In the Supreme Court of the State of California

COUNTY OF SAN DIEGO; COUNTY OF LOS ANGELES; COUNTY OF ORANGE; COUNTY OF SACRAMENTO; and COUNTY OF SAN BERNARDINO,

Plaintiffs and Appellants,

v.

COMMISSION ON STATE MANDATES; STATE OF CALIFORNIA; DEPARTMENT OF FINANCE FOR THE STATE OF CALIFORNIA; JOHN CHIANG in his official capacity as California State Controller,

Defendants and Respondents.

Case No. S239907

Fourth Appellate District, Division One, Case No. D068657
San Diego County Superior Court, Case No. 37-2014-00005050-CU-WM-CTL
Honorable Richard E. L. Strauss, Judge Presiding

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CONSTITUTIONAL PROVISIONS

ARGUMENT

Amici advance many of the same arguments presented by Appellants and already addressed in the prior briefs filed by the State Respondents.[1] This brief focuses on the arguments advanced by amici that are new or different from those presented by Appellants.

I. ALL OF THE SVPA DUTIES ARE "NECESSARY TO IMPLEMENT" PROPOSITION 83

Amici argue that the SVPA duties are not necessary to implement Proposition 83 for purposes of Government Code section 17556, subdivision (f). As explained below, however, the legal standard they propose rests on a mistaken reading of this Court's precedents. Amici also point to several considerations specific to the record and circumstances in this case. But those considerations should not affect the Court's analysis.

As to the legal standard, a duty is "necessary to implement" a ballot measure if the costs of complying with that duty flow from the ballot measure or are compelled by it. (RBOM 26-28; cf. *Dept. of Finance v. Com. on State Mandates* (2016) 1 Cal.5th 749, 767, 768.) Here, the voters materially expanded the definition of "sexually violent predator" in Proposition 83, a measure that was intended "to strengthen and improve the laws that punish and control sexual offenders." (AR 693 [Prop. 83, § 31].) As amici acknowledge, there is now "a larger category of offenders eligible for a Sexually Violent Predators Act commitment" as a result of "the Proposition's broadened definition." (Cities and Counties Br. 20.) The SVPA duties at issue in this case all involve processing individuals who have been found likely to satisfy that definition. (See RBOM 31-32; Welf.

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[1] Amici are the California Public Defenders Association and the Law Offices of the Public Defender for the County of Riverside (collectively, "the Public Defenders"), and the California State Association of Counties and the League of California Cities (collectively, "the Cities and Counties").

& Inst. Code § 6601, subds. (b), (c), (h), (i).) No one disputes that the voters, in Proposition 83, prohibited the Legislature from narrowing the definition through the standard legislative process requiring a majority vote of each house. (See AR 693 [Prop. 83, § 33]; RBOM 17-18, 34.) Because the costs of complying with the SVPA duties now "flow from" and are "compelled by" the voter-adopted definition of sexually violent predator (*Dept. of Finance*, *supra*, at pp. 767, 768), those duties are now necessary to implement Proposition 83 for purposes of Government Code section 17556 (see Gov. Code, § 17556, subd. (f); RBOM 34-36).

The Cities and Counties propose a different legal standard, but it rests on a misunderstanding of this Court's precedents. They invoke *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, reading it as holding that, for subdivision (f) to apply, a mandated activity must be "the 'only means'" of implementing a ballot measure. (Cities and Counties Br. 18, quoting *Dept. of Finance*, *supra*, at p. 768.) The phrase "the only means" does appear in *Department of Finance*, but it is not used in the way amici suggest. It appears in a section of the opinion rejecting the argument "that the Commission should have deferred to the Regional Board's conclusion that the challenged requirements were federally mandated" under the federal Clean Water Act, which state regional water boards are tasked with implementing and enforcing. (*Dept. of Finance*, *supra*, at p. 768.) The Court reasoned that deference was inappropriate because the question before it was "largely a question of law." (*Ibid.*) It observed that, in contrast, if the Regional Board had found "that [permit] conditions were the only means by which the [federal] standard could be implemented, deference to the board's expertise in reaching that finding would be appropriate." (*Ibid.*) That observation is not relevant here because there is no dispute in this case about deference to the technical expertise of a state agency in implementing and enforcing federal law.

Elsewhere in *Department of Finance*, this Court announced a principle that is more applicable to this case:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.

(*Dept. of Finance*, *supra*, 1 Cal.5th at p. 765.) In other words, the "essential question is how the costs came to be imposed upon the agency required to bear them," and whether or not they "flow from a federal mandate." (*Id.* at pp. 765, 767.) The State Respondents' interpretation of the "necessary to implement" provision of subdivision (f) is fully consistent with that approach. (See RBOM 27-28.) The SVPA duties are no longer reimbursable state mandates because, after Proposition 83, the costs of complying with those duties flow from, and are compelled by, the voter-adopted definition of "sexually violent predator." (See RBOM 30-36.)[2]

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[2] The Cities and Counties assert (at 13) that "to avoid the constitutionally required subvention, it is not sufficient to find that a duty is reasonably within the scope of a ballot measure," referencing *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183. That decision held that a prior version of subdivision (f) was impermissibly broad insofar as it provided that statutory duties "reasonably within the scope of" a ballot measure were not subject to reimbursement. (See *id.* at pp. 1215-1216.) The Legislature has since removed that language from subdivision (f) and the State Respondents did not rely on it in this case. Neither *California School Boards Association* nor the Legislature's modification of subdivision (f) alters the analysis here. The State Respondents' argument is that the SVPA duties are "necessary to implement" Proposition 83 and that some of them are "expressly included" in it. Those clauses remain in subdivision (f), and have not been held to be impermissibly broad or otherwise problematic. (Cf. *California School Bds. Assn.*, *supra*, at p. 1211 ["[N]ot every duty that is 'reasonably within the scope of' a ballot measure is 'expressly included in' or 'necessary to implement' that ballot measure"].)

The Cities and Counties also invoke *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859 for the proposition that a local "activity must be 'part and parcel' of the initiative" for subdivision (f) to apply. (Cities and Counties Br. 13.) Again, however, the quoted language is found in a portion of the opinion that is not directly applicable to the issue in this case. *San Diego Unified* considered whether certain local costs related to expulsion proceedings fell within the exception to reimbursement in subdivision (c) of section 17556, which addresses federal mandates. The Court agreed with lower court authority holding that, "for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate." (*San Diego Unified, supra*, at p. 890.) It reserved the possibility "that a local government might, under appropriate facts, demonstrate that a state law, though codifying federal requirements in part, also imposes more than 'incidental' or 'de minimis' expenses in excess of those demanded by federal law, and thus gives rise to a reimbursable state mandate to that extent." (*Id.* at p. 890, fn. 24.)

San Diego Unified does not direct that an "activity must be 'part and parcel' of [a ballot] initiative" (Cities and Counties Br. 13) for it to be "necessary to implement" that initiative under Government Code section 17556, subdivision (f). It does, however, acknowledge the possibility that a reimbursable duty imposed by the Legislature in the first instance might, as the result of later changes in federal law, become "an implementation of federal law" resulting in "nonreimbursable" costs. (*San Diego Unified, supra*, 33 Cal.4th at p. 883; see *id.* at p. 884 ["we do not foreclose [this] possibility"].) Similarly, as a result of the voters' changes to the definition of sexually violent predator in Proposition 83, the SVPA duties became

"necessary to implement . . . a ballot measure approved by the voters in a statewide or local election." (Gov. Code, § 17556, subd. (f).)

Like Appellants, the Public Defenders contend that the voter-expanded definition of sexually violent predator has not materially increased the costs of the SVPA duties for local governments. (Public Defenders Br. 9, 14, 23-24.)[3] Even if that assertion were correct as an empirical matter, that would not change the legal analysis. (See Reply 17.) The relevant consideration here is not the number of offenders processed by local governments, or the annual costs of processing those offenders. It is the voters' decision to expand the definition of sexually violent predator, in a manner that cannot be unwound by the Legislature through the standard legislative process. Whether the aggregate costs of carrying out the SVPA duties have increased, decreased, or stayed the same since Proposition 83,

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[3] The Public Defenders quote a statement in the opening brief out of context, and then characterize the statement as "patently untrue." (Public Defenders Br. 23, quoting RBOM 38.) In context, the quoted statement observed that "the voters expanded the category of offenders who 'shall' be referred to local governments as part of the SVPA process" by expanding the definition of sexually violent predator, and noted that "all those offenders are now referred to local governments at the direction of the voters—not the Legislature." (RBOM 38; see Welf. & Inst. Code, § 6601, subd. (h)(1) [Department of State Hospitals "shall" forward a request for a civil commitment petition to be filed to the county if it determines that an individual fits the definition of sexually violent predator].) The opening brief did not assert that there was an increase in the number of offenders processed by local governments on an annual basis, as the Public Defenders suggest it did. (Public Defenders Br. 23-24.) To the contrary, it acknowledged that the record did not contain information "identify[ing] the number of offenders processed by the counties" in recent years." (RBOM 38, fn. 18.)

they are no longer reimbursable because they now flow from that voter-adopted definition.[4]

The Cities and Counties next argue that the SVPA duties are not "necessary to implement" Proposition 83 because there is "no indication as to why the counties must be responsible for providing these services" as opposed to the State. (Cities and Counties Br. 16.) But the fact that a duty could conceivably be performed by a state entity rather than a local government does not control the inquiry into whether the duty is a reimbursable state mandate. Rather, the operative question is whether the duty is mandated by "the Legislature" (Cal. Const., art. XIII B, § 6, subd. (a)), or is instead mandated by some other entity, such as the federal government (Gov. Code, § 17556, subd. (c)), the courts (*id.*, subd. (b)), or—as here—the voters (*id.*, subd. (f)).

Finally, the Cities and Counties contend that the SVPA duties are not "necessary to implement" Proposition 83 because there has not been an adequate showing regarding "whether alternatives exist to the mandated

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[4] The Cities and Counties analogize Proposition 83 to AB 16, a bill that expanded the definition of a domestic violence crime in Penal Code section 273.5. (Cities and Counties Br. 21-22.) They note that "many of the costs incurred by local governments related to domestic violence arrests" have been determined to be reimbursable state mandates (*id.* at p. 21), and observe that, notwithstanding AB 16, "the domestic violence mandates have been funded for the current fiscal year" (*id.* at p. 22). All that is true. As amici acknowledge, however, "the *Legislature* adopted and the Governor signed AB 16." (*Id.* at p. 22, italics added.) So the definitional change in that bill could not have converted the local duties into ones "necessary to implement . . . a ballot measure approved by the voters" (Gov. Code, § 17756, subd. (f)) in the way that the voters' expansion of the definition of "sexually violent predator" altered the status of the SVPA duties. The fact that "no redetermination claim [has been] filed" based on AB 16 to date (Cities and Counties Br. 22) provides no support for amici's legal arguments.

activities that would still ensure due process is provided." (Cities and Counties Br. 16.) But the inquiry in this case is not whether the SVPA duties are necessary to implement constitutional guarantees of due process (cf. Gov. Code, § 17556, subd. (c)); it is whether they are necessary to implement the voters' expansion of the SVPA in Proposition 83 (see *id.*, subd. (f)). The Cities and Counties identify no authority suggesting that this Court's resolution of the latter question should turn on whether there is an alternative framework that would satisfy the Constitution.[5]

II. MANY OF THE SVPA DUTIES WERE "EXPRESSLY INCLUDED" IN PROPOSITION 83

In addition, certain SVPA duties are no longer reimbursable because they were "expressly included in" Proposition 83. (Gov. Code, § 17556, subd. (f); see RBOM 39-43; Reply 18-20.) The Cities and Counties contend that the SVPA duties included within the text of Proposition 83 are not "expressly included in" the Proposition for purposes of subdivision (f), arguing that including statutory language in a voter initiative "to fulfill the so-called 'reenactment rule'" imposed by the Constitution is a "mere technical reprint[]" that does "not constitut[e] an express voter enactment." (Cities and Counties Br. 2, 8.)

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[5] Amici also contend that the State Respondents have "failed to meet their burden." (Cities and Counties Br. 13; see *id.* at pp. 14-16.) The State Respondents have carried the burden of demonstrating that subdivision (f) applies here by establishing that, as matter of law, the duties at issue are necessary to implement the expanded definition of sexually violent predator, are expressly included in Proposition 83, or both. (See RBOM 30-45; Reply 13-26; see also, e.g., AR 33 [request to adopt new test claim explaining that, "[b]ased on the passage of Proposition 83, the state's obligation to provide reimbursement for this mandate has ceased pursuant to Government Code sections 17570 and 17556, subdivision (f)"].) To the extent amici suggest that the State Respondents failed to carry an evidentiary burden, they are incorrect; the question before the Court is one of law. (See, e.g., *Dept. of Finance*, *supra*, 1 Cal.5th at p. 762.)

As the State Respondents have explained, however, the cases on which amici rely for this argument do not control here (see RBOM 43-44 & fn. 23; Reply 20-22), and other authority suggests that a "technical" re-enactment of the sort at issue in this case *can* restrict the ability of the Legislature to alter a statute through normal legislative procedures (see RBOM 40-43; Reply 19; *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 596-597). That authority illustrates why it is appropriate to construe subdivision (f), consistent with its plain meaning, to apply to any duties that are "expressly included in[] a ballot measure"—including those that were in the ballot measure for purposes of complying with the Constitution's re-enactment requirement. (Gov. Code, § 17556, subd. (f); see Cal. Const., art. IV, § 9; RBOM 42-44; Reply 25 & fn. 16.)

Amici contend that "technical restatements are just a continuation of existing law rather than a new legal provision." (Cities and Counties Br. 10.) Unlike Appellants—who appear to embrace the position that a "technical" re-enactment by the voters can restrict the ability of the Legislature to alter the re-enacted language (ABOM 21)—amici argue that the Legislature may "make amendments to such provisions without meeting the [two-thirds] vote threshold" imposed by the voters (*ibid.*; see AR 693 [Prop. 83, § 33]). As the State Respondents have noted (Reply 25, fn. 16), if this Court were to endorse amici's view of the law, it could affect the analysis under subdivision (f). But amici's argument is not clearly supported by existing case law.[6]

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[6] Uncertainty also surrounds the issue of whether a "technical" re-enactment by the voters alters the Legislature's ability to suspend (or not fund) a statutory mandate contained in a re-enacted provision. (See RBOM 42.) In this case, the trial court was of the view that statutory mandates that were re-enacted by the voters "cannot be defunded by the State." (JA 362; see Cal. Const., art, XIII B, § 6, subd. (b).) Again, if the Legislature and

(continued...)

Finally, amici argue that "the State itself" agrees with their view of the law, pointing to instances in which "the Legislature has not met the required vote threshold when amending the technically restated provisions of Proposition 83." (Cities and Counties Br. 6; see *id.* at pp. 7-8.) They note particular examples where bills were not "identified by Legislative Counsel as requiring a 2/3 vote." (*Id.* at p. 7, fn. 3.) As the State Respondents have acknowledged, there is limited authority concerning the scope of the Legislature's authority with respect to a statutory duty that voters have re-enacted, and there are a diversity of views on that subject. (RBOM 44.) Neither the legal arguments advanced by amici, nor the historical examples they invoke, obviate precedent suggesting that even a technical re-enactment of statutory language may affect the Legislature's ability to alter that language. (See *Shaw*, *supra*, 175 Cal.App.4th at p. 596.) The current state of the law provides further support for a plain-meaning interpretation of the "expressly included in" clause of subdivision (f).

(...continued)
the Governor retained full authority to suspend such a mandate, that could affect the analysis under subdivision (f).

CONCLUSION

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

Dated: February 26, 2018

Respectfully submitted,

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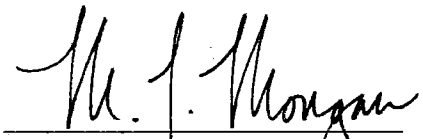

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Amicus Curiae Briefs uses a 13 point Times New Roman font and contains 2,937 words, as counted by the Microsoft Word word-processing program, excluding the parts of the brief excluded by California Rules of Court, rule 8.520(c)(3).

Dated: February 26, 2018

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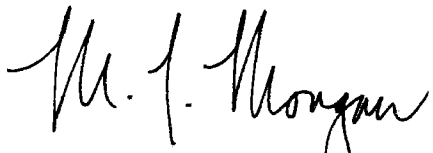

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **County of San Diego v. Commission on State Mandates**
Case No.: **S239907**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 26, 2018, I served the attached **ANSWER TO AMICUS CURIAE BRIEFS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 26, 2018, at San Francisco, California.

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