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

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

The State's Answer Brief on the Merits ("ABM") makes no effort to reconcile the challenged 2010 legislation with the language of article XIIIB, section 6 (Cal. Const., art. XIIIB, §6 ["Section 6"]) and the implementing legislation. Instead, the State simply restates generalities about its authority to set priorities for state money and claims that it doesn't have to provide "additional funding if the mandate is reimbursed." (ABM, p. 9.) These statements do not address the issues in this case.

Article XIIIB, section 6 requires the State to provide "a subvention of funds to reimburse" the costs of any new programs or services it imposes on local governments, including school districts. (Cal. Const., art. XIIIB, §§6&8.) Legislation enacted in 1989 allowed offsetting revenue to be identified but only where the State provided "*additional* revenue that was *specifically intended* to fund the costs of the mandate in an amount sufficient" to pay those costs. (Gov. Code, §17556(e).) Section 6 has thus been construed for decades to require actual reimbursement except in the narrow circumstances described in section 17556(e).

In 2010, the State adopted Government Code 17557(d)(2)(B), which allows the State to avoid mandate reimbursement by identifying purported "offsetting revenues" in the parameters and guidelines that neither provide

additional money nor are specifically intended to pay for the mandated costs. This seemingly small procedural change is profound. Once mandate reimbursement is de-coupled from any requirement for actual payment or the need for funding to be specifically intended for mandate costs, the State is effectively permitted to identify virtually any source of funding to local governments and deem it "offsetting revenue." Given the multiple forms of state funding to local government, it is not difficult to see how the State could easily circumvent its reimbursement obligation under Section 6. The State does not dispute this nor does it explain how the 2010 change can be reconciled with the State's longstanding construction of Section 6.

It appears clear that Government Code section 17557(d)(2)(B) – adopted in a trailer bill without legislative hearings or reports – was not enacted to address any perceived flaw in the prior law but is yet another effort to avoid mandate reimbursement. The State previously argued that it could direct schools to use education funding – both unrestricted and restricted – to pay mandate costs, but its arguments were rejected by the Commission on State Mandates (the independent, quasi-judicial body authorized to make such determinations) and the courts. The 2010 legislation was therefore specifically designed to allow the State to combine Government Code 17557(d)(2)(B) with other legislative directives

identifying "offsetting revenues" – in this case, Education Code sections 42238.24, which directs schools to use their general unrestricted funding to pay the costs of the *Graduation Requirements ("GR") Mandate*, and 56523(f), which directs schools to use non-existent special education funding to pay the costs of the *Behavioral Intervention Plans ("BIP") Mandate*. The 2010 legislation thus allowed the State to do the very thing previously rejected by the Commission and the courts as contrary to Section 6.

The State claims that these Education Code provisions provide funding intended to pay for the costs of performing the mandate and that funding has in fact covered all of the mandate's costs. (ABM, p. 22.) This statement is contrary to the longstanding understanding of those terms. It is undisputed that neither education statute is an actual appropriation and neither provides "additional" money. Nor is the referenced funding "specifically intended" to pay for mandated costs in the ordinary use of that term. The State apparently believes that funding can be considered "specifically intended" to pay for mandate costs so long as the Legislature tells local governments to use money received for other purposes to pay for the mandate costs. This case therefore calls on the Court to clarify whether the requirements for additional funding specifically intended to pay for the

mandate costs are part of the constitutional requirement – particularly where the funding identified is demonstrably unavailable – and what those terms mean. A related issue is whether the unrestricted education funding provided by the State to school districts and county office of education should be treated as state funds or local funds for purposes of article XIIIB.

It is important to keep in mind that while the Constitution requires reimbursement for state-imposed mandates, it does not create mandates or require the State to impose any particular program or service. The imposition of a mandated program is completely a matter of State decision-making. As the Legislative Analyst has repeatedly pointed out, the State can reduce its reimbursement obligation significantly *simply by eliminating the mandated program* (as it eventually did with the *BIP Mandate*). What the State cannot do, however, is ignore its constitutional obligation to reimburse local governments for mandate costs once it is determined that a mandate has been imposed.

Further, the creation of a complex cost-based reimbursement system, which takes years to litigate and requires extensive book-keeping and reporting, has also been completely a matter of State decision-making.

(Gov. Code, §§17500 *et seq.*)[1] The State asserts numerous problems with the mandate system (ABM, pp. 14-15), but the State itself has created the system and required local governments to use it. The 2010 legislation essentially requires local governments to undertake these lengthy and expensive proceedings only to tell them at the conclusion that they must use their own money to pay the costs of the mandates. This cannot be what Section 6 envisioned.

ARGUMENT

I. SECTION 17557(d)(2)(B) AS CONSTRUED BY THE STATE AND LOWER COURTS IS CONTRARY TO ARTICLE XIIIB, SECTION 6

The State construes Government Code section 17557(d)(2)(B) to allow it to identify virtually any funding – for any program, and whether actually available or not – for payment of mandate costs. If permitted, it would reverse decades of mandate law and could virtually eliminate reimbursement under Section 6 for schools. The State's broad construction should be rejected in favor of a narrow construction that affirms the right to reimbursement.

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[1] The State points to variations in reimbursement rates, but a cost-based system will inevitably have variations because costs to comply with the mandate will vary among districts.

A. Section 6 Requires That Local Governments be Made Whole for Mandate Costs

The plain language of Section 6 requires "a subvention of funds to reimburse the local government." The original administrative implementation allowed only for actual payment. A 1989 amendment allowed offsetting revenues to be identified but only where the State, the statute or executive order creating the mandate also provided "*additional* revenue that was *specifically intended* to fund the costs of the mandate in an amount sufficient" to pay those costs. (Gov. Code, §17556(e).) The legislative report made clear that the additional funding had to result in "no net costs" to the local government. (JA II:489.) This provision was further amended in 2004 to allow funding to be provided in *an appropriation* in a Budget Act or other bill." (Stats. 204, ch. 895, § 14.) The requirement for "an appropriation" demonstrates the understanding as recently as 2004 that an actual payment was required. For over three decades, Section 6 has thus been construed to require either an actual payment or additional revenue specifically intended for the mandate.

The language of section 17556(e) reflects the understanding that, unless the funding is "additional" and "specifically intended" for the mandate, the State could simply designate existing funding intended for other purposes in order to avoid its mandate obligation. In fact, that is

precisely what section 17557(d)(2)(B) now does by directly authorizing the State to identify funding *that would not satisfy section 17556(e)* as mandate "reimbursement."

The State describes petitioners' argument that Section 6 requires actual payment as a "novel theory" despite the fact that this has been the law for decades. Indeed, it is the State that has come up with its own "novel theory" in claiming that the statutes at issue "have already provided funding specifically intended to pay for the costs" of the mandate and "that funding has in fact covered all of the mandate's costs." (ABM, p. 22.) The "funding" identified by the State has *not* been provided to reimburse for mandated costs; it has been provided for other purposes. The State has simply directed schools to use existing funding to pay the mandated costs. Moreover, the districts are *not* made whole by this sleight-of-hand; they have additional mandated *costs* but no more money after the enactment of the "offset" statutes. To the extent they are required to pay the mandated costs out of their other funding, the State has effectively shifted those costs to the local entity.

The question presented by this case is whether the designation of funding provided for other purposes (and/or inadequate funding) constitutes "reimbursement" within the meaning of Section 6. It is undisputed that

section 17556(e) has answered that question in the negative since 1984. The State argues that section 17556(e) can be disregarded because the Legislature can always enact a new statute, and the real issue is reimbursement, not whether a mandate exists. (ABM, p. 27, fn. 7.) Both arguments miss the point. [2]

The State never suggests that section 17556(e) incorrectly construes the constitutional reimbursement requirement; in fact, it concedes the point in trying to distinguish the mandate determination from the parameters and guidelines. This concession is significant. If Section 6 requires actual payment except where additional funding is specifically provided for the mandate, the State cannot enact "procedures" that would unduly restrict the

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[2] The State also questions whether Government Code section 17556(e) is truly a "contemporaneous" construction of the constitutional language. (ABM, p. 26, fn.7.) As the State acknowledges, in 1984, the Legislature enacted a "comprehensive statutory scheme to resolve issues relating to claims under section 6." (ABM, p. 12.) That legislation had no provision for offsetting revenues. Section 17556(e) provided that in 1989. The initial implementation was thus even *more limited in terms of allowing offsets.* In any event, the current language was added almost 30 years ago and the State has yet to articulate any reasoning for rejecting this longstanding construction. (See *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 190 [pattern of legislative action over time evidences consistent legislative interpretation and should be accorded great weight].)

underlying right. (*Kinlaw v. State* (1991) 54 Cal.3d 326, 334; *Rose v. State of California* (1942) 19 Cal.2d 713, 725.)

The State suggests that since section 17556(e) provides for offsetting revenues and is constitutional, section 17557(d)(2)(B) is likewise constitutional. (ABM, p. 23.) This argument ignores the actual text of section 17556(e), which construes Section 6 to require the actual payment of mandated costs *unless* the State provides "additional revenue. . . .specifically intended to fund the costs of the state mandate." In other words, under section 17556(e), it is uncontested that *identifying existing funding for non-mandate purposes does not satisfy Section 6*. In expressly allowing for offsetting revenues that would not satisfy section 17556(e), section 17557(d)(2)(B) removes the very limitations that were deemed constitutionally necessary to allow any offsets to substitute for actual payment.

The State also appears to argue that it can accept the requirements in section 17556(e) for purposes of the mandate determination, but circumvent those requirements through a cleverly-worded provision in the parameters and guidelines because they are different determinations. Petitioners disagree.

In the statutory scheme, the parameters and guidelines (section 17557) are designed to *implement* the mandate determination (sections 17514 and 17556). Unless the two statutes treat offsetting revenues (or reimbursement more broadly) similarly, the State can effectively overrule the mandate determination through the parameters and guidelines. Even though the Commission has determined that a mandate imposes *costs that require reimbursement*, the State is allowed to use section 17557(d)(2)(B) to avoid reimbursement by creating the fiction that *no costs are incurred* because of the existence of other funding that would have been rejected in the mandate determination. Instead of implementing the mandate determination, the parameters and guidelines subverts the mandate determination.[3]

While the State argues that reimbursement is different from the mandate determination, it cites only cases that focus on whether a mandate exists, not whether reimbursement is required. In fact, no case supports a

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[3] The State misconstrues the current law when it states that "additional" payment is not required when "offsetting revenue" is identified. (ABM, p. 24.) Local governments have only been required to identify offsetting revenues where funding is actually available from other sources and the local government actually uses it to pay mandate costs. This is a far cry from what the State is attempting to require in Education Code sections 42238.24 and 56523(f).

standard for reimbursement that differs from the standard for the initial mandate determination. In the case relied upon primarily by the State, *Dept. of Finance v. Comm. on State Mandates* (2003) 30 Cal.4th 727 ("*Kern*"), this Court concluded that no mandate was created because the programs at issue included administrative funding that was sufficient to pay any administrative costs associated with the notice and agenda requirements. (*Kern, supra*, 30 Cal.4th at 747.) Nothing in *Kern* supports the distinction between the mandate determination and reimbursement that the State asserts.

First, in *Kern*, the Court was not focused on "reimbursement" for a mandate but on whether programmatic funding included funding that could cover mandated costs in the same program. Whether programmatic funding was available for additional administrative costs imposed *by those same programs* was thus central to the Court's analysis. Here, the State is trying to extend the Court's holding to allow it to identify funding for other purposes, *i.e.*, funding *unrelated* to the mandated costs.

Second, in *Kern,* the Court specifically noted that the administrative funding that was provided was sufficient to cover the costs at issue, and it noted that if funding were insufficient, a reimbursable mandate would "likely" be found. (*Id.* at 747-748.) *This is because "costs" would then be*

imposed. Here, the State is trying to extend the Court's holding to allow it to direct schools to use demonstrably insufficient funding.

Finally, the State ignores the implication of the *Kern* Court's observation that insufficient funding could lead to a mandate determination. Under the statutory scheme to implement Section 6, a State-imposed program either imposes reimbursable costs (creating a mandate and an entitlement to reimbursement) or it does not. Petitioners acknowledge if no mandate is created, no reimbursement is owed, but the State denies that the opposite is also true: if a mandate *is* created, then reimbursement *is* required. Nothing in *Kern* supports the State's argument that a program can be determined to be a mandate and yet not require reimbursement, and such an argument undermines the entire statutory scheme. More importantly, expanding *Kern* to allow the State to identify unrelated (and potentially insufficient) funding to defeat the right to reimbursement once a program has been determined to impose costs would fundamentally frustrate the very purpose of Section 6 to ensure that local governments are reimbursed for mandated costs.

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B. Section 17557(d)(2)B) Should be Construed to Incorporate the Requirements of Section 17556(e) That Mandate Funding Be Additional and Specifically Intended for Mandate Costs

The State purports not to understand why petitioners believe that section 17556(e) is constitutional and yet object to section 17557(d)(2)(B). To be clear, it is because the State's construction of the latter provision lacks the limitations of the former that petitioners believe are necessary to meet the requirements of Section 6, *i.e.*, additional funding that is specially intended to pay mandate costs.

As the appellate court noted, section 17557(d)(2)(B) addresses funding that would *not* meet the requirements of section 17556(e). But section 17556(e) has a third requirement – that funding be sufficient to pay for the costs of the mandate. Petitioners have therefore argued that a narrow construction of section 17556(e) is possible – a construction that construes section 17557(d)(2)(B) to include the limitations of section 17556(e) that funding be additional and intended for the mandate, but allows for less-than-full funding (otherwise required by section 17556(e)). Such a construction would make section 17557(d)(2)(B) consistent with the longstanding construction of Section 6 rather than turning it on its head. The State appears to take no position on this argument, and petitioners urge the Court to consider construing section 17557(d)(2)(B) narrowly.

II. GOVERNMENT CODE SECTION 17557(d)(2)(B) IS UNCONSTITUTIONAL AS APPLIED IN EDUCATION CODE SECTIONS 42238.24 and 56523(f)

Education Code section 422238.24 directs districts to use unrestricted education funding to pay for teacher costs associated with the *GR Mandate.* Education Code section 56523(f) directs schools to use special education funding to "first" pay for the *BIP Mandate*, despite the fact that there are no funds actually available to pay the costs of the *BIP Mandate*.

In directing schools to use the funding identified in these provisions as "offsetting revenue" that would eliminate mandate reimbursement, the State is providing neither "additional" funding nor funding "specifically intended" to pay for the costs of the mandate as those phrases are used in Government Code section 17556(e). The State's previous attempts to designate this funding as offsetting revenue have been rejected by the Commission and courts, and the use of Government Code section 17557(d)(2)(B) as applied in these Education Code provisions is contrary to Section 6.

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A. Section 6 Protects Unrestricted Education Funding Because it Protects Proceeds of Taxes, Not Just Local Revenues

It is uncontested that Education Code section 42238.24 directs schools to use their unrestricted education finding to pay for the costs of the *GR Mandate* – a mandate that cost schools over $250 million annually in 2012. (Slip Op., p. 17.) The State asserts that it is merely "prioritizing" its own funding and not directing local governments or schools to use their own "tax revenues" for the mandated program.[4] The State essentially argues (and the Court of Appeal agreed) that by virtue of the State's funding of education, it has no "additional" obligation to reimburse for mandate costs. (ABM, p. 35, citing Slip Op., p. 17.) These claims rest on two erroneous arguments.

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[4] The State claims that the statute directs schools to use "three sources of state funding" to pay for the *GR Mandate*, including Education Protection Account moneys. (ABM, p. 34.) The only funding referenced in section 42238.24 is unrestricted funding previously apportioned through revenue limits and now apportioned through the local control funding formula. Education Protection Account moneys are not apportioned to districts by Education Code section 422238 *et seq.*, but by article XIII, section 36 of the State Constitution. Petitioners have argued that these are local revenues and the Court of Appeal remanded this issue to the Superior Court for further proceedings.

1. Section 6 Protects Local "Proceeds of Taxes," Including, But Not limited to, Tax Revenues

The State cites several cases that refer to local tax "revenues," most notably *County of Fresno v. California* (1991) 53 Cal.3d 482, 487 ("*Fresno*").) But neither *Fresno* nor any other case cited by the State actually addressed the issue now before this Court, and none of those references provide legal authority for the proposition the State is now advancing.[5] (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 [cases cannot be considered authority for propositions not considered].)

The State relies on these general references to "revenues" in various cases precisely because it has no other argument. Its argument is contrary to article XIIIB itself, which defines the appropriations limit for each local government by reference to its "proceeds of taxes" *plus* the "proceeds of state subventions to that entity. . . ." (Cal. Const., art. XIIIB, §8(b).) "Proceeds of taxes" for local governments is similarly defined to specifically include "subventions received from the State." (*Id.*, §8(c).) It

[5] *Fresno* involved the constitutionality of the State excluding mandate reimbursement for costs that could be paid from local fee authority. *California School Bds. Assn v. State* (2011) 192 Cal.App.4th 770 involved the constitutionality of the State paying $1,000 annually for mandates and carrying the balance as a "debt." *County of Sonoma v. Comm. on State Mandates* (2000) 84 Cal.App.4th 1264 involved whether the State imposed a mandated program or service when it directed local governments to transfers certain funds to schools.

is therefore clear that the spending limitations of article XIIIB are based on the entity's proceeds of taxes, which include, but are not limited to, tax revenues *and* state subventions. The State's argument is also inconsistent with the ballot materials, which told voters that funds provided by the state to local governments would be part of the local governments' spending limits. (JA II: 441.) And, finally, its argument is contrary to the implementing legislation, which defined local "revenues and appropriations" to include any unrestricted state funding. (Gov. Code, §§7901(h); 7903.) (In fact, by virtue of this definition, it is arguable that judicial references to "revenues" actually incorporate unrestricted state funding, even if not stated explicitly.)

Nor can the State argue that the spending limits are unrelated to the scope of Section 6, as numerous cases have pointed out that the reimbursement requirement of Section 6 is directly related to the taxing and spending limitations of article XIIIA and article XIIIB. (See, *e.g.*, *County of San Diego v. California* (1997) 15 Cal.4th 68, 81 [Section 6 prohibits 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 XIII A and XIII B impose"]; *Cal. School Bds. Assn. v. State* (2011)

192 Cal.App.4th 770, 787 [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"]; *County of Los Angeles v. Comm. on State Mandates* (1995) 110 Cal.App.4th 1176, 1193 [mandate is program that "results in increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit"].)

In fact, this Court made that connection itself in *Fresno.* (*Fresno, supra*, 53 Cal.3d at 486-487.) The State nonetheless appears to argue that reimbursement under article XIIIB, section 6 is unrelated to the definitions of spending limits under article XIIIB more generally, relying on the language in *Fresno* that Section 6 requires reimbursement "only for those expenses that are recoverable solely from taxes." (ABM, p. 23, citing *Fresno*, *supra*, 53 Cal.3d at 487-488.) But *Fresno* also acknowledged that the appropriations limit was defined by reference to "proceeds of taxes" and that the scope of Section 6 was related to the appropriations limit. (*Id.* at 487.) Insofar as *Fresno* connects the right to reimbursement under Section 6 to interference with the entity's spending limit, *Fresno* supports the petitioners' position rather than the State's.

Nor is the State correct that Commission's decisions have indicated that additional funding is not required. (ABM, p. 24.) In fact, Commission decisions in both the *GR Mandate* and *BIP Mandate* rejected the State's argument that existing funding defeated the mandate. (JA II:620-623; 684.) Moreover, contrary to the State's assertion that there is "no support" for petitioners' claim that article XIIIIB requires new or additional state funding when a new program is imposed on local government (ABM, p. 24), that is exactly what existing law, and particularly section 17556(e), has required for decades.[6] There have been more than four dozen education mandate decisions made by the Commission since article XIIIB was adopted. The State has provided unrestricted education funding during that entire time. If the existence of state education funding had eliminated the need for mandate reimbursement (or, put another way, if Section 6 had not required additional funding), section 17556(e) would have prohibited the

[6] Inexplicably, the State argues that section 17556(e) itself "confirms that [Section 6] is concerned only with ensuring local governments do not spend local taxes" (ABM, p. 23), but that provision makes no reference to local tax revenues or even local proceeds of taxes – it simply (and clearly) requires an "additional payment." In fact, when read with the requirement that the funding be specifically intended for mandate reimbursement, section 17556(e) appears to be designed specifically to ensure that state funding for mandates is not combined or intermingled with other state funding and is not directly concerned with local tax revenues.

Commission from finding that costs were mandated by the state. The very existence of dozens of education mandates confirms that Section 6 requires "additional" funding and that it protects more than just tax revenues – it protects local proceeds of taxes more broadly.[7]

2. Unrestricted Education Funding Has Been Defined as Local Proceeds of Taxes by the Commission and Courts

The State next argues that unrestricted education funding is "state" money rather than "local" money. (See, *e.g.*, ABM, p. 11 ["School moneys belong to the state"].) While this may be correct in other contexts, it is wrong in the context of Section 6.

The State does not dispute that local government finance was dramatically re-structured in the aftermath of Proposition 13, or that Proposition 4 (now article XIIIB) reflects that re-structuring in defining local proceeds of taxes to include state subventions (payments). Nor does the State dispute that, because of this background, the implementing legislation initially defined unrestricted education funding up to the

[7] As noted in the Opening Brief, the trial court actually ruled that the State could "force school districts to use *local tax revenues* to fund state-mandated programs." (JA II:1076, emphasis added.) The State makes no effort to defend it, nor did the Court of Appeal address it. This aspect of the lower court ruling must be reversed irrespective of the disposition of the remaining issues.

foundation level as "local proceeds of taxes" (Gov. Code, §§7906&7907),[8] and later defined all unrestricted funding up to the local district's spending limit as "local proceeds of taxes" for purposes of the spending limits. (*Id*; RJN, Exh. A, p. 4.)[9] Finally, the State does not dispute that, in the *GR Mandate*, the Commission expressly held 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; 654-664) or that the courts reached the same conclusion. (JA II:562-563.)[10]

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[8]Sections 7906 and 7907 were recently amended to reference the local control funding formula in Education Code section 42238.02 but the amendments do not otherwise affect the issues in this case. (Stats. 2018, ch. 32, §§121&122.)

[9] Because amounts above the spending limit are state proceeds of taxes, it is theoretically possible for some districts to have a portion of their unrestricted funds defined as "state" funds. The courts and Commission have nonetheless treated all unrestricted funding as local for purposes of Section 6 and section 42238.24 does not make any distinction.

[10] The State asserts that petitioners "waived" this argument because they failed to use the term "proceeds of taxes" in the Complaint. (ABM 36, fn. 12.) The State's waiver argument was rejected by the trial court. (TR 26:15-21 (5/7/15).) The complaint alleged that the 2010 legislation was "designed to force districts to use their general, unrestricted funding to pay for the State's mandated services" (JA I:301); a complete list of relevant record citations can be found in petitioners' appellate Reply Brief, p. 19.)

The State's only response is that the language in Education Code section 42238.24 itself, which directs schools to use their unrestricted funding for mandated costs, somehow transmutes that unrestricted funding to a "subvention to reimburse for mandates." (ABM, p. 37.) This is incorrect.

While article XIIB, section 8 does exclude "subventions made pursuant to Section 6" from local proceeds of taxes, the ballot materials distinguished between "appropriations" made to pay for mandate reimbursement and "appropriations" made to provide state financial assistance to local governments. (JA II:437.) Government Code section 7906 reflects this distinction by including unrestricted state subventions for school support in the local proceeds of taxes, but excluding "subventions received from the state *for reimbursement of state mandates in accordance with Section 6 of Article XIII B of the California Constitution or of Section 17561. . . .*" (Emphasis added.) Government Code section 17561 is part of the administrative implementation of Section 6 and provides that mandate reimbursement is made by an appropriation in the budget bill "appropriated to the Controller for reimbursement." This is exactly what the State does. (See JA III:848-853 [mandate appropriation to Controller].) The State's claim (made for the first time in the Court of Appeal) would therefore make

the same appropriation serve two different purposes contrary to the comprehensive administrative scheme adopted by the State.

Nor can the State's appropriation for unrestricted education funding through the local control funding formula be considered "received from the state for reimbursement of state mandates" as that appropriation does *not* provide for mandate reimbursement. The only reference to mandate payment is in Education Code section 42238.24 itself – a provision that is not an appropriation.

In addition, State subventions for mandate reimbursement count toward the State's article XIIIB spending limit. (Cal. Const., art. XIIIB, §8(a).) When mandate payments are made through an appropriation to the Controller (or other appropriation in the budget bill) they are counted against the State's spending limit. If a statute like Education Code section 42238.24 can transform unrestricted funding (subject to local spending limits) into a state subvention for mandate reimbursement (subject to the State's spending limit) – without any state appropriation – it would require this spending to count toward the State's spending limits, but without any mechanism to track that spending. (See Cal. Const., art. XIIIB, §3(a) [requiring adjustment to spending limits to reflect transfer of financial authority]; Gov. Code, § 7904 [appropriations can only be subject to one

limit].) This shift would also require the district's spending limit to be lowered – at least by the costs of the *GR Mandate* and possibly by the district's entire allocation of unrestricted funding if that funding is deemed to be "state proceeds of taxes" in contravention of sections 7906 and 7907. The State neither disputes this nor reconciles its position with existing law. Nor does the State explain how schools can possibly be considered to be made whole for the costs of a mandate if they are required to pay those costs out of existing funds and their spending limits are correspondingly reduced.

3. The Facts of *Kern* Do Not Support the State's Broad Reading

The State argues that because *Kern* states that a mandate is not created if a local government does not have to use its own revenues, the State can simply "prioritize" its own funding in a way that eliminates its mandate reimbursement obligation. *Kern* does not support the State's argument.

Kern concluded that the districts did not have to use their own resources in that case because the statutes that funded the programs at issue specifically provided an "administrative" funding stream that was sufficient to pay for the costs of the mandated notice and agenda requirements. (*Kern, supra*, 30 Cal.4th at 744, 747.) Thus, the Court implicitly found that

funding was specifically intended to pay for administrative costs related to the programs and was sufficient to do so. To use section 17556(e) by analogy, the only question was whether "additional" funding was necessary. The Court's answer was no – because the necessary funding was provided *as part of the programmatic funding*. The State argues that the Court did not distinguish between categorical and non-categorical funding, but the fact that the programs were specially funded and included a specific funding stream *within the programmatic funding* to cover administrative costs was central to the Court's analysis. Programmatic funding *is* categorical funding; the Court's analysis cannot be separated from its focus on that programmatic funding.

Unlike the funding at issue in *Kern* – which was categorical and would therefore have been defined as "state" proceeds of taxes, here the State is attempting to direct local governments to use their own proceeds of taxes. This distinction is significant.

The State claims that no authority requires state funding to be related to the mandate. As a general rule, section 17556(e) requires funding to be specifically identified to pay for mandate costs. While *Kern* addressed a narrow circumstance in which programmatic funding was specifically available to pay for program-related costs, nothing in *Kern* changes the

general rule that funding must be specifically intended for the mandated costs, nor does it suggest that the State can identify unrelated, non-programmatic funding to cover such costs. The State misses the point when it claims that mandates could be paid from the General Fund but the "General Fund has no specific relation to graduation requirements." (ABM, p. 36.) General Fund moneys would be made through an appropriation to the Controller (which identifies the mandate costs to be paid) or through a specific appropriation to pay for the costs of the *GR Mandate*. It is not the original source of the funds that is the issue, but whether the funding is "specifically intended" to pay the mandate costs.

The State also ignores a more basic point. Unlike *Kern*, in this case, the statutes *have been determined to constitute mandates*. The Commission has found that *costs have been incurred* that are subject to reimbursement and this determination has been upheld by the courts. The State is attempting to use a case in which the Court found that no costs were incurred to justify a refusal to provide reimbursement where it has already been determined that costs have in fact been incurred. *Kern* does not support the State's position.

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4. Neither Proposition 98 Nor the Block Grant Change the Fundamental Analysis

The State claims that Education Code section 42238.24 now "applies only to a few schools" because the block grant provides "an alternative to the traditional mandate process." (ABM, pp. 19, 16.) This is misleading.

First, the block grant is not an alternative to the "mandate process;" it is only an alternative for reimbursement. (Gov. Code, §17581.6.) The block grant does not eliminate the need for schools to undergo the lengthy process, typically including litigation, that is necessary to *establish* the existence of a mandate and the costs that are reimbursable. The only thing the block grant eliminates is the need to file annual costs as a prerequisite for reimbursement. While this may make things somewhat easier for schools, it comes at a high cost; they are required to waive their claims for reimbursement under the existing system in return for an amount that is set by the State without regard to actual costs. (*Id.*) The amount paid through the block grant has been a fraction of actual costs but most schools have accepted it precisely because the State is providing no other mandate reimbursement, so something is better than nothing.

Second, the statement that section 42238.24 does not apply to schools accepting the block grant is fundamentally inaccurate. That

provision directs *all* schools to use their unrestricted funding to pay for the mandate. Although only schools filing actual costs would be immediately affected, all schools would be affected over time if the reimbursement obligation is eliminated in the way intended by section 42238.24. As petitioners explained in their Opening Brief, since the block grant provides an alternative form of reimbursement, it would only exist to the extent the State has a reimbursement obligation. (POB, p. 39.) Education Code sections 42238.24 and 56523(f) *effectively eliminate the need for reimbursement* because the existence of existing funding purportedly prevents any costs from being incurred. If the State were permitted to simply direct schools to use their unrestricted funding to pay all mandate costs, no additional reimbursement would be owed and the block grant would surely end. The State does not dispute this.

The State's arguments regarding Proposition 98 also miss the point. Proposition 98 requires a minimum payment each year for education; it does not set a maximum payment. Although current state law allows the State to "count" mandate payments toward the Proposition 98 minimum, this issue has never been litigated and may well violate Proposition 98 and/or article XIIIB. In any event, even if mandate payments count toward the Proposition 98 minimum, it is not necessarily true that mandate

payments will automatically decrease other state funding. Funding decisions represent difficult political choices that the State has consistently tried to avoid by refusing to fund mandate reimbursement.

The State's ultimate argument – that it makes no difference if mandates are reimbursed directly or the schools receive the money in some other form (ABM, p. 29) – is clearly wrong. The entire premise of article XIIIB, section 6 is that local governments will be reimbursed for any additional costs imposed by state mandated programs or services. The argument that the State need not do so because local governments receive other money for other purposes flies in the face of this constitutional requirement as well as the statutory scheme that the State has imposed for reimbursement.

Finally, the State claims that this case is only about two "dormant" statutes and that Government Code section 17557(d)(2)(B) will not "undercut Section 6's mandate requirement for schools" or affect other mandates. (ABM, p. 38.) This is extremely disingenuous. The legislation in 2010 may have only affected two mandates, but it affected three-quarters of the State's annual reimbursement obligation to schools. And the State's arguments would apply equally to *any* education mandate. The State itself reveals the unlimited breadth of its approach when it states: "In providing

general purpose education funding to schools and requiring the funds to first pay for the graduation requirements mandate, the Legislature is directly providing reimbursement for the mandate." (ABM, p. 36.) Virtually any mandate could be substituted in that sentence. The Court of Appeal acknowledged as much in holding that unrestricted education funding essentially eliminated the need for the State to reimburse for mandates. Indeed, this is the only logical conclusion that can be drawn from the State's argument, but it is a conclusion that is not permitted by article XIIB, section 6.

B. Section 6 Does Not Permit the State to Direct Local Agencies to Use Funds That Are Not Actually Available

Education Code section 56523(f) directs schools to use special education funding to "first" pay the costs of the *BIP Mandate*. Petitioners have argued that this funding is for a different program that is itself significantly underfunded and, as a result, schools are required to use their own proceeds of taxes to pay the costs of the *BIP Mandate*.

The State references the 2013 Commission decision approving the offsetting revenue without making it clear that the 2013 decision was made *after* the 2010 legislation at issue here. (ABM, pp. 17-18, 26.) The Commission specifically indicated that the 2010 legislation was intended to "negate" its earlier mandate determination and "end reimbursement" but

observed that it was required to presume the constitutionality of the legislation. (JA II:715-717; 726.)

The State also relies heavily on *Kern*, claiming that *Kern* allows the State to direct its own funding to be used for mandate costs. Special education funding (unlike unrestricted education funding) is, in fact, state funding for purposes of article XIIIB. (Gov. Code, §7906(e).) If the special education appropriation set aside a specific amount that could be used for the *BIP Mandate* costs and was sufficient to pay those costs, *Kern* might arguably support the State's position. Unfortunately, neither circumstance applies here.

The State argues that the categorical nature of the funding in *Kern* was not legally significant. (ABM, p. 28.) As a legal matter, categorical funding is different from unrestricted funding because it is "state proceeds of taxes" and the State therefore has increased authority to direct the use of such funds for mandate costs. But petitioners' additional point was that the programs in *Kern* included funding designated for administrative costs and the mandated costs in that case were administrative in nature. The State argues that there is "no constitutional or statutory requirement that state funding be 'related' to the mandate" (ABM, p. 29) but, as noted above, section 17556(e) requires that funding be specifically intended for the

mandate. While the administrative funding in *Kern* could be said to have satisfied that requirement, the State makes no claim that any similar funding is provided in special education funding, and the Commission found that special education funding was *not* specifically intended for the *BIP Mandate*. (JA II:684.) In addition, settlements in both the *Special Education Mandate* litigation and *BIP Mandate* litigation made clear that funding for each program was to be considered separately. (Ed. Code, §56836.156(f)&(g).)

The State next argues that the Court's analysis in *Kern* was not focused on the actual amount of the costs but on "whether there was sufficient funding to pay for the program." (ABM, p. 28.) This argument does not help the State in this case in light of the insufficiency of special education funding.

The State asserts that there can be no legal finding that special education is underfunded because the amount of funding is a "policy choice." (ABM, p. 30.) This is nonsensical and contrary to the record. Evidence submitted in the trial court established that special education funding was substantially insufficient to pay for the costs of the special education program. The State Legislative Analyst's Report clearly stated as much. (JA II:748-49.) While statements in an official report may be

contested, the State did not do so in this case, *i.e.*, it submitted no evidence of its own that would support an inference that special education has been adequately funded; it simply argued that underfunding was legally irrelevant. (JA III:819-820.) Nor does the State point to any such evidence now.

In addition to the unrebutted statements of the Legislative Analyst, the declarations of district officials specifically described the degree to which special education funding was inadequate in their district (and, in the case of the Skeels Declaration, statewide). (JA III:783-795; 967-970.) The State mischaracterizes the declarations by focusing on the fact that district officials acknowledged that funding for special education was more than the cost of the *BIP Mandate*. Petitioners have never disputed this, but the fact that special education funding exceeds the cost of the *BIP Mandate* says nothing about whether special education funding is adequate to support the special education program itself. The declarations are quite clear that it is not and that districts and county offices of education are required to make up the shortfall from their own resources. (*Id*; JA III:819-820.) This has been confirmed by State reports in the intervening years since the trial court proceedings. (See, e.g., https://lao.ca.gov/handouts/education/2015/Overview-of-Special-

Education-in-California050715.pdf, p. 3 [2015 Report];
https://lao.ca.gov/handouts/education/2018/Overview_Special_Education_Funding_California_022818.pdf, p. 2 [2018 Report].)

The State next argues that even if schools are required to use their own resources, they have not demonstrated that they were required to use their local "tax revenues" to pay for any inadequacy in funding. (ABM, p. 30, citing Slip Op., p. 21.) The State and Court of Appeal are both using the wrong legal standard. For reasons discussed above, the question is not whether Education Code section 56523(f) forces the districts to use their "tax revenues," but whether it forces them to use their local proceeds of taxes – which include both their local revenue sources and state funding.

As petitioners previously explained, schools have only three revenue sources: local revenues, state unrestricted funding and categorical or restricted funding. Any deficits between categorical funding and categorical expenses are necessarily paid from either local revenue sources or state unrestricted funding – both defined as local proceeds of taxes. This is because local revenue sources are subtracted from the maximum funding level under the local control funding formula and state unrestricted funds make up the difference. (See Ed. Code, §42238.02.) The State does not dispute this.

The State ultimately argues that even if special education funding is insufficient, directing schools to use it satisfies Section 6 so long as special education funding exceeds the mandate costs and it "first" pays the mandate costs. (ABM, p. 32 [alleged funding shortages "not a constitutional concern"].) But directing the schools to use nonexistent funding neither provides offsetting revenue nor reimbursement. The State again relies on cases finding that no mandate was created and attempts to use those case to support its argument that reimbursement can be denied once a mandate has in fact been created. (ABM, p. 32 [citing *Kern*, *Sonoma*, *City of San Jose,* and *Grossmont*].)[11] While these cases present various factual scenarios in which lack of funding was determined not to impose a mandate, the circumstances here are significantly different and none of those cases address reimbursement once a mandate has been found. Indeed, as discussed above, the State's position cannot be reconciled with the Court's observation in *Kern* that insufficient funding would likely create a mandate – a mandate requiring reimbursement.

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[11] To be clear, petitioners acknowledge that Government Code section 17557(d)(2)(B) can be construed to permit an offset where funding is less than sufficient. However, *actual* funding must be made available.

III. THE 2010 LEGISLATION VIOLATES SEPARATION OF POWERS

Petitioners have argued that the State's construction of Government Code section 17557(d)(2)(B) would allow it to use the parameters and guidelines to effectively overturn a prior mandate determination because it intentionally uses a different standard for "offsetting revenues," and that is precisely what the State has done with respect to the *GR Mandate* and *BIP Mandate*.

In response, the State argues that neither of these mandate determinations actually made any finding on the issues now before the Court and the 2010 legislation therefore does not "contravene" the earlier decisions. (ABM, pp. 18-19.) This is incorrect as a matter of mandate law generally, but is also incorrect in the context of these mandate determinations.

Section 17556(e) states that "[t]he Commission *shall not* find costs mandated by the state" if the State provides additional revenue specifically for the mandate. A test claim is required to identify any funds appropriated for the program and other funds that may be used to offset the increased costs. (Gov. Code, §17556(b)(1)&(2).) When the Commission makes a mandate determination, it therefore necessarily considers potential funding sources; if funding is actually provided for the mandate that results in no

net costs, the Commission is prohibited from making a mandate finding. This is true for all mandates. If the Commission does find costs are imposed, however, section 17557(d)(2)(B) allows a contrary determination that "no costs" are imposed – thus effectively overruling the mandate determination.

That is what happened with the *GR Mandate* and *BIP Mandate*. In the case of the *GR Mandate*, the initial determination found that costs were imposed but was ambiguous about whether schools could be required to use existing funding for teacher salaries. (JA II:559.) The State had argued that general education funding could be used and the Controller adopted that view in rejecting reimbursement for these costs. [12] Upon review, the court rejected this assertion, finding that this forced reallocation of funds was impermissible under Section 6 and the mandate determination. (JA II:562; 559, fn. 2.) The Commission subsequently reaffirmed this in its 2008 parameters and guidelines decision despite opposition from the State

[12] Technically, the issue was whether schools experienced "offsetting savings" because they were required to terminate other teachers in order to hire science teachers, but the State's underlying argument was the same: schools received general education funding for the education program and could accommodate the new costs in that funding. (See, e.g., JA II:558-559&fn. 2.)

based specifically on the availability of revenue limit funding. (JA II:620-623.)

In the *BIP Mandate*, the State specifically argued that no mandate was created because it had provided "billions of dollars to fund Special Education" that was "specifically intended to fund the BIP Mandate" and "more than offset any costs." (JA II:683.) The Commission rejected the argument, concluding that "although the state has provided substantial funding for special education, school districts have not received funds *specifically intended* to fund the costs of the state mandate. (JA I:684, emphasis in original.)

The State has therefore very clearly litigated the issues of requiring schools to use their general education funding for the *GR Mandate* and requiring them to use special education funding for the *BIP Mandate* and those issues were resolved against the State. Government Code section 17557(d)(2)(B) – which directs the Commission to come to a different conclusion – therefore represents a collateral attack on those final determinations. The State argues that the current circumstances are distinguishable because there were previously "no statutes that required schools to first use other sources of revenue." While true, this makes petitioners' point: nothing has changed here except the State's desire to

"negate" the earlier decisions and the legislative directive to the Commission – a quasi-judicial body – to come to a different conclusion. (See JA II:717.) This violates separation of powers principles.

The State argues that it is not really negating the mandate decision because "updating" the parameters and guidelines is not the equivalent of reversing the mandate. The State asserts that "the only dispute is the manner by which mandates will be reimbursed." (ABM, p. 41.) Petitioners disagree. The 2010 legislation is not about "how" mandates will be reimbursed, it is about whether they must be reimbursed at all. The Commission and courts have previously determined that costs have been imposed requiring reimbursement. Because the 2010 legislation would require the opposite conclusion, it effectively sets aside those determinations.[13]

The State's second argument is that the legislation is permissible because it is "prospective." Petitioners submit that the 2010 legislation is

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[13] Nor is this case about changes justified by intervening "changes in the law." (ABM, p. 42 [citing *Cal. School Bds. Assn. v. State, supra,* 171 Cal.App.4th at 1202.) The repeal of the *BIP* statute was a change in the law; telling schools to use special education money to pay *BIP* costs is not a change in the underlying mandate, it is simply another way of refusing to provide reimbursement. Moreover, as petitioners pointed out, the State adopted Government Code section 17570 to address "changes in law." Section 17557(d)(2)(B) does not use that procedure. (POB, pp. 50-51.)

retroactive for the same reasons identified in *Cal. School Bds. Assn. v. State* (2009) 171 Cal.App.4th 1183, 1198-1202. (POB, pp. 49-50.) The State does not address those arguments.

CONCLUSION

Petitioners respectfully request that the Court of Appeal's decision be reversed insofar as it affirms the constitutionality of Government Code section 17557(d)(2)(B) as applied to Education Code sections 42238.24 and 56523(f), the constitutionality of Education Code sections 42238.24 and 56523(f), and the trial court ruling that the State can direct local revenues to be used for mandate costs.

Dated: August 29, 2018

Respectfully submitted,

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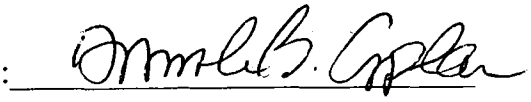
By: 

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CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1) OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the attached brief is proportionately spaced, has a typeface of 13 points, and contains 8,390 words as counted by the Microsoft Word 2010 word processing program used to generate this brief, excepting the caption, tables, signature, this certificate, and the certificate of service.

Dated: August 29, 2018

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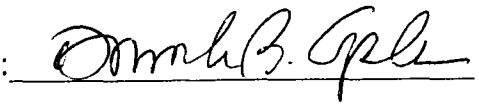
By: 

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 1000 Broadway, Suite 340, Oakland, California 94607. On August 29, 2018 I served **PETITIONERS' REPLY BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Service List attached

(BY MAIL) I am readily familiar with the firm's practice of collection and processing correspondence by mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Oakland, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 29, 2018, at Oakland, California.

Alan Rodriguez
PRINT NAME


SIGNATURE

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