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

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The State is financially responsible for the costs of duties mandated by the Legislature or a state agency on local governments, but not for costs arising from statutory duties that are expressly included in or necessary to implement a ballot measure approved by the voters. (See Cal. Const., art. XIII B, § 6, subd. (a); Gov. Code, § 17556, subd. (f).) As explained in the State Respondents' opening brief on the merits, applying this requirement in the context of a voter-approved ballot measure requires more than just an assessment of whether the voters altered the terms of a pre-existing statutory duty. A proper application of Government Code section 17556, subdivision (f) establishes that the six Sexually Violent Predator Act (SVPA) duties at issue here are no longer reimbursable state mandates, because they are either contained within the text of Proposition 83, or impose costs that flow from and are compelled by Proposition 83.

In their answer brief on the merits, the Counties of San Diego, Los Angeles, Orange, Sacramento, and San Bernardino do not analyze the text of subdivision (f) or explain how the Court of Appeal's "narrow construction" can be reconciled with that text. They do not offer any persuasive answer to the State Respondents' argument that all of duties at issue in this case have become "necessary to implement" a ballot measure for purposes of subdivision (f), as a result of the voters' expansion of the statutory definition of "sexually violent predator" in Proposition 83. Rather, they principally argue that the voters' re-enactment of certain SVPA duties should not affect the State's financial responsibility for those duties because Proposition 83 did not alter the text of the duties. At the same time, however, the Counties appear to take the position that this re-enactment has "constitutionally-precluded" the Legislature from making further changes

to those duties, except as expressly authorized by the voters. (ABOM 21.)[1] That position illustrates why it is appropriate for subdivision (f) to eliminate the State's financial responsibility for a statutory duty once that duty is "expressly included in[] a ballot measure approved by the voters" as a result of the voters' re-enactment of the duty in a ballot measure. If a consequence of a ballot measure is that the Legislature is no longer free to repeal or amend a statute through its normal procedures, that statute cannot fairly be said to impose a state mandate. The judgment of the Court of Appeal should be reversed.

ARGUMENT

I. STATUTORY DUTIES ARE NO LONGER STATE MANDATES IF THEY BECOME NECESSARY TO IMPLEMENT, OR ARE EXPRESSLY INCLUDED IN, A VOTER-ADOPTED BALLOT MEASURE

Determining the proper standard for deciding whether a voter-approved ballot measure altered the State's financial responsibility for a statutory duty requires interpreting Government Code section 17556, subdivision (f). That provision directs that costs are not "mandated by the state" if they arise from a statutory duty that is "expressly included in" a voter-approved ballot measure or "necessary to implement" such a measure, and it applies regardless of whether the voters approved the ballot measure after the duty was first enacted. (Gov. Code, § 17556, subd. (f).) The State Respondents' opening brief on the merits interpreted the text of subdivision (f) in light of the Constitution's state mandates requirement and this Court's precedents. Read in that light, subdivision (f) provides that the costs of a statutory duty are not reimbursable by the State if the duty is

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[1] "ABOM" refers to the appellants' answer brief on the merits filed by the Counties. "RBOM" refers to the State Respondents' opening brief on the merits. "AR" refers to the Administrative Record. "JA" refers to the Joint Appendix.

directly stated as part of the text of a voter-adopted ballot measure, or if the costs of complying with the duty flow from, or are compelled by, such a measure. (RBOM 21-28; cf. *Dept. of Finance v. Com. on State Mandates* (2016) 1 Cal.5th 749, 767 ("*Dept. of Finance*") [the "key factor" in applying Government Code section 17556, subdivision (c) is whether the costs of a duty "flow from a federal mandate"].)

The Counties embrace the Court of Appeal's "narrow" construction of subdivision (f) as the "correct[]" interpretation. (ABOM 6, 15, 23, 24.) But the Court of Appeal's interpretation is not correct. (See RBOM 19-20, 28-30.) Under the Court of Appeal's rule, "a ballot initiative that modifies statutes previously found to impose a state mandate only changes the source of the mandate" for reimbursement purposes "if the initiative changes the duties imposed by the statutes." (Opn. p. 25.) The court's application of that rule focused exclusively on a before/after comparison of the statutory section describing a duty, considering only whether the ballot measure changed the particular language setting out the duty. (See, e.g., Opn. p. 26, fn. 9; RBOM 29 & fn. 13.) The court ignored other changes to the surrounding statutory framework, including those that alter the nature of the duty or restrict the Legislature's ability to modify it. (See Opn. p. 32.)[2]

The Court of Appeal's rule contravenes the text of subdivision (f), which relieves the State of financial responsibility for a statutory duty whenever the duty becomes necessary to implement a later-adopted ballot measure or is expressly included in such a measure. (Gov. Code, § 17556, subd. (f).) A ballot measure that alters the specific text describing a

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[2] The Counties accuse the State Respondents of "mischaracteriz[ing] the Court of Appeal's decision" in the opening brief (ABOM 29), but they do not identify any inaccuracies in the description of the opinion below in that brief.

statutory duty might well satisfy subdivision (f), but so might other types of changes made by the voters. For example, subdivision (f) is also satisfied if a duty that was freely imposed by the Legislature in the first instance becomes necessary to fulfill the goals and objectives of a ballot measure subsequently approved by the voters, or if the voters re-enact the terms of that duty in a way that restricts the ability of the Legislature to amend or rescind it. (See RBOM 29-30.)

The Counties do not directly respond to the State Respondents' analysis of subdivision (f). Other than quoting or paraphrasing the subdivision in three places (see ABOM 15, 24, 26), they do not even discuss the statutory phrases "expressly included in" or "necessary to implement"—let alone interpret them. Instead, they assert that "the Court of Appeal correctly applied the rules of statutory construction, first examining the statutory language to determine its plain meaning." (ABOM 23, citing Opn. p. 22.) The Counties cite page 22 of the Court of Appeal's opinion in support of that assertion, but the cited passage only quotes general principles of statutory construction without applying them. (Opn. pp. 22-23.) Indeed, the Court of Appeal never actually examined the text of subdivision (f) to determine the plain meaning. (See Opn. pp. 23-37.) It simply proclaimed—without explanation—that subdivision (f) is "ambiguous" with respect to how it applies "when a statutory provision previously found to impose a state mandate is amended by a ballot initiative." (Opn. p. 25.) The court then pointed to that purported ambiguity as a justification for adopting its own "narrow construction." (*Ibid.*) But there is no ambiguity. Subdivision (f) expressly states that it "applies regardless of whether the statute" creating the duty "was enacted or adopted before or after the date on which the ballot measure was approved by the voters." (Gov. Code, § 17556, subd. (f).) The statutory text thus directs that the State is not financially responsible for the costs of

statutory duties that *become* "necessary to implement, or are expressly included in," a subsequently adopted ballot measure. (*Ibid.*)

The Counties also argue that the Court of Appeal's narrow approach "is supported by this Court's opinion" in *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859 ("*San Diego Unified*"). (ABOM 24.) As explained in the opening brief on the merits, however, that case actually supports the State Respondents' interpretation of subdivision (f). (See RBOM 22, 24, 27.) This Court recognized the basic principle that the Constitution does not require the State to pay the costs arising from a statutory duty that "implement[s]" a mandate imposed by a source other than the Legislature (there, the federal government). (*San Diego Unified*, *supra*, at p. 888.) The Court also acknowledged the possibility that a reimbursable statutory duty that the Legislature freely imposed in the first instance might, as a result of later changes in law, become "an implementation of federal law," resulting in costs that "are nonreimbursable." (*Id.* at p. 883; see *id.* at p. 884.)

Like the Court of Appeal, the Counties point to a passage in *San Diego Unified* holding that the State was responsible for the costs of statutory duties associated with mandatory expulsion proceedings during a period in which "it cannot be said that Education Code section 48915's mandatory expulsion provision 'implemented a federal law or regulation.'" (*San Diego Unified*, *supra*, 33 Cal.4th at p. 881; see Opn. pp. 29-31; ABOM 24.) That was because "federal law did not *then* mandate an expulsion recommendation—or expulsion—for firearm possession." (*San Diego Unified*, *supra*, at p. 881, italics in original.) By analogous reasoning, the State remains responsible for the costs of a statutory duty freely imposed by the Legislature during the period *before* the voters adopt a ballot measure that expressly includes that duty, or that renders the duty necessary to implement the ballot measure. The holding in *San Diego*

Unified provides no support for the Court of Appeal's and the Counties' interpretation of subdivision (f), which would require the State to continue paying for the costs of a duty even *after* the voters adopt such a ballot measure (except if the measure directly alters the terms of the statutory provision describing the duty).[3]

The Counties also contend that the Court of Appeal's interpretation was necessary to avoid a conflict with article XIII B, section 6 of the Constitution. (ABOM 25-28.) As a threshold matter, the avoidance canon does not apply here. It is a "tool of statutory interpretation that permits [courts] to select between competing plausible interpretations of statutory text"; but it does not allow a court "to do violence to the reasonable meaning of the language used." (*People v. Garcia* (2017) 2 Cal.5th 792, 815, internal quotation marks and alterations omitted.) The Court of Appeal's interpretation of subdivision (f) is not a plausible interpretation of the statutory text—indeed, it ignores the text entirely. (See *ante*, pp. 7-8; RBOM 28-30.)

And the plain meaning interpretation of subdivision (f) is consistent with the Constitution's state mandates requirement.[4] The Counties suggest

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[3] The opening brief on the merits also explained how the State Respondents' interpretation of subdivision (f) was consistent with *Department of Finance v. Commission on State Mandates*, *supra*, 1 Cal.5th at pp. 765, 767, which focused on whether the costs of complying with a duty result from a truly discretionary choice by the Legislature or instead "flow from" an external source, such as the federal government. (See RBOM 27-28.) The Counties do not respond to that discussion.

[4] To the extent the Counties are arguing that the plain meaning of subdivision (f) violates the California Constitution, that challenge is not properly before the 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); cf. *Garcia*, *supra* at p. 815 [avoidance canon does not "provide 'a method of adjudicating constitutional questions by other means'"].)

that the second sentence of subdivision (f), which directs that the subdivision applies "regardless of whether the statute . . . was enacted or adopted before or after the date on which the ballot measure was approved by the voters," is constitutionally problematic. (See ABOM 26-27.) But that sentence conforms with the Constitution, 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.) The second sentence of subdivision (f) properly accounts for the possibility that a ballot measure adopted after the Legislature first enacted a statutory duty might change the source of the mandate from the Legislature to the voters. (See RBOM 22-23; cf. Gov. Code, § 17556, subd. (c) [similar provision regarding changes in federal law]; *San Diego Unified*, *supra*, 33 Cal.4th at pp. 883-884 [recognizing possibility that change in federal law might relieve the State of financial responsibility for a statutory mandate].)[5]

Additionally, the Counties reason that "'[d]efining a "subsequent change in the law" to include any modification to a state-mandated program by ballot initiative . . . and not limiting the provisions to those modifications that change the duties imposed on local government (or that

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[5] The Counties contend that "[t]o the extent" the second sentence of subdivision (f) "allows the Commission to revisit test claim determinations when a ballot measure *does not change* the source of reimbursable duties, it is constitutionally infirm." (ABOM 27, italics in original.) It is not clear what the Counties mean by this. The point of subdivision (f), including the "necessary to implement" and "expressly included in" clauses in its first sentence, is to capture only those duties for which the source of the mandate *has* shifted from the Legislature to the voters as a result of a voter-approved ballot measure. The second sentence simply recognizes that the State's financial responsibility for the costs of a statutory duty can be affected by a ballot measure that the voters adopted after the Legislature initially enacted a statute.

impose new duties) directly conflicts with this constitutional dictate.'" (ABOM 26, quoting Opn. p. 33.) But subdivision (f) does not direct that "any modification" by the voters to a state-mandated program relieves the State of responsibility for the costs of that program. It directs that the State is no longer financially responsible for a statutory duty if the duty becomes "necessary to implement" or is "expressly included in" a voter-adopted ballot measure. (Gov. Code, § 17556, subd. (f).) Thus, subdivision (f) *is* limited to voter modifications that "change the duties" imposed on local government, such as by making them instrumental to a voter-adopted measure (see *post*, pp. 14-18), or by reiterating the duties in a way that might alter the Legislature's ability to amend or repeal them (see *post*, pp. 18-25). That is consistent with the Constitution's state mandates requirement, which requires reimbursement only if a duty is mandated by "the Legislature or any state agency." (Cal. Const., art. XIII B, § 6, subd. (a).)

II. THE SIX SVPA DUTIES AT ISSUE HERE ARE NO LONGER REIMBURSABLE STATE MANDATES AFTER PROPOSITION 83

Properly understood, Government Code section 17556, subdivision (f), directs that the State is no longer financially responsible for the costs arising from the six SVPA duties at issue here. All of those duties have become "necessary to implement" the expanded definition of sexually violent predator enacted by Proposition 83 because the costs of complying with the duties "flow from" and are "compelled by" that voter-adopted definition. (*Dept. of Finance, supra*, 1 Cal.5th at pp. 767, 768.) In addition, some of those duties were "expressly included in" Proposition 83 because they were re-enacted in their entirety by the voters in compliance with the California Constitution. (See Cal. Const., art. IV, § 9.)

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

As explained in the opening brief (RBOM 30-37), the SVPA duties are necessary to implement Proposition 83 because the voters changed the definition of sexually violent predator. The SVPA speaks in mandatory terms, requiring state and local officials to take particular actions with respect to offenders who appear to fit within the definition of a sexually violent predator. (RBOM 34-36; see Welf. & Inst. Code, §§ 6601, subd. (i), 6602-6604, 6605, subds. (b)-(c).)[6] Although the Legislature initially enacted the provision defining the class of offenders subject to the requirements of the SVPA, the voters materially expanded that class when they altered the definition of sexually violent predator in Proposition 83. At the same time, they prevented the Legislature from narrowing the expanded definition through ordinary legislative procedures. (See RBOM 34.) Because the costs of the local-government duties at issue in this case flow from and are compelled by a statutory definition adopted by the voters in Proposition 83—one that is now insulated from legislative amendment—those duties have become necessary to implement Proposition 83. (See *Dept. of Finance*, *supra*, 1 Cal.5th at pp. 767, 768.) Under Government Code section 17556, subdivision (f), the State is no longer responsible for their costs.

The Counties' counter-arguments are not persuasive. First, they suggest that the expanded definition of sexually violent predator should not affect the State's responsibility for the costs of the SVPA duties because the

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[6] For example, duty 2 involves an initial review by the county's designated counsel to determine if the county concurs with the State's recommendation that a person fits the definition of a sexually violent predator, and duty 3 involves preparing and filing a civil commitment petition for such a person. (See AR 3; Welf. & Inst. Code, § 6601, subd. (i); see also RBOM 15 [describing all eight duties].)

definitional changes were not part of the "controlling purpose" of Proposition 83. (ABOM 19; see *id.* at pp. 19-20, 25.) They argue that "Proposition 83 primarily made amendments to the Penal Code to increase penalties and impose monitoring requirements," and that the "few minor changes Proposition 83 made to" the SVPA duties "were incidental to the controlling purpose of Proposition 83, that being to provide for harsher criminal penalties for sexually violent predators." (ABOM 19.)[7] That is an incomplete description of the purpose of Proposition 83. Expanding the definition of "sexually violent predator" was one of the core objectives of the measure. (RBOM 33-34.) The ballot materials explained that Proposition 83 "generally makes more sex offenders eligible for an SVP commitment" by changing the definition of sexually violent predator, and described particular changes that Proposition 83 made to that definition. (AR 678.) The Proposition itself emphasized the People's intent "to strengthen and improve the laws that punish *and control* sexual offenders." (AR 693 [Prop. 83, § 31], italics added.) The Counties do not respond to that evidence of voter intent.

Second, the Counties argue that the voter-adopted changes to the definition of sexually violent predator "are not material" to this Court's resolution of the case, because the statutory section containing the definition "is not one of the" sections describing the particular duties that

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[7] See also ABOM 11 ["The primary focus of Proposition 83 was to amend provisions of the Penal Code to strengthen criminal penalties for certain crimes against children, expand the definitions of certain sexual offenses, mandate a minimum 25-year sentence for habitual sexual offenders, and require certain sex offenders who are released on parole to be monitored, while on parole, by a global positioning system device. (AR 410.) As further addressed below, the ballot measure also amended some of the Welf. & Inst. Code provisions found to impose reimbursable state mandates"].

the SVPA imposes on local governments. (ABOM 30.) In other words, they urge the Court to ignore the changes because the definition of sexually violent predator is contained in Welfare and Institutions Code section 6600, whereas the provisions telling local governments how they must process people who appear to meet that definition are in subsequent code sections. (See Welf. & Inst. Code, §§ 6601, subd. (i), 6602-6604, 6605, subds. (b)-(c).) That argument fails for the same reason that the Court of Appeal's "narrow construction" of subdivision (f) is inconsistent with the statutory text and the Constitution's state mandates requirement. The proper inquiry looks beyond the statutory sections that describe a specific duty, considering whether changes made by the voters to the surrounding statutory framework convert the duty from one that is mandated by the Legislature to one that is mandated by the voters. (See *ante*, pp. 7-8; RBOM 21-24, 26-27, 36-37.)

Third, the Counties observe that "the Legislature had already expanded the definition of what constitutes a 'sexually violent predator'" in SB 1128, which was signed by the Governor before the voters adopted Proposition 83. (ABOM 30.) As the Counties concede in a footnote, however, SB 1128 "did not include" many of the definitional changes made by the voters in Proposition 83. (ABOM 30, fn. 19.) Among other things, SB 1128 did not reduce the required number of victims from two to one, and it did not eliminate the cap on the number of juvenile adjudications that could count as a "sexually violent offense." (Compare AR 690-691 [Prop. 83, § 24] with Stats. 2006, ch. 337, § 53, pp. 2660-2663 [SB 1128]; see RBOM 33 & fn. 15 [describing definitional changes].) More importantly, regardless of what changes the Legislature made to the definition prior to Proposition 83, the definition adopted by the voters in Proposition 83 is now insulated from legislative revision. The voters prevented the Legislature from repealing or narrowing that definition, except by a two-

thirds vote of both houses. (AR 693 [Prop. 83, § 33].) After Proposition 83, the source of the expanded definition is the voters—not the Legislature.

Fourth, the Counties note that "there is no evidence in the record" that the voters' expansion of the definition of sexually violent predator "actually increased the number of referrals to district attorneys or the county counsels responsible for carrying out" the SVPA duties. (ABOM 30.) As the State Respondents have acknowledged, the record does not include up-to-date information on whether, and to what extent, the expanded definition has affected the volume of offenders for whom local governments must conduct the SVPA duties. (RBOM 37 & fn. 18.) A 2012 report suggested that the number of state inmates who potentially fit the definition has increased dramatically, though that report did not contain data on how many such offenders are currently referred to and processed at the local level. (See *ibid.*)[8] In any event, the relevant consideration here is not the number of offenders processed by local governments; it is the voters' decision to expand the definition of sexually violent predator as part of Proposition 83's effort "to strengthen and improve the laws that . . . control sexual offenders." (AR 693 [Prop. 83, § 31].) Because the costs of complying with the SVPA duties now flow from that voter-adopted definition, they are no longer reimbursable under the Government Code and the Constitution's state mandates requirement. (RBOM 30-36.)

Finally, the Counties assert that the State Respondents have "fail[ed] to show how definitional changes that may increase the number of persons found to be sexually violent predators changes the *source* of the mandated

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[8] The Counties argue that the discussion of this report in the opening brief was "misleading," because the report did not specify the number of referrals to local district attorneys and county counsels. (ABOM 31.) But the opening brief clearly explained that the "report did not . . . identify the number of offenders processed by the counties." (RBOM 38, fn. 18.)

duties." (ABOM 30.) But the opening brief explained precisely why the costs of carrying out the SVPA process flow from the statutory definition of sexually violent predator (RBOM 30-32), and why the voters are the source of that definition following Proposition 83 (RBOM 32-36). The Counties never directly respond to those arguments. (See ABOM 29-31.)

B. Several of the SVPA Duties Were "Expressly Included" in Proposition 83

Several of the SVPA duties are no longer reimbursable by the State for the independent reason that they were included in the text of Proposition 83. (See RBOM 39-45.) In particular, duties 1, 2, 3, and 6 were all explicitly stated within Proposition 83. (See RBOM 39; AR 690-693 [Prop. 83, §§ 24, 26, 27, 29]; see also RBOM 15 [listing and describing the SVPA duties].)[9] The Counties do not dispute that the duties are found within the text of Proposition 83. The re-enactment of these duties was required by article IV, section 9 of the California Constitution, which provides that a "section of a statute may not be amended unless the section is re-enacted as amended." As a result of that re-enactment, these SVPA duties were "expressly included in" Proposition 83 for purposes of Government Code section 17556, subdivision (f).

As explained in the opening brief, it made sense for the Legislature to direct in subdivision (f) that the voters' re-enactment of a statutory duty removes the State's financial responsibility for the costs of that duty, even if the voters did not alter the terms of the duty. (RBOM 25-26, 40-42.) The Constitution prohibits the Legislature from "amend[ing] or repeal[ing] an initiative statute" except where the initiative statute specifically "permits amendment or repeal without" the voters' approval. (Cal. Const., art. II,

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[9] In addition, parts of duties 5 and 7 were re-enacted in Proposition 83. (See RBOM 39 .)

§ 10, subd. (c).) And a published Court of Appeal opinion suggests that, after the voters re-enact a statutory section, every part of that re-enacted section is subject to this constitutional prohibition on legislative amendment of voter-enacted statutes. (See *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 596-597; RBOM 44-45.) If that view of the law is correct, it would appear that the SVPA duties re-enacted by the voters in Proposition 83 may not be repealed or narrowed by the Legislature except by a two-thirds vote of each house. (AR 693 [Prop. 83, § 33].)[10] And the Counties apparently agree with that conclusion. (See ABOM 21-23.)[11] If they are correct, then the Constitution's state mandates requirement no longer obliges the State to reimburse the costs of those duties. Once the voters have re-enacted the statutory provision imposing a

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[10] The voters' re-enactment of certain SVPA duties in Proposition 83 may also affect the Legislature's and the Governor's ability to suspend (or "defund") those duties. (See RBOM 42; see generally RBOM 13 [describing the suspension authority].) That was the view expressed by the trial court in this case. (See JA 366-367.) The Counties disagree, asserting that, "[e]ven after Proposition 83 was approved, nothing stopped the Legislature from exercising its authority" to "defund[] the mandated activities . . . ." (ABOM 23, fn. 18.) The State Respondents would not disagree with the Counties' understanding of the scope of the suspension authority—but the uncertainty on this legal issue presents another reason why it is sensible to read subdivision (f) as altering the State's financial responsibility for a duty when that duty is expressly re-enacted by the voters.

[11] The Counties argue that, "[a]pplying *Shaw*'s reasoning here, the Legislature could be constitutionally-precluded from modifying those [SVPA duties] that were actually reenacted by Proposition 83 absent an amendment clause in the ballot measure." (ABOM 21.) And they apparently take the position that any future effort by the Legislature to repeal or narrow the re-enacted SVPA duties would be subject to the super-majority requirements of Proposition 83's amendments clause. (See ABOM 21-22.) Elsewhere, they seek to distinguish *Shaw* on its facts. (See ABOM 28-29.)

duty, and particularly if they have prohibited the Legislature from narrowing that duty through its normal procedures, it cannot fairly be said that the Legislature is the one mandating the duty. (See Cal. Const., art. XIII B, § 6, subd. (a); RBOM 44-45.)

The Counties advance several theories why Proposition 83 did not "change the 'source' of the mandate" with respect to these duties, even though it re-enacted the statutory sections containing the duties. (ABOM 17.) They first note that the voters did not materially alter the statutory text describing the duties, and ask the Court to apply a "rule of statutory construction" that "the voters are considered to have enacted only those portions of [re-enacted statutory provisions] that were *altered*." (ABOM 17; see *id.* at p. 16 discussing Cal. Const., art. IV, § 9, and Gov. Code, § 9605.)

As the State Respondents have explained, however, the authorities that the Counties cite for this "rule" do not directly support it. (RBOM 43-44.) For the most part, those cases deal with Government Code section 9605 (or its predecessor, former Political Code section 325). Section 9605 instructs courts on how to determine the effective date of provisions within a statute that was amended and re-enacted by the voters or the Legislature:

> Where 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. The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted portions are to be considered as having been repealed at the time of the amendment.

(Gov. Code, § 9605.) The "purpose of 'Government Code section 9605 is to avoid an implied repeal and reenactment of unchanged portions of an amended statute, ensuring that the unchanged portion operates without interruption.'" (*St. John's Well Child & Fam. Center v. Schwarzenegger*

(2010) 50 Cal.4th 960, 984, quoting *In re Lance W.* (1985) 37 Cal.3d 873, 895.) It "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 v. Superior Ct.* (1992) 2 Cal.4th 978, 990, fn. 6.) Section 9605 does not speak to whether the voters' re-enactment of a statutory duty restricts the Legislature's ability to amend or repeal that duty, or whether it alters the status of the duty under the Constitution's state mandates requirement and Government Code section 17556, subdivision (f).[12]

The Counties also argue that under *Yoshisato v. Superior Court*, *supra*, "the constitutionally compelled reenactment of" certain of the SVPA duties "cannot reasonably be construed as a decision by the voters to 'impose'" those duties. (ABOM 19; see *id.* at pp. 18-20.) But *Yoshisato* also addressed a different question. It considered whether two voter-approved ballot measures that modified Penal Code section 190.2 were

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[12] The State Respondents addressed all but one of the cases cited by the answer brief on this subject (see RBOM 43-44 & fn. 23-24), and explained why those cases did not support the Counties' argument. The Counties do not respond to respondents' arguments about these authorities. (See ABOM 16-17.) The Counties cite one new case, *People v. Cooper* (2002) 27 Cal.4th 38. In *Cooper*, this Court addressed Government Code section 9605 in a footnote. The footnote responded to arguments about whether Penal Code section 190, which references article 2.5 of the Penal Code, should be construed to reference "the code sections contained in article 2.5 at the time of the Briggs Initiative" in 1978, or instead to reference the "article 2.5 in effect at the time Proposition 179 was approved" in 1994. (See *id.* at p. 43, fn. 4.) The Court adopted the former construction. Under section 9605, it was appropriate to consider the article 2.5 in effect in 1978 because the subsequent voter initiative "did not substantively change" the relevant provision of Penal Code section 190. (See *ibid.*) But this analysis was inconsequential because "there were no dispositive changes to article 2.5 between the passages of the Briggs Initiative in 1978 and Proposition 179 in 1994." (*Ibid.*)

"competing" or "complementary" measures for purposes of determining how to reconcile them under article II, section 10 of the California Constitution. (*Yoshisato*, *supra*, 2 Cal.4th at pp. 988-989.) Two "measures are competing initiatives" for purposes of article II, section 10, if "each creates a comprehensive regulatory scheme related to the same subject." (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 747.) In *Yoshisato*, the Court reasoned that in adopting Proposition 114 in 1990, "the voters intended merely to amend section 190.2 in . . . various discrete ways"; it found no evidence that the voters intended to create a comprehensive scheme. (*Yoshisato*, *supra*, at 990.) Accordingly, the Court concluded that "the technical (and indeed, constitutionally compelled) reenactment of" the statute by Proposition 114 did "not, in and of itself, reflect intent of the voters to adopt a 'comprehensive scheme.'" (*Ibid.*)

For purposes of this case, the operative question is not whether Proposition 83 was "presented as a comprehensive statutory scheme that would repeal and replace the existing SVPA." (ABOM 19.) The operative question here is whether Proposition 83 "expressly included" the SVPA duties at issue here, thereby potentially limiting the Legislature's ability to modify those duties. The text of the measure is "the first and best indicator of" voter intent on that question. (*Kwikset Corp. v. Superior Ct.* (2011) 51 Cal.4th 310, 321.) In Proposition 83, the voters directed that 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." (AR 693 [Prop. 83, § 33]; see *ibid.* [authorizing amendments that increase punishments or expand the scope of Proposition 83 by majority vote].) That manifested the

voters' intent to restrict the ability of the Legislature to modify statutory provisions appearing in Proposition 83.

The Counties also contend that the State remains financially responsible for all of the SVPA duties because the ballot materials for Proposition 83 did not "inform voters that state funding to local governments would end as a result of the measure, or indicate that existing state costs would be shifted to local governments." (ABOM 20, italics omitted; see also *id.* at pp. 11-12.) As the State Respondents explained in the opening brief, it should not surprise anyone that the ballot materials did not contain such information. At the time that Proposition 83 was considered by the voters in 2006, there was no established process for the State to seek a re-determination of a test-claim decision by the Commission on State Mandates directing that the State was financially responsible for costs arising from a statutory duty. (RBOM 38-39, fn. 19.) Indeed, the Counties acknowledge that it was not until "2010, [when] the Legislature enacted section 17570 (Stats. 2010, c. 719, § 33 (S.B. 856))," that there existed "a process whereby the Commission may redetermine a previously determined mandate." (ABOM 14; see generally RBOM 13-14; Gov. Code, § 17570, subd. (b).)[13]

Next, the Counties suggest that Proposition 83 does not affect the State's financial responsibility for the SVPA duties because "Proposition 83's amendment clause authorizes modification of any [of] its provisions, without limitation, by the necessary vote" (ABOM 22)—i.e., by a super-

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[13] The Department of Finance did not ask the Commission to reconsider its 1998 determination regarding the SVPA duties immediately after the voters adopted Proposition 83; the Department instead waited to initiate a redetermination proceeding until 2013, after Government Code section 17570 was modified to authorize such a proceeding. (See AR 31.)

majority vote of two-thirds of each house.[14] In making that argument, the Counties appear to embrace the view that the voters have restricted the Legislature's ability to narrow or eliminate *any* of the SVPA duties that were re-enacted in Proposition 83, even if the voters did not modify the statutory language describing the duties. (Cf. *Shaw*, *supra*, at p. 597 [noting that "when section 7102 was amended in 1990 by Proposition 116, it was actually re-enacted in its entirety as amended," and "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" in Proposition 116]; RBOM 41.)[15] If that view of the law is correct, it follows that the voters are now the source of those re-enacted duties for purposes of applying the state mandates requirement,

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[14] The possibility that the Legislature could modify the duties "by the necessary vote" of two-thirds of each house (ABOM 22) does not provide a basis for concluding that the duties remain "state" mandates—any more than it would if the voters had authorized the Legislature to modify the duties by a four-fifths vote of each house, or by a unanimous vote of each house. In any of these scenarios, the voters have interposed themselves between the Legislature and statutory duties, and restricted the ability of the Legislature to modify the duties.

[15] The Counties note that the Legislature has modified "the duties it imposed on counties through the Test Claim Statutes . . . no less than fourteen times since 2007." (ABOM 22; see *id.* at pp. 22-23, fn. 17, 29.) That is correct, but it does not establish that the Legislature is free to narrow or repeal the provisions of Proposition 83 without complying with the voter-imposed supermajority requirement. Indeed, twelve of the amendments cited by the Counties were passed with "two-thirds of the membership of each house concurring." (AR 693 [Prop. 83, § 33]; see Stats. 2007, ch. 208 (SB 542); Stats. 2007, ch. 571 (AB 1172); Stats. 2007, ch. 601 (SB 1546); Stats. 2009, ch. 61 (SB 669); Stats. 2010, ch. 710 (SB 1201); Stats. 2011, ch. 359 (SB 179); Stats. 2012, ch. 790 (SB 760); Stats. 2013, ch. 182 (SB 295); Stats. 2014, ch. 442 (SB 1465); Stats. 2014, ch. 877 (AB 1607); Stats. 2015, ch. 576 (SB 507); Stats. 2016, ch. 878 (AB 1906).)

because the Legislature is no longer free to alter the duties through its normal procedures.

Finally, the Counties argue that it would be "absurd" if financial responsibility for the costs of a duty were to shift simply because the voters re-enacted that duty without making substantive changes to it, such as if a ballot measure merely renumbered the statute, or "made changes in punctuation, changed tenses from past to present, or made the language . . . gender neutral." (ABOM 28.) There is nothing absurd about that result, however, in light of the constraints on the Legislature's authority that apparently arise from such a re-enactment. (See *ante*, pp. 18-20; RBOM 44-45.) It is appropriate to interpret subdivision (f), consistent with its plain meaning, as extending to any circumstances in which a statutory duty is re-enacted by the voters, because of the consequences that re-enactment appears to have under current law for the Legislature's ability to repeal, modify, or suspend the duty.[16]

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[16] The Court of Appeal was skeptical that a "technical reenactment" that does not involve any "actual changes" to a statutory duty, and is performed solely "to comply with the [Constitution's] restatement rule," should affect the Legislature's authority in this way, or alter the "source" of the duty for purposes of applying the state mandates requirement. (Opn. p. 34-35.) But the available precedent indicates that such a re-enactment may change the source of the mandate, by restricting the ability of the Legislature to amend "any portion of" the re-enacted statute, except with the approval or advance authorization of the voters. (See *Shaw*, *supra*, 175 Cal.App.4th at p. 597.) That is also the position the Counties appear to have taken in this Court. (See ABOM 21.) If this Court were ever to hold that a "technical" re-enactment does not limit the Legislature's ability to repeal or amend or suspend a statutory duty, that could affect whether such a re-enactment brings the duty within the scope of the "expressly included in" clause of section 17556, subdivision (f).

CONCLUSION

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

Dated: December 15, 2017

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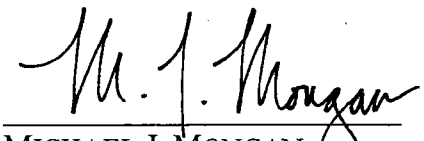

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CERTIFICATE OF COMPLIANCE

I certify that the attached Reply Brief on the Merits uses a 13 point Times New Roman font and contains 6,580 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: December 15, 2017

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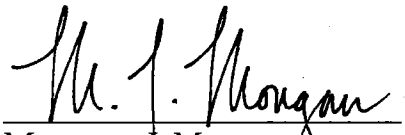

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DECLARATION OF SERVICE BY U.S. MAIL

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 December 15, 2017, I served the attached **REPLY 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 December 15, 2017, at San Francisco, California.

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Declarant

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