Case No. S208611

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.

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

OPENING BRIEF ON THE MERITS

LATHAM & WATKINS LLP
James L. Arnone (Bar No. 150606)
Winston P. Stromberg (Bar No. 258252)
Vanessa C. Wu (Bar No. 274336)
Michele L. Leonelli (Bar No. 280867)
355 South Grand Avenue
Los Angeles, California 90071-1560
Telephone: (213) 485-1234
Facsimile: (213) 891-8763
Email: james.arnone@lw.com

CALIFORNIA CHARTER SCHOOLS ASSOCIATION
Ricardo J. Soto (Bar No. 167588)
Julie Ashby Umansky (Bar No. 183342)
Phillipa L. Altmann (Bar No. 186527)
250 East 1st Street, Suite 1000
Los Angeles, California 90012
Telephone: (213) 244-1446
Facsimile: (213) 244-1448
Email: paltmann@calcharters.org

Attorneys for Plaintiff and Respondent
California Charter Schools Association

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CONSTITUTIONAL PROVISIONS

I. ISSUE PRESENTED

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. INTRODUCTION

In passing Prop. 39, California's 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 to benefit all of California's public school students. Prop. 39 requires school facilities to be "shared fairly among all public school pupils, including those in charter schools." (Ed. Code, § 47614, subd. (a).) School districts *must* offer "reasonably equivalent" facilities to all charter schools that request them. (Ed. Code, § 47614, subd. (b).) A school district must take a hard look at its facilities inventory, considering *all* of the space it has. A district may not just offer leftover space to charter schools; rather, it must affirmatively make room for charter schools, even if doing so is difficult.

At issue is LAUSD's refusal to use the Implementing Regulations' methodology for determining the number of classrooms to offer to charter schools. The Implementing Regulations expressly require school districts to divide the projected average daily attendance ("ADA") at LAUSD-run "comparison group" schools by the number of classrooms at those schools, regardless of whether LAUSD actually uses them as classrooms. That yields a classroom-to-ADA ratio. LAUSD must offer classrooms to charter schools using that ratio. (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).)

That calculation reflects the deliberate choice of the State Board of Education ("Board"), the agency that promulgated the Implementing

Regulations. But, instead of making those calculations, LAUSD offered classrooms to charter schools based on "norming ratios used for District students," which reflect the average number of students LAUSD chooses to assign to the classrooms *that it chooses to use as classrooms* at district-run schools. Prop. 39 does not allow LAUSD to use such district-wide norming ratios when determining how many classrooms to offer to charter schools.

Permitting LAUSD to use its district-wide norming ratios would create the absurdity that where LAUSD allocates its resources so that it uses fewer classrooms than it actually has, it could offer fewer classrooms to charter schools, resulting in classrooms left vacant or put to less important uses, like storage or lounges. Using norming ratios would allow LAUSD to count only classrooms that LAUSD decides to use for pupil instruction, and ignore the many classrooms that LAUSD controls but which LAUSD does not choose to use for classroom purposes. That would mean that some classrooms that physically exist at a campus would be treated as though they do not exist. The rules do not allow LAUSD to remove classrooms from Prop. 39's facilities-sharing obligation in this way.

The Court of Appeal erred in reversing the trial court and holding that LAUSD's use of its norming ratios is acceptable. Its decision violates principles of statutory interpretation and separation of powers. Rather than following precedent holding that regulations are to be interpreted to give effect to every word and avoid making language surplusage, the Court of

Appeal ignored portions of section 11969.3, subdivision (b)(1), and effectively rewrote it to conform to a supposed statutory intention that conflicts with its express language and with the California Department of Education's ("Department") clear regulatory interpretation. The decision also invalidated a portion of this quasi-legislative regulation without conducting the required narrow review or deferring to the rulemaking process. Further, the decision ignored Education Code section 35160 and *Hartzell v. Connell* (1984) 35 Cal.3d 899, which together forbid school districts from acting in a manner inconsistent with Board regulations.

Compliance with the plain language of the regulation would not yield absurd or unfair results as the Court of Appeal's decision speculated. In the trial court and at the Court of Appeal, LAUSD alleged that following the plain language of the Implementing Regulations would cause dire harm, but LAUSD presented no evidence to support its assertions. Indeed, the record shows that LAUSD has made such claims many times before, only to be ordered to follow the law with no dire results actually occurring. Further, even if unique problems were ever to arise in particular situations, LAUSD could employ normal canons of regulatory construction to prevent any absurdity without rewriting the regulation's entire methodology.

LAUSD may not use its norming ratios to cap its offers to charter schools. The trial court was correct to order LAUSD to stop doing so. The Court of Appeal erred in reversing the trial court.

III. STATEMENT OF THE CASE

A. Background On Charter Schools And Prop. 39

The role of California public charter schools in K through 12 education is part of the factual predicate of this appeal. CCSA begins there.

1. Charter Schools Play An Important Role In California's Public School System, Despite Disproportionate Financial Challenges

In passing the Charter Schools Act in 1992, the Legislature allowed teachers, organizations, community leaders and groups, parents, and private citizens the chance to inject innovation into the public school system and compete against traditional district-run schools to create better educational opportunities for California's children. (Ed. Code, § 47601.)

Charter schools are part of California's public school system. (Ed. Code, § 47615, subd. (a)(1) & (2).) The Legislature has declared that "charter schools are and should become an integral part of the California education system and that establishment of charter schools should be encouraged." (Ed. Code, § 47605, subd. (b).)

One of the key goals of the Charter Schools Act is to spur "vigorous competition within the public school system to stimulate continual improvements in all public schools." (Ed. Code, § 47601, subd. (g).) School funding is directly tied to student attendance. (Ed. Code, §§ 47612, 47633; Cal. Code Regs., tit. 5, § 11960.) Charter schools are funded pursuant to a per-pupil formula. (Ed. Code, § 47630.) Charter schools

therefore compete with school districts for students. Choice—parents and students voting with their feet—makes charter schools a force for change.

Although funds are scarce for all public schools, charter schools have less public funding than district-run schools. (Appellants' Appendix, Volume 10, Page 2783 (hereafter, e.g., 10 AA 2783) [Office of Legislative Analyst study].) This is in part because charter schools cannot tap into the local funding sources that school districts use. Charter schools do not have the power to issue general obligation bonds, levy fees on new real estate developments, or ask local voters to approve taxes, as school districts routinely do. (Ed. Code, §§ 15124, 17110, 17620; Gov. Code, § 50079.)

Charter schools have relatively few public sources to fund facilities independent of getting access to district-controlled campuses. The Legislature annually appropriates some monies for a rent reimbursement program for charter schools serving socioeconomically disadvantaged children, but that money is not accessible to charter schools seeking Prop. 39 facilities. (Ed. Code, § 47614.5, subd. (d)(3).) The state Charter Schools Facilities Program provides some facilities funding for charter schools, but only schools serving communities where at least 70 percent of students who are eligible for free or reduced-priced lunches may seek it. Similarly, the federal Charter School Facilities Incentive Grants Program has a small facilities fund that charter schools may seek, but that has similarly restrictive eligibility requirements.

Given the limits and scarcity of these charter school facilities funding options, and charter schools' lack of access to school districts' many facilities funding sources, if a charter school does not get facilities from a school district under Prop. 39 it typically has to pay rent out of its operating funds intended for classroom instruction to lease whatever low-cost facilities it can find, often at locations like church basements and converted office space that lack basic amenities common to traditional school campuses, like libraries, cafeterias, athletic fields, and so forth.

2. Prop. 39 Requires School Districts To Share Their Facilities With Charter Schools

Prior to Prop. 39, the Charter Schools Act contemplated that charter schools would get only leftover space after school districts satisfied their own facilities priorities. (*Cal. School Boards Assn. v. State Bd. of Education* (2010) 191 Cal.App.4th 530, 560 (*CSBA*).) Charter schools were "entitled to use district facilities only if that would not interfere with the district's use of them." (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 999 (*Ridgecrest*).)

The law changed in November 2000, when California's voters passed Prop. 39. Prop. 39 declares that "public school facilities should be shared fairly among all public school pupils, including those in charter schools." (Ed. Code, § 47614, subd. (a).) Unlike the former section 47614, Prop. 39 imposed a mandatory duty that "[e]ach 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." (Ed. Code, § 47614, subd. (b).)

Prop. 39 *requires* that "to the maximum extent practicable, the needs of the charter school must be given the same consideration as those of the district-run schools." (*Ridgecrest, supra*, 130 Cal.App.4th at p. 1001.) "[S]ome disruption and dislocation of the students and programs in a district may be necessary to fairly accommodate a charter school's request for facilities." (*Id.* at p. 1000.) Accordingly, school districts may no longer satisfy their preferences first and offer just leftover space to charter schools.

Prop. 39, in addition to requiring public school facilities to be shared with public charter schools, also made it easier for LAUSD and other school districts to pass school facilities bonds by steeply lowering the voter approval percentage from two-thirds to 55 percent.[1] School districts where charter schools currently operate in California have shown extraordinary

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[1] Before Prop. 39's passage, school districts, like other government agencies, were required to attain a two-thirds vote for bonds to acquire or improve real property. (Cal. Const., art. XIII A, § 1, subd. (b)(2); *Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 Cal.App.4th 11, 19.) Prop. 39 "reduced the required voter approval from two-thirds to 55 percent for a school facility bond proposition." (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1025.)

enthusiasm for that part of Prop. 39. Since Prop. 39 was enacted, voters in such school districts passed 137 different bond measures totaling $21.4 billion in new school construction bonds which would have failed had Prop. 39 not greatly reduced the voter approval percentage needed.[2]

No school district has been more aggressive in using Prop. 39 to get taxpayer money for new facilities than LAUSD, which issued nearly $8 billion in bonds that would have failed were it not for Prop. 39. Specifically, LAUSD's Measure R for $3.87 billion passed on March 2, 2004, and LAUSD's Measure Y for $3.985 billion passed on November 8, 2005, *each with less than a two-thirds vote.* (See Motion Requesting Judicial Notice in Support of Opening Brief on the Merits ("RJN"), Exhs. A & B.)

B. LAUSD's Persistent Failure To Comply With Prop. 39 Forced CCSA To File A Lawsuit Which Resulted In The Settlement Agreement At The Center Of This Litigation

CCSA is a nonprofit public charter school membership organization serving hundreds of public charter school members and their hundreds of thousands of charter school students statewide. (2 AA 321, 362.)

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[2] CCSA obtained information regarding voter approval of school district general obligation bonds since Prop. 39's enactment from the website Ed-Data (http://www.ed-data.k12.ca.us/App_Resx/EdDataClassic/fsTwoPanel.aspx?#!bottom=/_layouts/EdDataClassic/election/ElectionReport.asp?reportNumber=512&level=06), which contains fiscal, demographic, and performance data on California's K-12 schools. Ed-Data is a partnership between the Department, EdSource, and the Fiscal Crisis & Management Assistance Team.

Because LAUSD routinely violates Prop. 39 to the financial and operational detriment of public charter schools, CCSA and two of its charter school members were forced to sue LAUSD in 2007. (2 AA 323; 6 AA 1532-53.) Rather than defend its actions, LAUSD entered into a settlement agreement with CCSA in April 2008, promising to start complying with Prop. 39, among other obligations (the "Settlement Agreement"). (1 AA 63-79.) In Paragraph 3 of the Settlement Agreement, the provision relevant here, LAUSD promised that, beginning with the 2008-2009 school year, it would make a legally compliant facilities offer to each CCSA member charter school submitting a facilities request that complies with Prop. 39. (1 AA 64.)

LAUSD broke its contractual promise to comply with Prop. 39 almost immediately. Within days after the Settlement Agreement's execution on April 22, 2008, LAUSD unlawfully withdrew several facilities offers made to CCSA member charter schools for the 2008-2009 school year, in breach of Paragraph 3 (and in violation of Prop. 39). (2 AA 324; 6 AA 1605.) LAUSD also breached the Settlement Agreement (and violated Prop. 39) by making no offers at all to nearly a dozen CCSA member charter schools that requested facilities. (2 AA 325; 6 AA 1605.) LAUSD continued to breach Paragraph 3 during the 2009-2010 and 2010-2011 school years, offering no space whatsoever to nearly two dozen

CCSA member charter schools that submitted legally compliant Prop. 39 facilities requests. (2 AA 325; 6 AA 1605-66.)

C. CCSA Was Forced To File This Lawsuit To Enforce The Promises LAUSD Made And Then Broke In The Settlement Agreement That Resolved The First Lawsuit

Given LAUSD's continued breaches of the Settlement Agreement, and after many attempts to get LAUSD to keep its promises and follow the law, on May 24, 2010, CCSA was forced to file this lawsuit. (1 AA 1-53.)

1. The Trial Court Granted CCSA's Summary Adjudication Motion On The First Cause Of Action

On September 8, 2010, CCSA brought a motion for summary adjudication ("MSA") of its first and seventh causes of action. (2 AA 319-38.) The first cause of action sought, in accordance with Paragraph 3 of the Settlement Agreement, an order requiring that LAUSD specifically perform the Settlement Agreement by making final facilities offers to charter schools for the 2010-2011 school year and subsequent years in compliance with Prop. 39 and the Implementing Regulations. (1 AA 37). The seventh cause of action sought a declaration that LAUSD's failure to make final offers to charter schools violated Prop. 39. (1 AA 46-47.)

On December 7, 2010, the trial court granted CCSA's MSA as to its first cause of action and ordered that LAUSD specifically perform Paragraph 3 of the Settlement Agreement (the "MSA Order"). (6 AA

1603-08.)[3] The trial court did not grant CCSA's requests for an injunction and for declaratory relief under the seventh cause of action, finding that factual issues prevented determination of the issues via summary adjudication at that time. (6 AA 1608.) The trial court ordered LAUSD to make facilities offers that comply with Prop. 39, and any Prop. 39 Implementing Regulations in effect at the time, to each charter school that submitted a legally sufficient Prop. 39 facilities request. (6 AA 1606-07.)

2. LAUSD's Prop. 39 Offers For The 2011-2012 School Year Violated Prop. 39

Even with the MSA Order requiring LAUSD to make offers that comply with law, LAUSD's Prop. 39 offers for the 2011-2012 school year violated the law, forcing CCSA to file a motion to enforce the MSA Order. (6 AA 1610-28.) The trial court granted that motion, in part, ordering LAUSD to provide supplemental information concerning specialized teaching and non-teaching station space. (8 AA 2093-95.)

3. LAUSD's Prop. 39 Offers For The 2012-2013 School Year Violated Prop. 39

Despite two court orders requiring LAUSD to make Prop. 39 offers that comply with law, LAUSD once again made legally deficient offers for the 2012-2013 school year. (8 AA 2097-2105, 2122-36, 2154.) Although LAUSD's offers flouted the law in several respects, the violation at issue

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[3] The MSA Order was not at issue before the Court of Appeal and is not at issue here. The trial court entered the MSA Order on December 7, 2010, and LAUSD did not challenge its issuance.

before this Court is LAUSD's express admission that it calculated the number of classrooms to offer to charter schools using "norming ratios used for District students," which is the number of students that LAUSD chooses to assign to a classroom on a district-wide averaging basis. (8 AA 2154-55.) LAUSD defines norming ratios as follows: "Norms – Most District schools receive their base allocations of teachers, school administrators, school clerical positions, and various resources, on the basis of Board-approved 'norms,' which determine the resources to be allocated to individual schools." (8 AA 2155, fn. 2.)

LAUSD's preliminary offers and final offers to charter schools failed to indicate the projected ADA at comparison group schools for the 2012-2013 fiscal year, a mandatory variable to the ratio calculation required by the Implementing Regulations. (8 AA 2178-2270; 9 AA 2411-2537; 10 AA 2661-62.) Indeed, the final offers demonstrated that LAUSD used the wrong formula altogether to determine the number of teaching stations to offer charter schools. (8 AA 2157-59, 2163-65.) LAUSD explained that it calculated the number of classrooms to give to charter schools as follows:

> Consistent with norming ratios used for District students, the District provides classrooms to Charter School students at a ratio of 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. Thus, the District provided facilities to Charter School in same ratio [sic] of teaching stations to ADA as those provided to students in the District attending comparison group schools.

(9 AA 2412-13, 2424, 2435, 2447, 2457, 2468, 2480, 2486, 2498, 2512, 2519, 2526; 10 AA 2661-62.)

As reflected in charter schools' responses to the final offers, LAUSD's improper use of district-wide norming ratios to allocate teaching stations appears to have resulted in many charter schools receiving far fewer classrooms in the final offers than they were entitled to under the law. (See 10 AA 2609-10, 2618-20, 2631-32, 2641-42, 2644-57.)

D. Procedural Background Leading To This Court's Review

In accordance with the MSA Order, CCSA filed a Notice of Objections to the final offers on April 27, 2012. (8 AA 2122-36.) CCSA pointed out that LAUSD's use of norming ratios violated Prop. 39, the Implementing Regulations, and the MSA Order. (8 AA 2123-34.) CCSA urged LAUSD to correct the final offers, reserving the right to file an enforcement motion. (8 AA 2123-34.)

LAUSD still refused to follow the law. (8 AA 2149-67.) On May 17, 2012, CCSA was forced to move to enforce the MSA Order. (8 AA 2149-67.) On June 27, 2012, the trial court granted CCSA's motion and issued an order (the "June 27 Order"). (10 AA 2805-08.)

The trial court found that LAUSD's use of district-wide norming ratios to determine the number of classrooms to offer charter schools violated Implementing Regulations section 11969.3, subdivision (b)(1). (10 AA 2806.) The trial court ordered that "[i]n 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." (*Id.*)

LAUSD appealed. Due to the stay on appeal, LAUSD once again failed to comply with Prop. 39 for the 2012-2013 school year.

On December 5, 2012, Division Five of the Second Appellate District issued an unpublished opinion reversing the trial court. (*Cal. Charter Schools Assn. v. Los Angeles Unified School Dist.* (Dec. 5, 2012, B242601) [nonpub. opn.].) In doing so, the Court of Appeal assumed as true LAUSD's unfounded speculation that complying with the regulation's express language "may well have anomalous results." (*Cal. Charter Schools Assn. v. Los Angeles Unified School Dist.* (2012), formerly published at 212 Cal.App.4th 689, 695 [151 Cal.Rptr.3d 585, 589] (*CCSA v. LAUSD*).) That unfounded speculation appears to have dictated the Court of Appeal's ruling, as the court's very short opinion did not even address many of the legal authorities that were briefed in the case.

Following the petitions of several school districts across the state, the Second District ordered its opinion published on January 4, 2013. The Second District denied CCSA's Petition for Rehearing on January 22, 2013.

On February 13, 2013, CCSA petitioned this Court for review of the Second District's decision. On April 17, 2013, this Court granted review.

E. LAUSD's Enrollment Is Plummeting, But LAUSD Has More Facilities Than Ever Before

LAUSD's student enrollment plummeted at the same time it pursued a massive school construction program. (2 AA 320-21, 467-68.) Between 2002 and 2010, LAUSD lost about 137,000 students—nearly a 20 percent drop. (2 AA 335.) When CCSA filed the May 17, 2012, motion, LAUSD's projections showed another likely drop of about 20,000 students from the 2011-2012 school year to the 2012-2013 school year. (9 AA 2540, 2546.)

While LAUSD's enrollment has dramatically decreased, demand for charter schools within LAUSD's jurisdiction has steadily increased. (2 AA 320, 335; 8 AA 2158.) When CCSA filed its MSA in 2010, over 166 charter schools operated within LAUSD. (2 AA 335, 362.)

Despite LAUSD's declining enrollment, bond financing has allowed LAUSD to conduct the largest school construction program in the history of the United States. (1 AA 23; 2 AA 320, 466-73; 4 AA 963.) When CCSA filed its MSA in 2010, LAUSD had constructed 94 new schools to serve over 82,000 students in what was then just the previous eight years. (2 AA 335.) This odd situation—LAUSD's steeply declining student enrollment coupled with its huge school construction program—should have made LAUSD treat charter schools and their students fairly. Regrettably, it did not.

IV. THE COURT OF APPEAL ERRED BY DEFERRING TO LAUSD INSTEAD OF A STATE REGULATION, THEREBY FUNCTIONALLY INVALIDATING THE REGULATION

In permitting LAUSD to use district-wide norming ratios to determine how many classrooms to offer to charter schools under Prop. 39, the Court of Appeal made several errors. First, as discussed in Section IV.A., the Court of Appeal failed to interpret Implementing Regulations section 11969.3, subdivision (b)(1), to give effect to the plain language of the regulation and avoid making any of its language surplusage. Second, as discussed in Section IV.B., the Court of Appeal accorded no deference to the quasi-legislative Implementing Regulations and the intent underlying those regulations. The failure to defer to the rulemaking process had the unlawful effect of invalidating a portion of the regulation. Third, as discussed in Section IV.C., the Court of Appeal erroneously permitted LAUSD to violate Education Code section 35160, in direct contravention of *Hartzell v. Connell* (1984) 35 Cal.3d 899 (*Hartzell*).

A. Implementing Regulation Section 11969.3, Subdivision (b)(1), Should Be Interpreted To Give Effect To Every Word And To Avoid Making Any Language Surplusage

Section 11969.3 of the Implementing Regulations provides a specific methodology that school districts must follow when offering "teaching stations" (i.e., classrooms) to charter schools pursuant to Prop. 39. LAUSD's admitted use of district-wide norming ratios violates the express

methodology required by that section. The Court of Appeal erred in holding that LAUSD may disregard statewide quasi-legislative regulations when it decides, in its own discretion, that the regulation is not consistent with its view of the "purpose" of Education Code section 47614, the statute under which the regulation was promulgated. In doing so, the Court of Appeal impermissibly altered the plain meaning of section 11969.3, subdivision (b)(1), rendering a portion of the regulation meaningless, and adding words to the regulation not contemplated therein. That violated long-settled principles of statutory and regulatory construction.

"The rules governing statutory construction are uncomplicated and settled." (*Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 158.) 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; 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].)

"The 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.) The plain language of the statute or regulation controls, unless the words are ambiguous. (*People v.*

Maultsby (2012) 53 Cal.4th 296, 299.) A court 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." (*Cash v. Winn* (2012) 205 Cal.App.4th 1285, 1297.)

As explained in more detail below, the Court of Appeal's decision conflicted with those long-settled principles of construction by transforming meaningful words in a quasi-legislative regulation into meaningless surplusage and inserting language into that same regulation which appears nowhere in the Prop. 39 statute or the regulatory history of the Implementing Regulations.

1. To Determine The Number Of Classrooms To Offer Charter Schools Under Prop. 39, LAUSD Must Follow The Classroom Inventory Method Specified In The Implementing Regulations

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.)

"Subdivisions (a) through (c) of [section] 11969.3 specify the school district's methodology for conducting a reasonable equivalency analysis in

responding to a charter school's facilities request." (*Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 1022, 1040 (*Bullis*).) Subdivision (a) focuses on comparison group schools, which is "'[t]he standard for determining whether facilities' offered to a charter school satisfy the statute's reasonable equivalency requirement." (*Id.* at p. 1041.) Subdivision (b) (captioned "Capacity") describes three categories of facilities a district must consider in its reasonable equivalence analysis: "teaching stations (classrooms)," "specialized classroom space," and "non-teaching station space." (*Ibid.*) Finally, subdivision (c) (captioned "Condition") "identifies the factors a school district must consider in determining 'whether the condition of facilities provided to a charter school is reasonably equivalent to the condition of comparison group schools.'" (*Ibid.* [citing Cal. Code Regs., tit. 5, § 11969.3, subd. (c)].)

a. LAUSD Must Identify Comparison Group Schools And Make A Good Faith Effort To Measure All Of The Facilities At Those Schools

The first step in the "reasonable equivalence" determination is for school districts to select "comparison group" schools: "district-operated schools with similar grade levels" where the majority of charter school students would be enrolled if they chose to remain in a district-run school. (Cal. Code Regs., tit. 5, § 11969.3, subd. (a)(1).) 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-run schools. (*Id.*)

A school district may not use a district-wide "one-size-fits-all" approach instead of using the comparison group schools methodology. The Implementing Regulations specify that for school districts divided into high school attendance areas (like LAUSD), comparison group schools for a Prop. 39 facilities offer 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. (Cal. Code Regs., tit. 5, § 11969.3, subd. (a)(2).)

A school district must meaningfully and in good faith assess all of the comparison group schools' facilities in order to make a legally compliant facilities offer to a charter school under Prop. 39:

> The regulations specify that a school district—in responding to a Proposition 39 facilities request by offering "reasonably equivalent" facilities to the charter school—must (1) select appropriate district-run schools to use as a comparison group with the charter school, (2) consider three categories of space (teaching, specialized teaching, and non-teaching space) in the comparison group schools, and (3) consider the site size of the comparison schools. In 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.

(*Bullis, supra*, 200 Cal.App.4th at p. 1030, emphasis added.)

b. LAUSD Must Provide Facilities To Charter Schools In The Same Ratio Of Classrooms To Average Daily Attendance At The Comparison Group Schools

Implementing Regulations section 11969.3, subdivision (b)(1), obligates a school district 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).) The regulation also specifies a clear methodology for how school districts must determine that ratio.

To determine that ratio at comparison group schools, the school district must calculate the comparison group schools' ADA by "using projections for the fiscal year and grade levels for which facilities are requested." (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).) The regulation expressly states that the number of teaching stations at the comparison group schools must 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." (*Id.*, emphasis added.)

The school district is to calculate the charter school's ADA based on its "in-district classroom ADA projected for the fiscal year and grade levels for which facilities are requested." (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).) Then, to determine the number of teaching stations to be

offered to a charter school, the district multiplies the charter school's projected in-district ADA by the quotient of the number of teaching stations in comparison group schools divided by the district-run schools' ADA within the applicable comparison group schools. These steps ensure that a school district offers a number of classrooms to the charter school that is reasonably equivalent to the number of classrooms *that exist* in the district-run school a charter school student might otherwise attend.

Nothing in the plain language of section 11969.3, subdivision (b)(1), permits a school district to skip that analysis and substitute it with district-wide norming ratios to determine how many classrooms to offer a charter school. The regulation's unambiguous language requires a school district to use a classroom inventory, looking only to comparison group schools.

2. LAUSD Did Not Follow The Required Calculation And Instead Unlawfully Used Norming Ratios To Determine The Number Of Classrooms To Offer Charter Schools

LAUSD's final offers demonstrate that LAUSD did not follow the classroom inventory method required by section 11969.3, subdivision (b)(1). Instead of following the calculations required by the Implementing Regulations, LAUSD admits that it used a different approach to calculate the number of classrooms offered to charter schools—"norming ratios used for District students." (10 AA 2661-62; 9 AA 2412-13, 2424, 2435, 2447, 2457, 2468, 2480, 2486, 2498, 2512, 2519, 2526.) In effect,

LAUSD offered classrooms to charter schools using ratios driven by the number of teachers LAUSD decided to hire for the upcoming school year, which is a budgetary and staffing consideration rather than a calculation of the school facilities that LAUSD actually controls.

LAUSD's actions violated the clear requirements of section 11969.3, subdivision (b)(1), which require LAUSD to determine the number of teaching stations at the specific comparison group schools, identify the projected ADA at those schools, divide the number of teaching stations by the ADA, and apply that classroom-to-student ratio to the charter school's projected attendance.

LAUSD's use of district-wide, staffing-based norming ratios violates the plain language of section 11969.3, subdivision (b)(1).

3. The Court Of Appeal Erred When It Permitted LAUSD's Use Of Norming Ratios, As That Rendered Part Of The Regulation Meaningless And Unlawfully Added Language Into The Regulation

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* (2007) 42 Cal.4th 531, 545; Code Civ. Proc., § 1858.) Yet that is what the Court of Appeal's decision did. It rendered meaningless two crucial sentences in section 11969.3, subdivision (b)(1), and functionally inserted language that does not appear in the regulation.

In effect, the Court of Appeal took a pen to the regulation and changed it like this:

> (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. ***Alternatively, facilities made available by a school district to a charter school may be provided in the same ratio as a district-wide average of the school district's planned number of students per classroom that the school district chooses to staff.*** 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), language effectively "added" by Court of Appeal in bold/italics and language "omitted" by Court of Appeal in strikethrough.)

This Court has soundly rejected the Court of Appeal's approach to construing statutes and regulations. (E.g., *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [rejecting an interpretation transforming "meaningful words" in the statute "into meaningless surplusage"]; *Cel-Tech Communications v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th

163, 216 ["[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."]; *Cal. Fed. Savings & Loan v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [declining to add language to Government Code section 970.1, because "[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"].)

In drafting the Implementing Regulations for the Board's adoption, the Department 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 could have easily written the Implementing Regulations to allow a school district to use district-wide norming ratios in assigning classroom space to a charter school. It did not. By allowing districts to use district-wide norming ratios to assign classrooms to charter schools, the Court of Appeal improperly deleted language from and added extraneous language to the text of the regulation.

B. The Court of Appeal Erroneously Accorded No Deference To The Quasi-Legislative Implementing Regulations And The Board's Intent Underlying Those Regulations

By accepting LAUSD's methodology, the Court of Appeal failed to defer to the administrative body that adopted these quasi-legislative regulations pursuant to a grant of legislative authority. "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.* (1979) 25 Cal.3d 200, 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."].)

Prop. 39 obligated the Department to propose regulations implementing Prop. 39 for the Board's consideration, including the definition of "conditions reasonably equivalent." (Ed. Code, § 47614, subd. (b)(6).) In 2002, the Department, on behalf of the Board, undertook a rigorous rulemaking process under the Administrative Procedure Act to prepare the Implementing Regulations for the Board's consideration. Many stakeholders, including LAUSD, commented on the draft regulations, and later that year, the Board adopted them. (*CSBA, supra*, 191 Cal.App.4th at p. 542.) In conjunction with the Board's adoption, the Department issued a

Final Statement of Reasons.[4] The Final Statement of Reasons explained the rationale for the Implementing Regulations, and responded to stakeholder comments raised during the rulemaking process.

In 2007, after being "directed to review the existing regulations with the assistance of a workgroup broadly representative of the educational community, including charter schools, school administrators, school boards, and teachers," the Department undertook another rulemaking process to amend the Implementing Regulations for the Board's consideration. (*CSBA, supra*, 191 Cal.App.4th at p. 542.) In 2008, the Board amended the Implementing Regulations and the Department issued a new Final Statement of Reasons for those amendments. (See RJN, Exhs. C & D.) The amendments changed the text of section 11969.3, subdivision (b)(1), of the Implementing Regulations in the following manner:

> The number of teaching stations (classrooms) shall be determined using the classroom inventory prepared pursuant to California Code of Regulations, title 2, s~~S~~ection ~~1859.30~~ 1859.31 ~~of Title 2 of the California Code of Regulations~~, 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

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[4] On April 17, 2013, this Court granted CCSA's Motion Requesting Judicial Notice of the Final Statement of Reasons accompanying the originally adopted Implementing Regulations.

used as emergency housing for schools vacated due to structural deficiencies or natural disasters ~~portables~~.

(See RJN, Exh. E, p. 204.)

The Implementing Regulations are quasi-legislative rules subject to narrow review. (*CSBA, supra*, 191 Cal.App.4th at pp. 542-44.)[5] However, rather than exercise limited review of the Implementing Regulations, the Court of Appeal ignored portions of section 11969.3, subdivision (b)(1), and inserted substitute language found nowhere in Prop. 39. The Court of Appeal thus implicitly invalidated part of the regulation, contravening administrative law and separation of powers principles.

1. The Court Of Appeal Implicitly Invalidated A Portion Of The Regulation

Before presenting the original Implementing Regulations to the Board for adoption over ten years ago, the Department solicited written comments, took oral testimony, and responded to comments raised regarding the language of the proposed regulations. (Final Statement of Reasons For Original Implementing Regulations, pp. 14-25.) The Department assessed and responded to multiple comments about what constitutes "conditions reasonably equivalent" for purposes of school

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[5] Various stakeholders filed a petition for writ of mandate challenging fifteen provisions of the amended Implementing Regulations. (*CSBA, supra*, 191 Cal.App.4th at p. 542.) The Third Appellate District rejected the challenge, finding the regulations to be a valid exercise of the Board's rulemaking authority under Prop. 39. (*Id.* at p. 539.) That lawsuit did not challenge the validity of Implementing Regulations section 11969.3, subdivision (b)(1).

districts' obligations to offer charter schools facilities that are reasonably equivalent to the facilities their students would occupy if they attended district-run schools. (*Id.* at pp. 17-18.) Though LAUSD and other districts commented on drafts of the original Implementing Regulations, no one raised any concern about the Implementing Regulations' proposed method of calculating teaching stations using the classroom inventory. (*Ibid.*)

In 2007, during the rulemaking process for the amendments to the Implementing Regulations, LAUSD commented on drafts of those amendments, criticizing the proposed definition of "interim housing" being added to section 11969.3, subdivision (b)(1). (RJN, Exh. D, pp. 191-193.) Once again, LAUSD said nothing about the classroom inventory language.

Having failed to challenge the plain language of the regulation during two rulemaking processes despite weighing in on other parts of the Implementing Regulations, LAUSD's assertion now that the regulation's classroom inventory language must be disregarded should be viewed suspiciously. By holding that LAUSD's use of norming ratios to reduce classrooms offered to charter schools complies with Prop. 39's "intent," the Court of Appeal allowed a back door challenge to section 11969.3, subdivision (b)(1), and caused the last two sentences of the regulation to be implicitly invalidated as inconsistent with Prop. 39's "intent."

Principles of administrative law and separation of powers do not allow courts to ignore the heart of a regulation and arrive at a result that

allows local governmental bodies, at their discretion, to ignore regulatory commands. When a statutory scheme expressly empowers the executive branch to promulgate a regulation to implement that scheme, the separation of powers doctrine does not permit a subordinate governmental body (e.g., LAUSD) to exercise a quasi-judicial function of determining that the regulation is not consistent with the statute, or for a court to countenance that by declining to enforce the quasi-legislative regulation as written. (See, e.g., *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1080-82.)

2. The Court Of Appeal Ignored Clear Regulatory Intent In The Final Statements Of Reasons

The plain language of Section 11969.3, subdivision (b)(1), should govern the analysis. To the extent that any of the regulation's language might be considered ambiguous, other extrinsic aids, including legislative history, are instructive to its interpretation. (See *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 770 ["If it is susceptible of multiple interpretations, however, we will divine the statute's meaning by turning to a variety of extrinsic sources, including the legislative history."])

To that end, the Court of Appeal's decision also violates well-settled law providing that courts are to 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, supra,* 130 Cal.App.4th at p. 1000 [Final Statement of Reasons for the Implementing Regulations is entitled to consideration and respect].) The Court of Appeal failed to consider and defer to the Department's interpretation of the Implementing Regulations in the Final Statement of Reasons accompanying the original Implementing Regulations and in the Final Statement of Reasons accompanying the amendments to the regulations.

In both Final Statements of Reasons, the Department clearly expressed how facilities must be counted and shared to ensure equitable allocation between charter school students and students attending district-run schools. In the Final Statement of Reasons accompanying the original Implementing Regulations, the Department was explicit that school districts are not to use district-wide standards in assessing comparison group schools used in making Prop. 39 offers. That 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.)*

(Final Statement of Reasons For Original Implementing Regulations, pp. 5-6, emphasis added.)

By allowing LAUSD's use of district-wide norming ratios to reduce the number of classrooms it offers to charter schools, the Court of Appeal made irrelevant the comparison group school analysis required in the Implementing Regulations and explained in the Final Statement of Reasons.

Five years later, when the Department proposed amendments to the Implementing Regulations, the first draft had no changes to section 11969.3, subdivision (b)(1), except to change the classroom inventory reference in title 2 of the California Code of Regulations from section 1859.30 to 1859.31. (RJN, Exh. F, p. 225.) CCSA commented on the draft amendments, requesting that "[T]he reference to [the classroom inventory] form . . . be modified to ensure that all district facilities that could be used as classrooms are counted for the purposes of the Proposition 39 assessment." (RJN, Exh. C, pp. 135, 137.) The Department responded to that comment, noting in the Final Statement of Reasons accompanying the amended Implementing Regulations that it was:

> [P]roposing amendments that narrow the exclusion for interim housing under the current regulations. *The amendments allow exclusion only of interim housing used to house pupils temporarily displaced as a result of the modernization of classroom facilities and classrooms used as*

emergency housing for schools vacated due to structural deficiencies or natural disasters.

(*Id.* at p. 137, emphasis added.)

The addition of this language to section 11969.3, subdivision (b)(1), demonstrates that the Board only intended for "interim housing" to be excluded from the classroom inventory used to make offers to charter schools. (See *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 186, fn. 15 ["The agency's responses to comments received in the rulemaking process must be included in its statement of reasons stating its intent in adopting a regulation . . . and thus constitutes part of the official statement of regulatory intent."].)

The Court of Appeal thus ignored clear regulatory intent when it upheld LAUSD's use of norming ratios, as that allows a school district to disregard potentially available classroom space in making facilities offers to charter schools.

C. LAUSD's Use Of Norming Ratios Violates Education Code Section 35160 And This Court's Interpretation Of That Section

LAUSD's use of norming ratios to allocate classrooms to charter schools under Prop. 39 also runs afoul of Education Code section 35160 and this Court's decision in *Hartzell, supra*, 35 Cal.3d 899.

Education Code section 35160 states that:

> [T]he governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any

> manner *which is not in conflict with or inconsistent with, or preempted by, any law* and which is not in conflict with the purposes for which school districts are established.

(Emphasis added.)

Implementing Regulations section 11969.3, subdivision (b)(1), never mentions the words "norming ratios," and instead requires school district to assess classroom space at comparison group schools using a classroom inventory method. LAUSD's actions are plainly inconsistent with section 11969.3, subdivision (b)(1), and thus violate Education Code section 35160.

This inconsistency is further demonstrated by this Court's decision in *Hartzell.* There, a school district attempted to impose fees on students for participating in extracurricular activities, arguing that its fee program "is authorized because title 5, section 350 is only an administrative regulation, not a 'law' within the meaning of section 35160" of the Education Code. (*Hartzell, supra*, 35 Cal.3d at p. 916.) This Court disagreed, stating that "the flexibility provided by section 35160 is not without limits. School districts are authorized only to 'initiate and carry on any program, activity, or . . . otherwise act in any manner *which is not in conflict with . . . any law* . . . .'" (*Id.* at p. 915 [citing Ed. Code, § 35160], italics in original.) This Court elaborated:

> Under defendants' construction, section 35160 would work a radical change in the relationship between local school districts and the State Board. *If valid administrative*

> *regulations were not "laws" under section 35160, the section would authorize local school districts to act in derogation of all regulations promulgated by the State Board.*

(*Id.* at p. 916, emphasis added.)

Accordingly, under *Hartzell*, when Board regulations address a specific program, activity or matter, school districts have no discretion to deviate from the regulation. (*Hartzell, supra*, 35 Cal.3d at p. 916.) Here, because the Implementing Regulations specify how school districts must make Prop. 39 offers to charter schools, LAUSD must follow Implementing Regulations section 11969.3, subdivision (b)(1). LAUSD's use of district-wide norming ratios directly conflicts with that regulation because it ignores the required classroom inventory methodology. As such, the *CCSA v. LAUSD* decision conflicts with *Hartzell*, and the Court of Appeal erred in ruling that LAUSD complied with section 11969, subdivision (b)(1), by offering classrooms to charter schools using district-wide norming ratios.

V. LAUSD'S COMPLIANCE WITH THE PLAIN LANGUAGE OF SECTION 11969.3, SUBDIVISION (B)(1), WILL NOT YIELD ABSURD OR UNFAIR RESULTS

The Court of Appeal also disregarded established rules of statutory and regulatory construction by speculating, without any evidence, that requiring school districts to use the regulation's classroom inventory method to determine how many classrooms to offer charter schools "may well have anomalous results." (*CCSA v. LAUSD, supra,* 212 Cal.App.4th at p. 695.) The Court of Appeal's error hinges on the portion of

Implementing Regulation section 11969.3, subdivision (b)(1), stating that "[t]he 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." (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1), emphasis added.)

California Code of Regulations, title 2, section 1859.31 (entitled "Gross Classroom Inventory") requires a school district to prepare a "gross inventory of all classrooms owned or leased in the district." The language of section 1859.31 specifies what is considered to be a classroom, making it fully evident that *all* classrooms are to be counted regardless of how or whether they are used by the school district. A few examples of the types of classrooms counted in the inventory include: classrooms to be constructed (subd. (a)); classrooms used for Special Day Class or Resource Specialist Programs (subd. (c)); standard classrooms, shops, science laboratories, computer laboratories, or computer classrooms (subd. (d)); classrooms used for preschool programs (subd. (f)); and classrooms included in a closed school (subd. (m)). (Cal. Code Regs., tit. 2, § 1859.31.) The Court of Appeal speculated without evidence that compliance with the plain language of section 11969.3, subdivision (b)(1), may yield absurd results, in that it would require LAUSD "to count

classrooms that have been contracted for but not yet built and classrooms at closed school sites." (*CCSA v. LAUSD, supra,* 212 Cal.App.4th at p. 695.)

But the Court of Appeal's 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. 523.) A workable regulation is one in which all of its words are considered as a whole and harmonized together to avoid absurd results. (See *Rao v. Campo* (1991) 233 Cal.App.3d 1557, 1567.)

Courts "must read regulations as a whole so that all of the parts are given effect." (*Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1145-46.) "An elementary rule of statutory construction—which applies equally to the interpretation of regulations—is that 'statutes in pari materia—that is statutes relating to the same subject matter—should be construed together.'" (*Hoitt, supra,* 207 Cal.App.4th at pp. 523-24.) Where two regulations appear in conflict, courts must harmonize the regulations, to the extent possible. (*Id.* at p. 524.) "If inconsistent regulations cannot otherwise be reconciled, the more specific provision takes precedence over a conflicting general provision." (*Ibid.*)

The Court of Appeal failed to recognize these long-settled canons of interpretation, and instead sided with LAUSD's unfounded speculation that the regulation's classroom inventory method might, in extreme examples, be unfair or yield absurd results. It will not.

A. LAUSD's Assertions Are Unsupported By Any Evidence

In oral argument at the trial court, LAUSD recited an unsubstantiated litany of dire consequences that it asserted could result from hypothesized interpretations of the Implementing Regulations. (Reporter's Transcript ("RT"), page 26, line 27–page 28, line 1; page 39, lines 8-28; page 43, line 26–page 45, line 1.) "It is axiomatic that the unsworn statements of counsel are not evidence." (*In re Zeth S.* (2003) 31 Cal.4th 396, 413-14, fn. 11.)

LAUSD's assertions, also repeated on appeal, are nothing more than speculation about possible absurd results, which assumes without evidence that there is no *non*-absurd way LAUSD could make offers while following the rules. Such assertions cannot defeat a clear regulatory provision. (See, e.g., *Gualala Festivals Committee v. Cal. Coastal Com.* (2010) 183 Cal.App.4th 60, 68-69 & fn. 3 [rejecting claim of absurd results based on hypothetical examples]; *People v. Nelson* (2011) 200 Cal.App.4th 1083, 1104-05 [same].) Based on the lack of evidence proffered by LAUSD, the classroom inventory formula required by section 11969.3, subdivision (b)(1), may well never cause any unusual difficulties at all. And, even if it ever did cause challenges in a particular situation, LAUSD could craft a non-absurd way to deal with that unique situation. The mere imagined possibility of an absurd result does not mean that an absurdity will happen, nor that LAUSD would be powerless to solve the problem.

In any event, to the extent that an absurd result might arguably occur, applicable canons of construction can be employed to prevent such a result without rewriting the regulation's entire methodology.

B. Norming Ratios Themselves Lead To Absurd Results

It is LAUSD's use of district-wide norming ratios, not the regulation, that would lead to absurd results. Under LAUSD's approach, as its norming ratios increase, it could offer fewer classrooms to charter schools even though more classrooms physically exist. LAUSD's norming ratios reflect many choices that LAUSD can make for itself but cannot impose on charter schools. When LAUSD makes choices about how to spend money and how many teachers to hire, those choices can result in LAUSD's putting more students into fewer classrooms—for reasons other than a lack of classrooms.

LAUSD is free to use its funds as it sees fit and to use fewer classrooms than actually exist, but its budgetary and policy choices (which may increase its norming ratios) cannot be imposed on charter schools. By design, charter schools differ from schools managed by school districts. Charter schools do not have to make the same decisions school districts make. Charter schools differ from district-run schools in that they are freed from the "complex tangle of rules sustaining our public school system" which has "the potential to sap creativity and innovation, thwart accountability and undermine the effective education of our children."

(*Wilson v. State Bd. of Education* (1999) 75 Cal.App.4th 1125, 1130; see also Ed. Code, § 47610.) LAUSD has no authority to force charter schools to match LAUSD's students-per-classroom ratio. Charter schools are free to make different budgeting choices that allow them to have fewer or more students in a classroom.

The absurd result LAUSD urges by forcing its district-wide norming ratios on charter schools is highlighted by an example. If LAUSD has a "comparison group school" with 200 students and ten teaching stations, then it could have 20 students per classroom. But, if LAUSD's choices about how to spend its money result in that school having only eight teachers, then it would have to put 25 students in each classroom and leave two classrooms empty (or used for something else, like storage or lounge space). Under the Implementing Regulations, LAUSD's choices would not matter in calculating how many classrooms it offers to a charter school—LAUSD would have to offer facilities at a rate that reflects the facilities that actually exist (ten classrooms), not just the eight classrooms LAUSD decides to use for instruction. But, under LAUSD's norming ratios, LAUSD would only offer the charter school classrooms at the 25 students per classroom rate, leaving empty classrooms.

C. *Bullis* Held That School Districts Must Take An Objective Look At Its Comparison Group Schools In Making Offers

Prop. 39 and the Implementing Regulations plainly were not intended to let school districts waste usable classrooms. In *Bullis*, the school district made assertions similar to the ones LAUSD makes here. There, 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." (*Bullis, supra*, 200 Cal.App.4th at p. 1047.) "Under this view, for example, if all five comparison group schools had tennis courts, the area would be deemed nonteaching station space; but if one or more of the comparison group schools did not have tennis courts, the area would not be considered in the reasonable equivalence analysis." (*Ibid.*) The court rejected this narrow reading 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 that a school district satisfies its Prop. 39 obligations "only if it considers the *entire nonclassroom space* in the facilities offer." (*Bullis, supra*, 200 Cal.App.4th at p. 1047, emphasis added.) Though *Bullis* dealt with non-teaching station space, as opposed to

teaching station space at issue here, its rationale still applies here. LAUSD cannot use district-wide, one-size-fits-all norming ratios to withhold existing, unused classroom space from charter schools.

D. LAUSD's Norming Ratios Appear To Result In Fewer Classrooms Being Offered To Charter Schools

LAUSD's norming ratios may have resulted in many charter schools receiving far fewer classrooms than they were entitled to under the law. (See, e.g., 10 AA 2609-10, 2618-19, 2631-32, 2641-42, 2652, 2654, 2657.) To show how norming ratios do not reflect the reality of classroom usage at LAUSD campuses, CCSA compared Department enrollment reports for the comparison group schools that LAUSD used in twelve preliminary offers that CCSA attached to its May 17, 2012, motion with LAUSD-created charts attached to the Preliminary Offers listing the number of classrooms at those schools. (10 AA 2662.) Based on that review, CCSA determined that the ratio of enrollment to classrooms at those comparison group schools was far lower than the norming ratios that LAUSD applied. (10 AA 2662-63.) Though "enrollment" is not necessarily equivalent to "ADA," the ratios of enrollment to classrooms at those comparison group schools would be even lower if adjusted for ADA. (8 AA 2164-65.)[6]

The point of the Charter Schools Act and Prop. 39 is to encourage competition in public education so all public school students get a better

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

education. (Ed. Code, § 47601, subd. (g) [public charter schools exist in part to "[p]rovide vigorous competition within the public school system to stimulate continual improvements in all public schools"].) LAUSD defies this legislative goal when it tries to limit charter schools' use of existing classrooms unlawfully based on LAUSD's choices to use some of its classrooms for non-classroom purposes. Courts must be vigilant when a school district tries to stifle the healthy competition the law promotes.

Overall, the law is clear that LAUSD should not waste space. By using its norming ratios and thus only counting classrooms *actually provided* to students at LAUSD-run schools, LAUSD violated Implementing Regulations section 11969.3, subdivision (b)(1).

E. LAUSD Would Not Have To Include Future "Yet-To-Be-Constructed" Classrooms Or Classrooms At Closed Schools As Teaching Stations

Contrary to the Court of Appeal's speculation and LAUSD's assertions, using the classroom inventory method under section 11969.3, subdivision (b)(1) does not mean that LAUSD would have to count as teaching stations those classrooms under contract for construction but not yet built, or those teaching stations at closed schools. The classrooms a district must count are classrooms at the identified comparison group schools. "The standard for determining whether facilities 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 school district providing facilities shall be a comparison group of district-operated schools with similar grade levels." (Cal. Code Regs., tit. 5, § 11969.3, subd. (a)(1), emphasis added.)

If a charter school student was attending an LAUSD comparison group school instead of the charter school, that student could not be accommodated in an unbuilt classroom or a classroom at a closed school. As such, the regulation should not be interpreted to mean that LAUSD must count unbuilt classrooms at comparison group schools or classrooms at closed schools in determining the classrooms-to-ADA ratio.

However, LAUSD must count any classrooms being constructed at comparison group schools that will be operational in the upcoming school year. As the Department explained in proposing the Implementing Regulations, "[t]o account for the possible addition of schools and classrooms to the school district's inventory, the comparisons are calculated based on the *projected number of teaching stations* and projected ADA." (Final Statement of Reasons For Original Implementing Regulations, p. 6, emphasis added.) Accordingly, although LAUSD need not consider classrooms that will not be built for a long time when calculating the classrooms-to-ADA ratio, it must account for currently unbuilt or partially built classrooms that will be completed and could be used during the school year in which the charter school would occupy the facilities.

Similarly, section 11969.3, subdivision (a)(1), defines comparison group schools as "district-*operated* schools." It follows that a closed school is not in operation. As such, "using the classroom inventory" would not require a school district to consider classrooms at a closed school (see Cal. Code Regs., tit. 2, § 1859.31, subd. (m)) because closed schools would not be in the comparison group.

F. Allocation Of Specialized Classroom Space And Non-Teaching Station Space To Charter Schools Is Addressed In Implementing Regulations Section 11969.3, Subdivisions (b)(2) and (b)(3)

LAUSD has claimed that compliance with the plain language of section 11969.3, subdivision (b)(1), means it would be required to consider in the inventory those classrooms at comparison group schools used for non K-12 instruction. But "using the classroom inventory" does not mean that LAUSD would be forced to include in the classrooms-to-ADA ratio classrooms at the comparison group schools that are genuine specialized teaching or non-teaching station space. Section 1859.31 references "shops, science laboratories, computer laboratories, or computer classrooms" and "classrooms used for Special Day Class or Resource Specialist Programs" as countable classrooms. (Cal. Code Regs., tit. 2, § 1859.31, subds. (c)-(d).) However, the reach of section 1859.31 is modified by Implementing Regulations section 11969.3, subdivision (b)(2), which

addresses more specifically how specialized classroom space is handled under Prop. 39.

For genuine specialized classrooms (like science laboratories), Section 11969.3, subdivision (b)(2), clearly states that school districts must "include a share . . . and/or a provision for access to reasonably equivalent specialized classroom space." (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(2).) Construing sections 1859.31 and 11969.3, subdivision (b)(2), together, LAUSD need only account for genuine specialized classroom space as part of a shared space allocation to the charter school, not in deriving the classrooms-to-ADA ratio at the comparison group schools.

Non-teaching station space is handled similarly. LAUSD's "sky-is-falling" interpretation of section 1859.31 is that using the inventory means it must count that space in the calculation, and that it would be unfair to count classrooms that have been converted to non-traditional K-12 purposes. LAUSD presented no evidence supporting any of these assertions, so it is impossible to make sense of its speculation. However, even if LAUSD's unsupported speculations had any substance and some preschool classrooms needed to be reallocated in unique situations, no evidence shows that would be "fundamentally unfair."

Further, Implementing Regulations section 11969.3, subdivision (b)(3), governs charter schools' access to "non-teaching station space" under Prop. 39. To the extent that there is any conflict between that

provision and section 1859.31, the specific provision (§ 11969.3, subd. (b)(3)) takes precedence over the general provision (§ 1859.31). (*Hoitt, supra*, 207 Cal.App.4th at p. 524.) When the provisions are harmonized, it is clear that non-teaching station space need not be counted when LAUSD calculates the classrooms-to-ADA ratio required by Implementing Regulations section 11969.3, subdivision (b)(1), as those will be shared with charter schools pursuant to section 11969.3, subdivision (b)(3) .

G. Classrooms Allocated For Exclusive Use By Other Charter School Students Do Not Cause A Problem

LAUSD has further claimed that the plain language of section 11969.3, subdivision (b)(1), would require LAUSD to count classrooms in the classrooms-to-ADA ratio that will be exclusively occupied by other charter schools. LAUSD has claimed that this would unfairly inflate the number of classrooms allocated to a charter school. LAUSD is wrong.

There are at least two ways that LAUSD could account for classrooms exclusively allocated to a charter school at a comparison group school without "unfairly inflating" charter schools' classroom offers. One way could be to exclude classrooms exclusively allocated to a charter school when determining the classrooms-to-ADA ratio at the comparison group school, and to exclude the charter school's ADA when calculating that comparison group school's classroom-to-ADA ratio. Another way could be to count all classrooms at the comparison group school campus,

and to include the charter schools' in-district ADA when calculating that comparison group schools' classroom-to-ADA ratio.

Either way, LAUSD could use the classroom inventory mandated by the Implementing Regulations without yielding any "absurd results."

VI. LAUSD MAKES THE SAME DIRE PREDICTIONS EACH TIME ITS PROP. 39 VIOLATIONS ARE CHALLENGED

LAUSD asserts without evidence that complying with section 11969.3, subdivision (b)(1), by taking into account all space that could be provided to LAUSD students would lead to extreme consequences, like forced busing and reducing some LAUSD programs. LAUSD's claims of catastrophic harm should be disregarded because LAUSD presented no evidence whatsoever to support its speculation. Even without that insurmountable evidentiary deficiency, LAUSD's forecasts of catastrophe must be viewed skeptically because LAUSD makes these same claims *every time* its persistent failure to comply with Prop. 39 is challenged.

Throughout this litigation and in other cases filed by individual charter schools, LAUSD has continually claimed that compliance with Prop. 39 or court orders it deems unfavorable will be fatal to the school district. For example, in *New West Charter Middle School v. Los Angeles Unified School District, et al.* (Los Angeles Superior Court Case No. BS115979), a charter school challenge to LAUSD's illegal conduct under Prop. 39, LAUSD claimed that accommodating charter schools

"generate[s] ripple effects adversely affecting LAUSD students all across the District." (1 AA 119.) The trial court confirmed that LAUSD's Prop. 39 practices violated the law. In issuing a writ of mandate against LAUSD for violating Prop. 39 by refusing to provide school facilities to the school, the court chided LAUSD for using a "parade of unproven horribles" to make up excuses for ignoring the law. (1 AA 118-19.)

LAUSD presented the same "parade of unproven horribles" in this case, too, claiming in 2010 that it was completely impossible to comply with Prop. 39 and make facilities offers to each public charter school.

In opposing CCSA's MSA, LAUSD claimed it could not comply with Prop. 39 due to other "legal obligations that present cross-cutting obligations interfering with the District's ability to focus solely on Prop. 39." (4 AA 947, 1082-92.) LAUSD also argued that given the "competing demands for identical space from other charter school applicants . . . the reality is that there are insufficient facilities and limited funds to accommodate all of the demands made by charter schools." (4 AA 948.) Claiming that it could not offer *any* space to sixteen charter schools that request space, LAUSD made assertions similar to those it makes now:

> [S]hould the District have been forced to provide space where it was not feasible to the sixteen other charter school applicants, this would have likely required the displacement of tens of thousands of non-charter district students. *This would effectively result in a complete restructuring of the entire Los*

Angeles educational system—which would then have to recur on an annual basis for each Proposition 39 cycle.

(4 AA 1069; see also 4 AA 1081, ¶ 6.)

The trial court rejected LAUSD's arguments and ordered LAUSD to make offers anyway, and in the three annual cycles since then LAUSD has made at least some sort of space offer for each charter school requesting space, without any of its predicted catastrophes occurring. Indeed, despite those existing "legal obligations and competing regulations," in opposing CCSA's 2011 motion to enforce the MSA Order, LAUSD flipped its position and claimed that "the District fully satisfied its Proposition 39 obligations by offering approximately 26,000 seats spanning nearly 100 school sites to *every* charter school with an active and legally sufficient Proposition 39 request for facilities." (7 AA 1828.) In 2012, when CCSA filed the motion resulting in the June 27 Order, LAUSD again made similar assertions. (10 AA 2700, 2717.)

LAUSD's current predictions of catastrophe must be viewed in this context. Given LAUSD's ability to make offers to charter schools while simultaneously avoiding any repercussions for violating the legal obligations and regulations that allegedly constrained its ability to comply with Prop. 39, LAUSD's claim here that the June 27 Order would result in devastating consequences is just more of the overblown, unproven hyperbole that has marked countless LAUSD efforts to avoid the law.

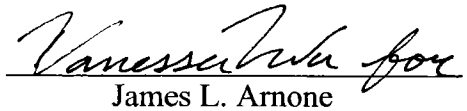
VII. CONCLUSION

A regulated local governmental body like LAUSD cannot disregard language in the Board's quasi-legislative regulations when it 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 requests this Court to reverse the Court of Appeal's decision and find that the trial court committed no error when it issued the June 27 Order.

Respectfully submitted,

DATED: June 17, 2013

LATHAM & WATKINS LLP
James L. Arnone
Winston P. Stromberg
Vanessa C. Wu
Michele L. Leonelli

By: 
James L. Arnone
Attorneys for Plaintiff and Respondent California Charter Schools Association

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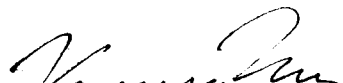
LATHAM & WATKINS LLP
James L. Arnone
Winston P. Stromberg
Vanessa C. Wu
Michele L. Leonelli

By: 
Vanessa C. Wu
Attorneys for Plaintiff and Respondent California Charter Schools Association

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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.

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David M. Huff, Esq. *(dhuff@ohslegal.com)*
ORBACH, HUFF & SUAREZ LLP
1901 Avenue of the Stars, Suite 575
Los Angeles, CA 90067

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David M. Huff, Esq.
Marley S. Fox, Esq.
Joanna Braynin, Esq.
ORBACH, HUFF & SUAREZ LLP
1901 Avenue of the Stars, Suite 575
Los Angeles, CA 90067
Attorneys for Appellants

Mark Fall, Esq.
Nathan A. Reierson, Esq.
Office of General Counsel
LOS ANGELES UNIFIED SCHOOL DISTRICT
333 South Beaudry Avenue, 23rd Floor
Los Angeles, CA 90017
Attorneys for Appellants

Clerk/Executive Officer of the Court
Court of Appeal of the State of California
Second Appellate District, Division Five
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

Clerk of the Court
Honorable Terry A. Green - Department 14
Superior Court of the State of California
County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012

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 **June 17, 2013**, at San Francisco, California.

Ruby Ordonio