# In the Supreme Court of the State of California

**COUNTY OF SAN DIEGO; COUNTY OF LOS ANGELES; COUNTY OF ORANGE; COUNTY OF SACRAMENTO; and COUNTY OF SAN BERNARDINO,**

**Plaintiffs and Appellants,**

**v.**

**COMMISSION ON STATE MANDATES; STATE OF CALIFORNIA; DEPARTMENT OF FINANCE FOR THE STATE OF CALIFORNIA; JOHN CHIANG in his official capacity as California State Controller,**

**Defendants and Respondents.**

Case No. S239907



Fourth Appellate District, Division One, Case No. D068657
San Diego County Superior Court, Case No. 37-2014-00005050-CU-WM-CTL
Honorable Richard E. L. Strauss, Judge Presiding

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## ISSUES PRESENTED

This case concerns a decision by the Commission on State Mandates. The Commission concluded that the State is no longer financially responsible for costs incurred by local governments in complying with certain duties imposed by the Sexually Violent Predator Act (SVPA). Under the state mandates requirement of the California Constitution, and the Government Code provisions implementing that requirement, the State generally must pay for the costs resulting from a new program or higher level of service imposed on local government by the Legislature. But the State is not responsible for the costs of duties that are expressly included in or necessary to implement a ballot measure approved by the voters. The Commission decided that amendments to the SVPA adopted by the voters in Proposition 83 changed the status of six of the SVPA duties from reimbursable state mandates to non-reimbursable voter mandates. The trial court agreed with that decision. In reversing the trial court, the Court of Appeal concluded that a ballot measure does not change the State's financial responsibility for a statutory mandate unless it alters the text of that duty. The issues presented by this case are:

(1) Whether the rule adopted by the Court of Appeal, which focuses exclusively on whether a voter initiative modifies the language of the statutory section or subdivision that imposes a statutory mandate, and does not allow consideration of other ways in which an initiative may modify the scope, nature, or source of that mandate, complies with the Government Code and the Constitution.

(2) Whether and to what extent the State remains responsible for the costs of duties imposed on local government by the Sexually Violent Predator Act, which the voters amended and partially re-enacted when they approved Proposition 83.

## INTRODUCTION

As originally enacted by the Legislature, the SVPA defined a narrow category of unusually dangerous sex offenders and established a process for identifying such offenders and having them civilly committed. That process imposed a number of mandatory duties on both state and local agencies. The Commission on State Mandates originally held that the State was financially responsible for certain duties imposed by the SVPA on local agencies, because the duties were part of a new program mandated by the Legislature.

The Constitution does not, however, require the State to pay for costs arising from statutory duties mandated by a source other than the Legislature or a state agency. The Government Code implements that exclusion. In particular, it directs that the State is not responsible for the costs of a statutory duty that is "necessary to implement, or [is] expressly included in, a ballot measure approved by the voters in a statewide election"—regardless of whether the voters adopted that ballot measure "before or after" the statutory duty was first enacted. (Gov. Code, § 17556, subd. (f).)

Under that Government Code provision, the State is no longer financially responsible for the six SVPA duties at issue in this case because of the voters' adoption of Proposition 83 in 2006. In Proposition 83, the voters substantially expanded the definition of "sexually violent predators," which triggers the duties that are part of the SVPA process; they re-enacted the entire text of the statutory sections that impose several of those duties; and they prevented the Legislature from narrowing or repealing the provisions of Proposition 83 through the normal legislative process. As the Commission and the trial court recognized, after Proposition 83, the SVPA duties at issue here were either necessary to implement, or expressly included in, Proposition 83.

The Court of Appeal disagreed, on the ground that Proposition 83 had not altered the specific statutory language describing those duties. The Court of Appeal's narrow construction of the Government Code is incorrect. Statutory duties are "expressly included in" a ballot measure if they are set out in its text. Statutory duties are "necessary to implement" a ballot measure if they flow from or are compelled by the measure. Here, all of the SVPA duties at issue were either contained within the text of Proposition 83 or impose costs that flow from and are compelled by Proposition 83. The California Department of Finance, the California State Controller, and the State of California (collectively, the "State Respondents") respectfully request that this Court reverse the judgment of the Court of Appeal.

## LEGAL BACKGROUND AND STATEMENT OF THE CASE

### A. Article XIII B and the Government Code Generally Require the State to Reimburse Local Governments for the Costs of Mandates Imposed by the Legislature

The Constitution requires the State to reimburse local governments for the costs of a program or increased level of service "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government." (Cal. Const., art. XIII B, § 6, subd. (a); see Gov. Code, § 17514.) The concern prompting that state mandates requirement 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.)[1]

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[1] The voters adopted the state mandates requirement as part of Proposition 4, which added article XIII B to the Constitution. (See Prop. 4, as approved by voters, Spec. Elec. (Nov. 6, 1979).) The year before, the (continued...)

The Constitution's state mandates requirement is implemented by the Government Code. The Legislature created the Commission on State Mandates as a quasi-judicial body to decide whether a statute imposes a state-mandated cost on local governments within the meaning of the Constitution and the Government Code. (Gov. Code, § 17551, subd. (a).) Local agencies must file a "test claim" with the Commission to establish that they are entitled to reimbursement for such a cost. (See *id.*, §§ 17514, 17521, 17553; Cal. Code Regs., tit. 2, § 1181.2, subd. (s).) A test claim is the "sole and exclusive procedure" for claiming and obtaining reimbursement (Gov. Code, § 17552), and decisions of the Commission apply statewide to similarly situated agencies (Cal. Code Regs., tit. 2, § 1183.1).[2] Either the claimant or the State may seek judicial review of a final Commission decision by filing a petition for a writ of administrative mandamus. (Gov. Code, § 17559, subd. (b), citing Code Civ. Proc., § 1094.5.)

The Government Code also contains substantive provisions, directing the Commission on how to resolve test-claim disputes consistent with the Constitution's state mandates requirement. In particular, Government Code section 17556 describes circumstances in which the Commission "shall not find costs mandated by the state." Subdivision (f) of that section directs

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(...continued)
voters had approved Proposition 13, adding article XIII A to the Constitution to "limit[] the state and local governments' power to increase taxes." (*San Francisco Taxpayers Assn. v. Bd. of Supervisors* (1992) 2 Cal.4th 571, 574.) Articles XIII A and XIII B "'work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.)

[2] See also *San Diego Unified School District v. Com. on State Mandates* (2004) 33 Cal.4th 859, 872, fn. 10; Cal. Code Regs., tit. 2, § 1181.2, subd. (s) [test claim "functions similarly to a class action"].

that costs arising from statutory duties "that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election" are excluded from the reimbursement requirement. (Gov. Code, § 17556, subd. (f).) That exclusion "applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters." (*Ibid.*)

When the Commission concludes that a state mandate exists, it must then determine the amount of reimbursable costs and adopt "parameters and guidelines" for reimbursement. (Gov. Code, § 17557, subd. (a).) The Legislature may choose to appropriate funds to reimburse the affected local agencies for the costs of the mandate; or the Legislature may choose not to fund the mandate, thereby suspending operation of the mandate for that fiscal year. (See Cal. Const., art. XIII B, § 6, subd. (b); Gov. Code, § 17581; *California School Bds. Assn. v. Brown* (2011) 192 Cal.App.4th 1507, 1513-1514 (*CSBA II*).) If the Legislature does not suspend the mandate, the Controller is responsible for disbursing the necessary funds to local agencies. (Gov. Code, § 17561, subds. (c)-(d).) If the Legislature suspends operation of a state mandate, an affected local agency may file an action to declare the mandate unenforceable and enjoin its enforcement for that fiscal year. (*Id.*, § 17612, subd. (c).)

Beginning in 2010, the Legislature authorized the Commission to "adopt a new test claim decision to supersede a previously adopted test claim decision . . . upon a showing that the state's liability for that test claim decision . . . has been modified based on a subsequent change in law." (Gov. Code, § 17570, subd. (b).) Under this re-determination process, an affected agency may request that the Commission conduct a new hearing process. (*Id.*, subd. (c).) In appropriate circumstances, the Commission may then conduct such a process and adopt a new test claim

decision to supersede one it issued before the change in law. (See *id.*, subd. (d)(4).)

### B. The Commission on State Mandates Determined That the SVPA, as Originally Enacted by the Legislature, Imposed Eight Reimbursable State Mandates

In 1995 and 1996, the Legislature enacted the SVPA, which established procedures for the screening, evaluation, and civil commitment of inmates convicted of certain sexual offenses following the completion of their prison terms.[3] The Act defines the term "sexually violent predator." (Welf. & Inst. Code, § 6600, subd. (a)(1).) It establishes a process for committing such offenders involving participation by state and local agencies. The SVPA process begins with the California Department of Corrections and Rehabilitation and the Department of State Hospitals, which must screen and evaluate offenders to determine whether they are likely to meet the definition of a sexually violent predator. (*Id.*, § 6601, subds. (a)-(h).) County officials must perform a variety of duties in connection with offenders who are likely to qualify as a sexually violent predator, such as reviewing records to determine if the county concurs with the State's recommendation for commitment, preparing and filing a civil commitment petition, attending the probable cause hearing and civil commitment trial, and participating in future hearings. (See, e.g., *id.*, §§ 6601, subd. (i), 6602-6604.)

In 1998, the Commission on State Mandates considered a test claim regarding the costs local agencies incurred in complying with duties

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[3] See Welfare & Inst. Code, §§ 6600-6608, 6601.3, 6601.5; Stats. 1995, ch. 762, § 3, pp. 5912-5921; *id.*, ch. 763, § 3, pp. 5921-5929; Stats. 1996, ch. 4, §§ 1-3, pp. 14-17.

imposed by the SVPA. (AR 4.)[4] The Commission concluded that several provisions of the SVPA imposed "a new program or higher level of service" upon local agencies and approved reimbursement for the following eight state-mandated duties:

1. Designation by the county board of supervisors of the appropriate district attorney or county counsel who will be responsible for handling the civil commitment proceedings. (See Welf. & Inst. Code, § 6601, subd. (i).)
2. Initial review of reports and records by the county's designated counsel to determine if the county concurs with the State's recommendation. (See *ibid.*)
3. Preparation and filing of the civil commitment petition by the county's designated counsel. (See *ibid.*)
4. Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (See *id.*, § 6602.)
5. Preparation and attendance by the county's designated counsel and indigent defense counsel at the civil commitment trial. (See *id.*, §§ 6603-6604.)
6. Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (See *id.*, § 6605, subds. (b)-(d) (1998), § 6608, subds. (a)-(d).)
7. Retention of necessary experts, investigators, and professionals for trial preparation and subsequent hearings regarding the condition of the sexually violent predator. (See *id.*, §§ 6603, 6605, subd. (d) (1998).)
8. Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (See *id.*, § 6602.)

(See AR 3.)

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[4] "AR" refers to the Administrative Record. "JA" refers to the Joint Appendix.

As a result of the Commission's 1998 decision, counties throughout the State have submitted claims for the costs incurred in performing these eight duties, and the State has reimbursed them. For fiscal year 2012-2013, for example, the State reimbursed counties in the amount of $20.75 million; and for fiscal year 2013-2014, the enacted budget appropriated $21.79 million in reimbursement funds. (AR 41; Stats 2013, ch. 20, § 2, p. 657 [item 8885-295-0001(l)(k)].)

### C. The Voters Approved Proposition 83, Which Substantially Amended the SVPA

In the November 2006 general election, California voters approved Proposition 83, a statutory initiative also known as "Jessica's Law." (AR 674-675; see Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2006).) Proposition 83 stated that its intent was "to strengthen and improve the laws that punish and control sexual offenders." (AR 693 [Prop. 83, § 31].) The ballot-pamphlet arguments in favor of Proposition 83 contended that "[o]ur families deserve the protection of a tough sex offender punishment and control law. The State Legislature has failed to pass Jessica's Law time and time again. WE CANNOT WAIT ANOTHER DAY TO PROTECT OUR KIDS." (AR 680.) The voters approved Proposition 83 by a margin of 70.5% to 29.5%.[5]

Proposition 83 had three main objectives. First, it increased criminal penalties for sex offenses. (See AR 677.) Second, it sought to protect the public by requiring certain offenders to be monitored by GPS devices and preventing them from living near parks and schools. (See AR 677-678.)

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[5] California Secretary of State, Statement of Vote, November 7, 2006 General Election, State Ballot Measures, p. 97 <http://elections.cdn.sos.ca.gov/sov/2006-general/ssov/props_sum.pdf> [as of June 26, 2017].

Third, and most relevant here, it substantially revised the SVPA. (See AR 678.)

With respect to the SVPA, Proposition 83 expanded the definition of "sexually violent predator": it reduced the required number of victims from two to one; expanded the set of crimes that qualify as "sexually violent offenses"; and allowed consideration of more prior offenses, including certain crimes committed by an offender while a juvenile. (AR 690-691.) Proposition 83 made several additional changes to the SVPA, such as modifying the term of commitment of offenders found to be sexually violent predators. (AR 691.) In making those changes, Proposition 83 re-enacted in full many of the statutory sections that comprise the SVPA. (AR 691-693.)[6] Those re-enacted sections contain most of the statutory duties that the Commission on State Mandates had previously found to impose reimbursable, state-mandated duties in its 1998 test-claim decision.

The final provision in Proposition 83 is an "Amendment Clause," which constrains the Legislature's ability to amend or repeal the provisions of Proposition 83:

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

(AR 693 [Prop. 83, § 33]; see generally Cal. Const., art. II, § 10, subd. (c) ["The Legislature . . . may amend or repeal an initiative statute by another

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[6] See generally Cal. Const., art. IV, § 9 ["A section of a statute may not be amended unless the section is re-enacted as amended"].

statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval"].)

### D. After Proposition 83, the Commission Determined That Six SVPA Duties Were No Longer State Mandates

In January 2013, the Department of Finance requested that the Commission reconsider its 1998 determination regarding the SVPA duties in light of the "change in law" effected by Proposition 83. (AR 31-50.) The Department argued that Proposition 83 modified the State's financial responsibility for the duties because they were now "expressly included in" Proposition 83 or "necessary to implement" the Proposition within the meaning of Government Code section 17556, subdivision (f). (AR 33, 37-39.) The Commission concluded that six of the eight SVPA duties (duties 1, 2, 3, 5, 6, and 7) had become voter-imposed mandates. (AR 605; see AR 623-640.)[7]

### E. The Trial Court Upheld the Commission's Determination

The Counties of San Diego, Los Angeles, Orange, Sacramento, and San Bernardino filed a petition for a writ of administrative mandamus and a complaint for declaratory relief. (JA 1-24.) They named the Commission, the Department of Finance, the State Controller, and the State of California as respondents and defendants. (JA 3-4.)[8] Among other things, the Counties argued that the Commission had misapplied the relevant

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[7] The Commission concluded that two other duties related to probable cause hearings (duties 4 and 8) "remain reimbursable as state-mandated costs." (AR 606.)

[8] At the time the Counties filed their petition and complaint, John Chiang held the Office of California State Controller. Betty Yee, having been duly elected on November 4, 2014, now holds that Office. Counsel of record for the former Controller and the present Controller remains the same.

Government Code provisions, and that "the changes in law imposed by [Proposition 83] cannot be lawfully used as a basis for a request for redetermination." (JA 12.)

The trial court denied the Counties' petition. (JA 368.) It ruled that Proposition 83 was a change in law modifying the State's reimbursement liability. (JA 366-367.) The court noted that Proposition 83 "was more than a mere restatement" and made "substantive changes to the SVP Act," including by adopting "a broader definition of 'sexually violent predator.'" (JA 367.) It also emphasized that the Proposition's "'Amendment Clause' mak[es] it more difficult for the Legislature to repeal or weaken the measure." (*Ibid.*)[9]

### F. The Court of Appeal Reversed, Applying A "Narrow" Rule for Determining What Constitutes a State Mandate

The Court of Appeal reversed. It first addressed the threshold question of how to determine whether a voter initiative "converted the duties . . . that the Commission previously determined were state-mandated[] into duties that are instead mandated by the People," and therefore no longer reimbursable by the State. (Opn. p. 24.) The court viewed this as a "novel question" that is "not easily answer[ed]" by the Government Code. (*Id.* at p. 25.) Adopting a "narrow construction" of sections 17556, subdivision (f), and 17570, the court held "that a ballot initiative that modifies statutes previously found to impose a state mandate

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[9] In addition to arguing that the Commission misapplied Government Code sections 17570 and 17556, subdivision (f), the Counties advanced several constitutional challenges to those sections in the trial court, such as arguing that the term "subsequent change in the law," as used in section 17570, "is unconstitutionally vague." (JA 15; see *id.* at pp. 12-15.) The trial court rejected the Counties' constitutional challenges (see JA 367-368); the Court of Appeal did not reach them; and the Counties have not raised them before this Court. (See *post*, p. 25, fn. 11.)

only changes the source of the mandate" for reimbursement purposes "if the initiative changes the duties imposed by the statutes." (*Ibid.*)

Next, the Court of Appeal applied that rule to Proposition 83 and the SVPA. It reviewed the sections of the Welfare and Institutions Code that the Commission had found to impose state-mandated SVPA duties, compared their text as originally enacted and as re-enacted by the voters in Proposition 83, and asked whether the Proposition modified any of the specific language that the Commission had found to impose a duty. (See Opn. pp. 26-29, 31.) Based on that comparative analysis of the statutory text, the court concluded that Proposition 83 "did not change any of the duties the law imposed on the Counties" and that the duties "were not affected by Proposition 83." (*Id.* at pp. 26, 29.)

The Court of Appeal rejected the argument that other changes the voters made to the SVPA when they adopted Proposition 83 altered the State's financial responsibility for the SVPA duties. (Opn. p. 32.) In particular, the court reasoned that Proposition 83's Amendment Clause and its expansion of the "sexually violent predator" definition "did not impact any of the duties imposed by the SVPA or change the source of the mandated duties," because those statutory changes did not modify the specific text within the Welfare and Institutions Code describing those duties. (*Ibid.*) The court also rejected the argument that the voters' re-enactment of several statutory sections containing SVPA duties altered the State's financial responsibility for those duties, stating that the argument would lead to "absurd" results. (*Id.* at pp. 33-36.) After concluding that the SVPA duties remain reimbursable state mandates notwithstanding Proposition 83, the Court of Appeal suggested that the Legislature remains free to suspend those mandates. (*Id.* at pp. 36-37.)

## STANDARD OF REVIEW

Appellate courts must "independently review[] conclusions" by the Commission on State Mandates "as to the meaning and effect of constitutional and statutory provisions." (*Dept. of Finance v. Com. on State Mandates* (2016) 1 Cal.5th 749, 762.) The "question whether a statute or executive order imposes a mandate is a question of law," warranting de novo review. (*Ibid.*; see *City of San Diego v. State of California* (1997) 15 Cal.4th 68, 109; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810.)

## ARGUMENT

### I. THE CONSTITUTION AND THE GOVERNMENT CODE REQUIRE THE STATE TO REIMBURSE ONLY THE COSTS OF DUTIES IMPOSED AT THE LEGISLATURE'S DISCRETION

This case principally involves an interpretation of Government Code section 17556, subdivision (f), which directs that the Commission "shall not find costs mandated by the state" if those costs arise from a statutory duty that is "expressly included in" a voter-adopted ballot measure or "necessary to implement" such a measure. Interpreting those clauses requires an analysis of the statutory language. Because subdivision (f) is part of a broader statutory framework adopted to implement the Constitution's state mandates requirement, that analysis also must consider the function and history of section 17556 "in the context of the statutory framework as a whole." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) Respondents begin by addressing that history and context.

#### A. Section 17556 Implements the State Mandates Requirement by Identifying Non-Reimbursable Costs That Are Mandated by Entities Other Than the Legislature

Section 17556 conforms with the constitutional text, which requires reimbursement only when "the *Legislature or any state agency* mandates a

new program or higher level of service" on local government. (Cal. Const., art. XIII B, § 6, subd. (a), italics added.) By its terms, that requirement does not apply if an entity other than the Legislature or a state agency mandates a program or higher level of service. For example, the State is not responsible for the costs of a statutory duty when the source of that duty is a mandate from the federal government. (See *San Diego Unified School Dist. v. Com. on State Mandates* (2004) 33 Cal.4th 859, 880 [the Constitution requires "reimbursement only of *state*-mandated costs, not *federally* mandated costs"].) Similarly, the reimbursement requirement does not apply to ballot measures, because the "'Legislature' does not include the people acting pursuant to the power of initiative." (*Cal. School Bds. Assn. v. State of California* (2009) 171 Cal.App.4th 1183, 1210 (*CSBA I*).)

The Legislature enacted section 17556 in 1984 as part of comprehensive legislation "to provide for the implementation of Section 6 of Article XIII B of the California Constitution." (Gov. Code, § 17500.) Section 17556 identifies specific categories of costs that are not reimbursable under the Constitution's state mandates requirement. (See, e.g., *id.*, § 17556, subd. (c) [federal mandates]; *id.*, § 17556, subd. (f) [voter-imposed mandates]; see generally Stats. 1984, ch. 1459, § 1, pp. 5118-5119.)

In the years since 1984, the Legislature has occasionally refined section 17556 to track more precisely the constitutional line between duties mandated by the Legislature and those traceable to some other source beyond the Legislature's control. For example, the Legislature amended section 17556 to recognize that the State's financial responsibility for the costs of a statutory duty may change as the result of an event occurring after the initial enactment of that duty. Subdivision (f), the provision at issue in this case, now directs that it "applies regardless of whether the

statute" describing the duty was first "enacted or adopted before or after the date on which the ballot measure was approved by the voters." (Gov. Code, § 17556, subd. (f); see Stats. 2005, ch. 72, § 7, p. 1373.) The Legislature has added similar provisions to four other subdivisions of section 17556, including subdivision (c), the subdivision addressing costs that arise from federal mandates. (See Stats. 2004, ch. 895, § 14, p. 6844; Stats. 2005, ch. 72, § 7, p. 1373; Gov. Code, § 17556, subds. (a), (b), (c), (d), (e).)

Those provisions conform with the approach this Court took in *San Diego Unified School Dist. v. Com. on State Mandates* (2004) 33 Cal.4th 859. That case considered whether the State was financially responsible for costs incurred by a school district between mid-1993 and mid-1994 in complying with statutory requirements for student expulsion proceedings. (*Id.* at pp. 866-867, 872.) In holding that costs related to mandatory expulsions were "fully reimbursable," the Court looked to "the statutes existing at the time of the test claim in this case." (*Id.* at pp. 881-882.) The Court rejected the argument that the state statutory requirements "constitute[d] an implementation of federal law," noting that "at the time relevant here" no federal law "compelled states to enact" them. (*Id.* at p. 883.) But the Court left open the possibility that later-enacted federal statutes might "lead to a different conclusion when applied to versions of [the state statutes] effective in years 1995 and thereafter." (*Id.* at p. 884.)

Since its inception, the provision currently contained in subdivision (f) has applied to duties "expressly included in a ballot measure approved by the voters. (Stats. 1984, ch. 1459, § 1, p. 5119.) In 2005, the Legislature amended subdivision (f) to clarify that the State is not responsible for the costs of a statutory duty if the duty is "necessary to implement" a ballot measure approved by the voters. (Gov. Code, § 17556, subd. (f); see Stats.

2005, ch. 72, § 7, p. 1373.)[10] That amendment is also consistent with *San Diego Unified School District*, which recognized that the Constitution does not require reimbursement for a statutory duty that "implement[s] a federal" mandate. (*San Diego Unified School District*, *supra*, 33 Cal.4th at p. 888.) The "'necessary to implement' language of Government Code section 17556, subdivision (f) is consistent with article XIII B, because it denies reimbursement only to the extent that costs imposed by a statute are necessary to implement the ballot measure." (*CSBA I*, *supra*, 171 Cal.App.4th at p. 1213.)

### B. "Expressly Included In": If A Statutory Duty Is Contained Within the Text of a Ballot Measure, It Is Not a Reimbursable Mandate

The meaning of the phrase "expressly included in[] a ballot measure" is plain in this context. A statutory duty is "expressly included in" a ballot measure if it is directly stated as part of the text of that ballot measure. The Counties acknowledge that, in some circumstances, the State is not responsible for the cost of statutory duties explicitly stated in a ballot measure. As they explained below, "if a statewide ballot initiative approved by the voters imposed new programs or activities on local agencies, or imposed additional requirements on local agencies relating to existing programs or activities, such activities would not have been

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[10] The same amendment included language directing that the State is not liable for costs arising from a statutory duty that is "reasonably within the scope of . . . a ballot measure approved by the voters." (Stats. 2005, ch. 72, § 7, p. 1373.) In *CSBA I*, however, the Court of Appeal held that the phrase "reasonably within the scope of" was "so broad that it cannot be used as a standard for determining whether the State must reimburse the local government for having imposed a duty resulting in costs." (*CSBA I*, *supra*, 171 Cal.App.4th at p. 1215.) The Legislature responded to that decision by deleting the words "reasonably within the scope of" from subdivision (f). (See Stats. 2010, ch. 719, § 31, p. 4866.)

reimbursable mandates imposed by the State." (Counties' Opening Br. in Court of Appeal, p. 35.)

The exclusion for duties "expressly included in" a ballot measure can also be triggered by a ballot measure approved *after* a statutory duty is originally enacted. If a statutory duty initially adopted by the Legislature is later expressly imposed by the electorate itself, then the duty thereafter no longer arises from a discretionary action by the Legislature. (See Gov. Code, § 17556, subd. (f) [exemption applies "regardless of whether" statute enacted "before or after" ballot measure].)[11] The ballot measure adopted by the voters "itself imposes" the duty, and the costs of complying with the duty flow from that voter mandate. (*Dept. of Finance*, *supra*, 1 Cal.5th at pp. 765, 767; see *CSBA I*, *supra*, 171 Cal.App.4th at p. 1206 ["The State's constitutional duty to reimburse local governments for mandated costs does not include ballot measure mandates"].) If the voters change the source of a statutory mandate in that way, the mandate is no longer reimbursable under the Constitution. (Cf. *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at p. 833.) The Constitution requires reimbursement by the State only when "the Legislature or any state agency" is the source of a statutory mandate. (Cal. Const., art. XIII B, § 6, subd. (a).)

This interpretation comports with background legal principles, of which the Legislature is presumed to have been aware when it adopted the

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[11] Before the trial court and the Court of Appeal, the Counties argued that the second sentence of subdivision (f) violates "the intent and purpose of article XIII B, section 6," by making the subdivision "applicable to activities and programs previously found to be reimbursable state mandates." (Counties' Opening Br. in Court of Appeal, pp. 34, 35.) The Court of Appeal did not reach that issue, and it is not presently before this Court because the Counties did not raise it in their answer or in a separate petition for review. (See Cal. Rules of Court, rule 8.516(b).)

current version of section 17556.[12] The Constitution places certain restrictions on the Legislature's ability to amend or repeal a statute that has been adopted by an initiative statute. (See Cal. Const., art. II, § 10, subd. (c); *post*, pp. 40-41.) So when the voters take a statutory duty previously imposed by the Legislature and make it part of an initiative statute, as to which the Legislature may be limited in its ability to make changes, the duty becomes a voter-imposed mandate.

### C. "Necessary to Implement": If the Duty Flows from a Ballot Measure, There Is No State Mandate

Subdivision (f) also directs that the State is not responsible for the costs arising from a statutory duty if the duty is "necessary to implement . . . a ballot measure approved by the voters." (Gov. Code, § 17556, subd. (f).) This clause recognizes that a duty is not a state mandate if it is needed to achieve the goals and objectives of the ballot measure, whether or not the duty is "expressly included" in the measure. In other words, if the costs of complying with a statutory duty flow from a ballot measure adopted by the voters, or are compelled by such a measure, then the duty is "necessary to implement" the measure, and the State is not financially responsible for its costs under the state mandates requirement. (See Cal. Const., art. XIII B, § 6, subd. (a).)

The Counties recognize that the "necessary to implement" exemption in subdivision (f) limits the scope of the State's financial responsibility for statutory mandates. They acknowledge, for example, that statutes "enacted after the adoption of such ballot initiatives to implement the provisions of the ballot measure . . . would not have been reimbursable mandates

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[12] See, e.g., *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199; *Cal. Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 595.

imposed by the State." (See Counties' Opening Br. in Court of Appeal, p. 35.) In that circumstance, costs arising from the implementing statute would obviously flow from the ballot measure. But the Counties seek to narrow the scope of the exemption to apply only when the ballot measure *precedes* the enactment of the statutory duty. (See *id.* at p. 36.) That reading of subdivision (f) is in tension with the reasoning of *San Diego Unified School District, supra*. (See *ante*, p. 23.) In that decision, this Court recognized the possibility that a reimbursable statutory duty the Legislature had freely imposed in the first instance might—as the result of later changes in federal law—become "an implementation of federal law," resulting in costs that "are nonreimbursable." (*San Diego Unified School Dist., supra*, 33 Cal.4th at p. 883; see *id.* at p. 884 ["we do not foreclose [this] possibility"].)

In the same way, a ballot measure that is approved by the voters after the original enactment of a statutory duty may affect the State's financial responsibility for the duty. If the duty is necessary to fulfill the goals and objectives of the measure, then it is "necessary to implement" the measure at any point after the measure becomes effective. Likewise, if a measure changes the statutory framework in a way that materially alters the scope or nature of a duty, then the modified duty can no longer be said to be mandated by "the Legislature or [a] state agency." (Cal. Const., art. XIII B, § 6, subd. (a).) The source of the newly modified duty is the voters, and the costs that local governments incur in complying with that duty flow from the ballot measure adopted by the voters, not from a discretionary act by the Legislature.

That interpretation is fully consistent with this Court's recent decision in *Department of Finance v. Commission on State Mandates, supra*, interpreting subdivision (c), the provision directing that the State is not responsible for the costs of federal mandates. As the Court of Appeal has

recognized, subdivision (f) "corresponds to" subdivision (c), and this Court's decisions construing subdivision (c) inform the meaning of subdivision (f). (See *CSBA I, supra*, 171 Cal.App.4th at pp. 1213, 1214 [noting that "[a]lthough the wording is different, there is no difference in the effect" of the two provisions].) In *Department of Finance*, the Court considered whether costs arising from state environmental permitting requirements are reimbursable under the state mandates requirement, or are exempt on the ground that they are mandated by federal law. The Court concluded that the central question is whether the duty results from a "discretionary action" by the Legislature. (*Dept. of Finance, supra*, 1 Cal.5th at p. 754.) If a federal statute "compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate," and the costs arising from it need not be reimbursed by the State. (*Id.* at p. 765.) If, on the other hand, the Legislature "exercises its discretion to impose the requirement by virtue of a 'true choice,'" then the costs do "not flow from a federal mandate," and must be reimbursed. (*Id.* at pp. 765, 767.) Put differently, the analysis must consider "how the costs came to be imposed on the entity that was required to bear them," and whether they "flow from a federal mandate." (*Id.* at p. 767.) That approach is equally applicable to subdivision (f).

### D. The Court of Appeal's "Narrow" Construction of Subdivision (f) Is Incorrect

The Court of Appeal adopted a contrary, "narrow" construction of section 17556, holding "that a ballot initiative that modifies statutes previously found to impose a state mandate only changes the source of the mandate if the initiative changes the duties imposed by the statutes." (Opn. p. 25.) In its view, such a change requires that the ballot measure alter the statutory text describing a mandatory duty. (See Opn. pp. 26-29, 31.) In other words, the Court of Appeal's rule would depend on a before/after

comparison of the particular section or subdivision that the Commission found to impose a duty on local government.[13]

That approach is not compatible with section 17556 or with the Constitution's state mandates requirement. To be sure, if a ballot measure directly alters the text of a statutory duty, that will likely satisfy subdivision (f). Such an alteration would create a new duty, mandated by the voters, which is "expressly included" in the ballot measure and therefore not reimbursable by the State. (Gov. Code, § 17556, subd. (f); see *ante*, pp. 24-25.) But subdivision (f) applies in other circumstances as well. It applies if a pre-existing statutory duty becomes necessary to the fulfillment of the goals or objectives of a ballot measure, or if the measure materially alters the scope or nature of the duty. In any of those circumstances, the duty at issue has now been imposed directly by the voters, not by the Legislature. (See *ante*, pp. 26-27; cf. *Dept. of Finance*, *supra*, 1 Cal.5th at p. 767; Cal. Const., art. XIII B, § 6, subd. (a).) And the same is true if a statutory duty originally enacted by the Legislature is expressly re-stated in a subsequent ballot measure—again changing the source of the duty from the Legislature to the voters, and potentially placing the duty beyond the power of the Legislature to amend or repeal through normal procedures. (See Cal.

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[13] For example, in applying its rule to the facts of this case, the Court of Appeal noted that Welfare and Institutions Code section 6601, subdivision (i), formed the basis of three of the mandated SVPA duties identified in the Commission's 1998 decision. (See Opn. pp. 8, 26, fn. 9.) It rejected any argument that the State's financial responsibility for those duties was affected by Proposition 83—including by Proposition 83's expansion of the population subject to the SVPA—on the ground that "Proposition 83 amended only subdivision (k) of Welfare and Institutions Code section 6601" and did not alter the terms of subdivision (i). (*Id.* at p. 26, fn. 9.) In other words, the Court of Appeal's analysis began and ended with a before/after comparison of the text of that subdivision, viewed in isolation.

Const., art. II, § 10, subd. (c); *post*, pp. 40-41.) The Court of Appeal's rule does not account for any of these circumstances.[14]

## II. AFTER THE VOTERS' APPROVAL OF PROPOSITION 83, THE DUTIES IMPOSED ON LOCAL GOVERNMENTS BY THE SVPA ARE NO LONGER REIMBURSABLE STATE MANDATES

### A. All of the SVPA Duties Are "Necessary to Implement" Proposition 83

The SVPA codifies a process for screening, evaluating, and committing a particular group of dangerous sexual offenders, defined as "sexually violent predators." The duties imposed on local governments by the SVPA ensure that any offender who satisfies that definition beyond a reasonable doubt, and has received appropriate procedural protections, is civilly committed. In Proposition 83, the voters materially expanded the definition of "sexually violent predator" and directed that the Legislature could not narrow or repeal that definition through its ordinary legislative process. The source of that expanded definition is the voters. After that expansion, the costs incurred by local governments in complying with the SVPA duties flow from Proposition 83, and are "necessary to implement" the Proposition for purposes of Government Code section 17556, subdivision (f).

#### 1. The definition of "sexually violent predator" is central to the process established by the SVPA

As originally enacted by the Legislature in 1995, the SVPA

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[14] The Court of Appeal's rule is also in tension with the text of Government Code section 17570. That provision defines a "subsequent change in law" to include, among other things, any "change in law that requires a finding that an incurred cost . . . is not a cost mandated by the state pursuant to Section 17556." (Gov. Code, § 17570, subd. (a)(2).) The definition does not require a modification to the statutory text describing a particular duty; it requires only a change in law that satisfies one of the exemptions stated in section 17556.

established a process for addressing "a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders." (Stats. 1995, ch. 762, § 1, p. 5913.) The Legislature found that these "persons are not safe to be at large and if released represent a danger to the health and safety of others," and "that it is in the interest of society to identify these individuals prior to the expiration of their terms of imprisonment." (*Ibid.*) The SVPA was intended to identify qualifying offenders, to set up an orderly and fair process for determining beyond a reasonable doubt if they are "likely to commit acts of sexually violent criminal behavior," and, if so, to ensure that they are properly confined and treated. (*Ibid.*)

The process established by the SVPA involves a division of responsibility between state and local agencies. In the first instance, the Department of Corrections and Rehabilitation screens inmates, referring those who are likely to meet the statutory criteria for commitment to the Department of State Hospitals for a full evaluation to determine if they qualify for civil commitment under the SVPA. (Welf. & Inst. Code, § 6601, subds. (a)-(h); see Stats. 1995, ch. 762, § 2, pp. 5914-5915 [as originally enacted].) If the Department of State Hospitals determines that the inmate is eligible for commitment, it forwards to the appropriate county a request that a civil commitment petition be filed. (*Id.*, § 6601, subd. (h)(1).) At that point, county officials become responsible for a number of duties regarding the inmate. Those duties include reviewing records to determine if the county concurs with the recommendation for commitment (*id.*, § 6601, subd. (i)); preparing and filing the civil commitment petition (*ibid.*); providing legal representation for the county (and indigent offenders) at the civil commitment trial (*id.*, § 6602); and other duties described in the Commission's initial test-claim determination (AR 3; see Welf. & Inst. Code, §§ 6601, subd. (i), 6602-6605, 6608, subds. (a)-(d)).

At every step of this process, the central issue is whether the individual satisfies the statutory definition of "sexually violent predator." The initial screening by the Department of Corrections and Rehabilitation asks whether an inmate is "likely to be a sexually violent predator." (Welf. & Inst. Code, § 6601, subd. (b).) The evaluation by the Department of State Hospitals inquires into "whether the person is a sexually violent predator." (*Id.* § 6601, subd. (c).) The Department of State Hospitals must request that the appropriate county file a civil commitment petition upon determining "that the person is a sexually violent predator as defined in this article." (*Id.* § 6601, subd. (h)(1).) The local duties required by the SVPA also center around the statutory definition of "sexually violent predator." For example, the county's designated counsel must determine whether he or she agrees with the Department of State Hospitals that the person fits the statutory definition. (See *id.*, § 6601, subd. (i).) And the ultimate question at the civil commitment trial is "whether, beyond a reasonable doubt, the person is a sexually violent predator." (*Id.*, § 6604.)

**2. In adopting Proposition 83, the voters materially altered the definition of "sexually violent predator" for the stated purpose of strengthening the SVPA**

The Legislature originally defined the term "sexually violent predator" to mean:

> a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

(Stats. 1995, ch. 762, § 2, p. 5914 [text of Welf. & Inst. Code, § 6600, subd. (a), as originally enacted].) It separately enumerated those crimes qualifying as a "sexually violent offense" for purposes of this definition.

(See *ibid.* [text of Welf. & Inst. Code, § 6600, subd. (b), as originally enacted].)

In adopting Proposition 83, the voters expanded the definition of "sexually violent predator" in several ways. First, they reduced the required number of victims, so that the offender must have "been convicted of a sexually violent offense against one or more victims," as opposed to "two or more" in the original statute. (AR 690.) Second, the voters expanded the set of crimes that qualify as a "sexually violent offense," adding any felony violation of Penal Code section 207 (kidnapping), section 209 (kidnapping for ransom, reward, or extortion, or to commit robbery or rape), or section 220 (assault to commit mayhem, rape, sodomy, or oral copulation), committed with the intent to violate another enumerated "sexually violent offense." (AR 691.) Third, the voters directed that if an offender had a prior conviction for which he "was committed to the Department of the Youth Authority pursuant to [Welfare and Institutions Code] Section 1731.5," or that "resulted in an indeterminate prison sentence," that prior conviction "shall be considered a conviction for a sexually violent offense." (AR 690.)[15]

This expansion of the category of people who would be subject to the SVPA process was a central purpose of Proposition 83. The voters found that "existing laws that provide for the commitment and control of sexually violent predators must be strengthened and improved." (AR 682; see also AR 693 [Prop. 83, § 31] ["It is the intent of the People of the State of California in enacting this measure to strengthen and improve the laws that punish and control sexual offenders"].) The opening lines of the ballot

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[15] The voters also eliminated a provision that had capped at one the number of juvenile adjudications that could count as a "sexually violent offense" for purposes of the sexually violent predator definition. (AR 691.)

summary notified voters that Proposition 83 "Expands [the] definition of a sexually violent predator." (AR 676.) The analysis by the Legislative Analyst also explained that Proposition 83 would "generally make[] more sex offenders eligible for an SVP commitment" by making changes to the definition of sexually violent predator. (AR 678.)[16]

Moreover, the voters insulated these changes from legislative repeal or revision. As noted above, Proposition 83 prohibits the Legislature from repealing or narrowing the scope of its provisions "except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters." (AR 693 [Prop. 83, § 33]; see *ante*, p. 17.) So the Legislature could not, for example, modify the SVPA through its normal legislative process to revert to the definition of "sexually violent predator" that existed before Proposition 83. That change—or *any* change that does not expand the scope of the definition—may be accomplished only by another voter initiative or referendum, or by a super-majority vote of both houses of the Legislature.

### 3. All of the duties that the SVPA imposes on local governments are necessary to implement Proposition 83

In determining whether the duties imposed by the SVPA on local governments are now "necessary to implement" Proposition 83, the Court should consider whether the costs of complying with those duties "flow

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[16] The Legislative Analyst offered the voters some detail on how Proposition 83 would expand the definition, noting that it would "(1) reduc[e] from two to one the number of prior victims of sexually violent offenses that qualify an offender for an SVP commitment and (2) mak[e] additional prior offenses—such as certain crimes committed by a person while a juvenile—'countable' for purposes of an SVP commitment." (AR 678.)

from" or are "compelled by" the Proposition. (*Dept. of Finance*, *supra*, 1 Cal.5th at pp. 767, 768; see *ante*, pp. 26-28.)

The SVPA speaks in mandatory terms, requiring state and local agencies to take certain actions with respect to offenders who appear to fit within the voter-adopted definition of a "sexually violent predator." The Department of Corrections and Rehabilitation "shall" evaluate any offender who appears to fit within that definition (Welf. & Inst. Code, § 6601, subd. (a)(1)), and "shall" refer the person to the Department of State Hospitals if he is likely to satisfy the definition (*id.*, subd. (b)). The Department of State Hospitals "shall" evaluate the offender to determine whether he meets the definition (*id.*, subd. (c)) and "shall" request that the appropriate county file a civil commitment petition for any offender who does (*id.*, subd. (h)(1)). Then county officials "shall" designate an attorney to handle the proceeding, who must review the case and "shall" file a civil commitment petition if he or she agrees with the State's assessment that the offender falls within the statutory definition. (*Id.*, subd. (i).) As that proceeding moves forward, the superior court "shall" conduct a probable cause hearing, at which the county "shall" provide counsel for indigent offenders. (*Id.*, § 6602.) If the court determines that there is probable cause, the offender "shall be entitled to a trial by jury, to the assistance of counsel, to the right to retain experts," and to all the other statutory protections accompanying such a proceeding. (*Id.*, § 6603, subd. (a); see *id.*, subds. (b)-(j).) If the offender is civilly committed based on a finding beyond a reasonable doubt that he satisfies the definition of "sexually violent predator," the offender must be given certain other procedural protections at future hearings. (*Id.*, §§ 6605, 6608.)

These provisions make clear that the costs of carrying out the SVPA process flow from the definition of "sexually violent predator." That definition compels the State to screen and evaluate an offender. (See Welf.

& Inst. Code, § 6601, subds. (a)-(h).) If state officials determine that the offender does not satisfy the definition, no local costs need be incurred with respect to the offender; but if they conclude that the offender does satisfy the definition, they must refer him to local authorities for civil commitment proceedings. (See *id.*, subd. (h)(1).) The counties must designate attorneys for the purpose of conducting an initial review of reports and records to determine whether the county agrees that the offender fits within the definition of a "sexually violent predator." (See *id.*, subd. (i).) Only if those attorneys agree that the definition applies to a particular offender will the county incur additional costs associated with some or all of the other eight SVPA duties. (See *ibid.*; *id.*, §§ 6602-6605, 6608, subds. (a)-(d).)

Because all of these costs flow from the definition of "sexually violent predator," the question whether the State must reimburse them turns on whether or not the Legislature is the source of that definition. Before 2006, it was. But when the voters adopted Proposition 83, the headwaters shifted. After Proposition 83, the voters are the source of the expanded definition of "sexually violent predator," and the Legislature can no longer repeal or narrow that definition through normal legislative processes. (Cal. Const., art. II, § 10, subd. (c).) Accordingly, the State is no longer financially responsible for such costs under the state mandates requirement.

As noted above (*ante*, p. 20), the Court of Appeal dismissed the significance of the voters' expansion of the "sexually violent predator" definition in Welfare and Institutions Code section 6600. (Opn. p. 32.) It reasoned that Proposition 83's changes to that definition did not affect the State's responsibility for the costs of the eight SVPA duties, because "Welfare and Institutions Code section 6600 was not a basis for any of the duties for which the Counties sought reimbursement." (*Ibid.*) By that, the court apparently meant that the specific duties the Counties must carry out under the SVPA are described in different sections of the SVPA from

section 6600. That is true, but it provides no basis for concluding that the duties are not necessary to implement the expanded definition of "sexually violent predator" adopted by the voters. The entire purpose of the SVPA is to provide a mechanism for processing and, where appropriate, civilly committing the category of offenders defined as "sexually violent predators." (See Stats. 1995, ch. 762, § 1, p. 5913.) The duties imposed on counties are necessary to that process. (See *ante*, p. 14.)

The Counties have suggested that the six SVPA duties remain reimbursable after Proposition 83 because, in their view, the Legislature retains authority to amend or repeal those duties. (See, e.g., Counties' Reply Br. in Court of Appeal, pp. 15-17; *post*, p. 43.) Even if that were correct, however, it would not mean the duties are not "necessary to implement" Proposition 83. A statutory duty may be compelled by another entity even if the Legislature has the power to alter the terms of that statute as a technical matter. (See, e.g., *County of Los Angeles v. Com. on State Mandates* (1995) 32 Cal.App.4th 805, 814-816 [costs of complying with Penal Code section 987.9 not reimbursable because it implements the Sixth Amendment].) Here, as a practical matter, the voters' expansion of the definition of sexually violent predator compels the Legislature to leave in place those provisions of the Act that impose duties on local governments. Those duties comprise the process for fairly adjudicating civil commitment petitions with respect to offenders who meet that statutory definition.[17]

The Counties have also argued that the voters' expansion of the definition of sexually violent predator "did not change the scope and reach

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[17] Cf. *City of Sacramento v. State of Cal.* (1990) 50 Cal.3d 51, 74 [state statute was enacted "in response to a federal 'mandate' for purposes of article XIII B" when the "alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards"].

of the SVPA because [it] did not result in an increase in the number of referrals to district attorneys or the county counsels responsible for handling the SVP cases." (Counties' Reply Br. in Court of Appeal, p. 15.) They rely on a 2011 report indicating that local governments processed approximately the same number of offenders under the SVPA in 2009 as they did just before Proposition 83. (See, e.g., Answer to Petition for Review, p. 7.)[18] Regardless of the number of offenders processed by local governments in a particular year, however, it is beyond dispute that the voters expanded the category of offenders who "shall" be referred to local governments as part of the SVPA process, when they adopted Proposition 83 and altered the definition of "sexually violent predator." And all those offenders are now referred to local governments at the direction of the voters—not the Legislature. (See *ante*, pp. 30-36.)[19]

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[18] The record in this case does not contain up-to-date information on how the voters' expansion of the definition of "sexually violent predator" has affected the volume of offenders for whom counties must conduct the SVPA duties. The data cited by the Counties are from eight years ago. A 2012 report stated that Proposition 83, in combination with other changes to the law made in 2006, increased the number of inmates referred by the Department of Corrections and Rehabilitation as possible sexually violent predators by "nearly 800 percent," from 50 per month to over 600. (JA 247.) That report did not isolate the increase flowing from Proposition 83, however, or identify the number of offenders processed by counties. (See *ibid.*) Of course, there are a range of factors that could increase or decrease the actual number of offenders processed by the counties in a given year. For purposes of this case, the relevant consideration is not those annual numbers, but that the voters imposed an expanded definition of "sexually violent predator" as part of their effort "to strengthen and improve the laws that . . . control sexual offenders." (AR 693 [Prop. 83, § 31].)

[19] The Counties have noted that statements by the Legislative Analyst, the Department of Finance, and the Attorney General before the 2006 general election did not warn that Proposition 83 "might end the State's obligation to reimburse counties for their costs of participation in the SVP commitment process." (Counties' Opening Br. in Court of

(continued...)

### B. Some of the SVPA Duties Were Also "Expressly Included" in Proposition 83

The "expressly included in" provision of Government Code section 17556, subdivision (f), provides an independent ground for holding that the State is no longer responsible for the costs of some of the SVPA duties. When the voters adopted Proposition 83, they re-enacted in full several sections of the Welfare and Institutions Code, including sections 6601, 6604, 6605, and 6608. (See AR 690-693 [Prop. 83, §§ 24, 26, 27, 29].) Contained within those sections are four of the eight duties that the Commission's 1998 decision found to impose reimbursable state mandates. Duties 1, 2, and 3 are contained in section 6601. (See AR 3.) Duty 6 is contained in sections 6605 and 6608. (See *ibid.*) In addition, part of duty 5 is contained in section 6604 and part of duty 7 is contained in section 6605. (See *ibid.*)

In its 2013 decision, the Commission concluded that SVPA duties re-enacted by the voters in Proposition 83 were no longer reimbursable by the State, because they have now been "expressly included in" a ballot measure within the meaning of Government Code section 17556, subdivision (f). (AR 626-629.)[20] That was a proper application of subdivision (f). As noted above, the plain text of subdivision (f) commands that a statutory duty is

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Appeal, pp. 10-11; see *id.* at p. 33.) That is not surprising. At that time, there was no process for the State to seek a re-determination of the Commission's 1998 test-claim decision directing that the State was financially responsible for the costs of the SVPA duties. (See JA 367; AR 644; *ante*, pp. 13-14 [discussing adoption of Government Code section 17570 in 2010].)

[20] The Commission's 2013 re-determination decision regarding duty 5 relied on the Commission's conclusion that the duty was "necessary to implement" Proposition 83; it did not rely on the "expressly included in" clause. (See AR 636-638.)

"expressly included in" a ballot measure—and therefore is non-reimbursable—if the duty is directly stated as part of the text of that measure. Four of the SVPA duties are stated, in their entirety, in the text of Proposition 83. (See AR 690-693 [Prop. 83, §§ 24, 27, 29].)

The Court of Appeal rejected this plain-meaning application of subdivision (f) on the ground that it would lead to "absurd" results such as "allowing the state to avoid" the state mandates requirement based on voter initiatives "that reenact without changing or that only marginally modify existing laws." (Opn. p. 33.) But that is hardly an absurd result, because the re-enactment of a duty by the voters can have far-reaching consequences for the Legislature's ability to modify that duty. The Constitution provides that the Legislature may not "amend or repeal an initiative statute" unless "the initiative statute permits amendment or repeal without [the voters'] approval." (Cal. Const., art. II, § 10, subd. (c).) So when the voters re-enact a statutory duty in its entirety, it carries the potential of insulating that duty from amendment or repeal by the Legislature. (See *ante*, p. 26.) The Government Code appropriately treats such duties as non-reimbursable mandates imposed by the voters instead of as reimbursable mandates imposed by the Legislature.

The only published opinion directly addressing the effects of voter re-enactment on the Legislature's ability to modify a statutory provision illustrates the soundness of this approach. In *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, the Court of Appeal considered the Legislature's power to amend Revenue and Tax Code section 7102, subdivision (a)(1), which the voters amended and re-enacted in Proposition 116. (See *id.* at pp. 588-590, 597.) Among other changes, the voters added a new subdivision to section 7102, authorizing the Legislature to amend the section by a super-majority vote in certain circumstances. (See *id.* at p. 590.)

In discussing the Legislature's authority to amend section 7102, the *Shaw* court first noted that "article IV, section 9 . . . provides, in pertinent part, that '[a] section of a statute may not be amended unless the section is re-enacted as amended.'" (*Shaw, supra*, 175 Cal.App.4th at p. 596.) As a result of that section, "'voters considering an initiative . . . that seeks to make discrete amendments to selected provisions of an existing statute, are forced to reenact the entire statue as amended in order to accomplish the desired amendments.'" (*Id.* at pp. 596-597, quoting *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 990.) The court then noted that article II, section 10, subdivision (c), and its limitations on the Legislature's ability to amend or repeal an initiative statute, protects """the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent."""" (*Shaw, supra*, at p. 597.) In light of these two constitutional requirements, the court reasoned that "when section 7102 was amended in 1990 by Proposition 116, it was actually re-enacted in its entirety as amended." (*Ibid.*) After that point, "any subsequent amendment to *any* portion of section 7102 . . . would require approval of the voters to be effective, except" if it fell within the "conditional authority for Legislative amendment" created by the voters when they approved Proposition 116. (*Ibid.*, italics added; cf. JA 367 [trial court order noting that Proposition 83 "is more than a simple reenactment" and observing that the Amendment Clause "make[s] it more difficult for the Legislature to repeal or weaken the measure"].)[21]

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[21]See also JA 130-131 [Commission's trial court brief explaining that in light of Proposition 83's Amendment Clause and the Constitution's limits on amendment or repeal of initiative statutes, the "Legislature no longer has the full power or discretion to repeal or amend the [SVPA] program by a simple majority vote"]; State Respondents' Br. in Court of Appeal, pp. 24-25 [in light of Proposition 83's Amendment Clause, "the (continued...)

In addition to affecting the Legislature's ability to amend or repeal a statutory provision, a voter re-enactment may alter the Legislature's ability to suspend a statutory mandate contained in such a provision.[22] The trial court noted its view that mandates imposed by the voters "cannot be defunded by the State" under the Constitution's suspension procedures for state mandates. (JA 367; see Cal. Const., art, XIII B, § 6, subd. (b) [authorizing the Legislature to "suspend the operation of" a state mandate "for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law"].) The State Respondents have had a similar understanding of the suspension authority. (See, e.g., State Respondents' Br. in Court of Appeal, pp. 28-31.) Now that the voters have re-enacted many of the SVPA duties in Proposition 83, the Legislature's ability to decide whether to fund those duties, and the Governor's ability to decide whether to eliminate funding for the duties by exercising the line-item veto power, has potentially been restricted.

The analysis of the *Shaw* court and the trial court regarding the Legislature's authority over voter re-enacted statutes provides further support for the Commission's application of subdivision (f)'s "expressly included" clause. If one extends these analyses to their logical conclusions, they suggest that the mere re-enactment of a duty by the voters insulates it

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(...continued)
Legislature can only weaken or repeal the measure's provisions by a super-majority vote of both houses"].

[22] In recent years, the Legislature has suspended operation of many state-imposed mandates each budget year by appropriating no money for their operation. (See Stats. 2015, ch. 10, § 2, pp. 721-729 [item 8885-295-0001(5) identifying for suspension 56 state-imposed mandates by appropriating zero dollars for each mandate]; Stats. 2014, ch. 25, § 2, pp. 739-743 [item 8885-295-0001(3) identifying for suspension 62 state-imposed mandates]; Stats 2013, ch. 20, § 2, pp. 657-661 [item 8885-295-0001(3) identifying for suspension 63 state-imposed mandates].)

from revision or suspension by the Legislature. That is another reason why it is appropriate to treat the re-enactment as changing the source of the duty from the Legislature to the People for purposes of the state mandates requirement, and eliminating the State's obligation to pay for local costs arising from the duty. (See Cal. Const., art. XIII B, § 6, subd. (a).)

The Counties and the Court of Appeal below take a different view of the effects of a voter initiative that re-enacts a statutory duty. The Court of Appeal reasoned that the voters' re-enactment of several SVPA duties was merely a "technical reenactment," required as a formality by the Constitution and the Government Code, which did not change the status of the duty for purposes of the state mandates requirement. (See Opn. pp. 34-35, citing Cal. Const., art. IV, § 9; Gov. Code, § 9605.) It also suggested that the Legislature retains the authority to suspend any or all of the SVPA duties, including those expressly re-enacted by Proposition 83. (See Opn. pp. 36-37; see also Counties' Opening Br. in Court of Appeal, pp. 26-27 [arguing that "a ballot measure does not reenact or change existing provisions," and that "the unaltered portions of a statute are treated as having remained in effect from the time originally enacted"].)

But the cases that the Counties and the Court of Appeal rely on for this view do not directly support it. (See Opn. pp. 33-36; Counties' Opening Br. in Court of Appeal, pp. 26-29.) Most of those cases involve Government Code section 9605, which directs that if "a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form," and that the "portions which are not altered are to be considered as having been the law from the time when they were enacted."[23] The purpose of that section "'is to avoid an implied repeal

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[23] See *Vallejo & Northern R.R. Co. v. Reed Orchard Co.* (1918) 177 Cal. 249, 255; *County of Sacramento v. Pfund* (1913) 165 Cal. 84, 85; (continued...)

and reenactment of unchanged portions of an amended statute, ensuring that the unchanged portion operates without interruption.'" (*St. John's Well Child & Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 984, quoting *In re Lance W.* (1985) 37 Cal.3d 873, 895.) Section 9605 "merely establishes that the effective date for unaltered portions of an amended statute remains the date on which the original, unaltered enactment was first operative" (*Yoshisato, supra*, 2 Cal.4th at p. 990, fn. 6); it does not directly address the issues presented by this case.[24]

The State Respondents appreciate that there is limited authority concerning the scope of the Legislature's authority with respect to a statutory duty that voters have expressly re-enacted to comply with the re-enactment requirement. As the parties' and the lower courts' positions in this litigation illustrate, there are a diversity of views on that subject. But the text of the Government Code is clear that if the voters take a state mandated duty that was previously imposed by the Legislature, and "expressly include[]" it in "a ballot measure approved by the voters," that duty ceases to be a state mandate and becomes a voter mandate that is no

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(...continued)
*Swamp-Land Dist. No. 307 v. Glide* (1896) 112 Cal. 85, 90; *In re Oluwa* (1989) 207 Cal.App.3d 439, 446; *City of Los Angeles v. Pacific Land Corp.* (1940) 41 Cal.App.2d 223, 225; cf. *Central Pac. R.R. Co v. Shackelford* (1883) 63 Cal. 261, 265-266. Some of these cases address former Political Code section 325, the predecessor to Government Code section 9605.

[24] Other cases cited by the Court of Appeal and the Counties on this subject are also off point. Some of them address the general purpose of the re-enactment requirement (see *American Lung Assn. v. Wilson* (1996) 51 Cal.App.4th 743, 748), or hold that the Legislature has violated that requirement when it fails to re-enact a statute that it purports to have amended (see *ibid.*). Others hold that an amendment by implication is not within the scope of the constitutional requirement. (See *Hellman v. Shoulters* (1896) 114 Cal. 136, 151-153; *Huening v. Eu* (1991) 231 Cal.App.3d 766, 772-773.)

longer reimbursable. (Gov. Code, § 17556, subd. (f).) That plain-meaning interpretation of the Government Code is an appropriate one, especially where the voters' re-enactment of the duty carries the potential to insulate that duty from legislative modification or suspension. (See *Shaw*, *supra*, 175 Cal.App.4th at p. 597; see generally *ante*, pp. 40-42.)

## CONCLUSION

This Court should reverse the judgment of the Court of Appeal.

Dated: June 29, 2017

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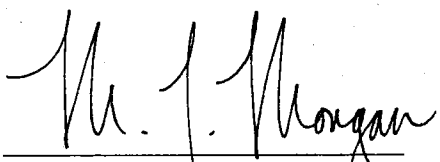

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## CERTIFICATE OF COMPLIANCE

I certify that the attached Opening Brief on the Merits uses a 13 point Times New Roman font and contains 11,394 words, as counted by the Microsoft Word word-processing program, excluding the parts of the brief excluded by California Rules of Court, rule 8.520(c)(3).

Dated: June 29, 2017

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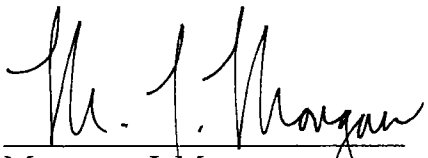

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## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **County of San Diego v. Commission on State Mandates**
Case No.: **S239907**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 29, 2017, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 29, 2017, at San Francisco, California.

| M. Campos | M. Campos |
| --- | --- |
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