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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COAST COMMUNITY COLLEGE DISTRICT, et al.
Appellants and Petitioners

v.

COMMISSION ON STATE MANDATES,
Respondent,

DEPARTMENT OF FINANCE
Real Party in Interest.

EXEMPT FROM FILING FEES (Gov. Code, § 6103)

Case No. S262663

Third District Court of Appeal, Case No. C080349
Sacramento County Superior Court, Case No. 34-2014-80001842
Honorable Christopher E. Krueger, Judge

REPLY TO ANSWER TO PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COAST COMMUNITY COLLEGE DISTRICT, et al. Plaintiffs and Appellants, v. COMMISSION ON STATE MANDATES, Defendant and Respondent;	No. S262663 Third District Court of Appeal No. C080349
DEPARTMENT OF FINANCE, Real Party in Interest and Respondent.	

The Commission on State Mandates ("Commission") respectfully submits its reply to the answer filed by the community college districts ("Colleges").

I. THE ISSUE WHETHER THE COURT OF APPEAL LACKED JURISDICTION TO MAKE FINDINGS UNDER ARTICLE XIII B, SECTION 6 OF THE CALIFORNIA CONSTITUTION ON STATUTES THAT WERE NEVER PLED OR WERE THE SUBJECT OF A PRIOR FINAL COMMISSION DECISION WAS NOT WAIVED AND IS PROPERLY RAISED IN THE COMMISSION'S PETITION FOR REVIEW.

The Commission's petition for review raises two jurisdictional issues *first* identified in the court of appeal's opinion, both of which are incorrect as a matter of law: (1) the court of appeal's remand of Education Code sections 76300 through 76395, and (2) the court of appeal's finding that section 54626(a) of the title 5 regulations imposes a new program or higher level of service because it implements Education Code section 25430.12, which imposes the same requirement as the regulation and was enacted after January 1, 1975. The Colleges did not plead Education Code sections 25430.12, and 76300 through 76395, and never alleged that these code sections were the source of a reimbursable state-mandated program.

In addition, Education Code section 76300 was the subject of a prior, final decision of the Commission, which cannot be re-heard. (*California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1202.) Therefore, neither the court of appeal, nor the Commission, have jurisdiction to determine whether these statutes impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution.

The Colleges contend, however, that the Commission did not raise or litigate these jurisdictional issues before either the trial court or the appellate court. (Answer at pp. 6 and 10-13.) Characterizing the issues as affirmative defenses, the Colleges urge this Court to deny review on the ground that the failure to raise them in the first instance deems them waived. (Answer at p. 11-12.) The Colleges postulate that if such issues are not defenses, they cannot now be raised. (Answer at p. 13.) The Colleges' answer is misleading and their analysis, based on inapplicable authority, is faulty.

The Colleges fail to take into account the facts. In the Commission's decision, and throughout all court proceedings, the Commission's position has been that California Code of Regulations, title 5, section 54626(a), as added in 1976, was correctly denied since the requirements imposed by that regulation were previously required by former Education Code section 25430.12, as added in 1975, and therefore the requirements in the regulation are not new. (Stats. 1975, ch. 816; AR, p. 151.) The Colleges did not plead former Education Code section 25430.12, or Statutes 1975, chapter 816, in their test claim. (AR, pp. 459 and 523 et seq., for the test claim filings; Commission's Points and Authorities in Opposition to Petition for Writ of Mandate, page 8; Commission's Respondent's Brief, page 45.) The court of appeal acknowledged that Education Code section 25430.12 was not pled; however, the court of appeal found that the

requirement in section 54626(a) of the regulations was new because it implemented Education Code section 25430.12, a statute enacted after January 1, 1975. (*Coast Community College v. Commission on State Mandates* (2020) 47 Cal.App.5th 415, 464, fn. 7, and 468.) Neither the court of appeal nor the Commission have jurisdiction to determine whether Education Code section 25430.12 contains a mandated new program or higher level of service: Jurisdiction is limited to section 54626 of the regulations and the requirement imposed by that regulation is not new. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 75, 98; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189.)

With respect to Education Code sections 76300 through 76395, the Commission is not asserting the jurisdictional issue as an affirmative defense because these code sections were never pled in the test claims, and were not identified in the petition for writ of mandate or any of the briefs filed by the Colleges in this case. The law requires that the test claim specifically identify each section of a chaptered bill or executive order, and the effective date and register number of regulations, alleged to impose a mandate. (Gov. Code, § 17553(b)(1); Cal. Code Regs. tit. 2, former § 1183(d)(1).) The law also requires that the test claim be filed within the statute of limitations. (Gov. Code, § 17551.) The caption of the College's test claim pleads section 51012 of the regulations (which provides community college districts "*may* only establish such mandatory student fees as it is expressly *authorized* to establish by law"), but does not plead or identify Education Code sections 76300 through 76395. (AR, pp. 524, 527.) The narrative of the test claim generally refers to Education Code sections 76300 through 76395, but only in the context of section 51012 of the regulations: "This condition alleges mandated costs reimbursable by the

state for community college districts to establish and implement policies and procedures to ensure that the collection of student fees complies with the law (generally, Education Code sections 76300 through 76395)." (AR, pp. 577-578.)[1] Following the receipt of the test claim, the Commission issued a notice of complete test claim inviting comments from the Colleges and all interested parties, which identifies the statutes and regulations pled and within the jurisdiction of the Commission. That notice identifies only section 51012 of the regulations, and not Education Code sections 76300 through 76395. (AR, pp. 4986-4991.) The Colleges did not object or comment on the notice of complete test claim. In response to the draft staff analysis of the test claim, the Colleges filed comments on section 51012 of the regulations, but did not mention Education Code sections 76300 through 76395:

> The subject of this program is Title 5, CCR, Section 51012. Section 51012 is the minimum condition that requires the district governing board to only establish such mandatory student fees as expressly authorized by law. The DSA does not analyze Section 51012. Education Code Section 70902, subdivision (b)(9), requires the district governing board to establish student fees as is required or authorized by law. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

(AR, p. 3704.) In addition, had the Colleges wanted to amend the test claim to include Education Code sections 76300 through 76395, they could have done so up until the time of the Commission's hearing on the claim. (Gov. Code, former § 17557(c).) At no time during the proceedings before the Commission, or before the courts, have the Colleges alleged that they

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[1] Section 51012, however, does not require community colleges to establish and implement policies and procedures, as alleged, and does not reference statutes, including Education Code sections 76300 through 76395. The court of appeal correctly denied section 51012 of the regulations.

were pleading Education Code sections 76300 through 76395 and the Colleges do not dispute this fact.

These jurisdictional issues arose solely from the court of appeal, beginning with the court's tentative decision issued March 4, 2020. The Commission addressed the issues at oral argument on March 16, 2020, and again through a petition for rehearing filed April 17, 2020. This Court is not barred from taking up these issues under California Rules of Court, rule 8.516(b) ("The Supreme Court may decide any issues that are raised or fairly included in the petition or answer.")

These issues of law affect every test claim filed with the Commission, are of widespread importance to the public, and the issues can be fully addressed by all parties on review. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6.)

II. CLARIFICATION OF THE STANDARDS OF LEGAL AND PRACTICAL COMPULSION AND THEIR APPLICATION TO SUPPORT A FINDING OF A STATE-MANDATED PROGRAM UNDER ARTICLE XIII B, SECTION 6 OF THE CALIFORNIA CONSTITUTION AFFECTS EVERY TEST CLAIM FILING AND IS, THEREFORE, OF WIDESPREAD IMPORTANCE TO THE PUBLIC.

The Commission's petition seeks review of the important question of law whether state requirements imposed as a condition entitling local government to the continued receipt of state aid constitutes legal compulsion, or requires a showing of practical compulsion, to support a finding of a state-mandated program under article XIII B, section 6 of the California Constitution. (Cal. Code Regs., tit. 5, §§ 51000, 51006, 51014, 51016, 51018, 51020, and 51025 ("minimum conditions").)

The Colleges assert that there are no grounds for the Commission to seek this Court's review of that issue. (Answer at p. 5-6, and 14-22.) They argue that the court of appeal properly applied the legal compulsion

standard for determining if the regulations are state mandates within the meaning of article XIII B, section 6 of the California Constitution. (Answer at p. 14-15, 17-18, and 21-22.) The Colleges, however, repeatedly point to the conclusion that they had no true choice but to comply with the minimum conditions. (Answer at p. 16-17, 19, 21.) In so doing, the Colleges prove exactly why the Commission is seeking this Court's review: Having "no true choice" is a factor used to establish practical compulsion and not legal compulsion. Practical compulsion requires substantial evidence in the record before a mandate finding can be made. (See analysis *infra*.)

The standards for legal compulsion and practical compulsion have to be clear as they must be applied to every test claim before there can be a finding of a state-mandated program under article XIII B, section 6. This is critical to the functioning of the Commission and to the local governments seeking reimbursement.

In *City of Sacramento* (1990) 50 Cal.3d 51, this Court reviewed a state statute enacted to comply with federal law, which extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. (*Id.* at pp. 58-59.) States that did not comply with the federal law faced a "stick," a loss of a federal tax credit and an administrative subsidy, which was imposed to induce compliance. (*Id.* at pp. 57-58.) The state argued that strict *legal* compulsion was not required to find a federal mandate and that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic "discretion" to refuse. (*Id.* at p. 71.) This Court agreed setting forth an element of practical compulsion: where there is no reasonable alternative to the scheme or no true choice but to participate. (*Id.* at pp. 73-76.)

In *Department of Finance v. Commission on State Mandates (Kern High School Dist.*) (2003) 30 Cal.4th 727, 752, this Court found that a state mandate could be found without strict legal compulsion, but only if local government faces certain and severe penalties, such as double taxation or other draconian consequences. *Kern* involved state open meeting laws that were amended to require compliance by school site councils and advisory bodies formed under state and federal grant programs. (*Id*. at p. 730.) This Court held that school districts elected to participate in the programs to receive the associated funding and, thus, were not legally compelled to incur the notice and agenda costs. (*Id*. at pp. 744-745.) Relying on *City of Sacramento*, this Court set forth another factor for practical compulsion: facing certain and severe penalties, such as double taxation or other draconian consequences. (*Id*. at p. 754.)

In *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, the court held that the Peace Officers Procedural Bill of Rights Act (POBRA) did not constitute a state-mandated program on school districts. The court concluded that school districts are authorized, but not required, by state law to hire peace officers and, thus, the court recognized there was no legal compulsion to comply with POBRA. (*Id.* at p. 1368.) The court noted that there could be a finding of a state mandate if, as a practical matter, exercising the authority to hire peace officers is the only reasonable means to carry out a school district's core mandatory functions. Relying on *City of Sacramento*, the court emphasized that practical compulsion requires a concrete showing in the record that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences, leaving districts no true choice but to comply in order to carry out their core essential functions. (*Id.* at p. 1367.)

Against this backdrop of case authority, the court of appeal found the minimum conditions regulations constitute legal compulsion when viewed in light of the core functions and mission of the Colleges. Minimum conditions, however, use *conditional* language which requires a practical compulsion analysis focusing on whether there is concrete evidence showing that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences leaving no true choice but to comply. This conditional language (Cal. Code Regs., tit. 5, § 51000, which states, "The provisions of this Chapter are adopted under the authority of Education Code Section 70901(b)(6) and comprise the rules and regulations fixing and affirming the minimum conditions, satisfaction of which entitles a district maintaining community colleges to receive state aid for the support of its community colleges.") is unlike the language in other regulations pled and approved in this case, which strictly compel the Colleges to act (i.e., Cal. Code Regs., tit. 5, § 55750, which states, "The governing board of a district maintaining a community college *shall* adopt regulations consistent with this [subchapter]. The regulations *shall* be published in the college catalog under appropriate headings and filed with the Chancellor's Office as required by section 51002 of this [division]." (Emphasis added.)) When the Legislature or state agency uses materially different language in the provisions addressing the same or related subjects, the normal inference is that the Legislature or the state agency intended a difference in meaning. (*People v. Trevino* (2001) 26 Cal.4th 237, 242.) Thus, based on the plain language of the minimum condition regulations, the state is not legally compelling performance. The plain language provides a choice, used by the state to induce compliance, and therefore the practical compulsion standard applies in this case.

The Commission found no evidence in the record and no provision in the law to support a finding that a potential loss of state aid is a certain or severe consequence leaving the Colleges no choice but to comply with the minimum condition regulations.[2] The law provides that the Chancellor may, but is not required to, withhold state aid if a College fails to comply with the minimum conditions. (Cal. Code Regs., tit. 5, §§ 51100, 51102.) Thus loss of state aid is not reasonably certain to occur, or may not be considered severe.

The Colleges provided no evidence regarding the amount of state aid or the amounts of other financial sources such as property tax revenue, student fees, and federal funds received to carry out their program. The apportionment of state aid depends on a number of factors including the number of colleges in the district, the courses offered, and the enrollment. Without such evidence, the Commission could not determine if a potential loss of state aid leaves the Colleges no true choice but to comply with the minimum conditions.

Although most Colleges receive some state aid annually, some do not receive state aid and obtain all of their funding through student fees and local property taxes. The administrative record in this case identifies four of these basic aid districts that existed in 2008, when the test claim was pending with the Commission: Marin, Mira Costa, South Orange, and "at

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[2] The Colleges point to the test adopted by the Commission asserting that it is based on a "misreading and misapplication" of law. (Answer at pp. 7 and 15.) The Colleges are in error. The basis for the test is established on well-founded law, although it may not be artfully drafted in the Commission's decision. The question whether costs are reimbursable under article XIII B, section 6 of the California Constitution is purely a question of law, and not a question of equity, requiring de novo review. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64 and 71, fn. 15; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.)

times" San Mateo Community College Districts (a litigant in this case).[3] If one of these basic aid districts fails to comply with the minimum condition requirements, there are no penalties at all under the test claim statutes and regulations.

The court of appeal's decision confuses the state mandate issues of legal and practical compulsion and allows the finding of a state-mandated program on conditional language without concrete evidence in the record supporting that finding. In addition, the court of appeal's reliance on the core functions of the Colleges to find legal compulsion will allow local governments to simply point to their core function to broadly argue that any new requirement, even if conditional based on its plain language, is now legally compelled by state law, regardless of whether they are forced to comply with the condition or not. The decision has already been cited by a county in another test claim filed with the Commission to apply the court of appeal's broad interpretation of legal compulsion to support the argument that requirements triggered by local decisions (i.e., vote by mail requirements imposed on all elections, including special elections called at the discretion of local government) are mandated by the state.[4]

III. CONCLUSION

For these reasons, the Commission respectfully requests the Court to grant the Commission's petition for review to settle these important questions of constitutional law and to correct jurisdictional flaws in the court of appeal's decision.

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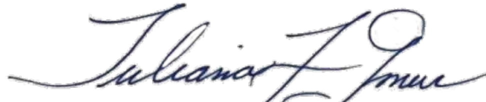
[3] Comments filed on the test claim by the Chancellor's Office on July 7, 2008. (AR, p. 3429.)

[4] Comments filed by the County of San Diego in 19-TC-01 (*Vote by Mail Ballots, Prepaid Postage*) https://csm.ca.gov/matters/19-TC-01/doc10.pdf.

Dated: July 10, 2020

Respectfully submitted,



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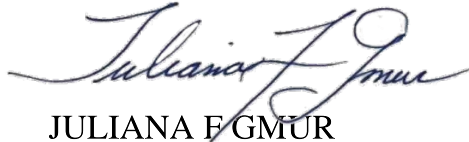
Respectfully submitted,



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I hereby certify that I am over the age of 18; and am employed in the County of Sacramento, where the mailing took place. My business address is located at the Commission on State Mandates, 980 Ninth Street, Suite 300, Sacramento, California, 95814. The Commission on State Mandates' electronic service address is litigation@csm.ca.gov.

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CARLA SHELTON
Sr. Legal Analyst

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STATE OF CALIFORNIA
Supreme Court of California

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