In the Supreme Court of the State of California

CALIFORNIA SCHOOL BOARDS ASSOCIATION, and its EDUCATIONAL LEGAL ALLIANCE; et al.,

Petitioners and Appellants,

v.

STATE OF CALIFORNIA, et al.,

Defendants and Respondents.

Case No. S247266

First Appellate District, Division Five, Case No. A148606
Alameda County Superior Court, Case No. RG11554698
The Honorable Evelio Martin Grillo, Judge

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Legislature's authority over school districts, which are subdivisions of the state, includes the authority to direct schools on the use of state money. Article XIIIB, section 6 of the California Constitution, which requires the state to reimburse local governments for the cost of state-mandated programs, does not change that authority.

At issue in this case are two school programs and the state's ability to prioritize funding for them. First, for "behavioral intervention plans," a type of special education program mandated for students with exceptional needs, the Legislature directed school districts to pay for this mandate by first using state funding appropriated for special education. Second, with respect to a mandated second science course that districts must provide for high school students prior to graduation, the Legislature likewise directed that those courses be paid for first by three sources of state funding appropriated to districts. Petitioners California School Boards Association et al. (CSBA) argue that these two "offset statutes" violate article XIIIB, section 6. But both the Court of Appeal and the trial court correctly recognized that no constitutional provision limits the Legislature's authority to prioritize school districts' use of state funds in this manner.

Contrary to CSBA's claims, this Court has consistently held that a required program is not a reimbursable mandate when a local government need not use its own tax revenues to pay for the cost of the program. Although here there is no dispute that the programs are mandates, there is no requirement for the state to provide additional funding if the mandate is reimbursed with state funds. The Court of Appeal was therefore correct to conclude that the Legislature may direct school districts to use appropriated state funds first before they are entitled to any additional mandate reimbursement from the state.

The Court of Appeal likewise did not err in finding that the offset statutes do not violate separation of powers by overriding quasi-judicial determinations by the Commission on State Mandates. The Legislature did not order the Commission to set aside or reconsider its previous decisions, and those decisions are unrelated to the statutory changes that are at issue here.

Accordingly, this Court should affirm the decision of the Court of Appeal.

BACKGROUND

I. LEGAL BACKGROUND

A complete understanding of this case requires discussion of the state's role in overseeing schools, state mandates law, and Proposition 98, as well as the specific mandates and changes to state law that prompted CSBA's lawsuit.

A. State Oversight of Schools

The Constitution requires "a system of common schools by which a free school shall be kept up and supported in each district . . . ." (Cal. Const., art. IX, § 5.) Although the Legislature "has chosen to implement this 'fundamental' guarantee through local school districts with a considerable degree of local autonomy," "the state retains plenary power over public education." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1195; see also *Cal. Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1524 ["[t]he Legislature's power over the public school system has been variously described as exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints"].) This state control is necessary because "education and the operation of the public schools remain matters of statewide rather than local or municipal concern." (*Cal. Teachers Assn.*, *supra*, 5 Cal.App.4th at p. 1524.)

The Legislature therefore may create, abolish, or otherwise alter the boundaries of its school districts, and is the beneficial owner of all public school property. (*Cal. Teachers Assn.*, *supra*, 5 Cal.App.4th at pp. 1524-1525.) The state is also ultimately responsible for funding its schools. (*Butt v. California* (1992) 4 Cal.4th 668, 680-681.) "School moneys belong to the state, and the apportionment of funds to a school district does not give that district a proprietary right therein." (*Cal. Teachers Assn.*, *supra*, 5 Cal.App.4th at p. 1525, citations omitted.)

B. Overview of California Mandates Law

Article XIIIA was added to the California Constitution by the passage of Proposition 13 in 1978. Proposition 13 "largely transferred control over local government finances from the state's many political subdivisions to the state, converting the property tax from a nominally local tax to a de facto state-administered tax subject to a complex system of intergovernmental grants." (*Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 244-245.) The next year, Article XIIIB was added to the Constitution by Proposition 4. The two provisions "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*City of Sacramento v. California* (1990) 50 Cal.3d 51, 59 fn.1.)

Article XIIIB, section 6, requires the state to provide funding to local government whenever it requires local government to provide a new program or higher level of service. (Cal. Const., art. XIIIB, § 6.)[1] The

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[1] Subdivision (a) of section 6 provides that, subject to certain exceptions: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service. . . ." (Cal. Const., art. XIIIB, § 6.)

requirement addresses concerns about "the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles v. California* (1987) 43 Cal.3d 46, 56.)

Section 6 thus prohibits "the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. California* (1997) 15 Cal.4th 68, 81.) However, "[a] state requirement that an entity redirect resources is . . . not a reimbursable mandate, only a new cost is reimbursable." (*Grossmont Union High School Dist. v. Cal. Dept. of Education* (2009) 169 Cal.App.4th 869, 876.)

In 1984, the Legislature enacted a comprehensive statutory scheme to resolve issues relating to claims under section 6, including processes for determining whether a new program or required service imposes state-mandated costs on a local agency and for reimbursing such additional costs. (Gov. Code, §§ 17500 et seq.) As part of this statutory scheme, the Legislature created the Commission on State Mandates, a "quasi-judicial" agency vested with the exclusive authority to adjudicate all disputes over the existence and reimbursement of state-mandated programs within the meaning of section 6. (*Kinlaw v. California* (1991) 54 Cal.3d 326, 342-343; Gov. Code, §§ 17551, 17552.)

Under the statute, local agencies and school districts may file claims with the Commission for reimbursement of state-mandated costs under section 6. (Gov. Code, §§ 17551, 17560.) The first claim alleging that state law imposes a reimbursable state-mandated program is called a "test

claim." (*Id.*, § 17521.) Filing a test claim is the "sole and exclusive procedure" for claiming and obtaining reimbursement for costs mandated by the state. (*Id.*, § 17552.) The Commission holds a public hearing on the test claim, at which time evidence may be presented by the claimant, the Department of Finance (DOF), any other state department or agency affected by the claim, and any interested organization or individual. (*Id.*, § 17553.)

If the Commission determines that a state-imposed mandate exists, the Commission must then determine the amount of reimbursement and adopt "parameters and guidelines" for reimbursement of any claims relating to the test claim legislation. (Gov. Code, § 17557.) The Commission submits the adopted parameters and guidelines to the State Controller's Office, which issues claiming instructions for each mandate that requires reimbursement. (*Id.*, § 17558.) The Legislature may choose to allocate funds to reimburse the affected local governments for the costs of the mandate, or the Legislature may choose to suspend operation of the mandate by not funding it at all. (See Cal. Const., art. XIIIB, § 6, subd. (b); Gov. Code, §§ 17581, 17581.5.)

C. Proposition 98 and School Funding

Proposition 98, which amended article XVI, section 8, of the California Constitution, was passed in 1988. "The measure . . . set up two tests, later expanded by the passage of Proposition 111 in 1990 to three tests, for determining the mandated minimum [education] funding level for the coming year." (*County of Sonoma v. Com. on State Mandates* (2000) 84 Cal.App.4th 1264, 1289.) "However, Proposition 98 does not appropriate funds . . . . The power to appropriate funds was left in the hands of the Legislature. Proposition 98 merely provides the formulas for determining the minimum to be appropriated [to schools] every budget year." (*Id.* at p. 1290.) As of 2015, the Proposition 98 minimum funding

guarantee was more than $60 billion a year for school districts (including over $46 billion in state general fund money appropriated to schools). (III JA 840; see also III JA 828, ¶ 4.)[2]

Proposition 98's requirement for a minimum amount of school funding each year interacts with section 6's requirement for the reimbursement of mandates. The Legislature's appropriation of funds for a mandate can be included to meet Proposition 98's minimum funding guarantee. (See, e.g., Ed. Code, § 41207.4, subds. (b), (c) [mandate appropriation satisfies Proposition 98 guarantee]; III JA 848, 852 [traditional mandate appropriations and mandate block grant appropriations part of Proposition 98 funding]; *id.* at p. 828, ¶ 4.)

D. Changes to Mandates Law

The application of the state's mandate process to education have been the subject of criticism and legislative refinement.

For instance, in 2010, the nonpartisan Legislative Analyst's Office (LAO) concluded that "virtually every aspect of [the] K-14 mandate system [was] broken." (III JA 893.) The LAO explained that many items were mandates "not because [they] serve[] an essential function, but because the original legislation did not phrase its requirements very carefully." (*Ibid.*) And some mandates did not benefit students or the education system in general (*id.*, p. 886), such as the "notification of truancy" mandate, which requires the state to give school districts $17 each and every time the school sends a form letter to parents notifying them that their student is truant. (*Id.*, p. 899.)

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[2] And in the 2018-19 budget, the Proposition 98 guarantee is now more than $78 billion, including over $56 billion in state general fund money appropriated to schools. (See http://www.ebudget.ca.gov/FullBudgetSummary.pdf at p. 21.)

And the system was "reward[ing] districts for performing activities not only inefficiently but ineffectively" (*id.*, p. 886), because "the more time devoted to an activity and the higher the staff member's rank, the greater the reimbursement." (*Id.*, p. 895.) Different "districts [could] claim widely different rates for performing the same activities," often because the larger or wealthier districts have staffing units or hire outside firms dedicated to processing mandates claims. (*Id.*, p. 895.) For example, Clovis Unified received $264 per student for complying with the graduation requirements mandate, while a neighboring district in Visalia received only $6 per student to comply with the same mandate. (*Ibid.*)[3] Finally, the report found that the state's process for paying mandates had a substantial backlog of outstanding obligations.[4] (*Id.*, pp. 886, 892.)

The Legislature has made a number of changes to the mandates process in recent years. In 2004, the Legislature adopted a new "reasonable reimbursement" methodology to try to standardize claims. (Gov. Code, §§ 17557, 17518.5.) In 2010, the Legislature adopted a redetermination process, which allows the Commission to make changes to a mandate determination if the underlying law changes. (*Id.*, § 17570.) And most significantly, starting in fiscal year 2013-14, the Legislature offered school districts the opportunity to receive a mandate "block grant," as an

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[3] This discrepancy also may be due to the proliferation of for-profit firms that exist to prepare mandate claims for some schools and local governments, as seen in the amicus letters filed in support of the petition for review.

[4] The backlog of payments owed to schools has been dramatically reduced, as CSBA notes. (OB, p. 12, fn. 3.) The recently enacted budget summary notes that state mandate debt is currently less than $1 billion after the state has provided billions of dollars in one-time funding to schools to use at local discretion. (See http://www.ebudget.ca.gov/FullBudgetSummary.pdf at p. 28.)

alternative to the traditional mandates process. The block grant is a per-student payment that is designed to encompass most education mandates and to allow districts to avoid the time-consuming process of having to submit detailed claims listing how much time and money was spent on mandated activities. (*Id.*, § 17581.6.)

This case involves other changes to mandates law. In 2010, the Legislature adopted Government Code section 17557, subdivision (d)(2)(B), which allows any local government agency or the state to ask the Commission to amend the parameters and guidelines for any mandate in specified circumstances. Section 17557 states that a "local agency, school district, or the state may file a written request with the commission to amend the parameters or guidelines." (Gov. Code, § 17557, subd. (d)(1).) Subdivision (d)(2) describes the types of changes that can trigger a request to amend the parameters and guidelines, with subdivision (d)(2)(B) allowing amendment to "[u]pdate offsetting revenues and offsetting savings that apply to the mandated program and do not require a new legal finding that there are no costs mandated by the state pursuant to subdivision (e) of Section 17556." Section 17557, subdivision (d)(2)(B) thus allows for the Commission to update the parameters and guidelines to account for new circumstances, including the identification of offsetting revenue in whatever form.

E. The Two Mandates at Issue in This Case

Also at issue here are two statutes that require certain mandates to be paid for out of state appropriations prior to seeking additional reimbursement through the mandates process.

1. Behavioral Intervention Plans

In 1990, the Legislature enacted Education Code section 56523, which required Behavioral Intervention Plans (BIP) for students with

exceptional needs who receive special education.[5] The Department of Education then issued implementing regulations for this requirement. (II JA 668; II JA 706-707.) In 2000, the Commission found the implementing regulations to constitute a mandate. (II JA 667-685.) Parameters and guidelines were delayed by litigation and unsuccessful settlement efforts, but were eventually adopted by the Commission in 2013. (II JA 707-710.)

In crafting the parameters and guidelines, the Commission examined Education Code section 56523(f) (section 56523(f)), which—beginning with the 2010-11 fiscal year—requires school districts to first utilize annually appropriated special education funding to offset any mandated costs. Based on that requirement, the Commission found that appropriations made in line item 6110-161-001 (special education funding in the annual budget act) must be used first to offset a school district's costs in complying with the BIP mandate. (II JA 725-729.) Only if a district's mandates costs exceed this special education funding is it entitled to additional reimbursement. CSBA did not bring a lawsuit to challenge the Commission's decision under the judicial review provisions relating to the Commission, instead collaterally attacking the constitutionality of this offset provision in this case.

In 2013, the Legislature repealed the regulations that were the basis of the BIP mandate. (See Ed. Code, § 56523, subd. (a); Opening Brief ("OB", p. 18 fn. 11 [conceding same]; see also http://csm.ca.gov/decisions/14-MR-05_Decision.pdf [Commission on State Mandates determines BIP ceased to be a mandate as of July 1, 2013].) Accordingly, although Education

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[5] "[B]ehavioral interventions are the design, implementation and evaluation of instructional and environmental modifications to produce significant improvements in behavior through skill acquisition and the reduction of problematic behavior." (II JA 669, quoting Cal. Code Regs., tit. 5, § 3001, subd. (f).)

Code section 56523(f) remains on the books, as of 2013, the offset statute no longer has any effect because the BIP mandate no longer exists. Given that schools no longer incur any costs with respect to BIP, the relief CSBA seeks is apparently limited to additional reimbursement for BIP in 2010 to 2013.[6]

2. Graduation Requirements (Second Science Course)

In 1983, the Legislature added section 51225.3 to the Education Code. This section requires students to complete at least two science courses to receive a high school diploma. Previously, only one science course was required. Section 51225.3 also specifies that the curriculum must include biological and physical sciences. (Ed. Code, § 51225.3, subd. (a)(1)(C).) In 1987, the Commission found this requirement to be a reimbursable mandate. (II JA 492-497.) The following year, the Commission adopted parameters and guidelines regarding reimbursement for the second science course, which have since been amended several times. (II JA 582-585 [chronology of graduation requirements mandate].)

In 2010, Education Code section 42238.24 was enacted, which requires school districts to first use three sources of state education funds to pay for this mandate before claiming reimbursement. CSBA challenges this provision.

Finally, in 2013, the graduation requirements mandate was made part of the mandates block grant, which, as described above, is a voluntary alternative to the traditional mandates reimbursement process. (Gov. Code,

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[6] CSBA does not ask for an order requiring that the Legislature appropriate more money for mandates. (See *Cal. School Boards Assn. v. California* (2011) 192 Cal.App.4th 770, 798 [court is prohibited under separation of powers doctrine from ordering state to appropriate funds for mandate payments].)

§ 17581.6, subd. (f)(23); see also Stats. 2013, ch. 48 (A.B. 86), § 78, eff. July 1, 2013.) Schools that utilize the block grant are relieved from requesting reimbursement, and therefore are unaffected by Education Code section 42238.24. (See Gov. Code, § 17581.6, subd. (d).)

At this point in time, Education Code section 42238.24 applies only to a few schools in the state. This is because as of 2014, more than 90% of local educational agencies (school districts, charter schools, and county offices of education), serving 95% of the students in the state, accepted the block grant, and avoid the traditional mandate reimbursement process for those mandates included in the block grant. (III JA 864.) And this number has only increased, with the Legislative Analyst's Office noting "[n]ear universal participation in [the] block grant" of 95% of schools by 2016-2017, representing 99% of the state's students. (http://www.lao.ca.gov/Publications/Report/3549#K.201112_Education_in_Context [as of July 27, 2018].) Accordingly, these school districts are currently receiving funding for graduation requirements through the block grant. And because they are getting funding through the block grant, they are not subject to the offsets at issue in this case. Therefore, for the vast majority of schools in the state, section 42238.24 is no longer relevant.

II. PROCEDURAL BACKGROUND

On January 6, 2011, CSBA filed its original petition in this matter, suing the State of California, the Director of DOF, and the Commission on State Mandates, and asserting generally that the state was implementing the mandates process in a manner that deprived schools of their right to reimbursement. (I JA 23-49.) CSBA filed amended complaints later in 2011 and in 2013, which added additional school districts as petitioners and the State Controller as a respondent. (I JA 58-90; I JA 198-227.)

This case arises from the third amended complaint, filed in 2014, which listed four causes of action. (I JA 285-316.) CSBA alleged in its first and second causes of action that it was unconstitutional for the state to designate certain revenues as offsetting without providing additional funding, and that the state improperly overturned decisions of the Commission on State Mandates in doing so. (I JA 307-310; see also II JA 372 [describing claims].) CSBA also challenged in its third cause of action Government Code section 17570, which is a new process for revisiting Commission decisions on test claims after changes in law. (I JA 310-313.) And in its fourth cause of action CSBA generally challenged whether the current system for mandate reimbursement satisfies constitutional requirements. (I JA 313-315.)

CSBA successfully moved to bifurcate the case and "to proceed on the first and second causes of action initially." (II JA 373, 393.) After carefully examining the evidence submitted by CSBA (III JA 1068-1072), a decision from the Commission on State Mandates (III JA 1072-1073), and relevant case law (III JA 1073-1075), the trial court denied the petition for writ of mandate, holding that the statutes that designated offsetting revenue were constitutional. The court stated that "the State's plenary power over school financing, and the case law upholding the State's right to allocate funds for specific educational needs, precludes the court from issuing an order that would, in essence, require the State to provide additional funding to school districts to allow them to meet those other educational needs." (III JA 1076.) And the court found that the offset statutes did "not violate the doctrine of separation of powers because it is not an attempt to override specific rulings made by the Commission." (III JA 1079.)

CSBA unsuccessfully sought to amend their petition to argue new theories about the first cause of action. (IV JA 1128.) Respondents moved to dismiss the remainder of the case in 2016, because CSBA had not

brought its remaining claims to trial within five years. (Code Civ. Proc., § 583.310; IV JA 1194-1206.) That motion was granted (V JA 1250-1253) and judgment was entered (V JA 1263-1305).

The Court of Appeal affirmed in part and reversed in part. In the published portion of its opinion, the Court held that the offset statutes did not violate article XIIIB, section 6 of the California Constitution. (Slip. Op., pp. 14-21.)

The Court examined this Court's precedents and concluded that section 6 was designed to protect the tax revenues of local governments. (Slip. Op., pp. 16-17, 21.) The Court determined that CSBA had failed to demonstrate that the offset statutes require school districts to use local revenues to pay for the costs of the mandates, particularly when the statutes themselves require schools to use "state funding" as an offset. (*Ibid.*)

The Court also held that the Legislature's actions in enacting the statutes did not violate separation of powers principles. (Slip. Op., pp. 21-28.) The Court determined that the 2010 legislation was "not an attempt to overturn" the decisions of the Commission (Slip. Op., pp. 23, 27), and even if it was, "[i]t is within the power of the Legislature to amend statutes to overrule a judicial decision" on a prospective basis. (Slip. Op., pp. 23-26, 28.)

In the unpublished portion of the opinion, the Court held that the trial court erred in denying CSBA's motion to amend to add a new legal theory to the first cause of action. (Slip. Op., pp. 28-32.) The Court also determined that the trial court erred in dismissing CSBA's third and fourth causes of action pursuant to the five-year rule. (Slip. Op., pp. 32-36.) The Court remanded the case to the trial court for further proceedings on the first, third, and fourth causes of action. (Slip. Op., p. 36.) The Court denied a petition for rehearing filed by CSBA.

STANDARD OF REVIEW

The interpretation of a statute and the determination of its constitutionality are questions of law subject to de novo review. (*Kavanaugh v. W. Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.)

ARGUMENT

I. THE OFFSET STATUTES ARE CONSTITUTIONAL

A. Section 6 Does Not Require Additional Reimbursement Where the Legislature Provides Funding for a Mandate, as Is the Case Here

Article XIIIB, section 6, protects local governments from being required to spend their own tax revenues on state-mandated programs. CSBA seeks to expand this protection and proposes that the state must provide "additional funding" for every mandate, even where the Legislature has already provided funding specifically intended to pay for the costs of performing the mandate and that funding has in fact covered all of the mandate's costs. (OB, pp. 23-25.) CSBA's novel theory has no support in article XIIIB, section 6, or this Court's precedent. Instead, case law and prior statutes make clear that the focus of section 6 is protecting local government's own tax revenue, not providing additional state funding for all mandates.

For decades, this Court and lower courts have held that a new program is not a mandate if the local government is not required to use its own revenues to pay for it. (*County of Fresno v. California* (1991) 53 Cal.3d 482, 487 ["the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes"]; *California School Boards Assn., supra*, 192 Cal.App.4th at p. 787 [under section 6, the state cannot "requir[e] . . . local entities to use their own revenues to pay for the programs"]; *County of Sonoma, supra*, 84 Cal.App.4th at p. 1283 ["it is the

expenditure of tax revenues of local governments that is the appropriate focus of section 6"].) The mandates at issue are paid out of state funding, not local taxes. They therefore do not require additional reimbursement under Article XIIIB, section 6.

CSBA's contrary position would also be inconsistent with Government Code section 17556, subdivision (d), which this Court upheld in *County of Fresno*, *supra*, 53 Cal.3d 482. Section 17556, subdivision (d) specifies that a state-imposed requirement is not a reimbursable mandate if the local government '"has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."' (*Id.* at p. 487, quoting Gov. Code, § 17556, subd. (d)(2)(B).) Fresno County argued that subdivision (d) unconstitutionally created "a new exception to the reimbursement requirement of article XIII B, section 6" and that "the Legislature cannot create exceptions to the reimbursement requirement beyond those enumerated in the Constitution." (*Id.* at pp. 487-488.) This Court rejected the argument, explaining that section 6 requires subvention "only for those expenses that are recoverable solely from taxes." (*Ibid.*) Accordingly, requirements that are paid for by fees or assessments are not paid for out of local tax revenues, so are not subject to the reimbursement requirements.

The same principle is illustrated by Government Code section 17556, subdivision (e), which provides that an item is not a mandate if the statute "provides for offsetting savings to local agencies or school districts that result in no net costs . . . , or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." (Gov. Code, § 17556, subd. (e).) CSBA does not challenge this statute; indeed, CSBA points to it as an example of what is constitutional. (OB, pp. 44-45.) But section 17556 confirms that Article XIIIB, section 6 is concerned only with

ensuring local governments do not spend local taxes, and that if a state law does not require such expenditures, either by providing savings or revenues that offset the cost, then there is no need for additional reimbursement.

CSBA's claim that additional state funding is required for every mandated program also contradicts numerous Commission decisions. The Commission's parameters and guidelines require local governments to offset savings and revenues for all mandates before they can receive additional funds. (See, e.g., III JA 936-937 [2006 parameters and guidelines for animal adoption mandate requires offsetting savings be deducted and noting that "reimbursement for this mandate from any source shall be identified and deducted from this claim"]; see also II JA 496 [1988 parameters and guidelines for graduation requirements mandate notes that any offsetting savings must be deducted from the costs claimed].) These decisions expressly contemplate that certain mandates may not result in the state having to provide additional funds because any added costs are offset by other savings or revenues.

Accordingly, there is no support for CSBA's claim that article XIIIB requires new or additional state funding any time there is a new program imposed on local government. Instead, case law and past practice has shown that the Legislature has flexibility to meet its requirements under article XIIIB, section 6 in a number of ways, including allowing fee authority to local governments, providing for offsetting savings, or—as it did here—designating state funding to offset the cost of the mandate.

B. The Legislature Can Prioritize How School Districts Use Special Education Funding

1. Section 56523(f) Provides for Offsetting Revenue

As the Court of Appeal correctly reasoned, section 56523(f) is constitutional because it provides for offsetting funding and local school

districts are not required to use any local tax revenues to comply with the mandate.

The state provided its school districts with more than $3 billion per year in special education funding from 2010 to 2013. (See III JA 777-778, # 21.) Section 56523(f), which governed funding for BIP from its 2010 enactment until the BIP regulations were repealed in 2013, provides that

> Commencing with the 2010–11 fiscal year, if any activities authorized pursuant to this chapter and implementing regulations are found be a state reimbursable mandate pursuant to Section 6 of Article XIII B of the California Constitution, state funding provided for purposes of special education pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act shall first be used to directly offset any mandated costs.

(Ed. Code, § 56523, subd. (f).)

Pursuant to this statute, for several years in the early 2010s, school districts were required to pay for the cost of providing BIP services with a portion of the special education funding the state provided districts each year. As explained below, because this funding was sufficient to cover the costs associated with BIPs, districts were never required to utilize local tax revenues for the BIP mandate.

2. Education Code Section 56523(f) Is Consistent with this Court's Precedent

CSBA's claim that section 56523(f) violates article XIII B, section 6 fails because the Legislature constitutionally may direct what funds should first be used to pay for the cost of the mandate. Here, the Legislature directed districts how to prioritize their spending of state special education funding.

In 2013, the Commission on State Mandates evaluated the offset language of Education Code section 56523(f) as part of its determination of the parameters and guidelines for the BIP mandate. (II JA 725-729.) The

Commission concluded that the BIP mandate's costs must be offset with special education funds after examining court decisions holding that (1) the Legislature constitutionally may direct school districts as to how funds must be expended; and (2) mandates reimbursement is not required if the additional costs are offset by other sources of revenue.

The Commission first examined *California Teachers Association v. Hayes*, *supra*, 5 Cal.App.4th 1513, which considered the Legislature's decision to include certain childcare funding within the Proposition 98 guarantee. The plaintiffs claimed that the legislation "was invalid because it divests school districts of complete and total control over the funds the state is required to devote to education under Proposition 98." But the court held that "[n]othing in Proposition 98 states or implies that school districts are to have the autonomy claimed by plaintiffs." (*Id.* at pp. 1532-1533.) The court reasoned that the operation of public schools is a matter of statewide concern, and that the Legislature's control over school districts is plenary. (*Id.* at p. 1533.) Because school districts are agents of the state "rather than independent, autonomous political bodies," school districts "do not have a proprietary interest in moneys which are apportioned to them." (*Ibid.*) Here, as in *California Teachers Association*, the Legislature is simply directing school districts as to how to expend state funds, and nothing in the article XIIIB, section 6 prohibits such a practice. (See *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817 ["A strict construction of section 6 is in keeping with rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power are to be construed strictly, and are not to be extended to include matters not covered by the language used"].)[7]

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[7] Unable to identify a constitutional defect, CSBA instead relies on Government Code section 17556, subdivision (e), which states that an item

(continued...)

Additionally, this Court has previously held that a state program is not a mandate if the Legislature provides funds to the local agency sufficient to cover the cost of the program. In *Department of Finance v. Commission on State Mandates (Kern)* (2003) 30 Cal.4th 727, two school districts and a county claimed a right to reimbursement from the state for statutory notice and agenda requirements for a number of school-related educational programs. (*Id.* at pp. 730-731.) This Court rejected the claim, holding that "the costs necessarily incurred in complying with the notice and agenda requirements under that funded program do not entitle claimants to obtain reimbursement under article XIII B, section 6, *because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda-related expenses*." (*Id.* at pp. 746-747, emphasis added.)

This Court's decision in *Kern* is consistent with its earlier opinion in *County of Fresno*. In that case a hazardous material act was held not to be

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(...continued)
is not a mandate "if the statute . . . includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." (OB, p. 23.) CSBA would have the Court give this "additional revenue" language constitutional significance, arguing that the offsets challenged here are unconstitutional because they do not identify additional revenue. But this language is merely statutory, and the Legislature is free to enact new statutes (such as Education Code section 56523(f)) that do not contain this requirement. Moreover, the Legislature's 1989 enactment of Government Code section 17556, subdivision (e), is not a "contemporaneous construction of the Legislature" for purposes of interpreting 1979's Proposition 4 (which enacted article XIIIB), and therefore is not entitled to the deference that CSBA claims. (OB, p. 24.) In any event, Respondents do not contend that BIP and graduation requirements are *not* mandates, in light of the statutory enactments at issue. Rather, Respondents contend only that the Legislature constitutionally may direct specific state funds to cover the costs of the mandates.

a mandate because the local government entity could collect fees from those who handle hazardous materials. (*County of Fresno*, *supra*, 53 Cal.3d at p. 485.) This Court explained that "the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes." (*Id.* at p. 487.) As in *Kern*, the requirement in *County of Fresno* was not a mandate because the local government did not need to use its own revenues.

CSBA's attempts to distinguish this precedent fails. First, CSBA asserts *Kern* may be distinguished because all of the programs in that case were optional. (OB, p. 42 fn. 19). Not so. With respect to the ninth program at issue in *Kern*, this Court "assume[d] for purposes of analysis that claimants have been legally compelled to participate in the [the Act]." (*Kern*, *supra*, 30 Cal.4th at p. 746.) Second, CSBA argues that the costs for complying with the notice and agenda requirements in *Kern* were *de minimis*. (OB, p. 41.) But this Court's analysis focused on whether there was sufficient funding to pay for the program, not the dollar value of the program itself.[8] (*Kern*, *supra*, 30 Cal.4th at p. 747 ["we have found nothing to suggest that a school district is precluded from using a portion of the funds obtained from the state for the implementation of the underlying funded program to pay the associated notice and agenda costs"].) Finally, CSBA asserts that *Kern* involved categorical programs and that state law treats them differently. (OB, p. 35.) But *Kern* did not distinguish categorical and unrestricted funding. (*Kern*, *supra*, 30 Cal.4th at pp. 746-748.) This Court should reject CSBA's attempt to add qualifying language to *Kern* that is not present in the decision itself.

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[8] On a statewide basis, even *de minimis* costs can be significant. For example, a $10,000 per-district cost (*Kern*, *supra*, 30 Cal.4th at p. 747 fn. 16) would cost $10 million when applied to the 1,000 school districts in the state (III JA 940).

CSBA acknowledges "that the State can adjust funding (within the parameters of Proposition 98) and the precise mix of unrestricted and restricted (categorical) funding as well as the amount of mandate payments remains subject to a legislative determination." (OB, p. 36 (analyzing *Kern*).) This is precisely what the state did here—the Legislature prioritized the use of state special education funding for a specific purpose (mandate reimbursement). Given that CSBA admits that the state could have simply reduced general funding and created a separate reimbursement item for the mandate (which would have provided schools the same total amount of revenue as under the offset statutes), their constitutional objection to the state providing schools the same amount of money by a different mechanism places form over function and should be rejected.

3. BIP Was a Special Education Program, Paid for by Special Education Funding

CSBA also errs in claiming that with respect to BIP, the state "is identify[ing] funding that is unrelated to the mandate." (OB, p. 8.) There is no constitutional or statutory requirement that state funding be "related" to the mandate, and CSBA does not cite to any authority in making this argument. The Legislature has discretion in determining how to pay for the mandate.

Regardless, BIP was a special education program. Behavioral interventions were required by Education Code section 56520 et seq., which is in the part of the Education Code for Special Education Programs. (See Ed. Code, §§ 56000-56865.) And behavioral interventions were targeted towards students with "exceptional needs" with "possible physical, mental, or emotionally disabling condition." (Ed. Code, § 56520, subd. (a)(1) and (a)(2).) Accordingly, the special education funding used to offset the cost of BIP was directly related to the mandate itself.

4. CSBA Fails to Demonstrate that Schools Will Be Required to Use Their Own Tax Revenues to Pay for the Mandate

CSBA argues that section 56523(f) violates section 6 with a policy-based argument alleging special education is "already significantly underfunded" (OB, p. 18). The argument rests on an unsupported and false legal premise, as there can be no legal finding that special education is underfunded—the total amount of funding allocated to special education is a policy choice for the Legislature and may increase or decrease from year to year. Opinions or preferences that special education receive more funding are merely that—opinions and preferences to be balanced against all other legislative spending priorities.

The argument also fails for additional reasons. CSBA fails to demonstrate that any schools were required to use their own tax revenues to pay for the cost of the mandate. Moreover, section 6 does not require that the Legislature hold all other funding to local governments steady while also providing a subvention. And simply directing local government how to use of state funding does not create a reimbursable mandate.

First, although CSBA makes an unsupported claim that special education funding is "demonstrably insufficient" to pay for BIP (OB, p. 43), CSBA never demonstrated that schools were required to use local tax revenues to pay for the cost of the mandate.[9] (See Slip. Op., p. 21 [noting that CSBA "never explain[s] how these facts establish section 56523, subdivision (f) requires school districts to use 'their own local revenues'"

[9] In order to prevail on its facial challenge to Education Code section 56523(f), CSBA must show either "a total and fatal conflict" with the California Constitution or at least that a constitutional violation will occur "in the generality or great majority of cases." (See *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1138, citations omitted.) Regardless of which test is used, CSBA's claim fails.

for BIP].) The "evidence" for CSBA's claim is primarily in the form of LAO reports that the courts below judicially noticed. (See OB, p. 40, primarily relying on a LAO report found in II JA 735-761.) While respondents did not object to the taking of judicial notice of these reports themselves, the reports do not—and cannot—establish facts to support CSBA's claims. (*StorMedia Inc. v. Sup. Ct.* (1999) 20 Cal.4th 449, 457 fn. 9 ["When judicial notice is taken of a document . . . the truthfulness and proper interpretation of the document are disputable"]; see *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064 [court could not take judicial notice of the truth of conclusions within a report from the United States Surgeon General regarding the health effects of smoking], overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.)

The declarations submitted in support of CSBA's writ petition likewise do not demonstrate that schools were required to use their own revenues to pay for BIP. (III JA 785-786; 794-795.) If anything, these declarations show the opposite. For example, the declaration from Castro Valley Unified School District admits that the district received sufficient state education funding to pay for the costs of BIP. (III JA 785, ¶ 13 ["Although [BIP] costs are substantial, they are less than the state funding CVUSD receives for special education"]); see also III JA 794, ¶ 10 [San Joaquin County Office of Education declaration admits that state special education funding "still exceeds the cost of the BIP [m]andate"].)

CSBA therefore fails to demonstrate that schools were required to use their own tax revenues to pay for BIP. CSBA alleged that BIP cost schools $65 million per year until 2013, when the mandate was discontinued. (II JA 417.) But the state provided schools with over $3 *billion* each year to pay for special education. In other words, the special education funding provided by Education Code 56523(f) was the subvention or

reimbursement required by article XIIIB, section 6. Because schools were required to offset BIP *first* before paying for other special education programs, even assuming that some believe that special education might be "underfunded," there is no dispute that there was enough state funding for BIP costs and school districts did not need to use their own revenues. Accordingly, the mandate reimbursement has been satisfied.

Second, alleged funding shortages for other special education programs, while not proven, are in any event not a constitutional concern. As this Court has explained, "[t]he circumstance that the program funds claimants may have wished to use exclusively for substantive program activities are thereby reduced, does not in itself transform the related costs into a reimbursable state mandate." (*Kern*, *supra*, 30 Cal.4th at p. 748.)

Other cases reach similar conclusions. For instance, in *County of Sonoma*, *supra*, 84 Cal.App.4th 1264, the court rejected a County's claim that the Legislature's direction of property tax revenues to schools (and attendant reduction in property tax payments to counties) constituted a reimbursable mandate. (*Id.* at pp. 1283-1284.) Instead, the Court concluded that "by using the word 'cost' in section 6 the voters meant the common meaning of cost as an expenditure or expense actually incurred." (*Id.* at p. 1285.) Similarly, in *City of San Jose*, *supra*, 45 Cal.App.4th at p. 1806, where the Legislature allowed counties to charge cities for the costs of booking prisoners, the Court denied the City's mandate claim. The Court reasoned that "section 6 cannot be interpreted to apply to general legislation which has an incidental impact on local agency costs," and that it was not "persuaded by the argument that budget cuts in other programs trigger the subvention requirement in section 6." (*Id.* at p. 1816; see also *Grossmont Union High School Dist.*, *supra*, 169 Cal.App.4th at p. 876 ["[a] state requirement that an entity redirect resources is . . . not a reimbursable mandate"].)

Finally, it is irrelevant if a school receives less general use special education funds because the overall state funding level to schools pursuant to Proposition 98 remains unchanged. As discussed above, if the Legislature appropriates funds for a mandate, this funding is usually part of the Proposition 98 guarantee. (See, e.g., Ed. Code, § 41207.4, subds. (b), (c) [mandate appropriation satisfies Proposition 98 guarantee]; III JA 848, 852 [traditional mandate appropriations and mandate block grant appropriations part of Proposition 98 funding]; III JA 828-829, ¶ 5.) Accordingly, if the Legislature appropriates more mandate funds for schools in a given budget year, this ordinarily would mean less funding for other school programs. (III JA 828-829, ¶¶ 5, 6.) Therefore, even if the Legislature were to appropriate more or less funding specifically for BIP, that would not change the district's overall state funding going to schools under Proposition 98. There is no constitutional requirement to the contrary.

C. Education Code Section 42238.24 Is Constitutional for the Same Reasons as Section 56523(f)

CSBA also challenges the graduation requirements offset in Education Code section 42238.24. But, as with section 56523, the Legislature has provided mandate reimbursement funding by way of the offsetting revenue provisions, and CSBA's challenge to section 42238.24 fails for the same reasons.

1. Section 42238.24 Provides for Offsetting Revenue

Section 42238.24 requires school districts to utilize state funding to offset the costs of the graduation requirements mandate, before seeking additional reimbursement.[10] The Legislature has provided school districts

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[10]Education Code section 42238.24 states:

(continued...)

with offsetting funding for the graduation requirement in three forms: 1) revenue limit funding; 2) Local Control Funding Formula money (LCFF); and 3) education protection account moneys. (See III JA 775, # 12.)[11] The Legislature has appropriated between $20 and $30 *billion* per year in general purpose funding that must be used to first offset the cost of the graduation requirement mandate, as discussed above, and serves as the subvention or reimbursement required by article XIIIB, section 6. (See III JA 775, # 13.) CSBA asserts that the graduation requirements mandate

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> Costs related to the salaries and benefits of teachers incurred by a school district or county office of education to provide [the second science course] shall be offset by the amount of state funding apportioned to the district pursuant to this article, or in the case of a county office of education pursuant to Article 2 (commencing with Section 2550) of Chapter 12 of Part 2 of Division 1 of Title 1, and the amount of state funding received from any of the items listed in Section 42605 that are contained in the annual Budget Act. The proportion of the school district's current expense of education that is required to be expended for payment of the salaries of classroom teachers pursuant to Section 41372 shall first be allocated to fund the teacher salary costs incurred to provide the courses required by the state.

[11]Revenue limit funding arises from this Court's decision in *Serrano v. Priest* (1971) 5 Cal.3d 584, which held that certain funding disparities that existed in the 1970's between wealthy and poorer school districts violated Equal Protection. (See *Wells v. One2One Learning Foundation*, *supra*, 39 Cal.4th at p. 1194.) Because of this decision, the Legislature adopted a system of equalized funding in which it contributes to school districts to bring about an equivalency of revenues. (*Ibid.*) Revenue limit funding was replaced by the LCFF in 2013-2014 (see Ed. Code, §§ 42238.02, 42238.03), which likewise attempts to reduce resource disparities between schools. Education protection account moneys are general purpose state aid funding pursuant to Proposition 30, The Schools and Local Public Safety Protection Act of 2012. (See Cal. Const., art. XIII, § 36, subd. (e).)

costs schools approximately $200 *million* annually. (II JA 413.) There thus is no question that the funding specified in section 42238.24 is sufficient to cover the cost of the graduation requirements mandate, and such specified funding properly serves as the subvention required by section 6.

Section 42238.24 therefore is constitutional for the same reasons as section 56523(f): (1) the Legislature has plenary authority over school districts—and the allocation of state education appropriations—and may direct them as to how state funds must be expended absent a constitutional provision that says otherwise (see *Cal. Teachers Assn.*, *supra*, 5 Cal.App.4th at pp. 1532-1533); (2) a state program is not a reimbursable mandate if the Legislature provides funds for the local agency sufficient to cover the cost of the program. (*Kern*, *supra*, 30 Cal.4th at pp. 746-747); and (3) CSBA cannot show school districts are required to use their own property taxes to pay for the cost of the mandate (see III JA 774-775, #12 ["No other revenues, including property tax revenues, are potentially offsetting"]; Slip Op., p. 17 [when schools "receive[] tens of billons of dollars in state funding each year, it simply does not follow that they are or were required to use local revenues to pay for teacher salaries . . . associated with the [graduation requirements] mandate"].)

Accordingly, this Court should reject CSBA's claim that Education Code section 42238.24 is unconstitutional.

2. The Funding for Graduation Requirements Is Related to the Mandate

Moreover, just like the special education funding with respect to BIP, CSBA cites no authority requiring that state funding designated for graduation requirements must be somehow related to the mandate. (OB, p. 8.) It is also a curious argument to make, since presumably CSBA would have no concern with the state making an appropriation for the mandate

directly from the General Fund, and the General Fund has no specific relation to graduation requirements, or even education requirements. It is just money, and CSBA's arguments regarding the source of that money are irrelevant.

Regardless, the purpose of the school system is to educate students. (See *Long Beach Unified Sch. Dist. v. California* (1990) 225 Cal.App.3d 155, 172.) The graduation requirements mandate is an education program that directly seeks to advance this purpose. The second science course is no different than any other course within the districts' overall curricula that is paid for with revenue limits or LCFF money. In providing general purpose education funding to schools and requiring the funds to first pay for the graduation requirements mandate, the Legislature is directly providing reimbursement for the mandate.

D. State Mandate Reimbursement Is Not Local Proceeds of Taxes

CSBA also argues that the funds provided by the state through the offset process are actually local revenues and local proceeds of taxes, and therefore the offset provisions are unconstitutional because they require schools to use their "proceeds of taxes" to pay for mandate reimbursement. CSBA is incorrect.[12]

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[12] CSBA also waived this argument by failing to raise it in the trial court. The operative complaint does not mention "proceeds of taxes" or the state appropriations limit, CSBA did not brief the argument in the trial court, and it is not discussed in the trial court's decision. (I JA 285-316; II JA 398-423; III JA 1055-1083.) The Court of Appeal evaluated the theory over Respondents' objections, but ultimately rejected it. (Slip. Op., p. 17, after denial of petition for rehearing.) CSBA therefore has forfeited this novel theory, and this Court should not consider it. (See, e.g., *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 185, fn. 2 [appellate courts need not address theories that were not advanced in the trial court].)

Under the challenged statutes, only state revenues are used to offset mandate costs. Education Code section 56523(f) provides that for the BIP mandate, "*state funding* provided for purposes of special education . . . shall first be used to directly offset any mandated costs." (Ed. Code, § 56523, subd. (f), emphasis added.) Similarly, section 42238.24 provides that costs for teachers to provide the second science course "shall be offset by the amount of *state funding* apportioned to the district pursuant to this article . . . and the amount of *state funding* received from any of the items listed in Section 42605 that are contained in the annual Budget Act." (Ed. Code, § 42238.24, emphasis added; see also Slip. Op., p. 16 ["Education Code section 42238.24 specifically directs local school districts . . . to use 'state funding' as an offset, not local tax revenues"].) Because local funding is not used for these offsets, CSBA's argument fails.

CSBA's argument that the reimbursements at issue here are local "proceeds of taxes" fares no better. The phrase "proceeds of taxes" in section 6 refers to the state and local appropriations limit found elsewhere in article XIIIB. But as described above, only state funding is used for the offsets providing the mandate reimbursement. And state mandate reimbursement payments do not count against local government's appropriation limits. This is made clear by the text of article XIIIB itself, which provides that "[w]ith respect to any local government, 'proceeds of taxes' shall include subventions received from the State, *other than pursuant to Section 6*." (Cal. Const., art. XIIIB, § 8, subd. (c), emphasis added.) Because the funding given to schools under the offset provisions is mandate reimbursement pursuant to section 6, it—by constitutional definition—is not part of a school district's local "proceeds of taxes," and

CSBA's claim fails.[13] (*Ibid.*; see also Gov. Code, § 7906, subd. (c)(2) [same].)

E. The Decision Below Does Not Undercut Section 6's Mandate Requirement for Schools

Finally, CSBA contends that the state's position and the two rulings below "creates a template for the eventual elimination of the state's mandate obligation for schools." (OB, p. 8.) This is not accurate. Both graduation requirements and BIPs remained mandates after the Legislature passed Education Code sections 56523(f) and 42238.24. BIP remained a mandate until 2013, and graduation requirements remain a mandate today. Although the Legislature specified how the two mandates are paid, it in no way questioned the state's obligation to pay them.

Moreover, CSBA's claim that the state seeks to eliminate traditional mandate reimbursement is unfounded. Since 2010, no other statutes have been enacted that are similar to Education Code sections 56523(f) and 42238.24. CSBA's purported concern also grossly exaggerates the scope of the challenged statutes. The offsets at issue in this case relate only to BIP and graduation requirements, not any other mandate. Other education mandates were unchanged by the two offset statutes. (See III JA 861 [listing dozens of other education mandates].) These other mandates still exist and are unaffected by the offsets at issue in this case.

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[13] CSBA asserts that the offset statutes cannot function as mandate reimbursement pursuant to Government Code section 7906, subdivision (c)(2), because mandate payments must be "appropriated to the Controller for reimbursement" pursuant to Government Code section 17561(b)-(d). (OB, p. 29, fn. 15.) But the Constitution does not contain this requirement. (Cal. Const., art. XIIIB, § 8, subd. (c).) The Legislature can provide mandate reimbursement in any manner consistent with the Constitution.

CSBA's claim also ignores factual realities. The state has an obvious and unquestioned interest in supporting school districts' general education programs. In the last several years the Legislature has appropriated billions of additional dollars in funding for mandate reimbursement, a fact CSBA simply ignores. (See Gov. Code, §§ 17581.8, 17581.9, 17581.95.) CSBA likewise fails to acknowledge that almost all education mandate reimbursement is now accomplished through the mandate block grant, and the offset provisions at issue in this case do not apply to the block grant. (See above on pages 15-16.)

Finally, because of the statutory developments discussed on pages 17-19, this case is primarily about schools seeking additional revenue for mandated programs performed years ago, not alleged funding needs going forward. It is hard to see how the offsetting statutes from 2010, effectively inapplicable today, could conceivably lead to the extreme result of ending all mandate reimbursement for schools. CSBA's alarmist rhetoric notwithstanding, this case is about two largely dormant statutes and the Legislature's unquestioned power to allocate school funding—not the end of mandates law as we know it.

II. THE LEGISLATURE'S ALLOCATION OF SCHOOL FUNDING DOES NOT VIOLATE SEPARATION OF POWERS PRINCIPLES

CSBA next asserts that the 2010 legislation violates separation of powers by overriding quasi-judicial determinations by the Commission on State Mandates. (OB, pp. 46-51.) In rejecting this argument, the Court of Appeal reasoned that separation of powers principles would prohibit the Legislature from "order[ing] the Commission to set aside or reconsider its previous decision." (Slip Op. p. 26.) Here, however, the Court of Appeal correctly found that the challenged legislation was "not an attempt to overturn" the decisions of the Commission (Slip. Op., pp. 23, 27), and even if it was, "[i]t is within the power of the Legislature to amend statutes to

overrule a judicial decision" on a prospective basis. (Slip. Op., pp. 23-26, 28.)

A. The 2010 Legislation Was Not an Attempt to Override Specific Commission Decisions

CSBA contends that once the Commission determined that BIP and graduation requirements were mandates, it followed that the 2010 legislation violated separation of powers because it disrupts the Commission's final decisions. (OB, pp. 46-47.) That is incorrect.

Contrary to CSBA's claim, the 2010 legislation did not affect any issues actually determined by the Commission. For example, after determining that the graduation requirements were a mandate, the Commission issued parameters and guidelines in 1987, which determined how schools could claim reimbursement for the mandate. (II JA 495-497.) After evaluating what types of costs were reimbursable, the Commission determined that "reimbursement for this mandate received from any source, e.g., federal, state, block grants, etc., shall be identified and deducted from this claim." (II JA Vol. 496.) Neither these guidelines, nor the Commission's initial mandate determination addressed the issue of offsetting funding—in fact, they confirm that the Legislature has discretion in how it pays mandate costs. As such, the 2010 legislation could not be an attempt to override the Commission's decision. Similarly, with respect to BIP, the Commission held only that DOF did not contend that there was evidence of offsetting savings at that time.[14] (II JA 684.) It did not hold that no offsetting savings or alternative funding sources would ever be available. If the Commission did not decide a legal issue, the Legislature's enactment of subsequent legislation cannot contravene anything the

[14] Accordingly, CSBA is incorrect when it claims that in 2000 DOF claimed special education funding was offsetting and the Commission rejected DOF's argument. (OB, p. 17.)

Commission has done. (Cf. *People v. Gilbert* (1969) 1 Cal.3d 475, 482 fn. 7 ["It is axiomatic that cases are not authority for propositions not considered"].)

In claiming that the 2010 change of law violates separation of powers principles, CSBA relies primarily on *California School Boards Association v. California* (2009) 171 Cal.App.4th 1183. In that case, the Commission had previously determined that several pieces of legislation (including the Open Meetings Act and Brown Act Reform) constituted mandates. (*Id.* at pp. 1193-1197.) The Legislature then enacted a statute that, among other things, "directed the Commission to 'set-aside all decisions, reconsiderations, and parameters and guidelines on the Open Meetings Act (CSM–4257) and Brown Act Reform (CSM–4469) test claims.'" (*Id.* at p. 1194.) The court found that "[t]he Legislature exceeded its power and therefore violated the separation of powers doctrine when it directed the Commission to set aside and reconsider test claim decisions." (*Id.* at p. 1199.) The court was careful to note, however, that "[i]n deciding that the Legislature cannot direct, on a case-by-case basis, that a final decision of the Commission be set aside or reconsidered, we do not imply that there is no way to obtain reconsideration of a Commission decision when the law or material circumstances have changed." (*Id.* at pp. 1202-1203.)

The Legislature's actions here are consistent with the decision in *California School Boards Association*. The Legislature did not attempt to override the Commission's mandate determination or compel it to reconsider a specific decision. In fact, CSBA agrees that "that the 2010 legislation did not directly set aside the original mandate determinations." (OB, p. 49.) Instead, the only dispute is the manner by which the mandates will be reimbursed. At the time of the Commission's initial determination that these programs constitute reimbursable mandates, there was no specific legislation directing that specific state funding sources be used to offset the

costs of the mandates before claiming reimbursement. Later, the Legislature, as is within its power, specified how the mandates must be paid. That did not alter or impact the Commission's original decisions in any way.

CSBA appears to contend that once an item has been found to be a mandate, the Legislature is not allowed to change any aspect of it. But this is inconsistent with case law. As the court noted in *California School Boards Association*, "[o]ver time, any particular decision of the Commission may be rendered obsolete by changes in the law and material circumstances that originally justified the Commission's decision. While decisions of the Commission are not subject to collateral attack, logic may dictate that they must be subject to some procedure for modification after changes in the law or material circumstances." (*Id.* at p. 1202.) Such is the circumstance here, as the 2010 legislation was clearly a change in the law.

B. Even If the 2010 Legislation Was an Attempt to Override a Commission Decision, the Legislature Can Abrogate the Decision Prospectively

The Court of Appeal also correctly rejected CSBA's separation of powers argument because the Legislature may prospectively abrogate the effect of a judicial decision. (Slip. Op., p. 24, citing *McClung v. Employment Dev. Dep't* (2004) 34 Cal. 4th 467, 473-474; see also *Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1212 [while the Legislature may not readjudicate a judicial decision, it still "may make a law prospectively to abrogate the effect of a judicial decision"]); *Anderson v. Superior Court* (1998) 68 Cal.App.4th 1240, 1250 [statute that prospectively abrogated effect of judicial decision relating to funding of federal program did not violate separation of powers provision].)

Both offset statutes were enacted in 2010. They have only prospective effect, requiring school districts and county offices of education

to offset state funding commencing in the 2010-2011 fiscal year.[15] There is no indication that either statute was intended to apply retroactively, and they have never been applied as such. It is the general rule that a new statute is "presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise." (*Eisner v. Uveges* (2004) 34 Cal.4th 915, 936.) And "a statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*McClung, supra*, 34 Cal.4th at p. 475, quoting *Myers v. Phillip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 844.)

Here, neither offset statute contains any express retroactivity language. (See Slip. Op., p. 24.) Nor is there any indication that the Legislature intended to have the statute apply retroactively. And applying the statutes prospectively is simple and workable. After the enactment of Education Code sections 42238.24 and 56523(f), school districts and county offices of education are required to offset state funding for costs claimed beginning with the 2010-2011 fiscal year.[16]

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[15] Both statutes were enacted as part of Assembly Bill 1610 (2010). AB 1610 was enacted as urgency legislation, in order "to implement the Budget Act of 2010 at the earliest time possible." (Stats. 2010, ch. 724, sec. 48.) Urgency legislation takes effect immediately upon enactment. (Cal. Const., art. IV, § 8, subd. (c)(3).) Accordingly, AB 1610 became effective on October 19, 2010, immediately after it was approved by the Governor. (II JA 465.)

[16] This interpretation is consistent with DOF's discovery responses in this case. (See, e.g., *Microsoft Corp. v. Franchise Tax Bd.* (2012) 212 Cal.App.4th 78, 93 ["interpretation put forth by an administrative agency charged with enforcement, implementation and interpretation of enactments is entitled to great weight"].) For example, interrogatory 13 asks about potentially offsetting revenues for the graduation requirements mandate since 2009. (III JA 775.) DOF identified a large amount of funding in its

(continued...)

Accordingly, even if the Legislature did abrogate a Commission decision here, it did so prospectively only, and CSBA's separation of powers argument fails.

CONCLUSION

For all of the above reasons, this Court should affirm the decision of the Court of Appeal.

Dated: July 30, 2018

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(...continued)
response, but exclusively from 2010-2011 forward. (*Ibid.*) DOF's response to interrogatory 21 likewise indicates that potentially offsetting revenue for BIP is not in place until the 2010-2011 fiscal year (III JA 778), after the enactment of Education Code section 56523(f).

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 9,363 words.

Dated: July 30, 2018

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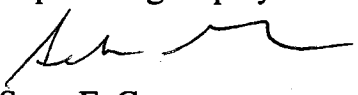

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DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **California School Boards Association, et. al. v. State of California. et. al.**
No.: **S247266**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **Golden State Overnight**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On July 30, 2018, I served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

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Attorney for Commission on State Mandates

Clerk of the Court
California Court of Appeal
First Appellate District, Division 3
350 McAllister Street
San Francisco, CA 94102
(served via True Filing electronic service)

Clerk of the Court
Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612
Re: Case No. RG11554698
(served via First Class mail)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 30, 2018, at Sacramento, California.

Eileen A. Ennis
Declarant

Eileen A. Ennis
Signature

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