No. S247266

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA SCHOOL BOARDS ASSOCIATION, et al.
Appellants and Petitioners

vs.

STATE OF CALIFORNIA, et al.
Appellees and Respondents.

CALIFORNIA COURT OF APPEAL, First Appellate District, Division 5
Case No. A 148606

Alameda County Superior Court (The Honorable Evelio Grillo)
Case No. RG 11554698

PETITIONERS' REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Petition focuses on whether article XIIIB, section 6 of the State Constitution ("Section 6") permits the State to direct local agencies to use their own funds to pay for state-mandated costs, either directly or by requiring them to use state funding that is not actually available. This case is not about whether schools are entitled to "additional" funding – it is about whether the State can statutorily define away its constitutional mandate funding obligation as it did with the 2010 legislation. The State carefully skirts this central question by asserting that the funding involved is "state funding" and the State is entitled to set "funding priorities," even if that involves shifting mandated costs to local education agencies. The State makes no attempt to explain why the Constitution has been interpreted for decades to prohibit what the 2010 legislation purports to permit.

The State suggests that the case is unimportant because the statutes at issue are "functionally obsolete" or "historical artifacts." (Answer at 5.) This is incorrect. This case challenges the constitutionality of Government Code section 17557(d)(2)(B), which allows the State to identify certain funding as "offsetting revenues" for state-mandated costs *that would not otherwise legally qualify as mandate payment*. Nothing has changed about that provision.

Although the State has acknowledged that section 17557(d)(2)(B) could be construed more narrowly, it has chosen a more expansive approach.[1] If this approach is unconstitutional, petitioners are entitled to have that issue examined before it is applied to further mandates. Nor does the existence of the "block grant" affect the constitutional questions, as it is merely a mechanism for payment of the State's reimbursement obligations – an obligation the 2010

[1] The State previously argued that section 17557(d)(2)(B) was not facially unconstitutional because it could be narrowly construed in a number of ways. (Resps' Brief at 23-24.) Petitioners have argued that it should be construed to apply to less-than-full but additional funding for mandates. (Pet. at 21.) The Court of Appeal declined a narrower construction. (Op. at 18-19.)

legislation seeks to eliminate.

The State largely avoids discussing section 17557(d)(2)(B). That provision, while specifically violating Section 6 with respect to two mandates, represents a template for elimination of the State's mandate reimbursement obligation by allowing the State to designate unrestricted funding and/or non-existent funding as "offsetting revenues."

The Court of Appeal concluded that Section 6 permits the State to use the "offset" provision to direct schools to use their unrestricted state funding for mandated costs (as in Education Code section 42238.24) or to direct schools to use restricted funding that is functionally unavailable and therefore requires schools to use their unrestricted funding or local revenues to cover the shortfall (as in Education Code section 56523(f).) The Court's reasoning is broad enough to allow the State to designate virtually any funding as "offsetting revenues" and thereby eliminate its mandate reimbursement obligation. And the Court's flawed separation of powers analysis will allow the State to reach back and eliminate reimbursement for virtually any previous mandate determination. The decision thus presents significant constitutional questions.

I. THIS CASE MEETS THE STANDARDS FOR REVIEW

A. The Case Presents Important Questions of Law Under Rule of Court 8.500(b)(1)

The State does not dispute that the 2010 legislation reversed the longstanding construction of Section 6 in two significant ways now approved by the Court of Appeal. First, the legislation reversed the construction of Section 6 reflected in Government Code section 17556(e) since 1989 that mandate payment requires an additional payment intended to pay for the mandated costs. This change undermines a central pillar of mandate reimbursement law. Second, the legislation treats unrestricted state funding for education (previously revenue limits, now the local control funding formula) as state

rather than local proceeds of taxes despite the opposite construction of article XIIIB since its adoption. Whether unrestricted funding to schools is state or local money for purposes of article XIIIB and Section 6 impacts not only reimbursement for education mandates, but also the spending limits of local education agencies.

B. Events Have Not Lessened the Adverse Impact of the Legislation

The State attempts to minimize the dramatic nature of the change in the law represented by the 2010 legislation and the appellate decision by asserting that the statutes are now largely irrelevant. (Answer at 10.) This is incorrect.

First, the State suggests that the "block grant" has eliminated most mandate issues, including the Graduation Requirements Mandate. (Answer at 8-9 ["schools that utilize the block grant are relieved from requesting reimbursement, and therefore are unaffected by Education Code section 42238.24"].) This mischaracterizes the block grant.

While most districts have accepted the block grant, not all have. (Answer at 11; Op. 10-11.) More importantly, the block grant itself is merely a form of (reduced) payment for the State's mandate reimbursement obligations. For example, in 2011-12, annual mandate costs were almost $477 million. (JA II:522.) The 2012 block grant provided $167 million, or approximately 1/3 of those costs. (http://lao.ca.gov/reports/2012/bud/spending_plan/spending-plan-091312.pdf.) The block grant allows the State to satisfy its reimbursement obligation by forcing schools to accept a reduced payment; they do so because the alternative has been no payment at all.[2]

[2] For a more detailed history of the State's efforts to avoid paying its mandate debt, see generally JA II:404-05; *Cal. Schools Bds. Ass'n v. State* (2009) 171 Cal.App.4th 1183 (*CSBA I*); *County of San Diego v. State* (2008) 164 Cal.App.4th 580; and *Cal. Schools Bds. Ass'n v. State* (2011) 192 Cal.App.4th 770 (*CSBA II*).

When the Graduation Requirements Mandate was added to the block grant in 2013-14, the costs of that mandate were over $250 million annually. (Op. at 17.) The State added $50 million to the block grant – a fraction of the actual costs. (http://lao.ca.gov/reports/2013/bud/spending_plan/spending-plan-073013.pdf.) It is undisputed that the 2010 legislation would eliminate any reimbursement obligation for that mandate going forward, as districts would be forced to absorb these costs themselves. If permitted, the logical result would be the reduction of the block grant to reflect the fact that schools are no longer owed any reimbursement. If the State requires schools to use their unrestricted funding for other mandates in the same manner, it would similarly eliminate the State's reimbursement obligation for those mandates. *Without a mandate reimbursement obligation, there is no reason for the block grant to exist since it is merely a form of payment of the State's reimbursement obligation* – an obligation section 17557(d)(2)(B) would eliminate. The State itself has acknowledged that its authority over education would allow it to eliminate most education mandate reimbursement through "offset" provisions similar to section 42238.24. (Respondents' Brief at 34.)

Similarly, the issues raised by Government Code section 17557(d)(2)(B) as applied to the Behavioral Intervention Mandate continue to have legal significance. While it is true that the underlying statute was repealed in 2013, the appellate decision reached the "underfunding" issue and did so in a way that opens the door to State manipulation of future mandate funding. After observing that state special education funding exceeded the cost of the Behavioral Intervention Mandate, the Court found it legally insignificant that special education itself was underfunded by $3.4 *billion* annually. (Op. at 21.) The State similarly argues that "[a]lleged shortages elsewhere for other programs. . . are . . . simply not a constitutional problem." (Answer at 16.) Whether the identified funding is actually available is constitutionally critical; it is the difference between whether actual payment is provided – or not provided,

in violation of the Constitution.

The appellate court also concluded that *even if no actual funding were provided*, it was unclear whether school districts were forced to use "their own local revenues" for the mandate. (Op. at 21.) This statement ignores the structure of California education funding and the record. Under the statutory funding formula, each district's upper funding limit is first determined[3] and then various forms of local revenue are subtracted out. (Ed. Code, §42238.03(a)-(c).) The amount remaining (if any) determines the State's unrestricted funding. While the mix varies from district to district, all district funding is some combination of local revenues, state unrestricted funding and state restricted (categorical) funding. If a categorical program is underfunded, the district must necessarily use either unrestricted funding or local revenues to absorb the costs. This was confirmed by declarations submitted in the trial court. (JA III:784-95.) [4]

Second, the appellate decision did not remand "most issues" back to the trial court. (Answer at 5.) Certain issues remain to be adjudicated; after bifurcating the causes of action, the trial court dismissed petitioners' remaining claims based on an erroneous interpretation of the dismissal statutes. (Op. at 32-36.) One claim challenges the "new test claim" process which allows the State to re-open final determinations of the Commission on State Mandates, and the other challenges whether the current mandate process continues to satisfy the requirements of Section 6 for education agencies in light of several changes

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[3] An upper limit on funding entitlements has been in place since *Serrano* as a mechanism for equalizing education spending among districts. (*Serrano v. Pries*t (1971) 5 Cal.3d 584.)

[4] If this Court concludes that issues surrounding the Behavioral Intervention Mandate are no longer timely, petitioners request that the Court narrow the issues to be addressed on review rather than denying review outright.

to the procedures in the past decade. (JA I:296-98; 301-307; 310-315.) Neither of those issues relate directly to the issues on which petitioners have sought review (and specifically not the Education Code provisions), nor could the additional proceedings change the determinations reached by the appellate court. [5]

Finally, this case is not about seeking "increased" or "additional" funding – it is about whether Government Code section 17557(d)(2)(B) is constitutionally permissible as used in the 2010 legislation. The State suggests that because it hasn't done anything further while this case has been in litigation, it is unlikely to do so. (Answer at 12.) This is disingenuous and incorrect. The State has already enacted several statutes that purport to make mandate payments but also simultaneously direct education agencies to use the same funds for *multiple* non-mandate purposes. (See Gov. Code, §§17581.8(d)(2), 17581.9(d)(2), 17581.95(d)(3), 17581.96(d)(2); see also amicus letter of California State Association of Counties and League of Cities.)

The appellate court concluded that the Constitution "allows the state to identify 'offsetting revenues' that will reduce or eliminate its mandate debt even if not new or additional funds are actually provided." (Op. at 15.) It also concluded that the State could identify state funding that is legally defined as local proceeds of taxes and/or funding that is unavailable as a practical matter. (Op. at 16-17; 20-21.) It even affirmed (without discussion) the trial court's

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[5] Only one issue was remanded that relates to Government Code section 17557(d)(2)(B) and Education Code section 42238.24 and that is the very narrow question whether funding from the Education Protection Account that can legally be directed by the State. Although the State asserts that EPA funding is included section 42238.24 (Answer, fn. 4), neither the trial court nor the appellate court made such a finding and petitioners dispute the claim. Article XIII, section 36, which creates the EPA, provides that the revenues are "continuously appropriated" to K-14 schools, which shall have the "sole authority to determine how the moneys" are spent, and they shall not be "used to pay any costs incurred by the Legislature . . . or any agency of government." (Cal. Const., art. XIII, §36(e)(1)-(6).)

ruling that the State could direct schools to use their own revenues for mandated costs. These rulings, including the significant misreading of this Court's precedent, will have a long-term detrimental impact on mandate reimbursement generally, but particularly for schools. Because the two mandates at issue represent archetypal situations – one involving unrestricted funding, the other involving restricted and insufficient funding, it would be difficult if not impossible to distinguish future state action given the broad reasoning of the appellate decision.

II. THE STATE FAILS TO ADDRESS THE CONSTITUTIONAL QUESTIONS IN THIS CASE

A. The State Makes No Effort to Justify the Reversal of Longstanding Statutory Interpretations of Article XIIIB, Section 6

The State's Answer largely avoids the constitutional questions presented in this case, instead focusing on the State's "plenary authority" over education. It claims that the case is about whether the State is providing "enough money for schools" and answers that Section 6 is not designed to cure "perceived unfairness resulting from political decisions on funding priorities." (Answer at 13.) This is not petitioners' contention and this case is not about the level of funding.

Petitioners contend that the mandate reimbursement requirement in the Constitution requires the actual provision of additional funds to pay the mandated costs. This is not a matter of "funding priorities." Once a mandate is established *pursuant to the process that the State itself devised*, a reimbursement obligation is created in the amount determined by the Commission on State Mandates ("Commission"). The 2010 legislation does not provide reimbursement but instead directs schools to use existing funding to pay the state-imposed costs. It "shifts" the costs to the local agency in precisely the

way Section 6 was designed to prohibit. (See *County of San Diego v. State* (1997) 15 Cal.4th 68, 81.) Whether Section 6 permits this is a matter of constitutional interpretation, not a question of equity or funding priorities.

The State repeats generalities like "[t]he legislature can prioritize how school districts use 'state funding'" and schools do not have a "proprietary interest in moneys which are apportioned to them," citing *California Teachers' Ass'n v. Hayes* (1992) 5 Cal.App.4th 1513, 1518. (Answer at 14.) Even if accurate, neither statement addresses the constitutional nature of the State's reimbursement obligation. As *Hayes* itself pointed out, the State's plenary authority always remains subject to constitutional constraints. (*Id*. at 1524.) Section 6 is such a constraint.

It is undisputed that the 2010 legislation re-interprets the requirements of Section 6 in ways that will allow the State to avoid actual payment for mandated costs and re-defines the State's mandate obligation to schools in a way that will make education mandate determinations meaningless and defeat the constitutional requirement. The State never addresses the constitutional significance of these changes.

Neither the State nor the appellate court have addressed the fact that, since 1989, reimbursement has required actual, additional mandate payment in order to ensure that the local agency has no "net costs." (Gov. Code, §17556(e); AOB at 26.) The Court of Appeal acknowledged that Government Code section 17557(d)(2)(B) allows mandate reimbursement to be largely eliminated "without actually providing any new or additional funding," contrary to the longstanding interpretation of Section 6 reflected in section 177556(e); it concluded only that it was what the Legislature intended. (Op. at 19-20.) Even if true, that does not answer whether it is constitutionally permitted.

The appellate decision discussed *CSBA II*, in which the Court found that the State's payment of $1,000 per year per mandate did not constitute mandate payment and therefore impermissibly shifted the cost of the mandated programs

to schools. (Op. at 18.) The appellate court found that this case presented a "different question" because the State was "not requir[ing] local entities to use their own revenues to pay for the programs." (*Id.*) But the constitutional question is, in fact, the same, i.e., whether the State is complying with its mandate reimbursement obligations under Section 6. And the funds that schools were required to use in *CSBA II* to cover the mandated costs (*and which that Court found impermissible*) are exactly the same funds that the State has directed schools to use in the 2010 legislation.

Neither the appellate court nor the State addresses the fact that article XIIIB itself and the 1980 implementing legislation reflect a conscious decision to treat unrestricted education funding as the *schools'* proceeds of taxes in order to protect their spending limits and comply with the *Serrano* decisions. (Cal. Const., art. XIIIB, §8(c); Gov. Code, §7906.) Nor does the appellate court explain why defining this funding as "local proceeds of taxes" does not trigger the protection of Section 6 in exactly the same way that "local revenues" are protected. Conversely, the court does not acknowledge that if such funding is not treated as local proceeds of taxes, the spending limit for each agency receiving funding would be reduced by the amount of state funding. [6]

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[6] The State suggests that petitioners failed to make this argument below. (Answer at 17, fn. 6.) This assertion was rejected by both the trial court and the Court of Appeal. The complaint alleged that the 2010 legislation was "designed to force districts to use their general, unrestricted funding to pay for the State's mandated services – precisely what Section 6 was designed to prevent" and that "[w]ithout any new or additional revenue that is specifically intended to fund mandates, districts and county offices of education are forced to redirect their own local revenues to pay for state programs." (JA I:301, 303.) Petitioners' trial briefs and supporting documents made clear that the Constitution and statutes defined unrestricted funding as local funds or local proceeds of taxes. (See Reply Brief at 19 for record citations.) The issue was discussed extensively on appeal and addressed in the final decision. The State cannot explain why it is entitled to argue that the funding at issue is "state funding," but petitioners cannot point out that the Constitution and implementing statutes contradict the State's assertion.

The State's only response – that "mandate reimbursement payments do not count toward the local government's appropriations limit" (Answer at 18) – was not adopted by the appellate court and is contrary to the structure of article XIIIB and the implementing statutes.

While "subventions received from the state for reimbursement of state mandates" are state proceeds of taxes (Gov. Code, §7906(c)(2)), the funding identified in Education Code section 42238.24 is not a "subvention. . . for reimbursement." Under the mandate provisions, local agencies must first incur costs and are then reimbursed. The effect of section 42238.24 is to *prevent costs from being incurred in the first instance* by directing schools to "first use other sources of revenue *before seeking reimbursement* through the mandates process." (Answer at 18, emphasis added.) The funding in section 42238.24 is therefore not a "reimbursement" payment; it is a legislative directive that prevents a reimbursement obligation from being created.

Moreover, as the ballot materials indicated, subventions for mandates refer to mandate "appropriations." (JA II:441.) The Education Code provisions are not "appropriations." Appropriations for mandate payments are made to the Controller, not directly to schools. (See, e.g., Gov. Code, §§17561, 17581.6 [block grant]; 17581.96 [2017-18 appropriation].) This allows the amount of the appropriation to be reflected in the State's spending limit, and the spending credited against that limit. The State does not explain how unrestricted education funding can be treated as a mandate appropriation and part of the State's proceeds of taxes without simultaneously reducing the spending limits of local agencies by the amount of state funding.

B. The State Misreads *Kern* and *Fresno*

The State claims there is little case law to support petitioners' construction of Section 6, but there was no reason for case law to address the issues in this case because state statutes previously provided fairly clear guidance. *Those statutes have not changed;* it is the State's addition of

Government Code section 17557(d)(2)(B) and its new treatment of unrestricted education funding that have changed the legal landscape. The State's argument that case law supports the constitutionality of its 2010 legislation turns heavily on its construction of this Court's decisions in the *Kern* and *Fresno* cases.

The State cites *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 ("*Kern*") for the proposition that "a program is not a mandate if the Legislature provides funds to the local agency sufficient to cover the program's cost." (Answer at 14.) Although the State disagrees with the distinctions identified by petitioners, these distinctions are real and legally significant. As detailed in the Petition, this case differs from *Kern* in that the State has *not* provided funds *for the programs at issue* and, in the case of the Behavioral Intervention Mandate, has identified funds that were functionally nonexistent.

Significantly, *Kern* found that the administrative costs in that case could be covered with existing funds, observing that if funding were insufficient, *a mandate would likely be established*. (*Id*. at 747.) In other words, it was the sufficiency of the funding that negated any "costs" and therefore any mandate. The State acknowledges that "here the item is a mandate, but the same principles apply." (Answer at 15.) This claim illustrates why section 17557(d)(2)(B) is constitutionally untenable.

Under *Kern*, a lack of sufficient funding would create a right to reimbursement. However, section 17557(d)(2)(B) allows the State to identify the very same insufficient funding as "offsetting revenue" in the subsequent parameters and guidelines in order to defeat any right to reimbursement because, according to the State, shortages in funding have no "constitutional significance." If the State is correct about this, *Kern's* observation makes no sense – schools would be entitled to establish a "mandate" but no right to reimbursement; indeed, the entire mandate process would be illusory.

In addition, as the State acknowledges, the amount of state unrestricted

funding exceeds the amount owed to schools for education mandates. If the holding of *Kern* is expanded from categorical funding to permit the State to direct unrestricted funding to "offset" any mandate obligation, the State's reimbursement obligation for education mandates can be eliminated – as the State has acknowledged. (Respondents' Brief at 34.)

With respect to County of *Fresno v. State* (1991) 53 Cal.3d 482 ("*Fresno*"), the State makes the remarkable assertion, without explanation, that *Fresno* is not about "the relationship between spending limitations of article XIIIB and section 6 reimbursement. (Answer at 16.) One cannot read *Fresno* any other way. This Court outlined the history and purpose of Section 6 in *Fresno* in order to point out why costs are not reimbursable if they are recoverable from sources other than local funds. Everything about the Court's reasoning, the structure of article XIIIB, and the definitions contained in Government Code sections 7901-7907 lead to the conclusion that costs are reimbursable if they require the local agency to spend its "local proceeds of taxes," not just its local revenues. This has long been confirmed by the Commission. (JA II:620-23.)

III. THE 2010 LEGISLATION VIOLATES SEPARATION OF POWERS

The State argues that when the original Commission determinations were made in the Graduation Requirements Mandate (1987) and the Behavioral Intervention Mandate (2000), "there were no statutes that required schools to first use other sources of revenue before seeking reimbursement through the mandates process." (Answer at 18.) But the mandate statutes then (as now) only permitted the Commission to make a mandate determination if it found there were "costs mandated by the state." (Gov. Code, §§17514, 17561.) And the statutes then (as now) prohibited the Commission from making a mandate determination if the state provided sufficient funding. (Gov. Code, §17556(e).)

And the State provided the same kinds of funding, i.e., unrestricted education funding (then revenue limits) and special education funding then, as now. The State is correct that the only thing that has changed (after decades of State litigation to overturn the mandate decisions) was the enactment of the 2010 legislation, which directs the Commission to use the parameters and guidelines – which are supposed to *implement* the mandate determination – as a vehicle for *overturning* the prior mandate determinations.

The State asserts that these issues were not previously decided. (Answer at 18-19.) While perhaps not expressly articulated in the original decisions, the State does not dispute that each mandate decision necessarily includes a finding that costs are being incurred and there are no payments sufficient to defeat the mandate. The Commission resolved any ambiguity in the Graduation Requirements Mandate in its 2008 decision – affirmed by the courts – which stated clearly that unrestricted education funding is part of the districts' proceeds of taxes and cannot be considered offsetting revenue under article XIIIB, section 6 of the Constitution. (JA II:620-23.) With the Behavioral Intervention Mandate, the Commission similarly concluded that special education funding did not qualify as offsetting revenues. (JA II:683-84.)

The State's attempt to distinguish *CSBA I* by arguing that the 2010 legislation does not "directly seek to set aside the original mandate determination" is equally unavailing. This distinction is largely a semantic one since the State acknowledges that the Commission previously found that *reimbursement was required* (Answer at 18), but that right to reimbursement has now been eliminated. (Op. at 26 [acknowledging that mandate decision was "abrogated"].)

In *CSBA I,* the Court explained that the reconsideration statutes – even those that did not directly set aside the earlier determination – had a retroactive effect that violated separations of powers because they potentially directed the Commission to find "cost that it had previously concluded were reimbursable

costs were no longer reimbursable." The 2010 legislation had precisely this effect. Nor does the State deny that the appellate court's separation of powers analysis would allow the State to use the parameters and guidelines to effectively overrule virtually any mandate decision, thus eliminating any finality for such decisions.

Dated: April 6, 2018

Respectfully submitted,

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Pursuant to Rule 8.204 of the California Rules of Court, I certify that this attached brief is proportionately spaced, has a typeface of 13 points or more, and contains 4,197 words as counted by the Microsoft Word 2010 word processing program used to generate this brief, excepting the caption, tables, verification, this certificate, and the Certificate of Service.

Dated: April 6, 2018

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Case Name : *California School Boards Assn, et al. v. State of California, et al.*
Case No: : S 247266
Court : CA Supreme Court

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed April 6, 2018 in Sacramento, California.

/s/ Ann Barner
ANN BARNER

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S247266**
Lower Court Case Number: **A148606**

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Signature

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