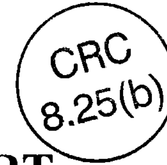
SUPREME COURT COPY No. S247266



SUPREME COURT
FILED
MAY 30 2018
Jorge Navarrete Clerk
Deputy

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.

On Review from the Court of Appeal
First Appellate District, Division 5 -- Case No. A 148606

After an Appeal from the Alameda County Superior Court
(The Honorable Evelio Grillo) -- Case No. RG 11554698

OPENING BRIEF ON THE MERITS

Deborah B. Caplan [SBN 196606]
Richard C. Miadich [SBN 224873]
OLSON, HAGEL & FISHBURN, LLP
555 Capitol Mall, Suite 400
Sacramento, CA 95814
Telephone: 916.442.2952
Facsimile: 916.442.1280

Counsel for Appellants/Petitioners

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.

On Review from the Court of Appeal
First Appellate District, Division 5 -- Case No. A 148606

After an Appeal from the Alameda County Superior Court
(The Honorable Evelio Grillo) -- Case No. RG 11554698

OPENING BRIEF ON THE MERITS

Deborah B. Caplan [SBN 196606]
Richard C. Miadich [SBN 224873]
OLSON, HAGEL & FISHBURN, LLP
555 Capitol Mall, Suite 400
Sacramento, CA 95814
Telephone: 916.442.2952
Facsimile: 916.442.1280

Counsel for Appellants/Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

ISSUES PRESENTED 6

SUMMARY OF ARGUMENT 6

STANDARD OF REVIEW 9

BACKGROUND AND PROCEDURAL HISTORY 9

A. The State's Constitutional Obligation to Provide Mandate Reimbursement 9

B. State Efforts to Avoid Complying With Section 6 11

C. The Two Mandates "Eliminated" in 2010 14

D. The Proceedings Below 18

ARGUMENT 21

I. GOVERNMENT CODE SECTION 17557(d)(2)(B) AS CONSTRUED BY THE COURT OF APPEAL IS CONTRARY TO ARTICLE XIIIB, SECTION 6 21

A. Section 6 Requires That Local Agencies Receive a Payment That Makes Them Whole for Mandated Costs 21

B. Section 6 Does Not Permit the State to Direct Local Agencies, Including School Districts, to Use Their Own Proceeds of Taxes to Pay Mandate Costs 25

1. Unrestricted Education Funding Has Been Defined as Local Proceeds of Taxes for Purposes of Article XIIIB 26

2. Local Proceeds of Taxes are Protected by Section 6 32

3. The State's Plenary Authority Over Education Does Not Permit It to Disregard its Obligations under Section 6 34

C. Section 6 Does Not Permit the State to Identify Non-Existent Funding or Funding Already Directed to Other Uses for Mandate Payment 39

D. Section 17557(d)(2)(B) Requires A Narrowing Construction to Meet Constitutional Requirements....44

II. THE STATE'S USE OF GOVERNMENT CODE SECTION 17557(d)(2)(B) WITH EDUCATION CODE SECTIONS 42238.24 AND 56523 VIOLATES SEPARATION OF POWERS PRINCIPLES....46

CONCLUSION 51

CERTIFICATE OF COMPLIANCE 53

CERTIFICATE OF SERVICE 54

TABLE OF AUTHORITIES

Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization
(1978) 22 Cal.3d 208 22
Bighorn-Desert View Water Agency v. Verjil
(2006) 39 Cal.4th 205 22
Cal. School Bds. Ass'n v. State ("CSBA I")
(2009) 171 Cal.App.4th 1183 .... *passim*
Cal. School Bds. Ass'n v. State ("CSBA II")
(2011) 192 Cal.App.4th 770 .... 12, 30
California Teachers' Ass'n v. Hayes
(1992) 5 Cal.App.4th 1513 34
Carmel Valley Fire Protection Dist. v. State of California
(2001) 25 Cal.4th 287 47
Carmel Valley Fire Protection Dist. v. State
(1987) 190 Cal.App.3d 521 50
Chesney v. Byram
(1940) 15 Cal.2d 460 44
Cirone v. Cory
(1987) 189 Cal.App.3d 1280 47
City of Richmond v. Commission on State Mandates
(1986) 64 Cal.App.4th 1190 .... 11, 47
City of Sacramento v. California
(1984) 156 Cal.App.3d 182 46
County of Fresno v. State
(1991) 53 Cal.3d 482 .... *passim*
County of Los Angeles v. Comm. on State Mandates
(2003) 110 Cal.App.4th 1176 .... 24, 34, 42
County of Los Angeles v. Comm. on State Mandates
(1995) 32 Cal.App.4th 805 47
County of Los Angeles v. State
(1987) 43 Cal.3d 46 46
County of San Diego v. State
(1997) 15 Cal.4th 68 9
County of Sonoma v. Comm. on State Mandates
(2000) 84 Cal.App.4th 1264 27
Dept. of Finance v. Comm. on State Mandates ("Kern")
(2003) 30 Cal.4th 727 .... *passim*
Grossmont Union High School Dist. v. State Dept. of Education
(2008) 169 Cal.App.4th 869 42
Hayes v. Comm. on State Mandates
(1992) 11 Cal.App.4th 1564 .... 17, 23
In re Marriage Cases
(2008) 43 Cal.4th 757 46
Kinlaw v. State
(1991) 54 Cal.3d 326 .... 10, 45
Mandel v. Myers
(1981) 29 Cal.3d 5 47
Pacific Legal Foundation v. Brown
(1981) 29 Cal.3d 168 24

People v. Hazelton
(1996) 14 Cal.4th 101 22
People v. Gutierrez
(2014) 58 Cal.4th 1354 46
Prof. Engineers in Cal. Gov't v. Kempton
(2007) 40 Cal.4th 1016 9
Redevelopment Agency v. Comm. on State Mandates
(1997) 55 Cal.App.4th 976 33
Rose v. State of California
(1942) 19 Cal.2d 713 44
Serrano v. Priest
(1971) 5 Cal.3d 584 26
Serrano v. Priest
(1976) 18 Cal.3d 728 27

STATUTES

Education Code
§ 2574-2579 16
§ 42238.24 .... *passim*
§ 51225.3 14
§ 56523(f) .... *passim*
§ 56836.16 17

Government Code
§ 7901(i) 7
§ 7903 .... 7, 29
§ 7906 .... 7, 29
§ 7907 7
§ 17500 .... 10, 12
§ 17521 10
§ 17525 10
§ 17551 10
§ 17555 24
§ 17556 .... *passim*
§ 17557(d)(2)(B) .... *passim*
§ 17559(b) 10
§ 17561(3) 24
§ 17561(a) 10
§ 17570(c) 13
§ 17581.6 14

CONSTITUTIONAL PROVISIONS

Cal. Const., art. XIII § 36 32
Cal. Const., art. XIIIA 9
Cal. Const., art. XIIIB, § 1 6
Cal. Const., art. XIIIB, § 3 .... *passim*
Cal. Const., art. XIIIB, § 6 .... *passim*
Cal. Const., art. XIIIB, § 8 .... *passim*

ISSUES PRESENTED

1) Does the State violate the mandate reimbursement requirement of article XIIIB, section 6 of the Constitution when it directs local agencies, including schools, to use their own "proceeds of taxes" to pay state-mandated costs, either directly or by directing them to use funds that are not available as a factual matter?

2) Does the State violate the separation of powers principles of article III, section 3 of the Constitution when it statutorily directs that certain funding satisfies its mandate reimbursement obligation despite final determinations by the Commission on State Mandates finding that the same funding did not satisfy the requirements of article XIIIB, section 6?

SUMMARY OF ARGUMENT

In 1979, Proposition 4 imposed spending limits on the state and local governments, including schools. (Cal. Const., art. XIIIB, §1.) With these limits, voters also directed that if the State requires a local government to provide a new program or higher level of service, it "shall provide a subvention of funds to reimburse the local government for the costs of the program. . . " (*Id.*, §6 ["Section 6"].) The purpose of Section 6 is "to require each branch of government to live within its means and to prohibit the entity having superior authority (the State) from circumventing this restriction by forcing local entities such as school districts to bear the State's cost. . ." (*Cal. School Boards. Ass'n. v. State* (2011) 192 Cal.App.4th 770, 787.)

Each agency's spending limit cannot exceed last year's "proceeds of taxes," adjusted for changes in inflation and population. (*Id.*, §§1&8.) For local governments, "proceeds of taxes" includes certain "subventions received from

the State." (*Id.*, §8(c).) The implementing legislation defined unrestricted state funding as state subventions included within "local proceeds of taxes." (Gov. Code, §§7901(i)&7903.)

The Commission on State Mandates – the quasi-judicial agency charged with making mandate determinations – has determined that several dozen state actions impose costs on local education agencies that require reimbursement ("education mandates"). Despite this, the State has repeatedly devised legislative and administrative roadblocks to avoid payment for these mandates.

In 2010, the Legislature enacted a provision that allows the State to eliminate a mandate obligation without actually providing any payment by simply identifying existing funding and designating it "offsetting revenues." (*Id.*, §17557(d)(2)(B).) In enacting this provision, the State effectively reversed decades of law that construed the reimbursement language in Section 6 to require an additional payment specifically provided for the mandated program or service.

While this fundamental change in the interpretation of Section 6 would be problematic for all local agencies, it is particularly problematic for schools because a large percentage of their funding comes from the State. Article XIIIB acknowledged this reality when it defined local proceeds of taxes to include state payments; the implementing legislation similarly defined most unrestricted education funding as the education agencies' "proceeds of taxes." (*Id.*, §§7903, 7906, 7907.)

The State's intent in enacting section 17757(d)(2)(B) was illustrated in the same budget legislation, which directed schools to use their unrestricted funding to "offset" the costs of the *Graduation Requirements Mandate* and to use special education funding to "offset" the costs of the *Behavioral Intervention Plans Mandate*. (Ed. Code, §§42238.24&56523(f).) In a tacit acknowledgment

that special education was significantly underfunded, section 56523(f) directs schools to "first" use that funding for the mandate.[1] By using Government Code section 17557(d)(2)(B) to circumvent the requirement for additional payment, both statutes effectively require schools to use their own proceeds of taxes to pay the costs of these mandates.

Commission decisions for each of these mandates had already rejected the argument that the funding claimed as offsetting revenue in 2010 could be considered mandate payment under Section 6. Although those decisions are final quasi-judicial determinations, section 17757(d)(2)(B) allows the State to use the idiosyncrasies of the mandate reimbursement process to "update" the reimbursement obligation in a way that eliminates reimbursement and effectively overturns the original mandate determination in violation of the separation of powers principles in the Constitution. (Cal. Const., art. III, §3.)

The statutes at issue would thus reverse longstanding interpretations of article XIIIB, section 6 and abrogate longstanding Commission decisions. Because of the nature of education funding in California, the 2010 legislation presents a unique threat to schools and creates a template for the eventual elimination of the State's mandate obligations for schools. In addition, allowing the State to identify funding that is unrelated to the mandate and direct that it "first" be used for mandated costs creates the likelihood that the State will defeat the right to reimbursement for all local agencies by designating funding for multiple purposes.

Petitioners/Appellants ("Petitioners") urge this Court to reverse the Court of Appeal and declare Government Code section 17557(d)(2)(B) unconstitutional as applied in Education Code sections 42238.24 and 56523(f)

---

[1] This provision was originally section 56523(e) but became 56523(f) as the result of a 2013 amendment. Petitioners use 56523(f) for ease of reference.

because those provisions violate both article XIIIB, section 6 and article III, section 3.

STANDARD OF REVIEW

The proper interpretation of the constitutional requirements of article XIIIB, section 6 and article III, section 3 are questions of law subject to *de novo* review in this Court. (See *Prof. Engineers in Cal. Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1032.)

BACKGROUND AND PROCEDURAL HISTORY

A. The State's Constitutional Obligation to Provide Mandate Reimbursement

The right of local agencies to mandate reimbursement grows out of several constitutional changes adopted by voters in the late 1970's. In 1978, Proposition 13 limited the power of state and local governments to impose new taxes and, in 1979, Proposition 4 imposed spending limits on the same entities. (Cal. Const., art. XIIIA&XIIIB.) Together, articles XIIIA and XIIIB restrict the power of local agencies to raise and spend public revenues.

Article XIIIB, section 6 requires that if the State imposes a new program or higher level of service on a local government, it "shall provide a subvention of funds to reimburse the local government for the costs. . ." The purpose of Section 6 is "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIIIA and XIIIB impose." (*County of San Diego v. State* (1997) 15 Cal.4th 68, 81.) School districts and county offices of education are "local governments" under article XIIIB. (Cal. Const., art. XIIIB, §8(d).)

Although the State initially used the Board of Control to process mandate claims, in 1984 it created a new, independent administrative process for mandate determinations. (*Kinlaw v. State* (1991) 54 Cal.3d 326, 331; Gov. Code, §§17500 *et seq.*) Local agencies file "test claims" with the Commission on State Mandates ("Commission"), a quasi-judicial body comprised of State and local representatives. (*Id.*, §§17521, 17525.) The Commission decides whether the local agency is "entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIIIB of the California Constitution." (*Id.*, §17551.)

Government Code section 17556 defines several circumstances (sometimes called mandate "exceptions") in which the costs of a state-imposed program or service are not reimbursable. Subdivision (e) provides that a mandate is not created if the State provides "additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate..." (*Id.*, §17556(e).) In other words, if the mandated program or service is accompanied by additional, adequate State funding for the mandated program, it does not impose "costs" subject to reimbursement.

If the Commission determines there are mandated costs, "it shall determine the amount to be subvened to local agencies and school districts for reimbursement. In so doing it shall adopt parameters and guidelines for reimbursement of any claims. . ." (*Id.*, §17557(a).) Reimbursement claims are filed with the Controller, and the amount necessary to reimburse local agencies for costs mandated by the State "shall be appropriated to the Controller for disbursement." (*Id.*, §§17558, 17558.5), 17561(c).)

Both the State and local agencies have the right to seek judicial review of Commission decisions. (*Id.*, §17559(b).)

B. State Efforts to Avoid Complying With Section 6

After article XIIIB was adopted, the State attempted to legislatively "disclaim" its reimbursement obligation under Section 6. This was rejected in *City of Richmond v. Commission on State Mandates* (1986) 64 Cal.App.4th 1190, 1201-02 ("*City of Richmond*") [only Commission has authority to determine whether statute creates a mandate].) In 1984, acknowledging that the prior administrative scheme "has not provided for the effective determination of the state's responsibilities under Section 6," the State developed the administrative process now in effect. However, the test claim process routinely takes many years and judicial review extends that time further. Even after a final mandate determination, the right to separate judicial review for the parameters and guidelines routinely adds several more years.

For example, the statute underlying the *Graduation Requirements ("GR") Mandate* was enacted in *1983*; the Commission determination was made in *1987*, and litigation over this mandate was still ongoing when the 2010 legislation was enacted. Similarly, the *Behavioral Intervention Plans* ("*BIP*") *Mandate* statute was enacted in *1993*, the Commission decision was made in *2000*, and litigation was still pending in 2010.

In 2002, the State began "deferring" its reimbursement obligations by appropriating $1,000 per mandate in the budget and carrying the remainder as a "debt" owed to local governments and school districts. The State and local governments sponsored a constitutional amendment in 2004 that ended the practice for local governments, but education agencies were not included in that protection. (Cal. Const., art. XIII B, §6(b)(1)-(4).)

In 2004, the Legislature began directing the Commission to set aside or "reconsider" prior education mandate decisions in light of self-serving legislative findings. This practice was invalidated in *Cal. School Boards Ass'n v. State* (2009) 171 Cal.App.4th 1183, 1200 ["*CSBA I*"] based on separation of

powers. Eventually, the practice of appropriating $1,000 and deferring the balance was declared unconstitutional for schools in *Cal. School Boards Ass'n v. State* (2011) 192 Cal.App.4th 770 ["*CSBA II*"], [2] although the Court also held that local governments could not affirmatively enforce certain administrative requirements of Government Code section 17500 *et seq*. When this case was briefed in the trial court, the State's mandate debt to education agencies was more than $5 billion.[3] (JA II:419.)[4]

Like much mandate legislation, the 2010 amendments were made in budget "trailer bills" without any public review or participation. (JA II:457-486.) Although Government Code section 17556(e) provides that no reimbursable costs are imposed if the state provides additional revenue specifically intended to fund the costs of the and sufficient to do so, the 2010 legislation added new language to 17557 which circumvents the restrictions of section 17556(e) while nominally maintaining those restrictions.[5]

Section 17557 governs the "parameters and guidelines" for reimbursement of claims once the Commission has determined that costs are being incurred that require reimbursement. Although the parameters and guidelines typically focus on the basis for reimbursement (*e.g.*, a standardized

---

[2] The State renewed its use of $1,000 appropriations in 2013 after the block grant was created. (JA III:848-852.)

[3] Some payments on the mandate debt have been made since that time, but not through the claims-based reimbursement process. (See *infra* at 43.)

[4] The Joint Appendix is designated "JA" followed by the volume and page number. Transcripts are differentiated by date.

[5] Section 17556(e) originally required the funding to be identified in the legislation imposing the mandate; the 2010 amendments allowed funding to be provided subsequent to the enactment of the mandate, but maintained the requirements that the funding be "additional," "specifically intended" for the mandate, and "sufficient to pay the costs of the mandate." (JA II:457.)

reimbursement methodology, time-based costs, actual costs for equipment or salaries), the 2010 amendments allow the parameters and guidelines to be "updated" to reflect "offsetting revenues" that "do not require a new legal finding that there are not costs mandated. . . .pursuant to. . . .section 17556." (*Id.*, §17557(d)(2)(B).)

This means that despite a Commission determination that costs have been imposed – which necessarily includes a finding that funding is not provided to cover those costs (otherwise there would be a "no cost" finding under section 17556(e)) – section 17557(d)(2)(B) nonetheless allows the State to "update" the parameters and guidelines and direct the Commission to find that costs are not, in fact, incurred; it allows funding that was determined in the mandate determination not to be "offsetting revenue" to constitute "offsetting revenue." By using this approach, the State is permitted to identify funding that would be insufficient to defeat the *creation* of a mandate under section 17556(e) to defeat the right to *reimbursement* for that mandate under section 17557(d)(2)(B).[6]

The 2010 budget package also added Education Code sections 42238.24 and 56523(f). Education Code section 42238.24 requires that teacher costs related to the *GR Mandate* "shall be offset by the amount of state funding apportioned to the district pursuant to this article. . ." Education Code section

---

[6] Also enacted in 2010 was Government Code section 17570, which gives the Commission authority to "adopt a new test claim decision to supersede a previously adopted test claim decision" based on a "subsequent change in law." (JA II:459; Gov. Code, §17570(c).) Having been told by the courts that it could not direct the Commission to reconsider or set aside its prior final decisions, the State created a new statutory procedure to accomplish the same goal whenever the Commission find that the State's liability has been "modified based on a subsequent change in law." (Gov. Code, §17570(a)-(b).) Such a "change in law" would be completely subject to legislative control (such as the 2010 legislation). Section 17570.1 also provides the Legislature with authority to initiate the new test claim process.

56523(f) was added to state that funding "provided for purposes of special education. . . .shall first be used to directly offset any mandated costs. . . .[for the *BIP Mandate*]." The clear intent of these provisions was to override the Commission's decisions in the *GR* and *BIP Mandates* and eliminate more than $300 million of the State's $400 million annual mandate obligation – a goal confirmed by the Legislative Analyst, who stated that "the [2010-11] budget package eliminated two of the state's costliest K-12 mandates – related to the high school graduation requirement and behavioral intervention plans..." (http://www.lao.ca.gov/reports/2010/bud/spend_plan/spend_plan_110510.pdf, at p. 21.)

There have been additional statutory changes since 2010, most notably the creation of a block grant "alternative" for education mandates adopted in 2012-13. (Gov. Code, §17581.6.) The block grant requires participating districts to waive the right to reimbursement of actual costs in return for an annual "grant." (*Id.*) The amount of the grant is unrelated to actual mandate costs and has represented a fraction of actual claims filed. Since the State has been providing no actual funding for individual education mandates, the block grant forces them to choose between accepting a greatly reduced (but certain) payment or declining it in the hope that their actual mandate claims will be paid at some point in the future. Unsurprisingly, most districts have accepted the block grant.

C. The Two Mandates "Eliminated" in 2010

In 1983, the State imposed new high school science requirements. (Ed. Code, §51225.3(a)(1).) In 1987, the Commission determined that a mandate was imposed requiring reimbursement for the costs of additional teachers, laboratory space, and equipment, *i.e.*, the *GR Mandate.* (JA II:495-496.) The State refused to pay for additional teacher costs, claiming that districts could use existing resources. The courts rejected the State's argument in 2004, concluding that it would "defeat the purpose of section 6, to protect local agencies ... from a state

mandate that forces the district to shift its limited revenues to the state mandate from existing local programs for which the revenues have been budgeted." (JA II:562-563.)

On remand, the Commission decided that a "reasonable reimbursement methodology" should be used for teacher costs.[7] The State argued that costs should be offset by the districts' revenue limit funding. As discussed in more detail *infra*, revenue limit funding was the State's unrestricted funding provided to education agencies in part to address education funding disparities and subsequently adjusted in response to Proposition 13. Revenue limits imposed an upper limit on funding for all education agencies; after subtracting local revenues, the State provided the difference, if any, as unrestricted funding.

The Commission concluded that districts could not be required to use their unrestricted funding because it "would require school districts to use their proceeds of taxes on a state-mandated program." (JA II:623.) The Commission reaffirmed its position in the subsequent judicial review proceeding. (JA II:654-664.) While the Superior Court action was pending, the Legislature enacted Education Code section 42238.24, which provides that teacher costs related to the high school science requirements "shall be offset by the amount of state funding apportioned to the district pursuant to this article" or, for county offices of education, section 2550 *et seq.*[8] The funding referenced in section 42238.24

---

[7] A "reasonable reimbursement methodology" allows reimbursement to be based on general allocation formulas established by the Commission rather than requiring local governments to submit actual cost data. (Gov. Code, §17557.1.)

[8] Section 42238.24 also provides that the percentage of funding required to be allocated for teacher costs under section 41372 "shall first be allocated to fund the teacher salary costs incurred to provide the courses required by the state." The Commission's 2008 decision also found that section 41372 does not appropriate any new funding. (JA II:623.)

was the same unrestricted education funding that the Commission had rejected as offsetting revenues in 2008. The State apparently never raised the new provision and abandoned the offsetting revenue argument; the trial court affirmed the Commission on other grounds. (JA II:649-650.)[9]

In 2013-14, while this case was in the Superior Court, revenue limit funding was replaced with the Local Control Funding Formula ("LCFF"). The LCFF combines each district's 2012-13 revenue limit entitlement and some prior categorical funding to create a new base, and then provides additional funding for districts with large numbers of low income students and English learners. The formulas function similarly in that each district has an upper LCFF funding entitlement, and the State provides the difference, if any, between local property tax receipts (and other local revenue offsets) and the LCFF entitlement. (Ed. Code, §§42238.02-42238.03.)[10] The final amount apportioned to the district is unrestricted funding to be used to provide the general education program. Whether referring to revenue limit or LCFF funding, section 42238.24 thus requires education agencies to use their own funds of taxes to pay for state-imposed mandates.

The State's efforts to eliminate its *BIP Mandate* obligation are similar. California first adopted special education requirements in the 1980's, and litigation over the *Special Education Mandate* extended over many years. (See *Hayes v. Comm. on State Mandates* (1992) 11 Cal.App.4th 1564, 1576 "*Hayes*").) In 2001, a settlement was reached and the State agreed to pay

---

[9] In 2011, the State moved to amend the parameters and guidelines to reflect section 42238.24. (http://www.csm.ca.gov/pendingclaims/docs/gr5/doc2.pdf .) That request was suspended pending resolution of this case.

[10] The formula for county offices of education is similar, but is adjusted for the fact that they provide both administrative and direct educational services. (See Ed. Code, §§2574-2579.)

education agencies $100 million annually for that mandate. (Ed. Code, §56836.156(f)&(g).) However, many special education activities are imposed by federal law and are not included in the state mandate and special education has been significantly underfunded for many years. (JA II:748-751.) The State's Legislative Analyst acknowledged that "a combination of increasing special education costs and relatively flat state and federal special education funding has resulted in local budgets covering an increasing share of these costs." (JA II:740.) In 2010-11, state and federal funding for special education fell short of actual costs incurred by education agencies by approximately $3.4 billion *annually*. (JA II:749.)

In 1993, the Legislature directed various state officers to require education agencies to establish "behavioral intervention plans" for students with serious behavior problems. (Ed. Code, §56523(f).) Although these requirements were not part of the *Special Education Mandate*, the State argued that funding for special education constituted offsetting revenues for the *BIP Mandate*; the Commission rejected this argument in its 2000 mandate determination. (JA II:683-684.) The State sought review.

While that case was pending, the original *Special Education Mandate* case was settled, but the settlement and implementing legislation made clear that the $100 million annual payment *specifically excluded payment for the BIP Mandate*. (Ed. Code, §56836.156(f)&(g).) In 2009, the parties separately settled the *BIP Mandate* litigation, with the State agreeing to provide $65 million annually for that mandate in addition to the $100 million for the *Special Education Mandate*. (JA II:689; 694-703.) Ultimately, the State failed to enact legislation to fund the settlement, and the State dismissed its appeal, rendering the Commission's 2000 mandate decision final and sending the case back to the Commission for parameters and guidelines. (JA II:707-710.)

Before dismissing its Superior Court case, the State added Education

Code section 56523(e) [now (f)] to direct that funding "provided for purposes of special education. . . shall first be used" to pay for the costs of the *BIP Mandate*. In considering section 56523(f), the Commission concluded that it was required to presume the constitutionality of the statute under article III, section 3.5 of the Constitution (JA II:726), but it acknowledged that the 2010 amendment was intended to "negate" its earlier mandate determination and "end reimbursement." (JA II:715-717.) Since special education is already significantly underfunded and no surplus revenues are available, section 56523(f), like section 42238.24, effectively required districts to pay for *BIP Mandate* costs out of their local revenues or state unrestricted funds. [11]

D. The Proceedings Below

The initial Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief was filed in 2011 (JA I:23-50) and amended shortly after to add several petitioners. (JA I:58-89.) It was subsequently amended again in Fall, 2012 and Fall, 2013 to reflect statutory changes and eliminate some claims. (JA I:198-227 [Second Am. Pet.]; JA I:285-317 [Third Am. Pet.].)

The 2013 Petition contained four causes of action. The first sought to invalidate Education Code sections 42238.24 and 56523(f) as contrary to article XIIIB, section 6 and article III, section 3 of the Constitution. (JA I:307.) The second alleged that Government Code section 17557(d)(2)(B) violated article XIIIB, section 6 on its face or as applied in Education Code sections 42238.24 and 56523(f). (JA I:308.) The third alleged that Government Code section 17570(c) violated article XIIIB, section 6 and article III, section 3. (JA I:310.)

[11] In 2013, the State repealed the regulations that were the basis of the *BIP Mandate* decision; the offsetting revenue issue for this mandate therefore extends only through 2012-13. (See Ed. Code, §56523(a).) However, the Court of Appeal opinion addressed section 56523(f) and the underfunding issue more generally. Its opinion approved of the approach taken in section 56523(f) despite the clear absence of available funding.

The fourth addressed the current statutory framework for reimbursement as a whole and alleged that changes to the mandate reimbursement process over the past decade deprived education agencies of their right to reimbursement under article XIIIB, section 6. (JA I:313.)

The parties stipulated to bifurcate the claims and brief the first two causes of action together first; the stipulation was rejected without prejudice to a written motion. (JA II:359, 366.) The subsequent motion was granted, but bifurcation was limited to the second cause of action. (JA II:393.)

The request for a writ of mandate declaring section 17557(d)(2)(B) unconstitutional was heard May 7, 2015 and denied July 6, 2015. (JA III:1055.) The trial court concluded that section 17557(d)(2)(B) was constitutionally permissible by virtue of the State's plenary authority over education, both facially and as applied in the Education Code provisions. (JA III:1055-1084.) Although much of the oral argument focused on whether unrestricted state funding constituted local proceeds of taxes for purposes of Section 6 (TR 7:6-10:20 [5/07/15]), the trial court did not address that issue in its ruling, holding only that the State's plenary authority over education allows it to direct schools to "use local revenues to fund state-mandated programs." (JA III:1076.) The ruling was limited to the second cause of action (JA III:1057) and did not address certain issues regarding the scope of Education Code section 42238.24.

After an order denying a request to amend or for further briefing regarding section 42238.24, and in response to a subsequent motion for clarification, the trial court held that the ruling on the second cause of action had "resolved the issues raised in the First Cause of Action" and its denial of the motion to amend made it unnecessary to address any issues related to section 42238.24. (JA IV:1189.) The court subsequently dismissed the remaining two causes of action because it concluded that the proceedings on the writ did not constitute commencement of the trial and the case had not been "brought to trial"

within five years as required by Code of Civil Procedure section 583.310. (JA V:1250.) Judgment was entered on all causes of action. (JA V:1263.)

The Court of Appeal affirmed the constitutionality of section 17557(d)(2)(B) and the Education Code provisions. It acknowledged that the reimbursement obligation of Section 6 is "[o]ne component of article XIIIB's spending limitation" (Op. at 3) and that section 17557(d)(2)(B) would allow the State to eliminate its mandate reimbursement obligation without providing any actual funding. (Op. at 19-20.) The Court did not address the longstanding construction of Section 6 that required actual, additional funding for the mandate (as reflected in section 17556(e)) or the Commission's prior determinations that article XIIIB did not permit the identified revenues to be considered "offsetting revenues." The Court simply concluded that section 17557(d)(2)(B) was *intended* to allow the State to identify funding that would not satisfy section 17556(e). (Op. at 19.)

With respect to Education Code section 42238.24, the Court concluded that this Court's ruling in *Dept. of Finance v. Comm. on State Mandates* (2003) 30 Cal.4th 727 (*"Kern"*) allows the State to require schools to use existing funding already provided by the State for mandated costs. (Op. at 20.) The Court also concluded that reimbursement is only necessary when a local government is required to use "local tax revenues," citing *County of Fresno v. State of California* (1991) 53 Cal.3d 482 ("*Fresno*"). (Op. at 16.) Although the Court acknowledged that the unrestricted education funding provided under section 42238 *et seq.* might be statutorily defined as local "proceeds of taxes" for purposes of article XIIIB, it concluded that "even if a school district's 'proceeds of taxes' include subventions received from the state, we are not persuaded that the reference to 'state funding' in Education Code section 42238.24 includes local tax revenues." (Order Modifying Opinion.)

With respect to Education Code section 56523(f), the Court again

concluded that Section 6 was satisfied since special education funding was state funding and exceeded the cost of the mandate. Regarding the significant underfunding of special education, the Court again relied on *Fresno*, concluding that local agencies had not demonstrated that they were required to use "local tax revenues." (Op. at 21.)

With respect to separation of powers, the Court acknowledged that the 2010 legislation "abrogates" the earlier Commission decisions on these mandates, but concluded that it was permissible because it was done "prospectively." (Op. at 26.)

The Court did reverse the trial court's ruling on the motion to amend and its dismissal of the remaining causes of action. (Op. at 32, 36.) However, in remanding for further proceedings on whether Education Protection Account ("EPA") funding could be designated for mandates by Education Code section 42238.24, the Court of Appeal emphasized that the remand was limited to the EPA issue and not the constitutionality of section 42238.24 more broadly. (Op. at 32.)

ARGUMENT

I. GOVERNMENT CODE SECTION 17557(D)(2)(B) AS CONSTRUED BY THE COURT OF APPEAL IS CONTRARY TO ARTICLE XIIIB, SECTION 6

A. Section 6 Requires That Local Agencies Receive a Payment That Makes Them Whole for Mandated Costs

Article XIIIB, section 6 appears relatively straightforward: If the State requires local governments to provide a program, it is required to pay for the costs of the program. The Court of Appeal made no effort to explain how the reimbursement requirement of Section 6 could be reconciled with the absence of payment under section 17557(d)(2)(B). They cannot be reconciled.

The Court's fundamental task in construing a constitutional provision is

to determine and effectuate the intent of the voters who enacted it. The Court first looks to the language, giving words their usual and ordinary meaning; if the words are open to more than one meaning, the Court may refer to extrinsic aids, such as the legislative history or ballot materials and the ostensible objectives to be achieved. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212; *People v. Hazelton* (1996) 14 Cal.4th 101, 105; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.)

Section 6 requires the State to "provide a *subvention* of funds to *reimburse* the local government for the *costs* of the program." (Emphasis added.) To "reimburse" is "to pay someone an amount of money equal to an amount that person has spent," "to make restoration or payment of an equivalent to,"[12] or "repay (a person who has spent or lost money)."[13] In the case of Section 6, reimbursement must be made "for the costs" of the program or service.

A "subvention" is "a grant of financial aid or assistance." (*Hayes, supra,* 11 Cal.App.4th at 1577.) While financial assistance may be provided in a variety of forms, article XIIIB itself distinguishes between subventions made or received pursuant to Section 6, *i.e.*, mandate payments, and "subventions received from the state" for other purposes. (Cal. Const., art. XIIIB, §8(a)-(c).) Article XIIIB, section 8(a) excludes "subventions for the use and operation of local government (other than subventions made pursuant to Section 6)" and the ballot materials referred to "state financial assistance to local governments" as "any state funds which are distributed to local governments other than funds provided to reimburse these governments for state mandates." (JA II:437.) This distinction would make no sense if the State is permitted to designate the same subvention (payment) to serve both mandate payment and non-mandate purposes.

---

[12] http://www.merriam-webster.com/dictionary/reimburse.

[13] http://www.oxforddictionaries.com/us/definition/american_english/reimburse.

The plain meaning of Section 6 is therefore that the State must replace any costs incurred for a mandate so that the local agency is not responsible for those costs. The Legislative Analyst confirmed this understanding in the ballot materials when it stated that "the initiative would establish a requirement that the state *provide funds* to reimburse local agencies for the costs of complying with state mandates." (JA II:441-442, emphasis added.) "[T]he constitutional rule of state subvention provides that the state is required to pay for any new governmental programs. . . .that it imposes upon local agencies." (*Hayes, supra,* 11 Cal.App.4th at 1577.) "Under article XIIIB, section 6, if the State wants to require the local school districts to provide new programs or services, it is free to do so, but not by requiring the local entities to use their own revenues to pay for the programs." (*Ibid.*)

The administrative process implements the constitutional directive: If the Commission determines that local agencies have incurred state-mandated costs (and those costs are not subject to one of the "exceptions" in section 17556), it makes a determination that the costs must be reimbursed and notifies the State and Controller. (Gov. Code, §17555.) The State "shall reimburse each local agency and school district for all 'costs mandated by the state'." (*Id.*, §17561(a).).

The administrative scheme adopted in 1984 did not even include an "offsetting revenues" provision; it provided only for direct payment by the Controller except where the statute generated local savings that offset the costs. In 1989, the Legislature expanded Government Code section 17556(e) to provide that no mandate was created if the statute or executive order imposing the mandate "includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." (*Id.*, §17556(e), as amended by stats. 1989, ch. 589.) Legislative reports explained that this provision applied where the statute or executive order imposing the mandate "generated" additional revenues resulting in "no net

costs" to the local government. (JA II:489.) Thus, the requirement for actual payment has been in place from the inception, with a limited exception created in 1989 where the State provides *additional* revenues that are *sufficient* to make the local government whole, *i.e.*, the offsetting savings or revenues must result in "no net costs." (Gov. Code, §17556(e).)

In a few limited circumstances, the courts have found no reimbursable "costs" based the ability to use existing funding. (*County of Los Angeles v. Comm. on State Mandates* (2003) 110 Cal.App.4th 1176; *Kern, supra*, 30 Cal.4th 727 ("*County of Los Angeles*").) Both cases found there were no reimbursable costs, and therefore no mandate was created. However, these cases are inapplicable once a mandate is determined since each mandate determination necessarily requires the Commission to conclude that "costs" have been "mandated by the state" under section 17514. Once the Commission determines that costs have been incurred, the State has never been permitted to identify existing funding to eliminate the mandate payment obligation, as section 17557(d)(2)(B) would do.

A contemporaneous statutory enactment "represents a considered legislative judgment as to the appropriate reach of the constitutional provision . . . [and] enjoys significant weight and deference by the courts." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.) A pattern of legislative action over time evidences a consistent legislative interpretation and should be accorded great weight. (*Id.* at 190.) Here, the longstanding requirement for additional payment has been fundamental to the enforcement of local agency rights under Section 6, and eliminating that requirement represents a radical departure from that interpretation without any explanation. It allows the State to require local agencies to shift, or divert, their own funds to mandated costs in a way that is contrary to the very purpose of Section 6.

Although the amendments to Education Code sections 42238.24 and

56523(f) represent somewhat different applications of Government Code section 17557(d)(2)(B), it is undisputed that neither statute provides additional funding for either mandate; instead, both statutes identify pre-existing education funding as mandate payment and require schools to use their own proceeds of taxes for state-mandated costs in violation of Section 6.

B. Section 6 Does Not Permit the State to Direct Local Agencies, Including School Districts, to Use Their Own Proceeds of Taxes to Pay Mandate Costs

In 1987, the Commission determined in the *GR Mandate* that new science requirements required reimbursement. In 2008, after two decades of litigation, the Commission re-affirmed that general education funding from the State did not defeat the mandate, concluding that the State's argument "would require school districts to use their proceeds of taxes on a state-mandated program." (JA II:623.) After reviewing the constitutional history of state funding, the Commission concluded that "the proceeds of taxes for school districts are different than those of other local governments. . . .because the general purpose revenue of school districts has always been partially provided by the state's general fund" and that identifying unrestricted education funding to defeat the mandate would "violate[] article XIII B, section 6." (JA II:621, 623.) Government Code section 17557(d)(2)(B) as applied in Education Code section 42238.24 thus overturns the Commission's longstanding determination that unrestricted state education funding constitutes "local proceeds of taxes" under article XIIIB protected by Section 6.

The Court of Appeal apparently concluded that the existence of "state funding" necessarily means that schools are not required to use "local revenues," citing *Fresno*. (Op. at 18.) This reasoning ignores that "state funding" identified in section 42238.24 has been defined as "local revenues" for purposes of article XIIIB; the Court's decision imposes a limitation on the right to reimbursement that potentially affects all local governments. The Court also viewed State

education funding as essentially eliminating the right to reimbursement, relying on the *Kern* decision. (Op. at 17.) Neither *Kern* nor the State's authority over education justifies the State's failure to pay its mandate obligations.

1. Unrestricted Education Funding Has Been Defined as Local Proceeds of Taxes for Purposes of Article XIIIB

Under article XIIIB, the local government spending limit is defined as "any authorization to expend. . . .the proceeds of taxes levied by or for that entity and the proceeds of state subventions to that entity (other than subventions made pursuant to Section 6). . . ." (Cal. Const., art. XIIIB, §8(b).) "'Proceeds of taxes' shall include, *but not be restricted to,* all tax revenues. . . .*With respect to any local government, 'proceeds of taxes' shall include subventions received from the State,* other than pursuant to Section 6. . . ." (*Id.*, §8(c), emphasis added.) These definitions reflected changes in state and local finance that occurred just prior to the enactment of XIIIB.

In the 1960's, local property taxes provided the majority of school funding, with the State providing additional funding through basic aid (Cal. Const., art. IX, §6), equalization aid, and supplemental aid for certain low wealth districts. Equalization aid was designed to bring all districts up to a minimum amount of spending per pupil (the "foundation level"). Districts whose revenues met or exceeded the foundation level received only basic aid ("basic aid districts") and districts whose revenues were below the foundation level received equalization aid.

In 1971, this Court held that the heavy reliance on property tax revenues and resulting disparities in education funding violated Equal Protection. (*Serrano v. Priest* (1971) 5 Cal.3d 584.) In response, the State substantially increased the foundation level and implemented "revenue limits" – maximum expenditures per pupil, combined with different inflation adjustments for high and low revenue districts, which were intended to equalize education spending

over time. (*Serrano v. Priest* (1976) 18 Cal.3d 728, 739-743.) Although this reduced disparities somewhat, districts were still allowed to exceed the revenue limits in various ways and the Court concluded that it did not sufficiently address the constitutional infirmities. (*Id.*)

In response, the State revised school funding to increase revenue limits and redistribute revenues from higher wealth districts to lower wealth districts. Before this system was implemented, Proposition 13 was enacted, which rolled back property tax rates and limited property tax increases going forward. The immediate result was a dramatic reduction in statewide property tax revenues. (*County of Sonoma v. Comm. on State Mandates* (2000) 84 Cal.App.4th 1264, 1271-75.) Because the State was experiencing a budget surplus at that time, it allocated the majority of property tax revenues to cities and counties, and it replaced the schools' lost property tax revenues with General Fund revenues; it also increased state spending on education and provided financial assistance to other local governments adversely affected by Proposition 13. (*Id.* at 1271-1274.) By the time article XIIIB was adopted in 1979, the percentage of property tax revenues going to schools had dropped from approximately 53% to 35%. (*Id.* at 1274.)

As a result of the *Serrano* decisions and Proposition 13, revenue limits became the basis of school funding. The State determined an upper limit of funding per pupil, set a revenue limit for each district based on average attendance, subtracted property taxes (and other local revenues) from that limit, and apportioned the balance to the district. (See Ed. Code, §§ 42238 *et seq.*) Districts whose local revenues were equal to or higher than their revenue limit received only nominal state funding ("basic aid districts"). The State's revenue limit funding was unrestricted, *i.e.*, it was provided to support the general

education program.[14] Revenue limits both reduced the tax revenues available to schools and increased state funding in order to equalize spending.

Against this backdrop, Proposition 4 based its spending limits on each entity's "proceeds of taxes" and it defined local proceeds of taxes to include "state subventions" in light of increased state assistance provided after Proposition 13. (Cal. Const., art. XIIIB, §8(a)-(c).) The ballot materials noted that "a large proportion of total state expenditures represents funds passed on to local governments for a variety of public purposes. *Under this ballot measure, these funds would be subject to the limits on local, rather than state appropriations*." (JA II:441, emphasis added.)

These provisions were particularly significant for education agencies. Although Proposition 4 did not define which state subventions would be treated as local proceeds of taxes, the 1980 implementing legislation defined unrestricted state funding as "subventions received from the state." (Gov. Code, §§7901&7903.) Government Code section 7906(c) defined the proceeds of taxes for school districts to include basic aid payments and state unrestricted funding under Education Code 42238 up to the "foundation level." (Gov. Code, §7906(c), as amended by stats. 1980, ch. 1205.) If this had not been done, the spending limits for education agencies would have excluded this funding, requiring potentially significant spending reductions. (See, e.g., JA III:784 [property taxes approximately 20.5% of district revenues]; JA III:789 [property taxes approximately 50% of district revenues].)

These definitions were in place in 1988 when voters adopted Proposition 98, which established minimum funding formulas for K-14 education. (Cal. Const., art. XVI, §8.) One effect of Proposition 98 was an immediate need to

---

[14] "Categorical funding," *i.e.*, restricted funding provided for specified purposes, was calculated and appropriated separately.

increase state general funding spending on education. In order to "free-up" space in the State's own spending limit, it defined even more unrestricted education funding as local by re-defining the "foundation level" as the district's appropriations limit under article XIIIB less certain local tax revenues that did not otherwise count toward the revenue limit. (Gov. Code, §7906(b), as amended by stats. 1989, ch. 82 ["SB 98"].) This change shifted approximately $900 million from the state's expenditure limit to the schools. (Enrolled Bill Report for SB 98.) Since that time, the State has defined state unrestricted spending, up to each agency's spending limit, as local proceeds of taxes and placed the maximum amount of funding within the school district spending limits. (See RJN, Exh. A, p. 4.)[15]

These provisions were also in place in 2013-14, when revenue limit funding was replaced with the local control funding formula ("LCFF"). Like revenue limits, the State provides the difference, if any, between local property tax receipts (and other credits) and the LCFF entitlement. (Ed. Code, §§ 42238.02-42238.03; see also §§ 2574-2579 [county offices of education].) The Court of Appeal nonetheless concluded that it was not "persuaded the reference to 'state funding' in Education Code section 42238.24 includes local tax revenues." (Order Modifying Opinion.)

Section 42238.24 does not refer simply to "state funding;" it refers to "state funding apportioned to the district pursuant to this article" or, for county

---

[15] The State has argued that funds received pursuant to Education Code section 42238 *et seq*. are payments received for mandate reimbursement of state mandates within the meaning of section 7906(c)(2). This is incorrect. Mandate reimbursement is made by an appropriation in the budget bill "appropriated *to the Controller for reimbursement*." (Gov. Code, §17561(b)-(d), emphasis added.) Payments for mandate reimbursement are thus those budget appropriations provided to the Controller specifically for that purpose. (See, *e.g.*, JA III:848-853.)

offices of education, by Education Code sections 2550 *et seq*. The "article" is Article 2 ("Apportionments and Revenue Control") – the article that previously described revenue limit funding and now describes LCFF funding. As noted above, both use formulas that begin with a state-determined upper limit and subtract out local revenues. The amount "apportioned" to the district is the unrestricted funding referenced in Government Code 7906 and 7907. This unrestricted funding, along with local tax revenues, constitutes the funding that must be used by education agencies to operate the general educational program, *i.e.*, hire teachers and other personnel, pay for utilities, maintenance and supplies, provide supplemental and tutorial services, etc. Because of the limitations of articles XIIIA and XIIIB, these represent the only unrestricted funds available to education agencies to fund the general education program and implement local education choices.

It was undisputed Education Code section 42238.24 refers to existing funding and does not provide any additional funding for the costs of the *GR Mandate*. (JA III:775.) It therefore requires education agencies to divert spending away from their own programs and priorities in order to pay for the State's mandates – contrary to article XIIIB, section 6. "Under article XIIIB, section 6, if the State wants to require the local school districts to provide new programs or services, it is free to do so, but not by requiring the local entities to use their own revenues to pay for the programs." (*CSBA II*, *supra*, 192 Cal.App.4th at 787.)

For most education agencies, general education funding will exceed not only the cost of the *GR Mandate* but all education mandates. If the State's approach is allowed, it could potentially designate general education funding as payment for virtually all education mandates and effectively eliminate the right to reimbursement under Section 6 for education agencies despite the express inclusion of these agencies in article XIIIB. The State effectively conceded this

point, but argued that the State's plenary authority permits this result. (JA III:822-23.)

Re-defining unrestricted education funding as state rather than local funds has two other potential consequences. First, defining this unrestricted funding as part of local proceeds of taxes means that these funds are considered to be controlled by the local education agency and are part of each local agency's spending limit. If this unrestricted funding is to instead be treated as restricted state funds subject to state control, the same spending would have to be considered state proceeds of taxes. This would mean that $20-30 billion would potentially be shifted from local spending limits (thereby lowering the local spending limits for most schools) to the state spending limit (thereby increasing the spending counted against its limit). (See Cal. Const., art. XIIIB, §3 [transfer of financial responsibility requires adjustment to spending limits].)

Second, the State's position means that districts that do not receive unrestricted state funding (basic aid districts) would be entitled to receive mandate reimbursement while districts receiving state funding would not. The trial court (JA III:1076) and Court of Appeal (Op. at 19) viewed this as simply an equal protection argument, but it is really a question about the interpretation and application of Section 6 to education agencies. The State's argument would necessarily mean that Section 6 requires reimbursement for some districts but not others – even though article XIIIB's definition of local proceeds of taxes combines state funding with local revenues and treats them both as local proceeds of taxes.

The State responded that since section 42238.24 includes Education Protection Account ("EPA") funding, and EPA funding is received by all education agencies, every agency would have offsetting revenues and none

would receive reimbursement. (JA III:775)[16] Petitioners disputed this. The trial court did not address the issue and the Court of Appeal remained it for further proceedings. (Op. at 32.) However the EPA funding issue is resolved, there is no question that the purpose and effect of section 42238.24 is to force education agencies to use their own revenues to pay for state mandates. Shifting financial responsibility to the local education agencies in this way not only adversely impacts other aspects of their educational program (JA III:783-791), but also contravenes Section 6.

2. Local Proceeds of Taxes are Protected by Section 6

The Court of Appeal also appears to have concluded that Section 6 protects "local tax revenues" but does not protect "local proceeds of taxes," citing this Court's decision in *Fresno.*[17] Petitioners submit that this conclusion ignores the interrelationship between Section 6 and article XIIB's spending limits.

Fresno involved a challenge to Government Code section 17556(d), which defines circumstances that do not impose "costs" requiring reimbursement. Section 6 itself excludes three categories of costs: legislation

---

[16] EPA funding is allocated to schools by the Constitution, not section 42238 *et seq*., and the funding is committed exclusively to schools by the Constitution itself. (Cal. Const., art. XIII, §36(e)(6).) Moreover, EPA funding is one of the forms of *local revenues subtracted* from the LCFF entitlement in order to determine each district's LCFF apportionment. (Ed. Code, §42238.03(c)(8).)

[17] The trial court went further, suggesting that the State could "force school districts to use *local tax revenues* to fund state-mandated programs." (JA III:1076.) Petitioners offered the trial court several opportunities to correct or amend this statement, but the trial court suggested that any error could be corrected on appeal. (JA IV:1122, fn. 3; TR 4:13-5:24; 9:1-10:6 [8/31/15].) Although contrary to *Fresno* even under the Court of Appeal's narrow construction of that case, the appellate court's affirmance leaves this clearly erroneous aspect of the ruling uncorrected.

requested by the local agency; legislation defining new crimes; and mandates enacted prior to 1975. (Cal. Const., art. XIIIB, §6(a)(1)-(3).) The Legislature added several exceptions: mandates affirming existing law; mandates imposed by federal law; mandates sufficiently funded by the State; mandates that implement voter-adopted initiatives; and mandates for which the local agency is authorized to impose fees. (Gov. Code, §17556 (a)-(g).) *Fresno* challenged the last of these and, more generally, the State's authority to expand the exceptions specifically provided in Section 6.

This Court analyzed the structure of article XIIIIB and concluded that if costs were recoverable through regulatory fees, they did not implicate local government "tax revenues" and were therefore not subject to reimbursement under Section 6. (*Fresno, supra,* 53 Cal.3d at 486-487.) The Court reasoned that the "appropriations limit" imposed by article XIIIB was defined as "any authorization to expend . . . the proceeds of taxes" and that Section 6 was intended to prevent the State from forcing local governments from using their limited revenues to pay for State-imposed programs and services. (*Id.* at 487.) Based on this purpose, the Court concluded that the Legislature had the authority to construe "costs" in Section 6 to exclude expenses recoverable from sources other than taxes because those other sources were not limited by article XIIIB. (*Id.*)

If the purpose of Section 6 is to protect the local agency's spending limit, *Fresno's* references to "tax revenues" must be understood to mean "proceeds of taxes." In concluding that reimbursement is not required unless specific "local tax revenues" are impacted, the appellate court ignored *Fresno's* underlying reasoning – that Section 6 requires reimbursement whenever the costs of the state program impact the local government's spending limit – a limit based on both local revenues and state payments. (Cal. Const., art. XIIB, §8(b)&(c); Gov. Code, §§7906&7907; see also *Redevelopment Agency v. Comm. on State Mandates* (1997) 55 Cal.App.4th 976, 986 [spending limits based on proceeds

of taxes as defined]; *County of Los Angeles, supra,* 110 Cal.App.4th at 1193 [mandate is program "that results in increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit"].) The *Fresno* Court had no reason to discuss the more expansive definition of "proceeds of taxes" since state subventions were not relevant in that case, but the reasoning of *Fresno* indicates that costs that impact any local proceeds of taxes – even those originating from the State – are protected by Section 6.

Since unrestricted education funding is part of the agencies' local "proceeds of taxes" for article XIIIB purposes, state mandates that require districts to spend these funds trigger the protection of Section 6 to the same extent as if they required the expenditure of local tax revenues. This understanding is fundamental to the application of article XIIIB to education agencies and was the basis of the Commission's conclusion that identifying unrestricted education funding as mandate payment "would require school districts to use their proceeds of taxes on a state-mandated program" and "violate[] article XIIIB, section 6." (JA II:623.)

The appellate court's conclusion that unrestricted education funding (or any unrestricted state subvention) may be part of the local agency's "proceeds of taxes" but is not entitled to protection under Section 6 is at odds with article XIIIB and the implementing legislation in a way that has consequences far beyond the *GR Mandate* and education mandates. The State has not articulated any reason for disregarding the consistent construction given to the constitutional requirements for the past decades, and *Fresno* does not support it.

3. The State's Plenary Authority Over Education Does Not Permit It to Disregard its Obligations under Section 6

Throughout these proceedings, the State has largely ignored the requirements of Section 6 and relied on its "plenary authority" over education, citing *California Teachers Association v. Hayes* (1992) 6 Cal.App.4th 1513, 1518 ("*CTA*"). However, as *CTA* observed, the State's authority over education

remains subject to constitutional constraints. (*Id.* at 1524.) One such constraint is article XIIIB, section 6 – a provision that *does* impose a limitation on the Legislature's authority in that it requires state reimbursement for any programs or services imposed. The Court of Appeal ignored this limitation and relied instead on *Kern* for the broad proposition that the State can simply "prioritize" spending for certain programs or services in a way that eliminates its mandate obligation. (Op. at 17.)

Kern involved several state categorical programs that required the participation of advisory councils as a condition of funding, and each program included a specific funding stream that could be used for "administrative costs." (*Kern*, 30 Cal.4th at 744.) The question was whether additional agenda requirements for the advisory councils added "costs" subject to reimbursement. This Court held that no mandate was created because the costs were "modest" and the categorical funding included funds that could be used to pay those costs. (*Id.* at 747.)

Kern did not focus on reimbursement for an existing mandate, but on whether "costs" were incurred in the first instance within the meaning of Section 6. In contrast, the mandates at issue here – in fact, every mandate determination – necessarily involves a determination that costs *have been* incurred by the local agency *that require reimbursement* – that is precisely why a "subvention to reimburse" is required by Section 6 to make them whole.

Equally important, *Kern* involved categorical programs – funding that is by definition restricted rather than unrestricted funding. The implementing legislation clearly treats them differently, with restricted, categorical funding treated as "state proceeds of taxes." (Gov. Code, §7906(e).) This reflects the fact that these funds are subject to state control and therefore should be included in the State's spending limit. In fact, if the State wishes to "prioritize" certain programs or services, it can do so with funds that count against its own spending

limit – as restricted, categorical funding does. In effect, the State wants it both ways – it wants to control the spending of the funds but exclude them from the State's spending limit. The requirements of Section 6 prohibit the State from "prioritizing" spending for funds that are local proceeds of taxes; indeed, requiring local agencies to use their own funds for state "priorities" is the quintessential violation of Section 6.

The appellate court took *Kern's* limited, fact-specific holding related to categorical funding and expanded it to conclude that if the State provides funding to local governments or schools, it need not also reimburse them for the costs of mandates. (Op. at 16-17 ["the state already provides funding to school districts and county offices of education. Indeed, it provides tens of billions of dollars in state funding each year"].) This reading of *Kern* essentially treats the entire education system as one categorical program; so long as the amount of state funding exceeds the cost of any new mandate, no reimbursement is required. It obliterates the distinction between state and local proceeds of taxes articulated in article XIIIB and the implementing statutes. Indeed, using the language of *Kern*, no "costs" would ever be incurred for any education mandate. Although article XIIIB, section 8 makes clear that education agencies are entitled to mandate reimbursement in the same way as other local governments, the appellate court's application of *Kern* would read education agencies out of Section 6.

In asserting that the State's unrestricted education funding constitutes "local proceeds of taxes" – and is therefore protected by Section 6 – Petitioners are not asserting that the level of unrestricted funding must be held at a certain level that cannot be changed. Petitioners acknowledge that the State can adjust funding (within the parameters of Proposition 98), and the precise mix of unrestricted and restricted (categorical) funding as well as the amount of mandate payments remains subject to a legislative determination.

Petitioners' argument is that reimbursement for the costs of mandates as required by article XIIIB, section 6 is distinct from other general funding and must be accounted for separately because once certain funding is defined as the education agencies' "proceeds of taxes," it is protected by Section 6 and the State's authority is correspondingly limited. Like local property tax revenues, the agencies' *unrestricted* state funds must be used to provide the local education program. By directing that a portion of these revenues be used for mandates, the State is imposing its own restrictions on the use of funds that have long been defined as local funds and forcing local education agencies to use *their own funds* to provide programs required by the State – precisely what section 6 was designed to prevent.

Finally, the State argues that even if it pays for mandates, there would be no net increase in education funding because Proposition 98 defines the spending limit and the State would simply reduce other spending because the State "counts" mandate payments toward its Proposition 98 funding obligation. (Gov. Code, §41207.4.) But Proposition 98 imposes a minimum education spending, not a maximum; moreover, whether mandate spending is properly included in the Proposition 98 calculations has never been litigated and may well be inconsistent with both article XIIIB and Proposition 98.[18] That issue is not before the Court.

The Constitution requires reimbursement for mandated costs and the State has set up a detailed, time-consuming and exclusive administrative scheme for establishing the right to reimbursement. The cost-based system *set up by the Legislature* reimburses local entities for funds already expended on the mandated program or service. (Gov. Code, §17500 *et seq.*) When the State

---

[18] The Proposition 98 implementing legislation suggests that if a new program is imposed on schools that did not exist prior to Proposition 98, the minimum funding requirement should be adjusted to reflect the additional costs. (Ed. Code, §41202.)

ignores its mandate reimbursement obligation simply because it provides general education funding, it renders those procedures not just irrelevant, but an elaborate charade.

Not all districts file requests for mandate reimbursement and all claims must adequately document allowable expenses in order to obtain payment. In contrast, unrestricted education funding, including LCFF funding, has been primarily based on enrollment (average daily attendance or "ADA"). Under section 42238.24, schools that submitted valid reimbursement claims would not receive any different funding than those districts that chose not to file claims at all. For example, two districts may each be entitled to $3 million in LCFF funding, but only one may have mandate claims related to the *GR Mandate* in the amount of $300,000. Under the State's approach to section 42238.24, both would receive exactly the same amount of LCFF money, but one has spent an additional $300,000 on a state-imposed program. That district is not made whole as required by article XIIIB.

Nor does the block grant eliminate the need for the State to be accountable for mandate costs. While most districts have accepted the block grant, not all have. (Op. at 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.) When the *GR Mandate* was added to the block grant in 2013-14, it was estimated to cost 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.) The block grant thus allows the State to satisfy its reimbursement obligation by forcing schools to accept a reduced payment because the alternative is no payment at all.

It is undisputed that the 2010 legislation would eliminate any reimbursement obligation for these two mandates, as districts would be forced to absorb these costs themselves. 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 an underlying mandate reimbursement obligation, there is no reason for the block grant to exist since it is merely a form of payment of that obligation* – an obligation the 2010 statutes would potentially eliminate.

Finally, one of the salutary effects of Section 6 is that it requires the State to think about imposing new programs or services on local governments, knowing that it will ultimately be responsible for the costs. If the State can eliminate these costs by identifying existing funding for other purposes and designating it for mandate payment, it gives it carte blanche to impose whatever programs or services it wishes – knowing there are no financial consequences. Such a result is directly contrary to the underlying purpose of Section 6.

C. Section 6 Does Not Permit the State to Identify Non-Existent Funding or Funding Already Directed to Other Uses for Mandate Payment

The 2010 legislation also added Education Code section 56523(f), which directs that funding "provided for purposes of special education. . . .shall first be used" to pay for the costs of the *BIP Mandate*. (Ed. Code, §56523(f).) Like section 42238.24, this provision would eliminate the reimbursement obligation without providing any actual funding. Although section 56523(f) directs schools to use restricted, categorical funds rather than unrestricted state funding, it nonetheless also violates Section 6.

Like the *GR Mandate*, the *BIP Mandate* was established long ago and still

unpaid in 2010. When the Legislature failed to fund the settlement agreement (which would have required a payment of $65 million annually), the Legislature enacted section 56523(f). The Commission acknowledged that the new legislation provided no new or additional revenue, but observed that new section 17557(d)(2)(B) did *not* include the limitations of section 17556, *i.e.*, it did not require that offsetting revenue be "additional" and "specifically intended" to pay for the mandate. (JA II:723, 727.) Because it concluded that it was required to presume the constitutionality of section 56523(f), the Commission imposed the offset. (JA II:726.)

The evidence from both Petitioners and the State's Legislative Analyst established that special education is significantly underfunded. (JA II:748-751.) At the time section 56523 was amended, education agencies were spending approximately $3.4 billion annually of their own revenues to cover unreimbursed special education costs. (JA II:749.) Since no special education funding is available as a factual matter, section 56523(f) forces districts to pay the costs of the *BIP Mandate* from their local sources.

Despite these essentially uncontested facts, the Court of Appeal stated that Petitioners had not demonstrated that they were required to use "their own local revenues." (Op. at 21.) In fact, the Legislative Analyst confirmed that "a combination of increasing special education costs and relatively flat state and federal special education funding has resulted in local budgets covering an increasing share of these costs." (JA II:740.) Petitioners' declarations echoed this. (JA III:783-795; JA III:967-970.)

Indeed, no alternatives are possible within the structure of education funding in California. Under both revenue limits and LCFF, education agencies have limited options for covering expenses; their local revenues are subtracted from a state-derived upper limit and that difference is unrestricted state funding. (See Ed. Code, §42238.03(c).) The only other funding sources are restricted state

or federal funding, but that funding can only be used for the program being funded.

If the State mandates a program or service and the funds it identifies for payment are not actually available to pay for it, education agencies have no choice except to pay for it from local tax revenues or unrestricted state funding, as those are the only unrestricted funds available to them. Both are defined as the education agency's "proceeds of taxes." (Gov. Code, §§7906&7907.) The State's identification of non-existent funds as offsetting revenues therefore has precisely the same effect as directing districts to use their own local revenues to pay for that mandate, and the diversion of local resources to cover state-mandated costs impacts the agency in precisely the same way.

As with section 42238.24, the Court of Appeal assumed that the State could direct "state funding" without any Section 6 concerns, citing *Kern.* (Op. at 21.) *Kern* does indicate that some duties imposed by the State in connection with funded categorical programs may not impose reimbursable costs. However, while special education funding is categorical funding, it is not funding for the *BIP Mandate*, and it does not follow that designating funding for a *different* program as mandate payment satisfies Section 6 – particularly where that program is so severely underfunded that funds are unavailable as a practical matter.

In *Kern,* this Court held that no "costs" were incurred under Section 6 because the additional agenda costs were *de minimis* and could be paid from the administrative funds provided for each categorical program. (*Kern, supra,* 30 Cal.4th at 744.) The costs of the *BIP Mandate* were more than $65 million annually in 2010. Unlike the programs in *Kern*, no funding has been provided directly for the *BIP* program itself; the State has instead directed schools to take money from a different program, itself significantly underfunded. The obvious

result is that funding is not available as a factual matter.[19]

Moreover, the *Kern* Court observed that if the additional mandated duties could *not* be accommodated by program funding, a reimbursable mandate would "likely" be found. (*Id.* at 747-748.) This is because "costs" would then be imposed. In the case of the *BIP Mandate*, the Commission determined in 2000 that "costs" *were* imposed, that special education funding was *not* intended to provide program funding for the *BIP Mandate*, and that reimbursement *was* legally required. (JA II:667-685.) *Kern* cannot be extended to justify the State's direction to education agencies to pay for state-imposed programs or services from funds for a different program that are clearly not available and which therefore require the agencies to use their local proceeds of taxes in violation of Section 6.

The only other case in which a court found that costs for an existing program could be "re-allocated" was *County of Los Angeles, supra,* 110 Cal.App.4th 1176, in which the State directed that funding already provided for police training be re-allocated to accommodate an additional domestic violence training requirement. The costs of the *BIP Mandate* cannot be "re-allocated" within existing program funding both because the identified funding is for a different program (special education) and because the program from which they are to recover costs was already significantly underfunded.[20]

---

[19] The *Kern* decision also discussed the voluntary nature of participation in most categorical programs and noted that it was *not* addressing the imposition of additional requirements when the local entity was not free to terminate participation. (*Id.* at 745, fn. 15.) By definition, state mandates such as the *GR* and *BIP Mandates* are not voluntary.

[20] Although the Court of Appeal cited *Grossmont Union High School Dist. v. State Dept. of Education* (2008) 169 Cal.App.4th 869, 876 for the proposition that a requirement to redirect resources is not a mandate,

Education Code section 56523(f) suffers from an additional problem. In a tacit acknowledgement that funding for special education was not actually available for the *BIP Mandate,* Education Code section 56523(f) required education agencies to "first" use special education funding for the costs of the *BIP Mandate*. The appellate court apparently relied on this directive in concluding that "special education funding is sufficient to cover the costs of the BIP Mandate." (Op. at 21.) While this may be true as a matter of mathematics, funding for special education is demonstrably insufficient to pay for the costs of that program. If the approach taken in section 56523(f) is accepted, as the Court of Appeal did, the State could simply designate a source of funding even though funding is factually unavailable, or it could designate that one source of funding be used for multiple purposes, even though the costs of all programs or services far exceed the amount of funding designated. In this case, the State has asserted that it has "provided funds" for the *BIP Mandate*. (JA III:819, fn. 9.) If section 56523(f) could be construed to "provide funds," it is difficult to see any limits on the State's ability to identify non-existent funding in order to eliminate its mandate obligations.

The State has already demonstrated a similar approach in Government Code sections 17581.8, 17581.9 and 17581.95 and 17581.96. Although the appropriations in these provisions purport to be payments for outstanding mandate debt, each appropriation also directs the schools to "prioritize" the use of these funds for multiple inconsistent purposes, including professional development, instructional materials, technology infrastructure, and other investments necessary to implement the Common Core standards.[21]

Grossmont merely cited *County of Los Angeles* and did not actually decide that issue (instead deferring to the Commission).

[21] In addition, funds are distributed on the basis of attendance (similar to unrestricted funding) rather than mandate claims.

This is a far cry from the requirement – on the books since 1989 – that funding for mandates be additional, sufficient and specifically intended to pay for the mandated program or service. (Gov. Code, §17556(e).) Whether the State designates funding that is unavailable or it designates one source of funding for multiple purposes that exceed the amount of funding available, *the local agency is required to use its own proceeds of taxes to make up the shortfall.* In both cases, the State is allowed to "force [the mandated program] on local governments without the state paying for [it]," which section 6 was designed to prohibit. (*Fresno, supra,* 53 Cal.3d at 487.)

D. Section 17557(d)(2)(B) Requires A Narrowing Construction to Meet Constitutional Requirements

Although the Legislature may establish reasonable procedures for the implementation of constitutional rights, such procedures may not unduly limit the underlying right. (*Kinlaw, supra,* 4 Cal.3d at 334.) A legislative enactment "may not abrogate or deny a right granted by the Constitution." (*Rose v. State of California* (1942) 19 Cal.2d 713, 725.) All legislation "must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." (*Chesney v. Byram* (1940) 15 Cal.2d 460, 463-34.)

Government Code section 17557(d)(2)B) allows the parameters and guidelines to be "updated" to reflect "offsetting revenues and offsetting savings" that "do not require a new legal finding that there are not costs mandated. . . .pursuant to. . . .section 17556." (Gov. Code, § 17557(d)(2)(B).) Once the Commission determines that costs have been imposed, the parameters and guidelines are intended to make the cost determination more specific so that individual claims can be submitted. (Gov. Code, §17557(a).) They serve to implement the mandate decision and have no independent vitality. The State's construction of Section 17557(d)(2)(B) allows the Commission's "cost"

determination, *i.e.*, its mandate determination, to be essentially overruled through the procedural device of an "update" to the parameters and guidelines, and allows the State to identify "revenues" that do not provide actual payment. Construed in this way, section 17556(e) violates Section 6.

It need not be read that broadly. Although Section 17557(d)(2)(B) allows the state to identify revenues that fail to meet the requirements of section 17556(e), the latter provision reflects *two* requirements: (1) that funding be additional revenue specifically intended to pay for the mandate and (2) that it be sufficient to cover the costs. Section 17557(d)(2)(B) could therefore be narrowly construed to retain the requirement that funding be additional and specifically intended for the mandate while allowing less-than-sufficient funding. The Court of Appeal failed to discuss whether section 17557(d)(2)(B) could be narrowly construed to apply to less-than-full funding.

The narrower interpretation would still be consistent with the language of that provision; indeed, the State acknowledged that narrowing constructions were plausible. (JA III:814-816.) Read as Petitioners suggest, section 17557(d)(2)(B) would permit funding that is less-than-sufficient within the meaning of section 17556(e) to nonetheless be reflected in the parameters and guidelines, allowing additional state revenues be subtracted out in the claims process.[22]

In contrast, the Court of Appeal's interpretation of section 17557(d)(2)(B) allows the State to identify revenues that neither provide actual, additional funding nor are specifically intended to fund the mandate, *i.e.*, it allows the State to identify existing revenues, or revenues made available for other purposes, as "offsetting revenues." Read that way, section 17557(d)(2)(B)

---

[22] This construction would still require that the funding represent additional moneys available and intended for the mandate.

provides no guarantee of actual payment or otherwise ensures that funds are available that can serve as reimbursement for local agency costs. In fact, the State has insisted that it be construed broadly to allow the State to identify *any* source of state funding as offsetting revenue – even funding that is demonstrably unavailable.

If a statute is susceptible of two constructions, one of which renders it unconstitutional (or raises serious constitutional questions), the court will adopt the construction that will render it free from doubt as to its constitutionality. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373; *In re Marriage Cases* (2008) 43 Cal.4th 757, 800, fn. 21; see also *CSBA I, supra*, 171 Cal.App.4th at 1215-16 [limiting scope of section 17556(f)].)

Petitioners submit that section 17557(d)(2)(B) as broadly construed by the Court of Appeal violates Section 6 and should be judicially limited in a way that would make it constitutional. "The interpretation of statutory language is a judicial function... While legislative declarations and characterizations are a factor we may consider in construing legislation, they are not binding...This is particularly true when the characterization is the product of an attempt to avoid the imposition of a financial responsibility." (*City of Sacramento v. California* (1984) 156 Cal.App.3d 182, 196-97, internal citations omitted, disapproved on other grounds in *County of Los Angeles v. State* (1987) 43 Cal.3d 46.)

II. THE STATE'S USE OF GOVERNMENT CODE SECTION 17557(d)(2)(B) WITH EDUCATION CODE SECTIONS 42238.24 AND 56523 VIOLATES SEPARATION OF POWERS PRINCIPLES

The State Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, §3.) The purpose of is to keep any one branch or individual from gaining too much power. (*Carmel Valley Fire*

Protection Dist. v. State of California (2001) 25 Cal.4th 287, 297.) "[N]one of the coordinate branches of our tripartite government may exercise power vested in another branch." (*Cirone v. Cory* (1987) 189 Cal.App.3d 1280, 1286.)

When the Legislature attempts to override a judicial determination, it "disrupts the judicial system by retaining a selective power to override individual adjudication." (*Mandel v. Myers* (1981) 29 Cal.3d 531, 548-49.) This principle applies equally to the Commission – a quasi-judicial body with the exclusive authority to adjudicate whether a state mandate exists. (*CSBA I, supra,* 171 Cal.App.4th at 1200.)

The Commission rendered final mandate determinations for both the *GR* and *BIP Mandates*, *i.e*, it determined in both cases that the State imposed costs that required reimbursement. In both cases, the Commission rejected the argument that the funding identified in the 2010 legislation was legally permissible "offsetting revenue" for the state-imposed costs. Those decisions are final, including judicial review.

The 2010 legislation is a transparent attempt to overturn these final administrative and judicial decisions by providing a procedural mechanism that allows the State to use the parameters and guidelines to negate the mandate decision along with legislative declarations that overrule the Commission's determinations and direct that unrestricted funding shall offset the *GR Mandate* costs (Ed. Code, §42238.24) and special education funding shall offset *BIP Mandate* costs. (Ed. Code, §56523(f).)

The courts have long held that legislative acts disclaiming a mandate or directing the Commission to make a specific decision are unlawful. (See, *e.g.*, *City of Richmond, supra,* 64 Cal.App.4th at 1201-02 [invalidating legislative declaration that mandate was not created]; *County of Los Angeles v. Comm. on State Mandates* (1995) 32 Cal.App.4th 805, 818 [same].) Legislative declarations that certain funding eliminates the State's mandate reimbursement

obligation despite final Commission decisions to the contrary represent similar attempts to legislatively require the Commission to make a specific mandate determination favorable to the State. [23]

The Court of Appeal's conclusion that this was permissible because it was "prospective" only (Op. at 24) reflects a fundamental misunderstanding of the relationship between the mandate determination and the use of parameters and guidelines to implement the reimbursement determination. (See, *e.g.*, Op. at 27 ["these legislative changes do not question whether the [] mandate exists; instead they update the parameters and guidelines for reimbursement."].)

It is only after the Commission "determines there are costs mandated by the state pursuant to Section 17551" that the "amount" is determined through the parameters and guidelines for reimbursement." (Gov. Code, §17557(a).) The mandate determination therefore necessarily includes a finding that the local agency is incurring costs requiring reimbursement; the "update" allowed by the State's construction of section 17557(d)(2)(B) allows it to direct the Commission to make the opposite finding – that there are no costs requiring reimbursement. And the appellate court agreed that the approach taken in 2010 could be used to effectively overrule the mandate determination and negate the right to reimbursement on a prospective basis, despite the fact that the "update" to the "parameters and guidelines" is based on the very same funding already rejected as offsetting revenue in the mandate determination. The Court's construction would dramatically limit the finality of Commission decisions.

In the case of the *GR* and *BIP Mandates*, the Commission has already determined that each *imposes costs that require reimbursement* under Section 6.

---

[23] See, *e.g.*, the Commission's acknowledgement that the 2010 legislation was intended to "negate" its earlier determination (JA II:715-717), but concluding that it was required to presume the constitutionality of section 56523(f) under article III, section 3.5. (JA II:726.)

The absence of funding sufficient to pay these costs was a necessary element of these determinations, *i.e.*, if the funding proposed by the State had satisfied Government Code section 17556(e), the Commission would have been required to find that there were no costs requiring reimbursement. The fact that education agencies were required to pay the costs of the mandate out of their own local proceeds of taxes was similarly a foundational aspect of each mandate determination; if the mandates had not impacted the districts' proceeds of taxes, there would have been no costs subject to reimbursement. (*Fresno, supra,* 53 Cal.3d at 486-487.) Allowing the State to identify the very same funding under section 17557(d)(2)(B) to eliminate reimbursement abrogates the finality of those decisions by allowing the State to collaterally attack – and change – an essential finding in those decisions.

In *CSBA I,* the Legislature directed the Commission to reconsider certain mandate decisions. Like the 2010 legislation, the reconsideration statutes operated "prospectively" in the sense that any new Commission decision would only apply from the date of reconsideration forward. (*CSBA I, supra*, 171 Cal.App.4th at 1199.) The Court nonetheless concluded that the "effect" of the legislative directive was to nullify the Commission's decision by allowing it to collaterally attack and re-litigate essential elements of that decision. (*Id.* at 1198-1202.) "Such a case-by-case legislative abrogation of Commission decisions violates the separation of powers doctrine." (*Id.* at 1201.)

While it is true that the 2010 legislation did not directly set aside the original mandate determinations, it had exactly the same practical effect by directing the Commission to adopt new "parameters and guidelines" that required the Commission to find "costs that it had previously concluded were reimbursable costs were no longer reimbursable." (*Id.* at 1192; see also Pets' Supp. Brief.) A legislative declaration negating reimbursement *is* a disregard of the Commission's mandate decision. *CSBA I* discussed *Carmel Valley Fire*

Protection Dist. v. State (1987) 190 Cal.App.3d 521, in which the Commission made a final mandate determination and the State refused to pay. (*CSBA I,* 171 Cal.App.4th at 1201-02.) The court analogized the reconsideration legislation to an outright refusal to pay, saying, "[a]s in *Carmel Valley*, the State. . . .is not entitled to nullify the finality of the prior Commission decisions, whether *by refusing to fund a mandate* or directing the Commission to reconsider." (*Id.* at 1202, emphasis added.) As in *CSBA I* and *Carmel Valley*, the "effect" of the 2010 legislation was a similar nullification of the finality of the Commission decisions by requiring the Commission to revisit and revise findings already made in an effort to justify non-payment. It represents "[a] transparent attempt[] to do indirectly that which cannot lawfully be done directly." (*Fresno,* 53 Cal.3d at 493.)

Implicitly acknowledging that this use of section 17557(d)(2)(B) "abrogates" the Commission's prior determination in a way that "*does* interfere with antecedent rights and obligations" (Op. at 26, emphasis added), the Court of Appeal cited *CSBA I* for the proposition that a mandate decision may be rendered obsolete by changes in the law and material circumstances that originally justified the Commission's decision. (*Id.*, citing *CSBA I*, 171 Cal.App.4th at 1202.) That principle is inapplicable here.

First, neither section 42238.24 nor 56523(f) reflects any change in the underlying mandate obligation that renders the original decision "obsolete;" indeed, the State has never made this argument. The only change made was the 2010 legislative direction to override the prior Commission and court findings in order to defeat the right to reimbursement. That approach was held to violate separation of powers in *CSBA I* and applies equally here.

Second, it is true that *CSBA I* left open the possibility that procedures could be developed to allow the Commission to revise a final determination (*Id.* at 1203), and the Legislature subsequently purported to adopt such a procedure.

(Gov. Code, §17570.)[24] However, the State chose not to initiate the new test claim procedure for these mandates, instead attempting to defeat payment through the offsetting revenue language of section 17557. (See JA II:715-720 [distinctions between these provisions].) Indeed, the State is unlikely to use section 17570 in the future as long as section 17557(d)(2)(B) can effectively be used to eliminate mandates without the need to set aside the original mandate determination. Although the Court acknowledged that the State could not order the Commission to set aside its previous mandate decisions, what the Legislature did here is indistinguishable – the 2010 legislation eliminates *payment* for those mandates, using legislative directives that are specifically designed to override the very basis of the mandate decisions. The use of section 17557(d)(2)(B) in this manner violates separation of powers principles.

CONCLUSION

Petitioners respectfully request that the Court of Appeal's decision affirming the constitutionality of Government Code section 17557(d)(2)(B) be reversed, and that that provision be declared contrary to article XIIIB, section 6 as applied in Education Code sections 42238.24 and 56523(f) and the latter statutes also be declared contrary to article III, section 3 insofar as they impermissibly seek to overturn final quasi-judicial determinations of the Commission on State Mandates.

///

///

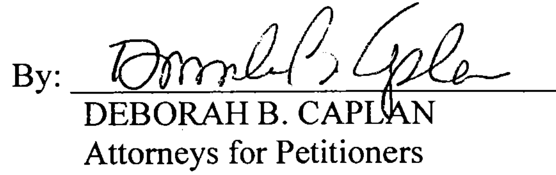
---

[24] The constitutionality of Government Code section 17570 is the subject of the third cause of action and was remanded by the Court of Appeal for further proceedings.

Dated: May 29, 2018

Respectfully submitted,

OLSON HAGEL & FISHBURN LLP
Deborah B. Caplan
Richard C. Miadich

By: 
DEBORAH B. CAPLAN
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

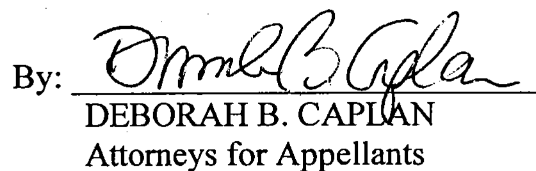
WITH RULE 8.204(c)(1) OF CALIFORNIA RULES OF COURT

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 13,921 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: May 29, 2018

Respectfully submitted,

OLSON HAGEL & FISHBURN LLP
Deborah B. Caplan
Richard C. Miadich

By: 
DEBORAH B. CAPLAN
Attorneys for Appellants

CERTIFICATE OF SERVICE

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

I am a citizen of the United States, over the age of 18, and not a party to the within action. My business address is 555 Capitol Mall, Suite 400, Sacramento, California, 95814. On this date, I served a true and correct copy of the following entitled documents:

OPENING BRIEF ON THE MERITS

on the parties in said action as indicated below:

__X__ BY ELECTRONIC SERVICE: By filing the foregoing with the clerk of the California 1st District Court of Appeal by using its True Filing system, which electronically serves counsel for each party.

__X__ BY MAIL: By placing the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

(served via True Filing electronic service)
Seth E. Goldstein, Deputy Attorney General
Office of the Attorney General
1300 I Street, Suite 125
Sacramento, CA 95814
Tel: 916.327.2364/Fax: 916.324.8835
Email: Seth.Goldstein@doj.ca.gov

Counsel for Respondents
State of California, John Chiang in his official capacity as California State Controller, Michael Cohen in his official capacity as Director of the California State Department of Finance

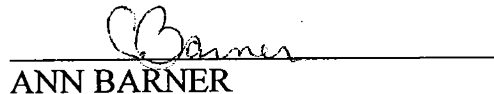
(served via True Filing electronic service)
Camille Shelton, Chief Legal Counsel
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Tel.: 916.323.3562/Fax: 916.445.0278
Email: camille.shelton@csm.ca.gov

Counsel for Respondent
Commission on State Mandates

(served via True Filing electronic service)
Clerk of the Court
California Court of Appeal
First Appellate District, Division 3
350 McAllister Street
San Francisco, CA 94102

(served via First Class mail)
Clerk of the Court
RE: Case No. RG 11554698
Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612

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 May 29, 2018 in Sacramento, California.



ANN BARNER