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Case No. S_____

COPY

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CALIFORNIA CHARTER SCHOOLS ASSOCIATION,

Plaintiff and Respondent,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, *et al.*

Defendants and Appellants.

SUPREME COURT
FILED

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Deputy

After a Decision by the Court of Appeal
Second Appellate District, Division Five
Case No. B242601

Los Angeles Superior Court Case No. BC438336
Honorable Terry A. Green, Presiding Judge, Dept. 14

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

REGULATIONS

RULES

OTHER AUTHORITIES

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE TANI GORRE CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

California Charter Schools Association ("CCSA") respectfully petitions this Court for review of an Opinion by the Court of Appeal, Second Appellate District, in *California Charter Schools Association v. Los Angeles Unified School District, et al.* (Dec. 5, 2012, B242601) 212 Cal.App.4th 689 ("*CCSA v. LAUSD*"). The Opinion of the Court of Appeal became final on February 3, 2013. Thus, this Petition is timely under Rule 8.500, subdivision (e)(1), of the California Rules of Court. A copy of the Court of Appeal's December 5, 2012, Opinion is attached hereto as Exhibit A. A copy of the Court of Appeal's January 4, 2013, Order Granting Publication of the Opinion is attached hereto as Exhibit B. The Court of Appeal reversed the June 27, 2012, order of the Los Angeles County Superior Court, which was decided in favor of CCSA.

I. ISSUE PRESENTED FOR REVIEW

May a local governmental body disregard statewide regulations when the local body decides, in its own discretion, that the statewide regulation is not consistent with the local body's view of the "purpose" of the statute under which the statewide regulations were promulgated?

The State Board of Education adopted regulations implementing Proposition 39 ("Prop. 39"), the voter-enacted law requiring public school facilities to be shared fairly among all public school pupils, including those in public charter schools. (Cal. Code Regs., tit. 5, §§ 11969.1 – 11969.11 ("Implementing Regulations").) One Regulation describes how a school district must calculate the number of classrooms it must offer to a charter school by using a specific classroom inventory method. (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).) The Los Angeles Unified School District ("LAUSD") refuses to use the Regulation's classroom inventory method, and instead calculates the number of classrooms it offers charter schools by using what it calls "norming ratios" which reduce the number of classrooms it offers. The trial court ordered LAUSD to comply with the Regulation's inventory method, and not to use its "norming ratios." The Court of Appeal reversed, holding that LAUSD may use its "norming ratios" instead of the classroom inventory method the Regulation specifies, because LAUSD had argued, without evidence, that the Regulation could have "anomalous results" in hypothetical situations. *Did the Court of Appeal err?*

II. WHY REVIEW SHOULD BE GRANTED

This Petition brings before the Court the issue of a local agency's discretion to disregard statewide quasi-legislative regulations promulgated under a state administrative agency's rulemaking authority. Review of this matter would secure uniformity of decision in the Courts of Appeal and settle important questions of law in conflict between the Courts of Appeal regarding the methodology courts should employ in interpreting statutes and regulations and the deference courts should give to quasi-legislative regulations adopted by state administrative agencies. This matter would also settle important questions of law regarding school districts' compliance with Prop. 39 that are in conflict between the Courts of Appeal.

How Much Deference Must Courts Accord the Language of an Applicable Quasi-Legislative Regulation? The primary issue in *CCSA v. LAUSD* is this: if a local governmental body disregards a statewide quasi-legislative regulation as being inconsistent with the local body's view of the "purpose" of the statute under which the regulation was promulgated, must a reviewing court interpret the regulation to give effect to all of its words, or can it, like the local government body, ignore portions of that regulation and substitute its own language? The answer to this question is crucial because it will govern the relationship between the executive or legislative branch that promulgates legislation, and the judicial branch that adjudicates disputes arising from the text of such legislation.

The complicated relationship between the executive, legislative, and judicial branches requires that each branch adhere to certain principles so as not to interfere with the prerogative of the other branch. (See *In re Cabrera* (2012) 55 Cal.4th 683, 687.) The courts are often called upon to adjudicate disputes arising from various possible interpretations of a quasi-legislative regulation, or to determine whether that regulation was a proper exercise of an administrative agency's rulemaking authority. The principles that courts generally follow when interpreting a regulation ensure that the language of the regulation is the basis for its analysis, and that such language is not to be omitted nor replaced. (See *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545; Code Civ. Proc., § 1858.) Moreover, to ensure a proper balance of power between branches of government, courts generally adhere to principles of deference and narrow review when reviewing legislative acts by state administrative bodies. (See *Cal. Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 211-12.)

The Court of Appeal's decision in *CCSA v. LAUSD* is in direct conflict with these established principles of interpretation and separation of powers. Rather than follow well-settled precedent, the *CCSA v. LAUSD* decision allows courts to ignore portions of a quasi-legislative regulation, and also to rewrite it to conform to a purported legislative intention that is contrary to that expressly provided for in the regulation and the drafting agency's statement of reasons for the regulation. The *CCSA v. LAUSD*

decision also allows courts to implicitly invalidate quasi-legislative regulations without conducting a narrow review or giving deference to the rulemaking process or the state agency's interpretation of its own regulations. This gives local governmental bodies subject to statewide regulations discretion to ignore clear directions in regulations if they subjectively believe that following the letter of the regulations would conflict with the "purpose" or "intent" of the statute under which the regulations were promulgated.

This Court's review is required to determine the appropriate latitude reviewing courts have when interpreting regulations promulgated by an administrative agency, pursuant to a grant of legislative authority. CCSA requests that this Court determine whether courts can ignore significant and specific text of a regulation and give local governmental bodies the discretion to substitute in their own language. CCSA further requests that this Court consider whether courts can invalidate a quasi-legislative regulation by effectively striking a portion of the regulation, when such a reading conflicts with the rulemaking agency's interpretation of how its own regulation is to function.

The issue that this case presents arises in the context of the important education reforms provided by the Charter Schools Act, which the Legislature enacted in 1992. In the two decades since the passage of the Charter Schools Act, locating viable, appropriate, and affordable facilities

has proven to be one of the biggest challenges faced by public charter schools in California. To address this potential barrier to education reform, the voters passed Prop. 39 in 2000. Prop. 39 requires public school facilities to be "shared fairly among all public school pupils, including those in charter schools." (Ed. Code, § 47614, subd. (a).) In passing Prop. 39, California voters acknowledged that students attending charter schools are public school students, and that public school facilities, while operated by school districts, are paid for by taxpayers for the benefit of all of California's public school students.

The underlying lawsuit from which the issue presented here arises is a challenge to LAUSD's consistent failure, year after year, to comply with Prop. 39. The part of that failure key to this Petition is LAUSD's admitted use of a methodology to calculate the number of classrooms it offers charter schools that does not comply with the methodology clearly outlined in the Implementing Regulations. LAUSD has expressly admitted that in assigning the number of teaching stations (classrooms) to charter schools seeking facilities, it uses school district "norming ratios," or in other words, the number of students that LAUSD chooses to assign to a classroom. (Appellant's Appendix ("AA"), Volume 8, pages 2154-55 (hereinafter cited as "'Volume' AA 'Page'"); see also 9 AA 2412-13, 2424, 2435, 2447, 2457, 2468, 2480, 2486.) LAUSD uses these norming ratios to allocate

teachers, school administrators, school clerical positions, and various other resources to individual district-run schools.

Neither Prop. 39 nor the Implementing Regulations mention school district "norming ratios" or class-size standards. Rather, Section 11969.3, subdivision (b)(1) of the Implementing Regulations provides school districts with clear directions on how to calculate the number of teaching stations to offer charter schools. The calculation requires school districts to count the total number of teaching stations at "comparison group schools" by "using the classroom inventory prepared pursuant to California Code of Regulations, title 2, Section 1859.31. . . ." (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).) School districts are to create a ratio of the teaching stations to those schools' projected Average Daily Attendance ("ADA"). That ratio is then required to be used to calculate the number of teaching stations a charter school must be allocated.

The discretion that school districts have under *CCSA v. LAUSD* to ignore a crucial part of the Implementing Regulations in making facilities offers to charter schools is an issue of statewide importance. Every year, hundreds of charter schools petition school districts for facilities. The manner in which school districts determine what constitutes a fair allocation of space will impact the amount of space charter schools receive, thereby directly affecting the quality of education charter schools can provide to the public school students they serve.

But the impact of this case is even broader than the 484,000 public school students who attend charter schools. This case calls into question the degree upon which all quasi-legislative regulations can be relied. Uniformity of decision is necessary to ensure certainty for the hundreds of cases each year which depend on this Court's precedent regarding the rules of construction and separation of powers.

In addition, this Court's review is required because the proper methodology school districts must follow in complying with Prop. 39 and the Implementing Regulations is now uncertain. *CCSA v. LAUSD* is at odds with *Bullis Charter School v. Los Altos School District* (2011) 200 Cal.App.4th 1022 (*Bullis*), a decision from the Sixth Appellate District. As those cases also cannot be reconciled, CCSA respectfully requests that this Court also grant review to address this conflict.

III. PROCEDURAL BACKGROUND

In LAUSD's final Prop. 39 facilities offers for the 2012-13 school year, LAUSD admitted that it used district-wide "norming ratios" in allocating teaching stations (classrooms) to charter schools. On May 17, 2012, CCSA filed a motion asserting that LAUSD's practice failed to comply with the Implementing Regulations. On June 27, 2012, the trial court granted the motion and ruled that LAUSD's use of "norming ratios" to determine the number of classrooms to offer charter schools violated Section 11969.3, subdivision (b)(1) of the Implementing Regulations. (10

AA 2805-08.) LAUSD appealed, and on December 5, 2012, the Fifth Division of the Second Appellate District issued an unpublished opinion reversing the trial court. Upon the urging of a number of school districts statewide who seek to emulate LAUSD's decision to ignore part of the Implementing Regulations, the Second District ordered the opinion published on January 4, 2013. CCSA then filed a Petition for Rehearing on January 22, 2013, which the court denied.

CCSA respectfully requests that this Court grant review of the decision reversing the trial court's order in favor of CCSA.

IV. DISCUSSION

A. The Appellate Courts' Latitude To Ignore Language In A Regulation Is An Important Question Of Law Requiring Uniformity Of Decision

CCSA v. LAUSD creates a conflict with long-settled principles of statutory and regulatory construction. In interpreting statutes and regulations, courts are supposed "to ascertain and declare what is in terms or substance therein, *not to insert what has been omitted, or to omit what has been inserted.*" (Code Civ. Proc., § 1858, emphasis added; see also *Pacific Gas & Electric Co. v. Superior Court* (2006) 144 Cal.App.4th 19, 24 [applying § 1858 to regulations]; *Hoitt v. Dept. of Rehabilitation* (2012) 207 Cal.App.4th 513, 523 (*Hoitt*) [rules of statutory construction apply to the interpretation of regulations].) This Court recently stated that "[t]he rules governing statutory construction are uncomplicated and settled."

(*Apple Inc. v. Superior Court* (2013) (Feb. 4, 2013, S199384) __ Cal.4th __ [p. 3]). The *CCSA v. LAUSD* decision puts that statement in peril.

Prevailing law provides that "[t]he fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) In doing so, the court's key role is to examine the words of the statute or regulation, "attempting to give effect to the usual, ordinary import of the language and to avoid making any language mere surplusage."[1] (*Cash v. Winn* (2012) 205 Cal.App.4th 1285, 1297.)

Decades of jurisprudence confirm these governing principles. Some examples are presented here.

- In *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135, this Court rejected an interpretation that would transform "meaningful words" in the statute "into meaningless surplusage," as contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage.
- In *Doe v. City of Los Angeles*, *supra*, 42 Cal.4th at p. 545, this Court held that "[i]n construing any statute, a court may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does."

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[1] "'Surplusage' is defined as 'excessive or nonessential matter.'" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1017 [citing Webster's 9th New Collegiate Dict. (1990), p. 1188].)

- In *S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 385 (*Berti*), this Court held that "[e]ven when broadly construing a statute, we may not 'ignore the plain statutory language' or reach conclusions inconsistent with this language."
- In *Cel-Tech Communications v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 216, this Court held that "[w]hen construing a statute, a court must consider the entire statutory scheme of which it is part and give effect to all parts of the statute, avoiding an interpretation that would render any provision nugatory."
- In *Cal. Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 (*Cal. Fed. Savings & Loan*), this Court held that a court "may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used."
- In *Breslin v. City and County of San Francisco* (2006) 146 Cal.App.4th 1064, 1079, the court held that a court's goal is "to interpret the language of the statute—not to insert what has been omitted or omit what has been inserted."

As explained in more detail in subsections 1 and 2 below, *CCSA v. LAUSD* creates a conflict with those long-settled principles of construction by (1) transforming meaningful words in a quasi-legislative regulation into meaningless surplusage and (2) inserting language into that same regulation

which appears nowhere in the Prop. 39 statute or the legislative history of the Implementing Regulations. As a result of this conflict, there is no longer uniformity of decision between the Appellate Districts (or even internally within the Second Appellate District) regarding issues of statutory and regulatory interpretation.

Principally, the *CCSA v. LAUSD* decision creates confusion as to the latitude a reviewing court has in construing a statute or regulation. Is a reviewing court still obligated to follow the text of a statute or regulation, or is it now free to ignore some language, and substitute other language in its place? As a result of the *CCSA v. LAUSD* decision, this question can no longer be answered with certainty.

CCSA respectfully submits that the *CCSA v. LAUSD* opinion created a conflict with settled law in granting a reviewing court entirely new authority to ignore the text of an applicable regulation. The split in authority created by *CCSA v. LAUSD* is irreconcilable. To secure uniformity of decision and settle this important issue of law, CCSA urges the Court to grant this Petition.

1. ***CCSA v. LAUSD* Impermissibly Renders Parts of Implementing Regulations Section 11969.3, Subdivision (b)(1) Meaningless**

A court "may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does." (*Doe v. City of Los Angeles, supra*, 42 Cal.4th at p.

545; Code Civ. Proc., § 1858.) Yet that is what the *CCSA v. LAUSD* opinion did in interpreting Implementing Regulations Section 11969.3, subdivision (b)(1). The *CCSA v. LAUSD* decision conflicts with this established principle of statutory interpretation by rendering meaningless two crucial sentences in Section 11969.3, subdivision (b)(1).

In offering facilities to each charter school that submits a legally sufficient Prop. 39 request, school districts must comply with Implementing Regulations Section 11969.3. That regulation is to be used "to determine whether facilities provided to a charter school are sufficient to accommodate charter school students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending public schools of the district." (Cal. Code Regs., tit. 5, § 11969.3.)

The first step in that determination is for school districts to select "comparison group" schools: "district-operated schools with similar grade levels" and which the majority of charter school students would be enrolled in had they chosen to remain in a district-run school. Those schools serve as a standard against which to base the school district's facilities offer to the charter school, ensuring that facilities provided to a charter school are most like the facilities charter school students would have access to if they attended district schools. (Cal. Code Regs., tit. 5, § 11969.3, subd. (a)(1).)

A school district is then obligated to provide facilities to a charter school "in the same ratio of teaching stations (classrooms) to ADA as those

provided to students in the school district attending comparison group schools." (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).) To establish that ratio, a district must determine the ADA[2] at the comparison group schools by "using projections for the fiscal year and grade levels for which facilities are requested," and the number of teaching stations at the comparison group schools "using the classroom inventory prepared pursuant to California Code of Regulations, title 2, section 1859.31, adjusted to exclude classrooms identified as 'interim housing.'" (*Id.*)

It is undisputed that LAUSD did not use a classroom inventory to determine the number of teaching stations at the comparison group schools. As the *CCSA v. LAUSD* court recognized, LAUSD admitted that it used a different approach to calculate the number of classrooms offered to charter schools: "norming ratios used for District students." The court found that this approach, even though in direct contravention to Section 11969.3, was acceptable because it would promote the "intent" of Prop. 39.

In sanctioning a school district's use of norming ratios as a means by which to determine the appropriate number of classrooms the district must offer to a charter school, the *CCSA v. LAUSD* opinion rendered portions of the regulation requiring the use of a classroom inventory meaningless. In essence, *CCSA v. LAUSD* took a pen to the regulation as follows:

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[2] ADA is a percentage, typically between 92 to 97 percent, of a school's overall enrollment, which accounts for student absences. (8 AA 2165.)

> (1) Facilities made available by a school district to a charter school shall be provided in the same ratio of teaching stations (classrooms) to ADA as those provided to students in the school district attending comparison group schools. School district ADA shall be determined using projections for the fiscal year and grade levels for which facilities are requested. Charter school ADA shall be determined using in-district classroom ADA projected for the fiscal year and grade levels for which facilities are requested. ~~The number of teaching stations (classrooms) shall be determined using the classroom inventory prepared pursuant to California Code of Regulations, title 2, section 1859.31, adjusted to exclude classrooms identified as interim housing. "Interim housing" means the rental or lease of classrooms used to house pupils temporarily displaced as a result of the modernization of classroom facilities, as defined in California Code of Regulations, title 2, section 1859.2, and classrooms used as emergency housing for schools vacated due to structural deficiencies or natural disasters.~~

(Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1), strikethrough added.)

Such an interpretation "omit[s] what has been inserted" in the regulation, contravening well-settled rules of construction and placing Second Appellate District jurisprudence squarely at odds with precedent from this Court and the other Appellate Districts.

As an example, in *Berti*, this Court affirmed a judgment preventing defendants from recovering fees and costs because the statute required the defendant to file an anti-SLAPP motion first. (*Berti, supra*, 39 Cal.4th at pp. 377-78.) Plaintiffs had dismissed their action before defendants filed the motion. (*Id.*) This Court held that because the statute allowing for recovery stated that "only a 'prevailing defendant on a special motion to

strike' may recover attorney fees and costs," the "filing of a viable anti-SLAPP motion" is a prerequisite to recovery. (*Id.* at p. 380.) This Court refused to ignore the statutory language, stating that "[e]ven when broadly construing a statute, we may not 'ignore the plain statutory language or reach conclusions inconsistent with this language.'" (*Id.* at p. 382.)

Much like the statutory prerequisite for recovering fees for an anti-SLAPP motion being the filing of the motion, a prerequisite for a school district to determine the ratio of teaching stations (classrooms) to ADA at the comparison group schools is the use of a classroom inventory. (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).) However, unlike this Court in *Berti*, the *CCSA v. LAUSD* court ignored and rendered meaningless the plain language in the regulation by allowing LAUSD to use norming ratios as a shortcut to the regulation's clear procedure.

In addition, *CCSA v. LAUSD* disregarded established rules of statutory construction by finding, without any evidence, that interpreting Section 11969.3, subdivision (b)(1) to require school districts to use a classroom inventory to determine how many classrooms to offer charter schools "may well have anomalous results." (*CCSA v. LAUSD*, 212 Cal.App.4th at p. 695.) Even if an interpretation *might* arguably lead to anomalous results— a claim that CCSA could disprove if the well-settled rules of interpretation are actually applied—the decision conflicts with case

law stating that in such a situation the statute and regulations are still to be interpreted to be "reasonable and workable." (See *Hoitt, supra*, 207 Cal.App.4th at p. 52.)

"It is a well-settled principle of statutory interpretation that the various parts of a statute must be considered *as a whole* to avoid absurd or anomalous results *by harmonizing any apparently conflicting provisions*; and thus, *a particular part of a statutory enactment must be viewed in light of the enactment in its entirety*. Moreover, statutes *should not be interpreted in a manner to render parts of them superfluous*." (*Rao v. Campo* (1991) 233 Cal.App.3d 1557, 1567, emphasis added.) The *CCSA v. LAUSD* decision does not do that.

2. *CCSA v. LAUSD* Also Impermissibly Rewrites Implementing Regulations Section 11969.3, Subdivision (b)(1) By Inserting Language Into The Regulation

CCSA v. LAUSD's sanctioning of a school district's use of norming ratios has a second impermissible consequence: it reads into the regulation "language that does not appear in it." (*Doe v. City of Los Angeles, supra*, 42 Cal.4th at p. 545.) This Court and the Appellate Districts have soundly rejected such an approach to the construction of statutes and regulations.

For example, in *Cal. Fed. Savings & Loan*, this Court declined to add language to Government Code Section 970.1, which would have had the effect of exempting public entities from paying the statutorily mandated

postjudgment interest rate of ten percent. (*Cal. Fed. Savings & Loan, supra*, 11 Cal.4th at p. 349.) Specifically, this Court declined to "rewrite Government Code section 970.1, subdivision (b), [which states that a judgment is 'not enforceable under Title 9'] to provide that judgments are 'not enforceable under *Division 2 of* Title 9 of Part 2 (commencing with Section 695.010) of the Code of Civil Procedure.'" (*Ibid.*, emphasis in original.) This Court noted that had the Legislature intended to include such language, it "could have readily done so," holding that "[w]e may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*Ibid.*)

In addition, even a different division of the *same* Appellate District that decided *CCSA v. LAUSD* has applied this well-settled canon of construction in refusing to insert unstated language into a statute or regulation. In *Singh v. Southland Stone, U.S.A., Inc.*, the Third Division of the Second Appellate District refused to add qualifying language to a provision of the Labor Code requiring the payment of earned wages. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 362-63.) The court stated: "We cannot insert qualifying language where it is not stated or rewrite the statute to conform to a presumed intention that is not expressed." (*Id.* at p. 363.)

In drafting the Implementing Regulations for adoption by the State Board of Education, the Department of Education specified the manner in

which a school district is to account for its classroom facilities, in order to share them fairly with charter schools. The Department of Education could have easily written the Implementing Regulations so as to allow a school district to use district-wide norming ratios in assigning classroom space to a charter school. It did not.[3] By allowing districts to use norming ratios to assign classrooms to charter schools, however, the *CCSA v. LAUSD* court has improperly read extraneous language into the text of the regulation.

Tellingly, before presenting the Implementing Regulations to the State Board for adoption *over ten years ago*, the Department of Education solicited written comments, took oral testimony, and responded to comments raised regarding the language of the proposed Implementing Regulations. (See CCSA's RJN, Exh. A, pp. 19-30.) The Department of Education fielded multiple comments on the subject of what constitutes "conditions reasonably equivalent." (*Id.* at pp. 22-23.) Though LAUSD and other school districts commented on and provided oral testimony regarding the proposed Implementing Regulations, *no one raised any concern about the Implementing Regulations' proposed method of*

[3] Pursuant to Government Code Section 11346.9, subdivision (a), a Final Statement of Reasons accompanied the State Board's adoption of the Implementing Regulations. (See CCSA's Motion Requesting Judicial Notice ("RJN"), Exh. A.) The concept of "norming ratios" appears nowhere in the Final Statement of Reasons, including in its discussion of a district's obligation to provide facilities that have the same ratio of teaching stations to ADA as comparison group schools. (See *id.*, Exhibit A, p. 11.)

calculating teaching stations using the classroom inventory. (*Id.* at pp. 11, 19, 22-23.)

By both ignoring the plain language of Section 11969.3, subdivision (b)(1) of the Implementing Regulations and adding text to that regulation, the Fifth Division of the Second Appellate District has sanctioned a method of statutory and regulatory interpretation that is directly in conflict with this Court's and other Appellate Districts' jurisprudence (as well as with the Code of Civil Procedure). That conflict creates uncertainty for countless groups and individuals throughout the state that must rely on regulations promulgated by administrative agencies.

Uniformity of decision is necessary to ensure that well-settled canons of construction are applied consistently by the courts. CCSA respectfully requests that this Court grant review to resolve these important questions of law.

B. *CCSA v. LAUSD* Violates Separation Of Powers Principles Governing Quasi-Legislative Regulations

"Of all the activities undertaken by an administrative agency, quasi-legislative acts are accorded the most deferential level of judicial scrutiny." (*Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1331.) Courts are to "exercise limited review of legislative acts by administrative bodies out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of

administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority." (*Cal. Hotel & Motel Assn. v. Industrial Welfare Com.*, *supra*, 25 Cal.3d at p. 211-12; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10 ["[I]f authorized by the enabling legislation, [quasi-legislative regulations] bind this and other courts as firmly as statutes themselves."].)

The *CCSA v. LAUSD* decision conflicts with these firmly established principles governing the proper deference accorded to quasi-legislative regulations adopted by an administrative agency. In opposing CCSA's trial court motion and on appeal, LAUSD never explicitly challenged the validity of Section 11969.3, subdivision (b)(1). The *CCSA v. LAUSD* court did not conduct an inquiry into the regulation's validity. Nevertheless, by ignoring portions of the regulation and inserting substitute language found nowhere in the Prop. 39 scheme, the Second Appellate District implicitly invalidated part of the regulation. That contravenes separation of powers principles and puts *CCSA v. LAUSD* in tension with a decision by the Third Appellate District upholding the Implementing Regulations as a valid exercise of the State Board's rulemaking authority under Prop 39. (See generally, *Cal. School Bds. Assn. v. State Bd. of Ed.* (2010) 191 Cal.App.4th 530 ("*CSBA*").) Review by this Court is required to secure uniformity of decision.

The statutory language of Prop. 39 obligated the Department of Education to propose regulations implementing Prop. 39 for the State Board of Education's consideration, including the definition of "conditions reasonably equivalent." (Ed. Code, § 47614, subd. (b)(6).) The Department of Education did so, and the State Board adopted the Implementing Regulations containing explicit criteria for determining whether facilities provided to a charter school are reasonably equivalent to the facilities the charter school students would occupy were they attending a district-run school. (Cal. Code. Regs., tit. 5, § 11969.3.)[4] The State Board undertook a rigorous process with input from many stakeholders to enact the Implementing Regulations, and acted well within its authority in adopting Section 11969.3, subdivision (b)(1).

The Implementing Regulations are quasi-legislative rules and thus are subject to narrow review. (*CSBA, supra*, 191 Cal.App.4th at pp. 542-44.) The *CCSA v. LAUSD* decision conflicts with these well-established principles. By holding that a school district's use of "norming ratios" in allocating classroom space to charter schools complies with the "intent" of Prop. 39, the decision implicitly invalidates the last two sentences of Section 11969.3, subdivision (b)(1) as inconsistent with the intent of Prop. 39. Principles of administrative law and separation of powers do not allow

[4] The State Board adopted the Implementing Regulations in 2002 and amended them in 2008. (*CSBA, supra*, 191 Cal.App.4th 530, 542.)

courts to ignore the heart of a regulation and arrive at a result that allows local governmental bodies, at their discretion, to ignore its commands.

The *CCSA v. LAUSD* decision is also in conflict with cases holding that courts are to recognize and defer to an administrative agency's interpretation of its own regulations. (See *Environmental Protection & Information Center v. Cal. Dept. of Forestry & Fire Protection* (2008) 44 Cal. 4th 459, 490 [noting that "courts will be deferential to government agency interpretations of their own regulations, particularly when the interpretation involves matters within the agency's expertise and does not plainly conflict with a statutory mandate"]; *Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1000 [Final Statement of Reasons for the Implementing Regulations is entitled to consideration and respect by the courts]; *Calderon v. Anderson* (1996) 45 Cal.App.4th 607, 613 [an agency's interpretation of its own regulations is entitled to respect and deference].) The *CCSA v. LAUSD* court failed to consider and defer to the State Board's interpretation of the Implementing Regulations in the Final Statement of Reasons.

As discussed above, comparison group schools play a vital role in assisting school districts to make Prop. 39 compliant facilities offers to charter schools and in doing so determine whether those facilities are

"reasonably equivalent."[5] In the Final Statement of Reasons accompanying the Implementing Regulations, the State Board made clear that school districts are not to use district-wide standards in assessing comparison group schools used in making Prop. 39 offers. Using norming ratios, however, does exactly that. The Final Statement of Reasons states:

> [Section 11969.3, subdivision (a),] establishes a standard that is a middle ground between a comparison group that consists of all district-operated schools and a comparison group that consists of one to three schools. Using all district-operated schools as the comparison group would present administrative and data problems for school districts. *In addition, for large school districts, using all district-operated schools as the comparison group would result in a standard that might be significantly different than the neighborhood schools the charter school students would otherwise attend. (This is because in large school districts the conditions in schools may vary widely from neighborhood to neighborhood.)*

(CCSA's RJN, Exhibit A, pp. 10-11, emphasis added.)

By sanctioning the use of district-wide norming ratios as a method of providing classrooms to charter schools, the *CCSA v. LAUSD* court makes pointless the comparison group analysis required in the Implementing Regulations and explained in the Final Statement of Reasons. That results

[5] The Implementing Regulations specify that comparison group schools for a Prop. 39 offer made to a charter school must consist only of district-run schools with similar grade levels that serve students living in the high school attendance area in which the largest number of that charter school's students reside. (Implementing Regulations, § 11969.3, subd. (a)(2).)

in the kind of district-wide comparison group specifically rejected by the Implementing Regulations and the Final Statement of Reasons.

In sum, by implicitly invalidating a portion of the regulation and failing to recognize and defer to the State Board's expertise, the *CCSA v. LAUSD* opinion is in conflict with well-settled separation of powers jurisprudence of this Court and other Appellate Districts. As with the standards for interpreting statutes and regulations, uniformity of decision is required to maintain consistent principles governing the assessment of the legality of quasi-legislative rules and the proper deference to be accorded to administrative agencies that promulgate and interpret such rules. CCSA respectfully requests that this Court grant the Petition to resolve these important legal issues.

C. ***CCSA v. LAUSD* Also Cannot Be Reconciled With *Bullis Charter School v. Los Altos School District***

Finally, the *CCSA v. LAUSD* decision is also in conflict with a Sixth Appellate District decision interpreting a school district's duties to provide reasonably equivalent facilities to charter schools. (See *Bullis, supra,* 200 Cal.App.4th 1022.) In *Bullis*, a charter school challenged the school district's compliance with Prop. 39, claiming that the district failed to provide an offer of reasonably equivalent facilities. (*Id.* at p. 1029.) In finding that the district did not comply with Prop. 39, the *Bullis* court held that "[i]n making its facilities offer, the school district must make a *good*

faith effort to consider and accurately measure all of the facilities of the comparison group schools and accurately describe the facilities offered to the charter school. It is only through such an approach that one can determine whether 'reasonably equivalent' facilities have been offered by the school district." (*Id.* at p. 1030, emphasis added.)

The school district argued that in assessing non-teaching space at comparison group schools, it was only required to consider space "common to each of the schools in the comparison group." (*Id.* at p. 1047.) But the Sixth Appellate District rejected this narrow view of the Implementing Regulation, noting that such an "approach would allow a comparison group school's subjective use determination of its nonclassroom space to control the analysis." (*Ibid.*) The *Bullis* court held that a school district "must take an objective look at all [non-teaching] space available at the schools in the comparison group," and satisfies its Prop. 39 obligations "only if it considers the entire nonclassroom space in the facilities offer." (*Ibid.*) The court ultimately concluded that a district violates Prop. 39's "reasonable equivalence" mandate when it provides "an incomplete and inaccurate report of . . . the comparison group schools' facilities." (*Id.* at p. 1060.)

Though *Bullis* dealt with non-teaching station space, as opposed to teaching station (classroom) space, its rationale still applies here, and the *CCSA v. LAUSD* decision is in conflict with it. It is undisputed that LAUSD did not provide a complete report of the projected ADA and

projected teaching stations (classrooms) at the comparison group schools identified in LAUSD's facilities offers. Rather, LAUSD used district-wide norming ratios to offer teaching station (classroom) space to charter schools, which could result in existing, unused classroom space being wasted (i.e., withheld from charter schools). Nevertheless, the *CCSA v. LAUSD* court did not see this as a Prop. 39 violation.

Bullis and *CCSA v. LAUSD* are at odds, and that creates uncertainty for both school districts making Prop. 39 facilities offers and charter schools that depend on public school facilities to operate successfully. Given this conflict, CCSA respectfully requests this Court grant review to address the important legal questions presented by this case.

V. CONCLUSION

The *CCSA v. LAUSD* decision has cast doubt on the proper method of interpreting quasi-legislative regulations and deferring to administrative agencies' promulgation of such regulations. In doing so, the *CCSA v. LAUSD* decision clears the way for a regulated local governmental body to disregard language in a state agency's quasi-legislative regulations when the local body decides, in its own discretion, that the regulations are not consistent with the local body's interpretation of the "purpose" of the statute under which the regulations were promulgated.

CCSA respectfully submits this Petition for Review and asks that this Court grant review to consider these important questions of law and to resolve the split in authority created by the Court of Appeal's decision.

Respectfully submitted,

DATED: February 13, 2013

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the word count for the brief above, excluding the caption and tables of contents and authorities is 6,264 words. I relied upon the word count feature provided by Microsoft Word.

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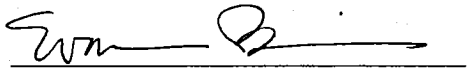
By: 
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CALIFORNIA CHARTER SCHOOLS ASSOCIATION, Plaintiff and Respondent, v. LOS ANGELES UNIFIED SCHOOL DISTRICT et al., Defendants and Appellants.	B242601 (Los Angeles County Super. Ct. No. BC438336)

APPEAL from an order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Reversed.

Orbach, Huff & Suarez, David M. Huff, Marley S. Fox, Joanna Braynin; Mark S. Fall for Defendants and Appellants.

Latham and Watkins, James L. Arnone, Winston P. Stromberg, Michele L. Leonelli; California Charter Schools Association, Ricardo J. Soto, Julie Ashby Umanksy and Phillipa L. Altmann for Plaintiff and Respondent.

I. INTRODUCTION

Public school districts are required to share their facilities fairly among all public school pupils, including those in charter schools. (Ed. Code § 47614, subd. (a) (Proposition 39).)[1] "Each school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school's in-district students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district." (*Id.* at subd. (b).)

At issue in this appeal is whether the trial court erred in finding that the Los Angeles Unified School District ("District") violated California Code of Regulations, title 5, section 11969.3, subdivision (b)(1))[2] when it used norming ratios as a method of assigning classroom space to charter schools.

II. FACTUAL AND PROCEDURAL BACKGROUND

On May 17, 2007, the California Charter Schools Association ("CCSA") filed two lawsuits against the District claiming that the District failed to comply with Proposition 39 in extending facilities offers to charter schools. On April 22, 2008, CCSA and the District entered into a settlement agreement to resolve those lawsuits.

Paragraph 3 of the settlement agreement states: "Provided that a CCSA member charter school submits future facilities request that is legally sufficient under Proposition 39 and any Proposition 39 implementing regulations in effect at that time, LAUSD shall make a facilities offer to that charter school that complies with Proposition 39 and any Proposition 39 implementing regulations in effect at that time. This obligation shall apply to requests for facilities that are submitted for the 2008-2009 school year, shall

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1 All further statutory references are to the Education Code, unless otherwise noted.

2 Further references to "regulation" are to sections under title 5 of the California Code of Regulations, unless otherwise noted.

EXHIBIT A

31

inure to the benefit of all CCSA member charter schools, including without limitation to PUC and Green Dot, and shall continue for the term of this Agreement."

By its terms, the settlement agreement was to remain in effect until June 30, 2013. On May 24, 2010, CCSA filed a complaint for breach of settlement agreement, and violation of Proposition 39 seeking specific performance, permanent injunction, appointment of special master and declaratory relief. ("Complaint")

CCSA's complaint included a first cause of action for breach of settlement agreement for failure to make facilities offers pursuant to Prop. 39 and a seventh cause of action for declaratory relief for failure to provide facilities offers pursuant to Prop. 39.

On September 8, 2010 CCSA filed a motion for summary adjudication of the first and seventh causes of action. On December 7, 2010, the trial court entered an order granting in part CCSA's motion for summary adjudication. The trial court ordered the District to extend facilities offers to all charter schools that submitted legally sufficient facilities requests for the 2011-2012 school year and to make Proposition 39 – compliant facilities offers to all CCSA member charter schools that submit legally sufficient facilities offers for future school years until the term of the settlement agreement ends on June 30, 2013. The trial court denied CCSA's requests for injunctive and declaratory relief. The issuance of this order was not challenged by the District.

On May 17, 2012, CCSA filed a motion to enforce the trial court's December 7, 2010 order with regard to the District's facilities offers for the 2012-2013 school year. CCSA asserted that the District's final facilities offers for the 2012-2013 school year failed to provide facilities to charter schools in the same ratio of teaching stations (classrooms) to ADA [Average Daily Attendance] as those provided to students in the school district attending companion group schools, as required by Regulation § 11969.3, subdivision (b)(1). CCSA objected to the District's use of norming ratios used for District students. [3]

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[3] The District defines "norming ratios" as follows: "Norms – Most District schools receive their base allocations of teachers, school administrators, school clerical positions,

In its opposition, the District claimed that it provided classrooms to charter school students in the same ratio of students to classrooms that it provided to students attending District operated schools. Specifically, the District provided classrooms to its own students at ratios of no less than 24:1 for grades K-3; 30.5:1 for grades 4-6; 28:1 for grades 7-8; and 30:1 for grades 9-12. It was the District's position that the use of norming ratios was an appropriate tool by which the District ensured an equal ratio of ADA to classrooms in a charter school and its District comparison group schools.

On June 27, 2012, the trial court ruled that the District's use of norming ratios to determine the number of classrooms to provide to charter schools violated California Code of Regulations, title 5, Section 11969.3, subdivision (b)(1). The trial court ordered that "in determining the number of teaching stations to provide to charter schools requesting facilities under Prop. 39, LAUSD must comply with Section 11969.3(b)(1) of the Prop. 39 Implementing Regulations, and must not use 'norming ratios' to reduce teaching stations offered to charter schools in the future."

The District appeals this order.

III. DISCUSSION

The District asserts that the order of June 27, 2012 is an injunction. CCSA characterizes it as an enforcement order. It is of no significance what it is called because this appeal presents a legal issue which requires review de novo. Appellate courts independently determine the proper interpretation of a statute. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *In re Clarissa H.* (2003) 105 Cal.App.4th 120, 125.)

The issue is one of statutory and regulatory construction. The declared intent of Proposition 39 is "that public school facilities should be shared fairly among all public

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and various resources, on the basis of Board–approved 'norms,' which determine the resources to be allocated to individual schools."

school pupils, including those in charter schools." (Ed. Code § 47614, subd. (a).) "Each school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school's in-district students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district". . . . (§ 47614, subd. (b).) The State Board of Education adopted regulations implementing the provisions of section 47614. (Regulations 11969.1 et seq.) The focus of this appeal is the interpretation of regulation 11969.3, subd. (b)(1).[4]

CCSA emphasizes that the regulatory language explicitly states that "the number of teaching stations (classrooms) shall be determined using the classroom inventory prepared pursuant to California Code of Regulations, title 2, section 1859.31, [5] adjusted

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4 Subdivision (b) of regulation 11969.3 reads in part: "(b) Capacity [¶] (1) Facilities made available by a school district to a charter school shall be provided in the same ratio of teaching stations (classrooms) to ADA as those provided to students in the school district attending comparison group schools. School district ADA shall be determined using projections for the fiscal year and grade levels for which facilities are requested. Charter school ADA shall be determined using in-district classroom ADA projected for the fiscal year and grade levels for which facilities are requested. The number of teaching stations (classrooms) shall be determined using the classroom inventory prepared pursuant to California Code of Regulations, title 2, section 1859.31, adjusted to exclude classrooms identified as interim housing. . . ."

5 California Code of Regulations, title 2, section 1859.31 reads: [¶] The district shall prepare a gross inventory consisting of all classrooms owned or leased in the district, the HSAA or super HSAA as appropriate. For the purpose of this gross classroom inventory, the following shall be considered a classroom. Any classroom: (a) for which a contract was signed for the construction or acquisition of facilities or for which construction work has commenced at the time the SFP application for determination of eligibility is submitted to the OPSC; (b) constructed with funds from the LPP; (c) used for Special Day class or Resource Specialist Programs; (d) that are standard classrooms, shops, science laboratories, computer laboratories, or computer classrooms; (e) acquired or created for Class Size Reduction purposes; (f) used for preschool programs; (g) converted to any non-classroom purpose including use by others; (h) with Housing and Community Development or Department of Housing insignia; (i) acquired for interim housing for a modernization project; (j) leased or purchased under the State Relocatable Program pursuant to Chapter 14 of Part 10 of the Education Code; (k) that

to exclude classrooms identified as interim housing. . . ." The regulations have a clear formula that does not rely on how many students a district decides to put in each classroom as a district-wide average, but rather on how many students and classrooms, whether they are used as classrooms or not, the district has in the relative comparison group schools.

The District responds that § 47614, subdivision (b) requires the district to accommodate charter school students in the same manner they would be accommodated if they attended District public schools. The District counts classrooms actually provided to students in the school district attending comparison group schools in determining the ratio of students to classrooms used to allocate space to charter schools. The District contends regulation §11969.3 subd. (b)(1) should be analyzed by focusing on the language "Facilities made available by a school district to a charter school shall be provided in the same ratio of teaching stations (classrooms) to ADA as those provided to students in the school district attending comparison group schools" rather than the gross classrooms in existence.

We read regulation § 11969.3, subdivision (b)(1) as requiring the District to provide its facilities to charter schools in a manner that will promote the intent of Proposition 39 of public school facilities being shared fairly among all pupils, including those in charter schools. We make a distinction between facilities that are "provided" and "classroom inventory." Regulation 11969.3, subdivision (b)(1) states "[f]acilities made available by a school district to a charter school shall be *provided* in the same ratio of teaching stations (classrooms) to ADA as those *provided* to students in the school district attending companion group schools." (Emphasis added.)

We have been unable to find and neither party has referred us to any regulatory history bearing upon the meaning to be ascribed to the word "provided" as used in regulation § 11969.3, subdivision (b)(1). "[C]ourts should give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.'"

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have a waiver for continued use by the Board for Field Act exemptions; (l) used for Community School purposes; (m) included in a closed school."

[Citations.] (*Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 918.) Webster's dictionary defines "provide" as "to supply" and "provided" as "supplied" or "equipped." (Webster's 3d. New Internat. Dict. (2002) p. 1827.)

If we were to adopt the analysis proffered by CCSA, it may well have anomalous results. For example, the District would have to count classrooms that have been contracted for but not yet built and classrooms at closed school sites. "It is well established that a statute open to more than one construction should be construed so as to avoid anomalous or absurd results." (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 18.)

The District's use of norming ratios is consistent with the intent of Proposition 39. It furthers the goal of ensuring that public school facilities are being shared fairly among all public school pupils and that the charter school's in-district students are being accommodated in conditions reasonably equivalent to those in which those students would be accommodated if they were attending other public schools of the District.

IV. DISPOSITION

The order of June 27, 2012 is reversed. The parties are to bear their own costs on appeal.

FERNS, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

EXHIBIT A

36

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CALIFORNIA CHARTER SCHOOLS ASSOCIATION, Plaintiff and Respondent, v. LOS ANGELES UNIFIED SCHOOL DISTRICT et al., Defendants and Appellants.	B242601 (Los Angeles County Super. Ct. No. BC438336) ORDER CERTIFYING OPINION FOR PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:

The opinion in the above-entitled matter filed on December 5, 2012 was not certified for publication in the Official Reports. Upon application of appellants and for good cause appearing, it is ordered that the opinion shall be published in the Official Reports.

Pursuant to California Rules of Court, rule 8.1105(b), this opinion is certified for publication.

FERNS, J.* TURNER, P. J. KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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FERNS, J.* TURNER, P. J. KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111-6538.

I served the following document described as:

RESPONDENT CALIFORNIA CHARTER SCHOOLS ASSOCIATION'S PETITION FOR REVIEW

by serving a true copy of the above-described document in the following manner:

BY ELECTRONIC MAIL

The above-described document was transmitted via electronic mail to the following party(ies) on **February 13, 2013**:

David M. Huff, Esq. *(dhuff@ohslegal.com)*
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BY U.S. MAIL

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents with the United States Postal Service; such documents are delivered to the United States Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service on **February 13, 2013**:

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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **February 13, 2013**, at San Francisco, California.

Elizabeth A. Alvarez