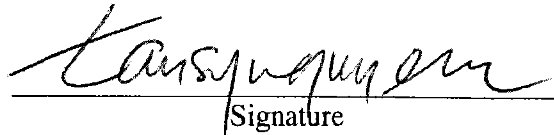

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